

Volume 2  
Update Report

# 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



2019 Update Report

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



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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.

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**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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# 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;<sup>1</sup> supporting federally funded and appointed counsel for indigent immigrants in removal proceedings;<sup>2</sup> calling for appointed counsel in the legal cases of unaccompanied minors;<sup>3</sup> urging transition to a civil detention model, consistent with the *ABA Civil Immigration Detention Standards*;<sup>4</sup> and promulgating standards relating to

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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](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](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](http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_102.doc) (last visited Mar. 2019).

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the custody, care, and adjudication of unaccompanied children.<sup>5</sup>

## 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?

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<sup>5</sup> *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).

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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.





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# 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

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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

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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.





# Department of Homeland Security

2019 Update Report

## REFORMING THE IMMIGRATION SYSTEM

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

March 2019

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American Bar Association Commission on Immigration



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# Part 1: The Department of Homeland Security

## I. Introduction and Summary on 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 Update Report spans the administrations of two presidents: Barack Obama (2009-2017) and Donald Trump (first two years, 2017-2018).

At the same time, however, it is essential to note that many of the issues we discussed in the 2010 Report have been eclipsed by new policies and directives issued by President Trump that have dramatically altered DHS’s immigration mission.

Within the first year of his administration, the president issued a travel ban against individuals from predominantly Muslim nations, temporarily suspended the refugee program, increased interior apprehensions, reinstated reliance on state enforcement of immigration laws, and terminated the Deferred Action for Childhood Arrivals (“DACA”) and Central American Minors Refugee and Parole (“CAM”) programs. In 2018, the government instituted a zero tolerance prosecution policy for any form of unlawful entry, sanctioned family separation, expanded immigration detention, and issued regulations that both undermined asylum eligibility for some asylum seekers and made others ineligible to even seek asylum if the President deemed them a threat to national security. These are all indicators of a dramatic shift not only in enforcement policy, but in the United States’ efforts to welcome immigrants and refugees and to provide due process protections in the immigration adjudication system.

Consequently, we have opted to trace the shifts in policy that have taken place between 2010 and 2018 by administration, focusing on key topics that illustrate differences in philosophy around immigration enforcement. The significant swings in enforcement policies over the last few years provide an opportunity to assess the effectiveness of executive branch action. Comparing the points of similarity and difference between the first two years of the current administration to the past administrations provide unexpected insights into the limitations, opportunities, and dangers of relying exclusively on administrative reforms to implement policy.

Generally, administrative policies and regulations change incrementally, if at all, over time. Good policies and bad policies co-exist, sometimes in different agencies, sometimes across a department as a whole. The inability to craft a consistent and fair approach to enforcement policies remains a constant problem



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across DHS, the nation's largest law enforcement agency. This was certainly the case during the Obama administration, where DACA and record-high deportation levels existed side-by-side.

At least some of these challenges arise from competing views of enforcement and adjudication, particularly the role of discretion, the relationship between state and federal governments in law enforcement, the role and authority of the executive branch versus the legislative branch of government, and the breadth of flexibility available under our current immigration laws. Legal challenges to the creation and administration of the DACA and Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") programs during the Obama administration turned on these competing views of discretion and executive authority. Similarly, the Obama administration, like the George W. Bush administration, found itself mired in challenges to the detention of immigrants, particularly of families and children.

Legal challenges to state and local law enforcement of immigration laws yielded major precedential decisions on the scope of the federal government's power to enforce immigration laws. On the one hand, the Supreme Court held, in *Arizona v. United States*, that immigration enforcement was both a federal responsibility and prerogative, limiting the ability of states to pass competing immigration enforcement schemes. On the other hand, the lower courts grappled with constitutional limits on the ability of state and local law enforcement to honor immigration detainers.<sup>1</sup>

Similar challenges, albeit against very different policies, continue today, as the courts have become the crucible for a wide range of issues such as the travel ban, refugee policy, family separation, zero tolerance prosecutions, and widespread detention. In 2010 or in 2018, however, these challenges to administrative policy and practice often shared one characteristic: they are grounded in frustration over immigration laws and policies that no longer reflect the reality of today's migration issues and thus lack the flexibility, creativity, and due process protections necessary to ensure fair, efficient, and humane treatment under our immigration laws.

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. Very few of the Obama-era reforms could be fully institutionalized, as the Obama administration was forced to rely on administrative policies, regulations, and executive orders to advance immigration reform, particularly after the failure of the 2013 comprehensive reform package in the Senate.

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.

As explained in the 2010 Report, 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. Tracing the evolution of DHS over the last nine years allows us to look at both the possibilities and limits of administrative action. 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. In fact, 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.

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<sup>1</sup> See, e.g., *Garza v. Szalcyk*, 745 F.3d 634 (3d Cir. 2014); *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018).

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## II. The 2010 Report and Recommendations

The 2010 Report described how DHS policies and procedures, together with substantive provisions of immigration law, had contributed to an exploding caseload that overwhelmed the removal adjudication system. DHS increased its use of accelerated removal procedures that failed to ensure due process for noncitizens and undermine confidence and trust in the adjudication system. The 2010 Report identified the following key issues:

- (1) DHS policies and procedures, including insufficient use of prosecutorial discretion, increased case load burdens in the removal adjudication system;
- (2) Coordination problems within DHS led to inconsistent positions among Department component offices, particularly ICE, CBP, and USCIS;
- (3) Removal on the ground of an aggravated felony conviction had expanded to include minor crimes, burdening the adjudication system, and depriving many noncitizens of access to court review;
- (4) Removal on the ground of a conviction of a “crime involving moral turpitude” (“CMT”) had been expanded to include misdemeanor convictions, further burdening the adjudication system;
- (5) Expanded use of expedited removal proceedings had deprived many noncitizens of access to the immigration courts;
- (6) Increased burdens on the removal adjudication system as a result of issues relating to adjustments to lawful permanent resident status; and
- (7) Increased use of detention raised both efficiency and fairness issues.

The 2010 Report concluded that the removal adjudication system would benefit from the increased use of prosecutorial discretion, additional resources, improved training, and better internal

coordination within DHS. As a result, the 2010 Report recommended additional oversight of expedited and administrative removal proceedings; and improved and expanded use of alternatives to detention, particularly for asylum seekers. The 2010 Report also urged Congress to pass laws that enhanced the fairness and efficiency of the immigration system, while recommending that the administration adopt policy interpretations and practices that could promote those goals in the interim.

## III. Developments Since 2010

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, 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.<sup>2</sup> 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.<sup>3</sup>

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

#### *1. Changing Enforcement Priorities through Prosecutorial Discretion*

In June 2010, then-Director of ICE John Morton issued the first of three memoranda describing ICE’s removal priorities and standards for the exercise of prosecutorial discretion.<sup>4</sup> The first memorandum

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<sup>2</sup> MUZAFFAR CHISHTI ET AL., MIGRATION POLICY INST., THE OBAMA RECORD ON DEPORTATIONS (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> [hereinafter “MPI, Obama Record”].

<sup>3</sup> RANDY CAPPES ET AL., MIGRATION POLICY INST., ADVANCES IN U.S.-MEXICO BORDER ENFORCEMENT (May 2017), <https://www.migrationpolicy.org/research/advances-us-mexico-border-enforcement-review-consequence-delivery-system>.

<sup>4</sup> Memorandum from John Morton, Director, ICE, to all ICE employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), <https://www.ice.gov/doclib/news/releases/2010/civil-enforcement->

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focused on delineating enforcement priorities based on the severity of the offense and utilization of scarce resources. Priority 1 included national security and criminal categories, “with a particular emphasis on violent criminals, felons, and repeat offenders,” as well as “aliens subject to outstanding criminal warrants,” and “aliens who otherwise pose a serious risk to public safety.”<sup>5</sup> This latter category was “not intended to be read broadly,” but rather to be employed only when “serious and articulable public safety issues exist.”<sup>6</sup> Priority 2 included “recent illegal entrants,” though no entry date was specified; and Priority 3 included “aliens who are fugitives,” which included those subject to a final order of removal who failed to depart for various reasons as well as aliens who reentered unlawfully after being deported with enumerated subcategories.<sup>7</sup>

A year later, Morton issued additional guidance that emphasized the necessity of affirmatively exercising prosecutorial discretion, citing positive factors such as length of residence, arrival in the United States as a young child, and lack of criminal history.<sup>8</sup> The memorandum also stressed weighing potential prosecution against available relief, particularly if the individual was likely to qualify for

a benefit based on a family relationship, or asylum or other humanitarian relief.<sup>9</sup> A second memorandum re-emphasized the necessity of exercising discretion in cases where the individual had been the victim of a crime, was a witness in a criminal or other judicial matter, or was attempting to vindicate a right in court.<sup>10</sup>

Generally, ICE shifted its arrests and removals according to the priorities outlined in the Morton memorandum. Removals of individuals with a criminal conviction made up 80% of all removals from 2011 to 2013, with a minority of these for violent crimes, and the majority for nonviolent crimes including traffic offenses and immigration crimes.<sup>11</sup> ICE-initiated removals of individuals without criminal convictions declined sharply, from 78,000 interior removals (43%) in fiscal year 2009 to 17,000 interior removals (13%) in 2013.<sup>12</sup> Removals of individuals fitting ICE’s Priority 1 rose from 69% of all removals in fiscal year 2009 to 87% in fiscal year 2013, while removals of individuals who did not fit a priority declined from 20% of all removals in fiscal year 2009 to 6% in fiscal year 2013.<sup>13</sup>

Interior removals began to decline from a peak of 188,000 in fiscal year 2011 to 131,000 in 2013, and

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priorities.pdf.

5 *Id.* at 1-2. ICE further subdivided Priority 1 into Levels 1, 2, and 3 according to type of offense.

6 *Id.* at 2, n.1.

7 *Id.* at 2-3.

8 Memorandum from John Morton, Director, ICE, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011) [hereinafter 2011 Morton Memorandum], <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

9 Other factors outlined in the 2011 Morton Memorandum included: the person’s pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degree; whether the person, or the person’s immediate relative, has served in the U.S. military, reserves, or national guard; the person’s ties and contributions to the community, including family relationships; the person’s ties to the home country and conditions in the country; and whether the person is currently cooperating or has cooperated with federal, state, or local law enforcement authorities, such as ICE, the Department of Justice, the Department of Labor, or the National Labor Relations Board. *Id.* at 4-5.

10 Memorandum from John Morton, Director, ICE, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>. The 2011 Morton Victims Memorandum built on prior agency guidance and provided for prosecutorial discretion to “minimize any effect that immigration enforcement may have on the willingness of victims, witnesses, and plaintiffs to call police and pursue justice,” at 1.

11 MARC R. ROSENBLUM & KRISTEN MCCABE, MIGRATION POLICY INST., DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 3, 19 (October 2014) [hereinafter MPI, DEPORTATION AND DISCRETION], <http://www.migrationpolicy.org/sites/default/files/publications/Deportation-Discretion-Report.pdf>.

12 *Id.* at 3, 19, & fig. 2. MPI defines “interior removals” as removals initiated by ICE more than 14 days after a person has entered the U.S. *Id.* at 7.

13 MPI, Obama Record, *supra* note 2.

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criminal removals from the interior remained the majority of these removals.<sup>14</sup> By contrast, formal border removals increased from just over 200,000 in 2009 to 306,000 in 2013, with increases in both noncriminal and criminal removals.<sup>15</sup> The vast majority of border removals were for noncriminal violations (73%), and 14% of the remainder were removals for immigration crimes, such as illegal entry or illegal re-entry.<sup>16</sup>

## 2. *Deferred Action for Childhood Arrivals (DACA)*

Nevertheless, despite its attempts to guide the use of prosecutorial discretion, the government continued to come under fire for overzealous prosecution in many cases involving non-criminal offenders and persons whose convictions were many years in the past, as well as for the removal of young people collectively known as Dreamers, who met the criteria for relief from removal under the Development, Relief, and Education of Alien Minors Act of 2010 (“DREAM Act”).<sup>17</sup> In the fall of 2010, the House passed H.R. 6497,<sup>18</sup> a version of the DREAM Act that would have provided a path to citizenship for many undocumented young people;<sup>19</sup> however,

the bill failed in the Senate on a procedural vote.<sup>20</sup> Subsequently, advocates for the DREAM Act pressed to create some type of deferred action program for undocumented young people. The government initially resisted these calls, stating that the existing prosecutorial discretion memos sufficiently protected Dreamers.

In June 2012, however, President Obama authorized the creation of DACA, directing that DHS provide time-limited relief from removal for certain undocumented people who entered the United States as children.<sup>21</sup> “Deferred Action” is an exercise of prosecutorial discretion that provides some protection from removal, as well as permission to work.<sup>22</sup> As of August 2018, USCIS had granted deferred action to 822,872 individuals under DACA.<sup>23</sup> Numerous studies demonstrate the transformative effect of DACA on undocumented youth, allowing them to attend college, work, and provide contributions to their families and communities without fear of deportation. As noted in section III.H of this Part, President Trump terminated DACA in 2017, but the program continues in a limited fashion while litigation over the legality of the termination continues.

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14 MPI, DEPORTATION AND DISCRETION, *supra* note 11, at 19 & fig. 2.

15 *Id.* at 17-18.

16 *Id.* at 20.

17 S. 3992, 111th Cong. (2010).

18 H.R. 6497, 111th Cong. (2010).

19 A young person was eligible under HR 6497 if he or she: (1) entered the United States before his or her 16th birthday and has been present in the United States for at least five years immediately preceding this Act’s enactment; (2) is a person of good moral character; (3) is not inadmissible or deportable under specified grounds of the Immigration and Nationality Act; (4) has not participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (5) has not been convicted of certain offenses under federal or state law; (6) has been admitted to an institution of higher education or has earned a high school diploma or general education development certificate in the United States; (7) has never been under a final order of exclusion, deportation, or removal (unless the alien has remained in the United States under color of law after such order’s issuance, or received the order before attaining the age of 16); and (8) was under age 30 on the date of this Act’s enactment.

20 S. 3992, 111th Cong. (2010).

21 USCIS, Consideration of Deferred Action for Childhood Arrivals (DACA), <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Oct. 25, 2017). To be eligible for deferred action under DACA, an individual must have come to the U.S. before reaching their 16th birthday; have continuously resided in the U.S. since June 15, 2007; have been under the age of 31 as of June 15, 2012; have never had lawful immigration status; be currently in school, graduated or obtained a GED, or have been honorably discharged from the Coast Guard or Armed Forces of the U.S.; have never been convicted of a felony, significant misdemeanor, or three or more misdemeanors and not otherwise be a threat to national security or public safety; and have been physically present in the U.S. on June 15, 2012.

22 Immigration Equality, What Does “Deferred Action” Mean?, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/path-to-status-in-the-u-s/daca-deferred-action-for-childhood-arrivals/> (last visited Oct. 25, 2018).

23 USCIS, Data Set: Form I-821D Deferred Action for Childhood Arrivals (August 31, 2018), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performance\\_data\\_fy2018\\_qtr3\\_plus\\_august.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performance_data_fy2018_qtr3_plus_august.pdf) (last visited Oct. 26, 2018).

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### 3. Further Revisions to Enforcement Priorities

Despite the success of the DACA program, removals continued to increase.<sup>24</sup> In November 2014, then-DHS Secretary Jeh Johnson revised DHS enforcement priorities and directed that they be used across CBP and USCIS as well as ICE.<sup>25</sup> The new policy focused still further on individuals with criminal convictions as well as recent arrivals. Under the new guidance, Priority 1 included noncitizens who pose a threat to national security, border security, and public safety, including individuals apprehended while attempting to enter the U.S. unlawfully.<sup>26</sup> Priority 2 included noncitizens convicted of three or more misdemeanors or a “significant misdemeanor” —such as domestic violence, sexual abuse or exploitation, burglary, or certain firearms and drug offenses for which the individual was sentenced to at least 90 days or more in custody— and recent border crossers.<sup>27</sup> Priority 3 included noncitizens with an order of removal issued on or after January 1, 2014.<sup>28</sup>

Significantly, the new guidelines required a conviction for the individual to be considered a removal priority, except for those suspected of gang affiliation. This requirement effectively eliminated the Morton memorandum’s inclusion of individuals subject to criminal arrest warrants. The new guidelines also tighten the requirements for arrests outside the

priorities and requiring a determination from the Field Office Director that removal “would serve an important federal interest.”<sup>29</sup> Moreover, by explicitly applying the guidelines to all immigration agencies within DHS, Secretary Johnson created a framework for more uniform decisions and greater accountability within the famously inconsistent practices of DHS agencies.

According to DHS, in fiscal year 2015 the vast majority of individuals subject to enforcement actions and removals fit into one of the priority categories.<sup>30</sup> Ninety-eight percent (98%) of individuals arrested through initial enforcement actions, which include ICE determinations of inadmissibility, ICE administrative arrests, and CBP border apprehensions,<sup>31</sup> falling into one of the three priority categories and 91% under Priority 1.<sup>32</sup> Of these, the majority fit under category 1(b), “Aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States.”<sup>33</sup> When broken down by DHS agencies, it is clear that CBP actions most effectively tracked the enforcement priorities within Priority 1. ICE administrative arrests included 59% under Priority 1, and a significant minority, 31%, under Priority 2, (including 18% for significant misdemeanors, and 7% for unlawful entry since January 1, 2014).<sup>34</sup>

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24 Eyder Peralta, National Council of La Raza Dubs Obama “Deporter-In Chief,” NPR, March 4, 2014, <https://www.npr.org/sections/thetwo-way/2014/03/04/285907255/national-council-of-la-raza-dubs-obama-deporter-in-chief>.

25 Memorandum from Jeh C. Johnson, Secretary, DHS, to Acting Director of U.S. Immigration and Customs Enforcement (ICE), Commissioner of U.S. Customs and Border Protection (CBP), Director of U.S. Citizenship and Immigration Services (USCIS), and Acting Assistant Secretary for Policy, “Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants” (November 20, 2014) [hereinafter 2014 Johnson Apprehension Memorandum], [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

26 *Id.* at 3.

27 *Id.* at 3-4.

28 *Id.* at 4.

29 *Id.* at 5.

30 DHS OFFICE OF IMMIGRATION STATISTICS, DHS IMMIGRATION ENFORCEMENT: 2015, at 1 (December 2016) [hereinafter DHS 2015 Enforcement Statistics], <https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf>.

31 An ICE “determination of inadmissibility” refers to an Office of Field Operations (“OFO”) officer determination at the border of inadmissibility pursuant to INA § 212(a). An ICE administrative arrest is an arrest within the interior of the U.S. CBP apprehensions are made by Border Patrol, which is a division of CBP. *Id.* at 2, Box 2.

32 *Id.* at 1-2.

33 *Id.*

34 *Id.* at Table 1.



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Overall, interior apprehensions and removals declined substantially, from 102,224 in fiscal year 2014<sup>35</sup> to 69,478 in fiscal year 2015.<sup>36</sup> That level remained almost the same in fiscal year 2016, at 65,332.<sup>37</sup> In contrast to interior removals, border removals increased steadily after 2011, reaching a peak of 306,000 in 2013<sup>38</sup> before declining again in subsequent years to 213,719 in 2014.<sup>39</sup> The number declined further to 165,935 in 2015,<sup>40</sup> and rose to 174,923 in 2016.<sup>41</sup>

These enforcement priorities also influenced immigration court caseloads, although not enough to change existing backlogs significantly. Following implementation of the Morton and Johnson priorities, between October 2013 and February 2017, 9.9% of immigration court cases were closed based on an exercise of prosecutorial discretion — roughly 67,180 cases total, or the equivalent of about 19,600 per year.<sup>42</sup> However, immigration advocacy groups and the media reported that ICE did not apply prosecutorial

discretion consistently, and continued to remove noncitizens who appeared to be strong candidates for a favorable exercise of discretion.<sup>43</sup>

In addition to realigning enforcement priorities, a series of executive actions were issued in November 2014 designed to 1) further expand the use of discretion in providing temporary relief from removal; 2) create greater efficiencies in immigration processing; and 3) use other administrative tools, such as parole, to further protect noncitizens from removal. The signature element of these executive actions was a proposed expansion of DACA<sup>44</sup> and the creation of a new program, DAPA. DAPA would have benefited eligible undocumented parents of children who are U.S. citizens or lawful permanent residents (“LPRs”).<sup>45</sup> However, these initiatives never took effect because 26 states brought a lawsuit challenging them in the U.S. District Court for the Southern District of Texas, alleging that the initiatives violated the Take Care Clause of the Constitution and the Administrative

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35 ICE, ICE ENFORCEMENT AND REMOVAL REPORT: FISCAL YEAR 2014, at 7 (Dec. 14, 2015), <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf> [hereinafter ICE, 2014 ENFORCEMENT AND REMOVAL REPORT].

36 ICE, FY 2015 ICE Immigration Removals: Overview, fig. 2, <https://www.ice.gov/removal-statistics/2015> (last updated June 22, 2017) [hereinafter ICE, 2015 Removals].

37 MPI, Obama Record, *supra* note 2, at fig. 1 and accompanying text.

38 MPI, DEPORTATION AND DISCRETION, *supra* note 11, at 18.

39 ICE, 2014 ENFORCEMENT AND REMOVAL REPORT, *supra* note 35, at 8.

40 ICE, 2015 Removals, *supra* note 36, fig. 2.

41 DHS, DHS Releases End of Year Fiscal Year 2016 Statistics (Dec. 30, 2016), <https://www.dhs.gov/news/2016/12/30/dhs-releases-end-year-fiscal-year-2016-statistics>.

42 Transactional Records Access Clearinghouse, Syracuse University (“TRAC”), Immigration Court Cases Closed Based on Prosecutorial Discretion (May 15, 2017) [hereinafter “TRAC IMMIGRATION”], <https://web.archive.org/web/20170408135008/https://trac.syr.edu/immigration/prosdiscretion> (version from Feb. 28, 2017 accessed via Internet Archive Wayback Mach (“Wayback”), <https://archive.org/web/>).

43 MARC ROSENBLUM, MIGRATION POLICY INST., UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT 21 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/ExecAction-Removals-SCOMM.pdf>.

44 USCIS, 2014 Executive Actions on Immigration, <https://web.archive.org/web/20160215094011/https://www.uscis.gov/immigrationaction> (version from Feb. 15, 2016 accessed via Wayback.) The proposed DACA expansion would have broadened that program to include undocumented immigrants who entered the country before 2010, eliminated the requirement that applicants be younger than 31 years old, and required DACA recipients to renew their status every three years rather than every two.

45 The requirements for DAPA included that a person must have lived continuously in the United States since January 1, 2010; have been physically present in the United States on November 20, 2014 with no lawful status; had on that date a son or daughter, of any age or marital status, who is a U.S. citizen or lawful permanent resident; have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors (and not otherwise pose a threat to national security); and not be an enforcement priority for removal. See USCIS, Outreach Materials, Flyers in English, *You May be Able to Request DAPA. Want to Learn More?* (Jan. 30, 2015), [https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier\\_DAPA.pdf](https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf); Memorandum from León Rodríguez, Director, ICE, to all ICE employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), [https://web.archive.org/web/20170208214333/https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://web.archive.org/web/20170208214333/https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) (version from Feb. 8, 2017 accessed via Wayback).

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Procedure Act.<sup>46</sup> The district court issued a preliminary injunction temporarily blocking the implementation in February 2015,<sup>47</sup> which the Fifth Circuit affirmed.<sup>48</sup> In June 2016, the Supreme Court left the lower court's injunction in place by way of a one-line *per curiam* opinion by an equally divided 4-4 court.<sup>49</sup>

#### 4. ICE Worksite Enforcement

In 2010, then-DHS Secretary Napolitano issued new guidelines that marked a shift in policy with respect to worksite enforcement toward focusing on employers rather than workers.<sup>50</sup> Like DHS's prosecutorial discretion policy, this shift enabled DHS to focus agency resources according to policy priorities, with the goal of "reduc[ing] the demand for illegal employment and protect[ing] employment opportunities for the nation's lawful workforce."<sup>51</sup> In 2008, before the new policy went into effect, ICE made 1,103 criminal arrests at worksites, which included 135 owners, managers, supervisors, and human resources employees, and 968 other employees.<sup>52</sup> In the same year, ICE made 5,184 administrative arrests at worksites. In fiscal year 2014, ICE made 362 criminal arrests for worksite violations, including 172 arrests of owners, managers, supervisors, and human resources employees, 190 criminal arrests of other employees, and 541 administrative arrests.<sup>53</sup> These numbers show a 90% decrease in the number of worksite administrative arrests between 2008 and 2014, confirming a shift away from worker-focused enforcement efforts.

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

The 2010 Report criticized many elements of ICE's use of the criminal justice system and its partnerships with federal, state, and local law enforcement agencies to carry out interior enforcement operations. 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 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. This morphing of responsibility was often confusing and difficult to track.

#### 1. The Criminal Alien Program

The 2010 Report critiqued CAP, the successor to other ICE programs designed to identify and remove incarcerated noncitizens.<sup>54</sup> Under CAP, ICE pursues removal orders for noncitizens incarcerated in state and local jails before their criminal sentences are completed. According to a study by the American Immigration Council, CAP was the primary tool ICE

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46 Center for Migration Studies, *Federal Court Halts and Expanded DACA Programs*, <http://cmsny.org/federal-court-halts-dapa-and-expanded-daca-programs/> (last visited on Oct. 25, 2018); *Texas v. U.S.*, 809 F.3d 134, 147 (5th Cir. 2015).

47 See *Texas v. United States*, 86 F.Supp.3d 591, 598 (S.D. Tex. 2015).

48 See *Texas v. United States*, 809 F.3d 134, 743 (5th Cir. 2015).

49 See *United States v. Texas*, 136 S. Ct. 2271 (2016), *reh'g denied*, 137 S. Ct. 285 (2016).

50 2010 Report at 1-20, citing ICE, Fact Sheet, Worksite Enforcement Overview (Apr. 30, 2009).

51 ICE, Fact Sheet, Worksite Enforcement (Apr. 1, 2013), <https://www.ice.gov/factsheets/worksite>.

52 2010 Report at 1-20 and fn. 131; ICE, WORKSITE ENFORCEMENT FY 2014 ANNUAL REPORT (Mar. 3, 2015), at 3, [https://www.dhs.gov/sites/default/files/publications/OCFO/Immigration and Customs Enforcement \(ICE\) - Worksite Enforcement FY 2014 Annual Report.pdf](https://www.dhs.gov/sites/default/files/publications/OCFO/Immigration%20and%20Customs%20Enforcement%20(FY%202014)%20Annual%20Report.pdf) (version from Feb. 12, 2017 accessed via Wayback).

53 ICE, WORKSITE ENFORCEMENT FY 2014 ANNUAL REPORT (Mar. 3, 2015), at 3, [https://www.dhs.gov/sites/default/files/publications/OCFO/Immigration and Customs Enforcement \(ICE\) - Worksite Enforcement FY 2014 Annual Report.pdf](https://www.dhs.gov/sites/default/files/publications/OCFO/Immigration%20and%20Customs%20Enforcement%20(FY%202014)%20Annual%20Report.pdf) (version from Feb. 12, 2017 accessed via Wayback).

54 ICE, Criminal Alien Program, <https://web.archive.org/web/20170208220009/http://www.ice.gov/criminal-alien-program/> (version from Feb. 8, 2017 accessed via Wayback); GUILLERMO CANTOR ET AL., AM. IMMIGRATION COUNCIL, ENFORCEMENT OVERDRIVE: A COMPREHENSIVE ASSESSMENT OF ICE'S CRIMINAL ALIEN PROGRAM (Nov. 2015) [hereinafter ENFORCEMENT OVERDRIVE], <https://www.americanimmigrationcouncil.org/research/enforcement-overdrive-comprehensive-assessment-ice%E2%80%99s-criminal-alien-program>.

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used to generate interior removals from fiscal year 2010 to August 2013.<sup>55</sup> Under CAP, ICE officials review lists of foreign nationals housed at federal facilities and voluntary lists provided by certain state and local facilities. During this time, ICE routinely issued detainers, which are requests to the state or local jurisdiction to hold the noncitizen for 48 hours after the state or local release date so that ICE agents could take the individual into custody. At the time of the 2010 Report and continuing to this day, ICE's use of detainers has been the subject of significant litigation involving Fourth Amendment custody issues.

As DHS adjusted its enforcement priorities, removals generated through CAP identification began to decrease. For instance, Priority 1 Level 1 removals, most closely aligned with CAP, increased from 28.5% in 2011 to 40.5% in 2013, while the overall percentage of individuals with no conviction declined from 27.4% to 14.3% in the same period.<sup>56</sup> However, just as interior removals overall were largely for non-violent crimes, the majority of CAP removals were for individuals who had not been convicted of a violent crime or a crime the FBI classified as "serious."<sup>57</sup>

This overbroad definition of "criminal" priorities also played out in the rise of detainers against individuals who had minor or no criminal convictions. In the context of CAP, the use of detainers was a significant measure of who the government was choosing to pursue for removal. For instance, from fiscal year 2012 through fiscal year 2013, "half of detainers issued were for individuals with a criminal record [...] and] [a]n even smaller percentage — roughly one in five — had a felony conviction in either period," suggesting that detainers were most often

issued against persons with minor or no criminal violations.<sup>58</sup>

By the time the November 2014 guidelines had been released, ICE's use of detainers had dropped, in large part due to significant legal challenges and community opposition to ICE's detainer policy. In October 2014, for example, one month before the November 2014 enforcement guidelines were issued, ICE issued 11,355 detainers. That number had dropped to 7,993 by April 2015, and perhaps of greater note, the number of non-criminal detainers had dropped as well.<sup>59</sup>

## 2. Secure Communities and PEP

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 built into the program. Under the program, the FBI automatically sends fingerprints obtained by state and local law enforcement to DHS to check against its immigration databases.<sup>60</sup> If those checks indicate that an individual is unlawfully present or removable,<sup>61</sup> ICE may lodge a detainer requesting the local jurisdiction to hold that individual for up to 48 hours for ICE to take custody.<sup>62</sup> Despite heavy criticism of Secure Communities, by 2013 the program had been implemented in all 50 states, the District of Columbia, and 5 U.S. territories.<sup>63</sup>

As the program expanded, however, so did community opposition. Unlike the original mission of CAP, which involved identifying incarcerated noncitizens for potential removal, Secure Communities casts a much larger net. Automatic data sharing meant that many noncitizens with no criminal

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<sup>55</sup> *Id.* at 4.

<sup>56</sup> *Id.* at 14 and Table 4. The "no conviction" group refers to those with no conviction recorded in ICE's ENFORCE Integrated Database. *Id.*

<sup>57</sup> *Id.* at 14-15 and Table 5.

<sup>58</sup> TRAC, Further Decrease in ICE Detainer Use (Aug. 28, 2015), <http://trac.syr.edu/immigration/reports/402/>. See also TRAC, Reforms of ICE Detainer Program Largely Ignored by Field Officers (Aug. 9, 2016), <http://trac.syr.edu/whatsnew/email.160809.html> (reporting on the first two months of fiscal year 2016).

<sup>59</sup> TRAC, Further Decrease in ICE Detainer Use (Aug. 28, 2015), <http://trac.syr.edu/immigration/reports/402/>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> ICE, Secure Communities: FAQ, <https://www.ice.gov/secure-communities> (last updated Mar. 20, 2018); see also Am. Civil Liberties Union, Immigration Detainers, <https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers> (last visited Oct. 26, 2018).

<sup>63</sup> ICE, Secure Communities: Overview, <https://www.ice.gov/secure-communities> (last updated Mar. 20, 2018).



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record who encountered local law enforcement during non-criminal traffic stops, as well as those arrested but not charged for an offense, came to the attention of ICE. As the number of non-criminal deportations continued to grow, opponents of Secure Communities launched major campaigns within local and state government and in the courts to block the data sharing agreements. By the end of 2014, legal and civil liberties concerns had led some 350 jurisdictions to end or limit their participation in Secure Communities.<sup>64</sup>

Consequently, as part of then-Secretary Johnson's November 2014 enforcement priority overhaul, DHS suspended the Secure Communities program and replaced it with the Priority Enforcement Program ("PEP").<sup>65</sup> The PEP program 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 those 16 years of age or older who intentionally participated in a gang to further its illegal activity.<sup>66</sup>

In addition to marking a significant departure in scope from Secure Communities, PEP 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.<sup>67</sup>

When PEP was introduced, Secretary Johnson highlighted the notification process. He also stated that the use of ICE detainers should be relatively rare, and restricted to "special circumstances" where the individual was subject to a final removal order or there was sufficient probable cause to address Fourth Amendment concerns.<sup>68</sup> 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.<sup>69</sup>

### 3. 287(g) Program

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.<sup>70</sup> Section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996 authorizes state and local law enforcement agencies to partner with ICE to enforce immigration law.<sup>71</sup> Under the program, ICE has entered into two types of agreements with local law enforcement agencies.

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64 Jerry Markon, DHS Deportation Program Meets with Resistance, WASH. POST, Aug. 3, 2015, [https://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9\\_story.html](https://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9_story.html).

65 Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Security, to Thomas Winkowski, Acting Director, ICE, Megan Mack, Officer, Office for Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs, Secure Communities (Nov. 20, 2014) [hereinafter 2014 Johnson Secure Communities Memorandum] at 2, [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf). For a useful discussion of how DHS enforcement priorities shifted from the Bush to the Obama administration, see MARC ROSENBLUM, MIGRATION POLICY INST., UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT 2, 6-8 (2015), <http://www.migrationpolicy.org/research/understanding-potential-impact-executive-action-immigration-enforcement>.

66 2014 Johnson Secure Communities Memorandum, *supra* note 65, at 2-3.

67 Laurence Benenson, The Trouble with Immigration Detainers, National Immigration Forum (May 24, 2016), <https://immigrationforum.org/article/trouble-immigration-detainers>. DHS stated that, under PEP, it was able to secure participation from 16 of the top 25 law enforcement jurisdictions that had previously declined detainer requests under Secure Communities. News Release, U.S. Dep't of Homeland Security, DHS releases end of fiscal years statistics (Dec. 22, 2015), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics>.

68 2014 Johnson Secure Communities Memorandum, *supra* note 65, at 2. See TRAC, Has Cooperation by State and Local Law Enforcement Agencies Improved ICE's Apprehension Numbers? (Aug. 12, 2016) [hereinafter TRAC COOPERATION], <https://web.archive.org/web/20161031125238/http://trac.syr.edu/immigration/reports/433/> (version from Oct. 31, 2016 accessed via Wayback).

69 2014 Johnson Secure Communities Memorandum, *supra* note 65, at 3.

70 See 2010 Report at 1-22-1-23.

71 CRISTINA RODRÍGUEZ ET AL., MIGRATION POLICY INST., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) (March 2010), <http://www.migrationpolicy.org/research/program-flux-new-priorities-and-implementation-challenges-287g>.

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Under one type of agreement, the jail enforcement model, ICE contracts with state and local law enforcement officers to enforce immigration laws against individuals who are already incarcerated. Under the second type of agreement, the task force model, state and local officers are authorized to enforce immigration law directly in their communities. In both models, participating officials perform a variety of immigration enforcement tasks, including interviewing individuals regarding their immigration status, checking DHS databases, issuing detainers, and issuing notices to appear (“NTA”).<sup>72</sup> In 2009, ICE had 66 agreements with state and local partners. In 2012, DHS phased out its use of the task force model.<sup>73</sup> At the end of 2016, ICE had 29 agreements in place.<sup>74</sup>

### C. Elimination of the National Security Entry-Exit Registration System (“NSEERS”) program

The elimination of the highly controversial National Security Entry-Exit Registration System (“NSEERS”) program was a highlight of the efforts since the 2010 Report to end programs that restricted due process rights for noncitizens. NSEERS was created in 2002 in response to the 9/11 attacks in the United States, and required individuals from 25 almost exclusively Muslim-majority countries to undergo heightened travel screening, to register in person with DHS officials if they were already in the U.S., and to notify DHS of any change of

address.<sup>75</sup> The NSEERS program effectively imposed a prosecutorial priority based on national origin to individuals who were undocumented at the time of their registration, and 13,799 individuals were placed into removal proceedings as a result.<sup>76</sup> The program 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.<sup>77</sup> In late 2016, DHS repealed the regulation that had implemented the program, and acknowledged that it was obsolete.<sup>78</sup>

### D. 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. IIRIRA delineated a broad category of individuals who could be removed without a hearing, authorizing DHS officials to use expedited removal for “arriving aliens” unless they express a fear of persecution or are able to show they have been continually present in the U.S. for two years.<sup>79</sup> DHS initially applied expedited removal solely to individuals arriving at ports of entry, but later expanded it in 2002 to include persons who arrived

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72 Am. Immigration Council, The 287(g) Program: An Overview (Mar. 15, 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_287g\\_program\\_an\\_overview\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview_0.pdf).

73 Danyelle Solomon et al., Ctr. for American Progress, The Negative Consequences of Entangling Local Policing and Immigration Enforcement (March 21, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/03/21/428776/negative-consequences-entangling-local-policing-immigration-enforcement/>.

74 See ICE, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, <https://www.ice.gov/factsheets/287g> (last updated Aug. 10, 2018).

75 Muzaffar Chishti & Claire Bergeron, DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program, Migration Policy Inst. (May 17, 2011), <http://www.migrationpolicy.org/article/dhs-announces-end-controversial-post-911-immigrant-registration-and-tracking-program> [hereinafter “MPI, DHS Announces End of Registration”]; Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 Fed. Reg. 94,231 (Dec. 23, 2016) (codified at 8 C.F.R. §§ 214 & 264).

76 MPI, DHS Announces End of Registration, *supra* note 75.

77 *Id.*

78 Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 Fed. Reg. at 94,232.

79 INA § 235(b)(1)(A)(i), (iii). There is also an exception for noncitizens who are citizens of a Western Hemisphere country that does not have full diplomatic relations the U.S. government and arrive by air at a port of entry. INA § 235(b)(1)(F). See also American Immigration Council, A Primer on Expedited Removal (Feb. 3, 2017), <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

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by sea and were not admitted or paroled.<sup>80</sup> In 2004, DHS further amended its regulations to authorize expedited removal of individuals in the interior of the country, if they were apprehended within 100 miles of the U.S. border and within 14 days of entry.<sup>81</sup>

The 2010 Report addressed the significant problems raised by having front-line law enforcement officials make removal decisions without judicial review.<sup>82</sup> Nonjudicial removal options include expedited removal, reinstatement of removal, and administrative removal for non-lawful permanent residents who have been convicted of an “aggravated felony;”<sup>83</sup> all of these nonjudicial removal orders provide minimal due process protections. Without the right to counsel, to gather evidence, or to examine witnesses at a hearing before an immigration judge, individuals have been deported in contravention of domestic and international law. During the period 2003 to 2013, 65% of all removals (2.4 million out of 3.6 million) were nonjudicial removals.<sup>84</sup> In fiscal year 2016, 83.6% of all removals were either accomplished through “expedited removal” or “reinstatement of removal” which are removals ordered unilaterally by DHS officials.<sup>85</sup>

One of the major contributing factors to the escalation of nonjudicial removal is the implementation by CBP of a revised “Consequences Delivery System” (“CDS”) in 2011. According to CBP, the CDS, which was first introduced in

2005,<sup>86</sup> “provides a process designed to uniquely evaluate each subject and apply the appropriate post-arrest consequences to that individual to break the smuggling cycle and end the subject’s desire to attempt further illegal entry.”<sup>87</sup> In addition to focusing on deterring unlawful migration and crime, CBP intended CDS to achieve a greater level of consistency in discretionary decisions made by border officials: “CDS is a means of standardizing the decision making process regarding the application of consequences and provides for the evaluation of outcome effectiveness.”<sup>88</sup> Beyond expedited removal and reinstatement of removal, CBP uses a range of other options, including referral of migrants for federal criminal prosecution, based on the individual’s particular risk factors.<sup>89</sup>

According to the Migration Policy Institute, application of the CDS criteria between 2011 and 2014 led to a dramatic decrease in the use of “voluntary returns” (or the granting of voluntary departure prior to the commencement of formal removal proceedings), and a corresponding increase in the use of expedited removal, reinstatement of removal, and other more formal immigration actions.<sup>90</sup> CBP’s use of voluntary returns declined from 129,000 in 2011 to 38,000 in 2014, while expedited removals rose from under 100,000 in 2011 to 192,000 in 2014 (45% of all CBP apprehensions that year) and reinstatement of removal rose to 122,000 (29% of all CBP apprehensions).<sup>91</sup>

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80 Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002).

81 Designating Aliens For Expedited Removal, 69 Fed. Reg. 48, 877-01 (Aug. 11, 2004).

82 2010 Report 1-44.

83 *Id.* at 3.

84 MPI, DEPORTATION AND DISCRETION, *supra* note 11, at 23.

85 DHS Office of Immigration Statistics, DHS Immigration Enforcement Actions: 2016 (December 2017) [hereinafter DHS Immigration Enforcement Actions 2016], at Table 6, [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2016.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf).

86 RANDY CAPPS ET AL., MIGRATION POLICY INST., ADVANCES IN U.S.-MEXICO BORDER ENFORCEMENT: A REVIEW OF THE CONSEQUENCE DELIVERY SYSTEM 1, 7 (2017) [hereinafter MPI, CONSEQUENCE DELIVERY SYSTEM], <https://www.migrationpolicy.org/sites/default/files/publications/ConsequenceDelivery-Report-FINAL.pdf>.

87 CBP, 2012-2016 Border Patrol Strategic Plan, at 17, [https://www.cbp.gov/sites/default/files/documents/bp\\_strategic\\_plan.pdf](https://www.cbp.gov/sites/default/files/documents/bp_strategic_plan.pdf).

88 *Id.*

89 MPI, CONSEQUENCE DELIVERY SYSTEM, *supra* note 86, at 7. Operation Streamline involves federal prosecution of illegal entry and re-entry cases. These cases are tried in U.S. Magistrate courts, where one hearing can include up to 70 noncitizens and carry a sentence of up to 180 days in jail. *Id.*

90 *Id.* at 8-9.

91 *Id.* at 8-9.

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### 1. Expedited Removal

Expedited removal may be employed to remove noncitizens who arrive in the U.S. without documents or who attempt to enter fraudulently.<sup>92</sup> Noncitizens removed through expedited removal generally have very limited opportunities for further review, including in immigration court.<sup>93</sup> However, a noncitizen who expresses a fear of persecution upon removal may request a “credible fear” interview with USCIS.<sup>94</sup> A final expedited removal order results in a five-year bar to admission to the United States.<sup>95</sup> The 2010 Report charted DHS’s increased reliance on expedited removal from 2004 to 2008. DHS continues to rely heavily on expedited removal. In 2016, the most recent year for which DHS has reported expedited removal statistics, there were 141,518 expedited removals, or 41.6% of 340,056 total removals.<sup>96</sup>

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.<sup>97</sup> Data obtained through Freedom of Information Act requests reveal that in 2011 and 2012, 81% of migrants from Honduras, for example, were placed in fast-track expedited removal and reinstatement of

removal proceedings.<sup>98</sup> During 2011 and 2012, CBP referred about 21% of border-crossers for credible fear interviews; that number was much lower for migrants from Mexico, Honduras, El Salvador, and Guatemala, ranging from 0.1 to 5.5%.<sup>99</sup>

The 2010 Report noted that DHS appeared to exempt unaccompanied minors from expedited removal, but that there were no regulatory provisions protecting accompanied minors or the mentally ill from being subject to expedited removal.<sup>100</sup> By 2015, DHS continued to exempt unaccompanied children from expedited removal proceedings as required by the Trafficking Victims Protection Reauthorization Act (“TVPRA”),<sup>101</sup> but used these proceedings liberally against children accompanied by one or more parents or legal guardians.<sup>102</sup>

Similarly, DHS used an expedited process to return unaccompanied children from Mexico and Canada. Children from contiguous countries are routinely returned to their country of origin regardless of how long they have lived in the United States, if a CBP officer determines in a cursory screening that the child is capable of making an independent decision to return and does not fear persecution or trafficking.<sup>103</sup> This process does not result in a formal expedited removal order, but instead, a withdrawal of the application for admission.<sup>104</sup> DHS was criticized

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92 INA § 235(b).

93 DHS Immigration Enforcement Actions 2016, *supra* note 85, at 3.

94 INA § 235(b)(1)(B).

95 INA § 212(a)(9)(A)(i).

96 DHS Immigration Enforcement Actions 2016, *supra* note 85, at Table 6.

97 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>.

98 *Id.*

99 *Id.*

100 Cf. *Franco-Gonzalez v. Holder*, No. 10-02211, 2013 WL 3674492, at \*1, 3 (C.D. Cal. Apr. 23, 2013) (requiring the appointment of a Qualified Representative as a reasonable accommodation for those who are not competent to represent themselves by reason of their mental disability); see also Aimee L. Mayter-Salins, *Fast-Track to Injustice: Rapidly Deporting the Mentally Ill*, 14 CARDOZO PUB. L., POL’Y & ETHICS J. 545 (2013) (arguing that due process requires that the mentally incompetent be given more procedural protections in fast-track removal proceedings).

101 Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, Title II, § 235; 8 U.S.C. § 1232.

102 AM. IMMIGRATION COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES AND RESPONSES 7 (2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses>.

103 *Id.*

104 TVPRA 2008 § 235(a)(2); 8 U.S.C. § 1232(a)(2).



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for delegating this screening responsibility to CBP officials, and despite recommendations to improve the system and incorporate child welfare professionals, little progress was made on this issue by the end of 2016. Litigation challenging various aspects of expedited removal procedures, including DHS's negative credible fear determinations, faced high jurisdictional obstacles.<sup>105</sup>

## 2. Reinstatement of Removal and Administrative Removal

In addition to expedited removal, the 2010 Report described other administrative procedures that are used outside the immigration court system to effectuate removal: reinstatement<sup>106</sup> of a final order of removal and administrative removal of aggravated felons.<sup>107</sup> The majority of nonjudicial removals in fiscal year 2016 were reinstatements (143,003), with expedited removals a close second (141,518).<sup>108</sup> Publicly available statistics from the DHS Office of Immigration Statistics do not break out the number of administrative removals of aggravated felons.<sup>109</sup>

In short, aside from targeted litigation successes, between 2010 and 2016 there was a continued increase in the reliance on accelerated nonjudicial proceedings, even after the shifting of enforcement priorities. Because individuals with final removal orders and those convicted of aggravated felonies both fell under enforcement priorities, there was no incentive to treat these individuals differently or to consider placing them in full removal proceedings where they might

have had an opportunity to challenge their removal and argue for relief under the law.

## E. Unfair Laws that Burden the Removal Adjudication System

Consistent with the 2010 Report's findings, a number of statutory provisions and agency practices continued to increase the likelihood of removal once an individual was charged and entered the immigration enforcement system. In addition to the administrative removal procedures described above, which can impose outsized consequences with no judicial review, the laws that remain in place regarding so-called "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 CIMT in the Immigration and Nationality Act ("INA"). However, there have been significant developments in the case law regarding these two categories of offenses, due to their nebulous definitions and the increasing number of removal proceedings based on these categories.

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<sup>105</sup> In November 2015, a group of 28 Central American women and their 33 minor children apprehended within the United States sought habeas review of DHS's orders expeditiously removing them from the United States after finding that none of them had established a credible fear of torture or persecution in their countries of origin. In February 2016, the U.S. District Court for the Eastern District of Pennsylvania ruled that it lacked jurisdiction to consider petitioners' constitutional and statutory challenges. *Castro v. U.S. Dep't of Homeland Security*, 163 F. Supp. 3d 157 (E.D. Pa. 2016). In August 2016, the Third Circuit affirmed, stating that the INA "narrowly circumscribes" judicial review of expedited removal orders, and petitioners are only eligible for this limited habeas review. *Castro v. DHS*, 835 F.3d 422 (3d Cir. 2016). The court rejected the petitioners' argument that the INA's jurisdiction-stripping provisions violated the Suspension Clause, because "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Id.* at 444 (citing *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)). The court stated that "petitioners were each apprehended within hours of surreptitiously entering the United States, so we think it is appropriate to treat them as 'alien[s] seeking initial admission to the United States.'" *Id.* The Supreme Court denied review. 137 S. Ct. 1581 (2017) (Mem.).

<sup>106</sup> Reinstatement of final removal orders under INA section 241(a)(5) applies to noncitizens who have been removed or departed voluntarily under a removal order and are apprehended after returning unlawfully to the U.S. A DHS officer conducts a short interview to determine whether the person has a prior removal order, is the person identified in the prior order, and has unlawfully reentered. The person has an opportunity to make a statement at the end of the interview, after which the officer issues the final order (unless the individual has expressed a fear of persecution in the country of origin, in which case the person must be referred to an asylum officer for further screening). The compressed timeframe generally leaves the individual no opportunity to consult with a lawyer to challenge the reinstatement of removal. An individual who has been removed twice is subject to a 20-year bar to admission. See INA § 212(a)(9)(A)(i)&(ii).

<sup>107</sup> INA §§ 241(a)(5), 238(b).

<sup>108</sup> DHS Immigration Enforcement Actions 2016, *supra* note 85, at 8, Table 6.

<sup>109</sup> *Id.* at 3, Table 7, & fig. 3.

In the last few years, both the U.S. Supreme Court and Board of Immigration Appeals (“BIA”) case law have repeatedly affirmed the 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.<sup>110</sup>

Another area of considerable recent litigation has involved the definition of a “crime of violence” under 18 U.S.C. § 16. This definition is used in multiple areas of immigration law, including two commonly charged grounds of removability, crimes of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i) and aggravated felonies under 8 U.S.C. § 1101(a)(43)(F). In *Johnson v. United States*, the Supreme Court held that the “residual clause” of the Armed Career Criminal Act (“ACCA”) was void for vagueness.<sup>111</sup> The similarity of the language in this clause to that of 18 U.S.C. § 16(b) prompted litigation and a split in decisions among

the federal courts of appeals. In *Sessions v. Dimaya*,<sup>112</sup> the Supreme Court resolved this conflict and held that section 16(b)’s definition of “crime of violence” as incorporated into the INA was impermissibly vague and violated due process.<sup>113</sup>

As immigration enforcement in recent years has increasingly focused on noncitizens with criminal convictions and relied upon these overly broad and infinitely retroactive removal grounds, the BIA and federal courts have reminded immigration officials that the scope of these categories is not limitless.

## 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 due to their 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

110 See *Taylor v. United States*, 495 U.S. 575 (1990); see also *Mathis v. United States*, 136 S. Ct. 2243 (2016). In certain limited circumstances, one may look beyond the statute to the record of conviction (a limited class of documents, such as a complaint, indictment or docket sheet) to determine the specific offense for which the individual was convicted. This secondary approach is called the “modified categorical approach.” In *Descamps v. United States*, 570 U.S. 254 (2013), the Supreme Court clarified that the modified categorical approach may only be used when the criminal statute is “divisible” in that it “sets out one or more elements of the offense in the alternative.” Courts may not apply the modified categorical approach to indivisible statutes, as those statutes “criminalize a broader swath of conduct than the relevant generic offense.” An overbroad statute cannot match a removal ground, therefore, because it criminalizes conduct that falls both within and outside of the generic federal definition.

The Supreme Court has elaborated further on the categorical approach in subsequent cases, see *Moncrieffe v. Holder*, 569 U.S. 184 (2013), and has upheld its application to grounds of removability, see *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). In *Mathis v. United States*, 136 S. Ct. 2243, the Supreme Court reaffirmed the use of a strict elements-based approach, clarifying that when a statute lists alternative ways to commit a crime, the statute is only divisible (and convictions under the statute subject to analysis under the modified categorical approach) if the alternate ways are “elements” of the crime; elements are facts which must be found unanimously by a jury beyond a reasonable doubt, as opposed to merely different “means” of committing a single offense. The BIA put to rest any question about whether the categorical approach applies to removal grounds in *Matter of Chairez-Castrejon (III)*, 26 I&N Dec. 819 (BIA 2016) (Utah firearm statute indivisible and overbroad thus conviction did not constitute “crime of violence” aggravated felony).

The BIA settled the debate regarding application of the categorical approach to CIMTs in *Matter of Silva-Trevino*. The first decision in this case from 2008, which permitted adjudicators to look beyond the record of conviction and consider virtually anything it deemed relevant (including police reports) to determine whether a criminal offense constituted a CIMT, was vacated by the Attorney General in 2015 and remanded to the BIA in light of intervening Supreme Court decisions. In *Matter of Silva-Trevino (III)*, 26 I&N Dec. 826 (BIA 2016), the BIA affirmed that the strict categorical approach — not the modified categorical approach — applies to the analysis of CIMTs and that the immigration courts thus cannot delve into the record of conviction to determine whether the conviction qualifies as a CIMT under the INA.

One issue that continues to be the subject of litigation is whether, in determining if a criminal statute is overbroad, there must be a “realistic probability” that such conduct would actually be prosecuted. In *Silva-Trevino (III)*, the BIA held that it would defer to circuit court decisions on realistic probability from the originating jurisdiction. The courts of appeals are divided on whether and how to apply the realistic probability analysis. See, e.g., *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (declining to add realistic probability requirement to CIMT analysis in finding Pennsylvania conviction for assault on a child not to be CIMT); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (realistic probability found in language of Oregon burglary statute which is broader than federal generic definition) (en banc), abrogated on other grounds by *United States v. Stitt*, 139 S. Ct. 399 (2018); *Vazquez v. Sessions*, 885 F.3d 862, 873-874 (2018) (even if statutory language is broader than generic definition, realistic probability must be established by evidence of actual prosecution of overbroad conduct).

111 135 S. Ct. 2551, 2557 (2015) (holding that 18 U.S.C. § 924(e)(2)(B) was unconstitutionally vague as it denied fair notice to defendants and invited arbitrary enforcement).

112 138 S. Ct. 1204 (2018).

113 See note 110, *supra*.

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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.<sup>114</sup> 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.<sup>115</sup> 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 unlawfully to enter the United States.<sup>116</sup> This provisional waiver process shortens the time that family members are separated, and encourages applications by reducing the uncertainty of whether an applicant will be allowed to return to the United States after traveling abroad for visa processing.<sup>117</sup>

In October 2016, USCIS issued a long-awaited update to its policy manual that provided guidance on what constitutes “extreme hardship” for qualifying relatives.<sup>118</sup> The guidance included examples across an array of situations, which should provide consistency

in adjudications and clearer expectations for applicants.

## F. 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 been created. In December 2016, Congress passed the National Defense Authorization Act for Fiscal Year 2017, which elevates the headquarters Assistant Secretary for Policy to an undersecretary and provides the undersecretary with authority to coordinate policy among the DHS component offices.<sup>119</sup> This new role has the potential to foster more coordination of immigration policy, though it does not require it.

In addition, in October 2017, the DHS Inspector General issued a recommendation to create an Immigration Policy Council to assist in coordination across the Department.<sup>120</sup> DHS has agreed to the recommendation, but has not offered any additional information beyond the response to the Inspector General.<sup>121</sup> Therefore, we again reiterate our recommendation to create a centralized position to oversee and coordinate DHS immigration policies and procedures.

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<sup>114</sup> 8 C.F.R. § 212.7(e); INA § 212(a)(9)(B)(v).

<sup>115</sup> 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].

<sup>116</sup> The waiver is only available for those eligible noncitizens pursuant to INA § 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 115.

<sup>117</sup> Even though the immigration visa process is separate from the waiver application, the intent of allowing the noncitizen to remain in the United States until the waiver application was decided was to ensure the potential family visa beneficiary that he or she would be allowed to return to the United States. Otherwise, some applicants would be dissuaded from pursuing lawful permanent status because they would have to adjust their status at a consulate outside the United States.

<sup>118</sup> USCIS, Policy Alert: Determining Extreme Hardship (Oct. 21, 2016), <https://www.uscis.gov/policymanual/Updates/20161021-ExtremeHardship.pdf>.

<sup>119</sup> National Defense Authorization Act for Fiscal Year 2017, Pub.L. 114-328, 130 Stat. 2670-71 (Dec. 23, 2016).

<sup>120</sup> OFFICE OF INSPECTOR GENERAL, DHS NEEDS A MORE UNIFIED APPROACH TO IMMIGRATION ENFORCEMENT AND ADMINISTRATION, OIG-18-17, (Oct. 30, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-11/OIG-18-07-Oct17.pdf>.

<sup>121</sup> *Id.*

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## G. Increased Use of Detention Raises Efficiency and Fairness Concerns

The 2010 Report highlighted the rapid growth in the number of people detained by DHS in the wake of the enactment of IIRIRA. The Report criticized DHS practices that led to inhumane conditions, a lack of DHS control or supervision over the burgeoning detainee population, unnecessary detention of noncitizens, and lack of access to legal representation and resources.<sup>122</sup>

At the time of the 2010 Report, it was too soon to evaluate the October 2009 detention reform efforts announced by Secretary Napolitano and ICE Assistant Secretary John Morton. The reforms sought to implement the proposals set forth by then ICE Office of Detention Policy and Planning Director Dora Schriro, which included: (1) advancing effective use of alternatives to detention; (2) distinguishing in policy and practice civil detention from criminal incarceration; (3) improving management of civil detention operations (including by assessing risk to ensure appropriate placement of detainees, and housing non-criminal populations, including asylum seekers at facilities commensurate with their assessed risk); and (4) reducing reliance on contractors, and providing federal personnel to oversee the facilities where the majority of detainees were housed.<sup>123</sup> In the intervening years, DHS implemented many of these reforms, but with mixed results.

### *1. Increased Transparency in Placement, Transfer and Risk Assessment*

A number of reforms proposed in the Schriro report specifically addressed longstanding complaints about lack of transparency in ICE's overall management of individual placement decisions and lack of access to counsel and family members. For

instance, in July 2010, DHS launched the ICE Online Detainee Locator System, to address longstanding problems for family and counsel who had no way to locate a detainee. According to its website, ICE updates location information at least every eight hours.<sup>124</sup> Practitioners report there is room for improvement with respect to updating location information, but the implementation of this system is an important advancement in creating a more transparent process.

Similarly, in 2012, ICE issued guidance on detainee transfers to address difficulties in accessing detainees who were often moved far from counsel and their communities. The guidance limits transfers away from immediate family, an attorney of record, pending proceedings, or when bond had been granted or a bond hearing scheduled, unless transfers are necessary.<sup>125</sup> Notwithstanding this guidance, ICE continues to house noncitizens in remote detention facilities and jails, and to build new facilities in remote locations with inadequate access to resources. ICE's consistent failure to forecast population needs and to rely on private prisons and sheriff departments' facilities to house civil detainees represents a systemic failure. By undervaluing proximity to legal counsel, family, and support services, ICE continues to deny detained noncitizens adequate access to fair treatment and full due process rights.

### *2. Detention Conditions*

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."<sup>126</sup> ICE made policy changes to move toward more civil detention conditions, but its efforts with respect to purchasing or constructing new facilities were disappointing. In March 2012, ICE announced

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<sup>122</sup> 2010 Report 1-50.

<sup>123</sup> Press Release, ICE, Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives (Oct. 6, 2009), <https://www.dhs.gov/news/2009/10/06/new-immigration-detention-reform-initiatives-announced>.

<sup>124</sup> ICE, About the Detainee Locator/FAQs, <https://locator.ice.gov/odls/about.jsp> (last visited Oct. 26, 2018).

<sup>125</sup> ICE, Directive 11022.1: Detainee Transfers (Jan. 4, 2012), <https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf>.

<sup>126</sup> Spencer S. Hsu, ICE to Strengthen Oversight of Immigrant Detention, WASH. POST, Aug. 9, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080601543.html>.



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the opening of “its first-ever designed-and-built civil detention center,”<sup>127</sup> the Karnes County Residential Center, which was initially intended to be a less punitive adult detention facility housing up to 640 adults.<sup>128</sup> However, since August 2014, the Karnes facility has been used to detain women and children,<sup>129</sup> and ICE has not succeeded in building another adult civil detention facility. Instead, ICE has contracted detention space or commissioned new buildings designed for criminal incarceration.<sup>130</sup>

Through 2016, ICE continued to issue new and updated detention standards. Notably, in 2012, ICE issued the “Sexual Abuse and Assault Prevention and Intervention” directive to ensure an integrated and comprehensive system to prevent and respond to sexual abuse or assault of individuals in ICE custody.<sup>131</sup> In 2013, ICE issued a directive regarding the use of segregation for ICE detainees, with data collection and reporting requirements. The last major Obama-era revisions to the detention standards included disability accommodation provisions, provisions for communication assistance for detainees with disabilities or who are Limited English Proficient (“LEP”), and protections provided for in the DHS regulations implementing the Prison Rape Elimination Act (“PREA”) of 2013.<sup>132</sup>

In 2012, the ABA issued recommendations for guidelines for creating a civil detention system for individuals who are required to be detained, which call for less restrictive living conditions; improved access to legal services and medical care; vigorous oversight of staff and contractors; and vigorous DHS and independent oversight of facilities.<sup>133</sup> In 2013, however, the U.S. Commission on International Religious Freedom still found that “the majority of asylum seekers remain detained in jails and jail-like facilities.”<sup>134</sup>

In 2015, the U.S. Commission on Civil Rights found 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.”<sup>135</sup>

ICE also has failed to implement adequate reforms with respect to detention oversight. In 2010, ICE established the on-site Detention Monitoring Program, which places Detention Service Managers (“DSM”) in its largest facilities.<sup>136</sup> Despite this safeguard and many others,<sup>137</sup> ICE’s internal inspections have persistently failed to address serious shortcomings with respect to living conditions, medical care, segregation, and

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127 News Release, ICE, ICE opens its first-ever designed-and-built civil detention center (Mar. 13, 2012), <https://www.ice.gov/news/releases/ice-opens-its-first-ever-designed-and-built-civil-detention-center>.

128 *Id.*

129 See Justice for Immigrants, Family Detention, <https://justiceforimmigrants.org/2016site/wp-content/uploads/2016/11/Family-Detention-FINAL.pdf> (last updated Feb. 6, 2017).

130 Approximately 72% of ICE detainees are held in private facilities that are not designed for civil detention. Conditions in these facilities, as in the state and local jails ICE utilizes, continue to be inappropriately punitive. AM. CIVIL LIBERTIES UNION, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 8 (2016) [hereinafter SHUTTING DOWN THE PROFITEERS], [https://www.aclu.org/sites/default/files/field\\_document/white\\_paper\\_09-30-16\\_released\\_for\\_web-v1-opt.pdf](https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf). Many county jails continue to operate under outdated detention standards, and frequently do not meet even those standards.

131 ICE, Directive 11062.2, Sexual Abuse and Assault Prevention and Intervention (May 22, 2014), <https://www.ice.gov/doclib/detention-reform/pdf/saapi2.pdf>.

132 ICE, Summary of Revisions to the 2011 Performance-Based National Detention Standards (Dec. 2016), <https://www.ice.gov/detention-standards/2011> (last updated Jan. 3, 2018).

133 AM. BAR ASS’N, ABA CIVIL IMMIGRATION DETENTION STANDARDS (2014), <http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf>.

134 U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ASSESSING THE U.S. GOVERNMENT’S DETENTION OF ASYLUM SEEKERS 1 (April 2013), <http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf>.

135 U.S. COMM’N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 106 (2015) [hereinafter WITH LIBERTY AND JUSTICE FOR ALL], [https://www.usccr.gov/pubs/docs/Statutory\\_Enforcement\\_Report2015.pdf](https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf).

136 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-153, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 2, 35-37 (Oct. 2014), <http://www.gao.gov/assets/670/666467.pdf>.

137 Since the original National Detention Standards were implemented in 2001, the ABA has maintained a limited role in monitoring certain detention standards through coordination with (former) INS and ICE. The ABA was a key stakeholder in the development of the

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other issues.<sup>138</sup> Numerous civil and human rights organizations have “identified serious, life-threatening deficiencies in ICE’s oversight of both private prison contracts and county jail contracts.”<sup>139</sup> And ICE has failed to implement a program for comprehensive oversight by external organizations, as recommended in the 2010 Report.

### 3. Detention Capacity

Congress appropriates funds for a specified number of beds in detention facilities each year. That number has remained steady between 33,400 and 34,040 beds since 2010, although in 2016 President Obama reduced the budget request to 30,319 beds for fiscal year 2017.<sup>140</sup> While the number of beds in the annual congressional appropriation are often referred to as a “bed mandate,” then-Secretary Napolitano called the mandate “artificial.”<sup>141</sup> In March 2014, then-Secretary Johnson similarly stated to the House Committee on Appropriations that he viewed the 34,000 bed number as a capability requirement—a requirement to maintain available beds to detain that

many individuals—rather than a mandate that 34,000 people must be using those beds at any given time.<sup>142</sup> Following implementation of the 2014 enforcement priorities, the number of people detained on a daily basis declined steadily, though there was a sharp increase in mid-2016.<sup>143</sup>

### 4. Detaining 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.<sup>144</sup> 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. Meanwhile, the Department of Health and Human Services’ (“DHHS”) Office of Refugee Resettlement (“ORR”) contracted for additional emergency and permanent facilities to detain unaccompanied children, mainly in South Texas.

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five access to justice standards (access to telephone, mail, visitation, legal materials and the law library, and group rights presentations). In an effort to continue this collaboration, the ABA implemented its Detention Standards Implementation Initiative (“DSII”), in which (former) INS granted the ABA exclusive access to detention facilities to ascertain compliance with these five Standards. A typical DSII visit consists of a meeting with facility staff and ICE officers followed by a tour of the facility, including the living areas, medical department, segregation units, kitchens, recreation areas and the law library. Immediately following the tour, detainees are individually interviewed regarding their experiences in ICE detention. Since 2001, the DSII program has sent delegations of pro bono lawyers into more than 150 facilities across the country. The ABA staff trains pro bono lawyers on the requirements of the Standards and instructs the lawyers on how to accomplish a DSII visit. Following the visit, the delegation prepares a confidential report regarding areas of non-compliance, which is then shared with the ICE Field Office and Headquarters. In addition, the report highlights areas in which a facility may have developed a “best practice” which could be duplicated in other facilities. A follow-up conference call is scheduled with the ICE Field Office and Headquarters to discuss questions, concerns and clarifications raised in the report. While the reports are confidential, many were released to the public following a FOIA request in 2008 and are available on the ICE FOIA website. *See* ICE, FOIA Library, <https://www.ice.gov/foia/library> (last updated July 24, 2018).

138 *See, e.g.*, SHUTTING DOWN THE PROFITEERS, *supra* note 130, at 12; WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 135, at 44; HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 31-33 (2016) [hereinafter LIFELINE ON LOCKDOWN], [http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown\\_0.pdf](http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf); HUMAN RIGHTS FIRST, AILING JUSTICE: NEW JERSEY—INADEQUATE HEALTHCARE, INDIFFERENCE, AND INDEFINITE CONFINEMENT IN IMMIGRATION DETENTION (2018), <https://www.humanrightsfirst.org/sites/default/files/Ailing-Justice-NJ.pdf>.

139 SHUTTING DOWN THE PROFITEERS, *supra* note 130, at 12.

140 NAT’L IMMIGRANT JUSTICE CTR., IMMIGRATION DETENTION BED QUOTA TIMELINE (2016) [hereinafter NIJC, DETENTION BED QUOTA TIMELINE], [http://immigrantjustice.org/sites/immigrantjustice.org/files/Immigration%20Detention%20Bed%20Quota%20Timeline%202016\\_03\\_16.pdf](http://immigrantjustice.org/sites/immigrantjustice.org/files/Immigration%20Detention%20Bed%20Quota%20Timeline%202016_03_16.pdf).

141 Ted Robbins, Little-Known Immigration Mandate Keeps Detention Beds Full, NPR (Nov. 19, 2013), <http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full>.

142 NIJC, DETENTION BED QUOTA TIMELINE, *supra* note 140.

143 In June 2016, the average daily detention population approached 37,000. NIJC, DETENTION BED QUOTA TIMELINE, *supra* note 140; Caitlin Yoshiko Kandil, Jails serve inmates and immigrants, L.A. TIMES, July 29, 2016, <http://www.latimes.com/socal/weekend/news/tn-wknd-et-0731-orange-county-detainees-20160723-story.html>.

144 AM. BAR ASS’N COMM’N ON IMMIGRATION, FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE 9, 18 (2015) [hereinafter ABA FAMILY IMMIGRATION DETENTION], [http://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf).

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At the beginning of 2009, ICE operated two family detention centers. In September 2009, ICE consolidated the two and transferred remaining families from the Don T. Hutto facility in Taylor, Texas, to its much smaller facility in Berks, Pennsylvania; Hutto was recommissioned as a female residential facility.<sup>145</sup> In fiscal year 2013, CBP apprehended 38,759 unaccompanied children, and an additional 14,855 family units, at the border. In fiscal year 2014, the number of unaccompanied children had risen to 68,541, and families to 68,445.<sup>146</sup>

DHS responded to the crisis by increasing enforcement, including using expedited removal for families, and detaining families at the southern border.<sup>147</sup> ICE increased its family detention capacity to 3,200 beds in three main family detention centers: Artesia Family Detention Center in Artesia, New Mexico; the Karnes Residential Center in Karnes City, Texas; and the South Texas Residential Center in Dilley, Texas.<sup>148</sup> ORR also increased its capacity to hold unaccompanied minors from around 2,000 beds in 2011 to 10,000 beds in 2014.<sup>149</sup> To enable swifter processing of family units, USCIS shifted resources away from processing affirmative asylum applications

to providing credible fear screenings at the new family detention facilities on the southern border.

Government agencies, international organizations, the ABA, and many others have strongly criticized the policy and conditions of family detention.<sup>150</sup> In 2015, the ABA issued a report examining the government's decision to detain women and children seeking protection in the U.S. The report concluded that the dramatic increase in the use of family detention was "at odds with the presumption of liberty that should apply."<sup>151</sup> The ABA also concluded that detention "necessarily impinges on the families' due process right to access to counsel for legal information and representation, and in turn negatively impacts their ability to pursue legal relief based on the merits of their claims."<sup>152</sup> The ABA made a number of recommendations for reform, including that the government should permanently abandon its deterrence-based detention policies, and should adopt a presumption against detention for families, children, and asylum seekers.<sup>153</sup>

In July 2015, then-Secretary Johnson commissioned the DHS Advisory Committee on Family Residential Centers, which comprised experts in detention management and reform,

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145 *Id.* at 11-12.

146 CBP, "United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2014," <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014>. In Fiscal Year 2016, families and children comprised nearly one-third of the total apprehensions on the southern border: 137,000 out of 409,000. MPI, CONSEQUENCE DELIVERY SYSTEM, *supra* note 86, at 3, 6.

147 *See, e.g.*, Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on

Appropriations (July 10, 2014), <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations> ("Our message is clear to those who try to illegally cross our borders: you will be sent back home. We have already added resources to expedite the removal, without a hearing before an immigration judge, of adults who come from these three countries without children. ... Within the last several months, we have dramatically reduced the removal time of many of these migrants. Within the law, we are sending this group back, and we are sending them back quicker. Then there are adults who brought their children with them. Again, our message to this group is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited removal orders are effectuated.")

148 ABA FAMILY IMMIGRATION DETENTION, *supra* note 144, at 16-18.

149 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-180, UNACCOMPANIED CHILDREN : HHS CAN TAKE FURTHER ACTIONS TO MONITOR THEIR CARE 16 (2016), <https://www.gao.gov/assets/680/675001.pdf>.

150 *See, e.g.*, AM. BAR ASS'N COMMISSION ON IMMIGRATION, FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE 18 (2015) [hereinafter ABA FAMILY IMMIGRATION DETENTION], [http://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf); SHUTTING DOWN THE PROFITEERS, *supra* note 130, at 21-23. The U.S. District Court for the District of Columbia held that deterrence is not a permissible rationale for custody determinations. The United States Government subsequently has announced that it will abide by that ruling. ABA FAMILY IMMIGRATION DETENTION, *supra* note 144, at 20.

151 ABA FAMILY IMMIGRATION DETENTION, *supra* note 144, at 6.

152 *Id.*

153 *Id.* at 49-50.

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immigration law, family and youth services, physical and mental health, and other disciplines.<sup>154</sup> The Advisory Committee was charged with developing recommendations for best practices in family detention facilities.<sup>155</sup>

In October 2016, the Advisory Committee completed its report and voted on final recommendations. The first recommendation is that “DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families — and that detention or the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children.”<sup>156</sup> 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.” It recommended the use of community-based case management programs as the more appropriate mechanism to ensure individual accountability.<sup>157</sup> DHS issued no statement on the Advisory Committee report, and ICE declined to adopt or implement any of the advisory committee’s 284 recommendations.

## 5. Alternatives to Detention

At the time of the 2010 Report, ICE was in the process of reforming its alternatives to detention (“ATD”) programs. At that time, the government primarily made use of two models of alternatives to detention: “full service” and “technology only.” The full service component requires in-person contact with the immigrant, including office visits and unscheduled home visits, as well as monitoring with GPS or a telephonic reporting system. The contractor provides case management services and documents attendance at court hearings and compliance with supervision requirements.<sup>158</sup> The technology only component entails GPS monitoring or telephonic reporting.<sup>159</sup> ICE’s use of ATDs grew from 32,065 average daily enrollment in 2011 to 40,864 in 2013.<sup>160</sup>

Given the rise in the number of families intercepted at the border, ICE instituted a new Family Case Management program (“FCMP”) in January 2016. This program provided individualized case management services to assist families both during their removal proceedings and after a removal order was issued.<sup>161</sup> In FY 2015, ICE enrolled 26,625 individuals in FCMP, and it projected greater use of this model in FY 2017 and 2018. Despite such projections, however, FCMP was eliminated in 2017.<sup>162</sup> For individuals who do not have final orders of removal, ATD programs have been extremely successful with respect to appearance rates: over

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154 ICE, Advisory Committee on Family Residential Centers, <https://www.ice.gov/acfrc> (last updated Jan. 3, 2018).

155 *Id.*

156 REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 2 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

157 *Id.*

158 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 8-12 (2014) [hereinafter GAO-15-26, ALTERNATIVES TO DETENTION], <http://www.gao.gov/assets/670/666911.pdf>.

159 *Id.* While GPS ankle monitors have been supported by some as a more humane alternative to detaining people, others have observed that they are overly intrusive and stigmatizing, and that they are used for individuals who otherwise would not be detained. Kyle Barron & Cinthya Santos Briones, No Alternative: Ankle Monitors Expand the Reach of Immigration Detention, NACLA (June 1, 2015), <http://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention>; E.C. Gogolak, Ankle Monitors Weigh on Immigrant Mothers Released From Detention, N.Y. TIMES (Nov. 15, 2016), <https://www.nytimes.com/2015/11/16/nyregion/ankle-monitors-weigh-on-immigrant-mothers-released-from-detention.html>

160 GAO-15-26, ALTERNATIVES TO DETENTION, *supra* note 158, at 13.

161 ICE, Fact Sheet: Stakeholder Referrals to the ICE/ERO Family Case Management Program (Jan. 8, 2016), <https://www.aila.org/File/DownloadEmbeddedFile/66854>.

162 Dep’t of Homeland Security, Congressional Budget Justification FY 2017, vol. 2, at 78, <https://www.dhs.gov/sites/default/files/publications/FY2017CongressionalBudgetJustification-Volume2.pdf>. But see, OFFICE OF INSPECTOR GENERAL, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S AWARD OF THE FAMILY CASE MANAGEMENT PROGRAM CONTRACT (REDACTED), OIG-18-22, (Nov. 30, 2017) (eliminating FCMP), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf>.



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99% of individuals with a scheduled court hearing appeared at their hearings while participating in the full service component of the program.<sup>163</sup>

#### 6. DHS Parole and Bond Policies

DHS may enhance due process through appropriate parole and bond policies that offer noncitizens individualized assessments of flight risk and danger to the community. An individual who achieves release on bond or parole is more likely to access counsel and the resources needed to adequately defend her case. The 2010 Report 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 of persecution and who are neither a flight risk nor a danger to the community is “not in the public interest.”<sup>164</sup>

In March 2013, ICE introduced the Risk Classification Assessment system. It is an automated system that analyzes public safety and flight risk through ICE database and interview records. The system then generates a recommendation regarding whether an individual should be released or detained, as well as a suggested custody level.<sup>165</sup> The Risk Classification Assessment system enables ICE to be more consistent in making detention decisions by allowing ICE to detain individuals based upon an objectively assessed risk that the individual will abscond or cause harm to others. 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. While ICE granted parole to 80% of asylum seekers who passed a credible fear interview in 2012, that number declined to just 47% in 2015.<sup>166</sup> 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. In the family detention context, Secretary Johnson stated that bonds must be “reasonable” and based upon the family’s ability to pay.<sup>167</sup> However, attorneys representing asylum seekers and other immigrants in the family detention context or otherwise have reported that — where ICE even sets bond at all — bond amounts are often too high for asylum seekers to pay.<sup>168</sup>

#### 7. The Central American Minors Program

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. The program provided children from El Salvador, Honduras, and Guatemala as well as certain qualifying parents with an avenue to apply for refugee status and/or parole to enter the U.S. from abroad.<sup>169</sup> The CAM program

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<sup>163</sup> GAO-15-26, ALTERNATIVES TO DETENTION, *supra* note 158, at 30.

<sup>164</sup> 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](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf).

<sup>165</sup> Mark L. Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 47-48 (2014).

<sup>166</sup> AM. IMMIGRATION LAWYERS ASS’N, DUE PROCESS DENIED: CENTRAL AMERICANS SEEKING ASYLUM AND LEGAL PROTECTION IN THE UNITED STATES (2016), <https://www.aila.org/File/DownloadEmbeddedFile/68331>.

<sup>167</sup> Press Release, DHS, Statement by Secretary Jeh C. Johnson on Family Residential Centers (June 24, 2015), <https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>.

<sup>168</sup> LIFELINE ON LOCKDOWN, *supra* note 138, at 25. The government does not release public data about bond amounts issued by ICE or the immigration courts, but court filings in a recent lawsuit indicate that some immigrants have remained in prolonged detention due to the inability to pay bonds ranging from \$1,500 to \$100,000. *Id.* at 25 & nn.54-55.

<sup>169</sup> 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/>

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started slowly, with only 2,884 grants and 267 arrivals of children in the U.S. as of July 2016.<sup>170</sup> The program was expanded in 2016 to include additional family members.<sup>171</sup>

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, notwithstanding the fact that 2,714 beneficiaries had already received conditional approval.<sup>172</sup> While this program was small in scope, it was an effective way to allow Central Americans to apply for protection in the region, thereby avoiding the dangerous journey to the United States and additional burdens on law enforcement at the U.S.–Mexico border.

## H. 2017 and Beyond

### 1. Reversing Course on Enforcement

Within days of the arrival 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 these Executive Orders have —by design or effect— undermined numerous initiatives by the prior administration.

Most notably, the Trump administration during its first two years (2017-2018) has overseen an abrupt change in immigration 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.<sup>173</sup> Section 5 instructs the DHS Secretary to prioritize for deportation removable aliens who:

- (a) Have been convicted of any criminal offense;
- (b) Have been charged with any criminal offense, where such charge has not been resolved;
- (c) Have committed acts that constitute a chargeable criminal offense;
- (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- (e) Have abused any program related to receipt of public benefits;
- (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
- (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.<sup>174</sup>

Former DHS Secretary John Kelly issued a memorandum on February 20, 2017 setting forth guidance for DHS personnel regarding these new enforcement priorities,<sup>175</sup> and noting that the directors of ICE, CBP, and USCIS may issue further guidance to set priorities within these categories.<sup>176</sup>

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politics/trump-administration-ends-obama-era-protection-program-for-central-american-minors/2017/08/16/8101507e-82b6-11e7-ab27-1a21a8e006ab\_story.html.

170 David Nakamura, U.S. to expand refugee program for Central American minors, WASH. POST, July 26, 2016, [https://www.washingtonpost.com/politics/us-to-expand-refugee-program-for-central-american-minors/2016/07/26/242ab0cc-533f-11e6-bbf5-957ad17b4385\\_story.html](https://www.washingtonpost.com/politics/us-to-expand-refugee-program-for-central-american-minors/2016/07/26/242ab0cc-533f-11e6-bbf5-957ad17b4385_story.html).

171 USCIS, CAM, *supra* note 169.

172 Nakamura, *supra* note 170.

173 Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

174 *Id.* § 5.

175 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](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

176 *Id.* at 2. The list of priorities includes “those described in [INA] Sections 212(a)(2), (a)(3), and (a)(6)(C), 235(b) and (c), and 237(a)(2) and (4).”

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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 or unlawful immigrants for removal.<sup>177</sup> Under § 5(c) of the executive order, many undocumented immigrants with no criminal convictions (who entered the country without authorization) are designated as priorities for removal, because entering the United States without inspection is a “chargeable criminal offense.”<sup>178</sup> This subsection is also a “catch-all” category, because the executive order states that unauthorized immigrants are a risk to public safety and national security.<sup>179</sup>

The current administration has taken additional actions with respect to prosecutorial discretion, including the September 5, 2017, announcement that it would terminate DACA.<sup>180</sup> National litigation challenging the actions to terminate DACA is ongoing.<sup>181</sup> 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. Instead, then-Acting Director of ICE Thomas Homan warned

that anyone encountered during a worksite operation who is in the country “illegally” would be arrested.<sup>182</sup> The administration has also targeted cities that limit cooperation with state and local law enforcement for possible funding cuts and other punitive measures. In March 2017, then-Attorney General Jeff Sessions announced an expansion of CAP, referring to its earlier name and incarnation, the “Institutional Hearing Program.”<sup>183</sup> The re-emergence of Secure Communities was announced in a new factsheet posted by ICE, noting that the program had been suspended between 2014 and 2017. The renewal of Secure Communities led to an additional 43,300 removals in the first 9 months of 2017.<sup>184</sup>

In addition to the elimination of the FCMP,<sup>185</sup> ICE has shifted its focus to expanding detention, separating families, and redefining the term “unaccompanied minors” to allow for greater control by DHS of these populations. The January 25, 2017 executive order requires DHS to “construct, operate, control, or establish contracts” for facilities “to detain aliens at or near the land border with Mexico.”<sup>186</sup> Increasing detention in remote areas or areas where legal resources are already overstretched will further impede access to justice for noncitizens.<sup>187</sup>

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<sup>177</sup> Exec. Order No. 13,768 § 5.

<sup>178</sup> Am. Immigration Council, Fact Sheet: Summary of Executive Order “Enhancing Public Safety in the Interior of the United States” (May 19, 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/summary\\_of\\_executive\\_order\\_enhancing\\_public\\_safety\\_in\\_the\\_interior\\_of\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/summary_of_executive_order_enhancing_public_safety_in_the_interior_of_the_united_states.pdf); see 8 U.S.C. §§ 1325, 1326.

<sup>179</sup> *Id.*

<sup>180</sup> Statement from President Donald J. Trump (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-7>.

<sup>181</sup> 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.).

<sup>182</sup> Tal Kopan, Ice Chief Pledges Quadrupling or More of Workplace Crackdowns, CNN, Oct. 17, 2017, <https://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html>.

<sup>183</sup> Press Release, Dep’t of Justice, Attorney General Sessions Announces Expansion and Modernization of Program to Deport Criminal Aliens Housed in Federal Correctional Facilities (Mar. 10, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-expansion-and-modernization-program-deport-criminal>.

<sup>184</sup> ICE, Secure Communities, <https://www.ice.gov/secure-communities> (last updated Mar. 20, 2018).

<sup>185</sup> OFFICE OF INSPECTOR GENERAL, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S AWARD OF THE FAMILY CASE MANAGEMENT PROGRAM CONTRACT (REDACTED), OIG-18-22, (Nov. 30, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf>.

<sup>186</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 30, 2017).

<sup>187</sup> HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES (2009), <https://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf>.

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As of April 2017, ICE had added 1,100 detention beds and identified an additional 21,000 detention beds it could use if funded.<sup>188</sup> In 2018, ICE developed a revised version of the National Detention Standards (“NDS”) from 2000, in anticipation of expanding the number of detention beds available in county jails. The expressed purpose of this revision was to modernize the standards by both streamlining existing language and introducing new requirements.

The ABA was invited to submit comments on these revisions and after careful review of the five access to justice standards, submitted recommendations regarding important provisions in the original 2000 NDS which were not included in the 2018 version. The ABA also reviewed standards addressing discipline, grievances, and disciplinary segregation. The ABA also noted that transitioning non-dedicated facilities, which currently operate under the 2000 NDS, to the revised Performance Based Detention Standards (“PBNDS”) would provide enhanced protections for detainees. However, transitioning non-dedicated facilities to the revised 2000 NDS, after having adopted the prior 2008 PBNDS or the 2011 PBNDS,<sup>189</sup> would mark a step backwards. In any event, increasing numbers without adequate resources and oversight will exacerbate the problems that led the Obama administration to pursue reforms eight years ago.

The changing enforcement landscape also extended to USCIS practices. On June 28, 2018, USCIS issued a memorandum outlining its policies implementing DHS’s removal priorities, including those identified in Executive Order 13,768. This memorandum, entitled “Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens,” purports to align USCIS practice with DHS’s removal priorities. It requires USCIS to

issue NTAs (the charging document that initiates immigration court proceedings) in a far broader set of cases than was its previous practice. USCIS was originally established as an entity focused on the adjudication of immigration benefits —i.e., an entity separate from DHS’s enforcement arms. Prior to 2018, USCIS issued just 12% of all NTAs, and those were by and large in cases where an asylum officer made a positive credible fear or reasonable fear finding— i.e., cases that USCIS regulations require to be referred to immigration court for full proceedings on the merits of the asylum claim. USCIS’s new guidance, however, requires the agency to issue NTAs in virtually every case where an adjustment of status application is denied and the individual is not lawfully present in the United States. This effectively transforms USCIS into a third immigration enforcement component of DHS. Beyond adding to the backlog in the immigration court system, these new enforcement responsibilities will require a diversion of resources away from USCIS’s traditional functions, and will likely result in significant backlogs in application processing times at USCIS.<sup>190</sup>

## *2. By the numbers*

The changes discussed above took place during a time when the overall number of migrants attempting to enter the country illegally decreased. In FY 2017, CBP recorded the lowest level of illegal cross-border migration on record, as measured by apprehensions along the border and encounters with inadmissible noncitizens at U.S. ports of entry. CBP recorded 310,531 apprehensions by U.S. Border Patrol agents and 216,370 inadmissible cases by CBP officers in fiscal year 2017, a 23.7% decline over the previous year.<sup>191</sup>

Illegal migration along the southwest border also declined sharply from January 21, 2017 through April 2017, which was the month with the lowest

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<sup>188</sup> David Nakamura, Trump administration moving quickly to build up nationwide deportation force, WASH. POST, Apr. 12, 2017, [https://www.washingtonpost.com/politics/trump-administration-moving-quickly-to-build-up-nationwide-deportation-force/2017/04/12/7a7f59c2-1f87-11e7-be2a-3a1fb24d4671\\_story.html](https://www.washingtonpost.com/politics/trump-administration-moving-quickly-to-build-up-nationwide-deportation-force/2017/04/12/7a7f59c2-1f87-11e7-be2a-3a1fb24d4671_story.html).

<sup>189</sup> See U.S. Customs & Immigration Enforcement: 2011 Operations Manual ICE Performance-Based National Detention Standards, <https://www.ice.gov/detention-standards/2011> (last modified Jan. 3, 2018).

<sup>190</sup> Am. Immigration Lawyers Ass’n, AILA Policy Brief: New USCIS Notice to Appear Guidance (July 17, 2018), <https://www.aila.org/File/DownloadEmbeddedFile/76684>.

<sup>191</sup> CBP Border Security Report FY 2017, p. 1, : <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/cbp-border-security-report-fy2017.pdf> (last visited Nov. 18, 2018).



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border enforcement activity on record.<sup>192</sup> In May 2017, however, CBP began to see a month-over-month increase in apprehensions and inadmissible cases along the border.<sup>193</sup> In fiscal year 2017, approximately 58% of Border Patrol apprehensions were of individuals from countries other than Mexico — mostly Central America. This figure was up from 54% the previous year.<sup>194</sup> At ports of entry, CBP officers encountered 216,370 inadmissible individuals, a decrease of 21.2% from FY 2016.<sup>195</sup> While CBP recorded an increase in overall apprehensions from October 2017 to August 2018 — a total of 361,993 (even as the number of inadmissible cases continued to decline, to 204,288)— those numbers remain well below 2016 levels.<sup>196</sup>

In contrast, ICE interior arrests escalated in 2017, largely a result of the expanded enforcement standards laid out in the memo by then-DHS Secretary Kelly. According to an analysis prepared by ICE, 143,470 individuals were arrested in FY 2017, 110,568 of whom were arrested after January 20, 2017.<sup>197</sup> During this same eight-month time period in 2016, ICE arrested 77,806 individuals.<sup>198</sup> The analysis notes that ICE arrested more individuals during the first eight to nine months of 2017 than during the entirety of FY 2016, attributing that increase to the Executive Order on Border Security.<sup>199</sup> Similarly, while ICE acknowledged that the overall removal rate for FY 2017 dropped from 240,255 in FY 2016 to 226,119 in FY 2017, due primarily to the decrease in border crossers, it emphasized the increase in removals that took place after January 20, 2017, noting that there were 81,603 removals attributed to ICE interior arrests in the eight months after the start of the new administration, but only 65,332 during the same time period for 2016.<sup>200</sup>

While the numbers are startling, it is the rhetoric embedded in this ICE report that is most telling. For example, given the expansion of enforcement priorities to include individuals who had been arrested but not convicted of a crime, and the expansion of what constitutes a crime, it is hardly surprising that ICE detainees also increased during the first eight to nine months of 2017. Nonetheless ICE's explanation for this increase attempts to shift blame to cities and states that oppose its tactics:

"In FY2017, ERO [Enforcement and Removal Operations] issued 142,356 detainees, up 65 percent from 86,026 in FY2016, which demonstrates ERO's commitment to taking enforcement action on all illegal aliens it encounters, as directed by the EO. The rise in detainees issued shows a more active approach to interior enforcement, particularly for those aliens involved in criminal activity, despite continued opposition from some state and local jurisdictions. ... In FY 2017, law enforcement agencies declined 8,170 ERO detainees, as compared with 3,623 in FY 2016 ... . This is the greatest number of declined detainees over the last three fiscal years. Despite intensified efforts to locate and arrest these aliens — many of whom are convicted criminals — ERO was only able to arrest 6 percent of them in FY17. While this is a 67 percent increase over FY2016, this further illustrates the public safety threat posed by those sanctuary jurisdictions that refuse to cooperate with ICE's enforcement efforts, as 7,710 illegal and criminal aliens remain at-large as a direct result of these policies."<sup>201</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 2.

<sup>195</sup> *Id.* at 1.

<sup>196</sup> CBP Enforcement Statistics FY2018, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> (last visited Dec. 28, 2018).

<sup>197</sup> ICE, Fiscal Year 2017 ICE Enforcement and Removal Operations Report, <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> (last visited Oct. 26, 2018).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 7-8.

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As the next section illustrates, ICE's tendency to shift blame continued unabated in 2018.

### 3. Family separations at the border

On April 6, 2018, former Attorney General Sessions announced a "zero tolerance policy" pursuant to which anyone crossing the border unlawfully would be subject to criminal prosecution.<sup>202</sup> On May 7, 2018, the Attorney General further clarified that if an adult was accompanied by a minor child, upon apprehension, the child would be separated from the parent.<sup>203</sup> However, the government had been separating families even prior to announcement of the policy. On February 8, 2018, 75 Democratic Representatives sent a letter to DHS Secretary Kirstjen Nielsen voicing outrage at the increase in family separations, citing two complaints filed with DHS oversight components "illustrat[ing] that DHS appears to be intentionally separating families for purposes of deterrence and punishment."<sup>204</sup>

The legality of family separation is currently being litigated in the U.S. District Court for the Southern District of California.<sup>205</sup> On February 26, 2018, the ACLU brought a federal lawsuit on behalf of Ms. L., claiming her due process rights were violated when immigration agents separated her from her 7-year old daughter after they entered the United States to request asylum. Ms. L. was held by ICE in a detention

center in San Diego while her daughter was held at a youth shelter in Chicago run by ORR.

On March 9, 2018, the ACLU amended its complaint to add a plaintiff to the lawsuit and requested class certification.<sup>206</sup> The second plaintiff, Ms. C., is a citizen of Brazil who crossed into the United States between ports of entry and was apprehended by U.S. Border Patrol.<sup>207</sup> Ms. C. told Border Patrol that she and her son were seeking asylum, but the government charged her with entering the country illegally, placing her in criminal custody and her son in the care of ORR.<sup>208</sup> Ms. C. was convicted of misdemeanor illegal entry and served 25 days in criminal custody.<sup>209</sup> After completing her sentence, Ms. C. was transferred to ICE detention for removal proceedings and consideration of her asylum claim. She was released on bond on April 9, 2018, but was not reunited with her son for several months.

On June 6, 2018, the district court held that the plaintiffs set forth sufficient facts and a sufficient legal basis to state a claim that separation from their children while they are contesting their removal, and without a determination that they are unfit or present a danger to their children violates due process.<sup>210</sup>

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

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202 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>.

203 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>.

204 Letter from Members of Congress to Kirstjen Nielsen, Sec'y, Dep't of Homeland Security (Feb. 8, 2018), <https://democrats-homeland.house.gov/sites/democrats.homeland.house.gov/files/documents/DemsLetterDHSFamilies.pdf>.

205 *Ms. L v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018).

206 Mem. in Support of Mot. for Class Certification, *Ms. L v. U.S. Immigration and Customs Enforcement*, No. 18-cv-428 (S.D. Cal. Mar. 9, 2018), ECF No. 35-1. The class was certified on June 26, 2018 to include: "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the [DHS], and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody absent a determination that the parent is unfit or presents a danger to the child." *Ms. L v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018). The class does not include parents with criminal history or communicable disease, or those apprehended in the interior of the country or subject to the Executive Order ("EO") that the President signed on June 20, 2018, that was aimed at "maintain[ing] family unity." *Id.* at 1139 n.5.

207 *Id.*

208 *Id.*

209 *Id.*

210 *Ms. L v. U.S. Immigration and Customs Enforcement*, 302 F. Supp. 3d 1149, 1166 (S.D. Cal. 2018).

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to the availability of appropriations.<sup>211</sup> 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."<sup>212</sup>

Noting that there was no plan for reunification set forth in the Executive Order or the Fact Sheet, on June 26, 2018, the Court granted Ms. L's motion for a classwide preliminary injunction. The Court ordered that class members in DHS custody could not be detained apart from their minor children, "absent a determination that the parent is unfit or presents a danger to the child, unless the parent affirmatively, knowingly and voluntarily declines to be reunited with the child in DHS custody." He further ordered that unless there is such a determination, or the parent declines reunification, the defendants must reunify all class members with their children under 5 years of age within 14 days of the order, and with their children ages 5 to 17 within 30 days.<sup>213</sup>

Despite its efforts to comply with Judge Sabraw's order, the government was unable to meet the required deadlines, and the process of reunification continues. As of August 1, 2018, of the 2,551 children originally identified as possible children of potential class members, 1,979 had been discharged from ORR.<sup>214</sup> Some were reunified with parents in ICE

custody under the government's plan, and others were discharged, including to sponsors.<sup>215</sup> Of the approximately 572 children remaining in care with ORR, as of that date, the adult associated with the child was either not eligible for reunification or not eligible for release from detention.<sup>216</sup>

#### 4. Narrowing of 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*<sup>217</sup> and "all other opinions inconsistent with the analysis in [that] opinion."<sup>218</sup> In *Matter of A-R-C-G*, the BIA established that "married women in Guatemala who are unable to leave their relationship"<sup>219</sup> 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.<sup>220</sup> 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.

Immigration judges and the BIA have routinely found that violence perpetuated by private citizens, when an individual's country of nationality is unable or refuses to intervene, can be grounds for asylum.<sup>221</sup> *Matter of A-B* throws these precedents into question, casting doubt on whether a claim for asylum can

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<sup>211</sup> Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018).

<sup>212</sup> 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>.

<sup>213</sup> *Ms. L.*, 310 F. Supp. 3d 1133.

<sup>214</sup> Supplement to Joint Status Report, *Ms. L. v. U.S. Immigration and Customs Enforcement*, Case No. 18-cv-428 (S.D. Cal. Aug. 2, 2018), ECF No. 173.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* The reasons for ineligibility for release include waiver of reunification, reunifications potentially affected by separate litigation, adult red flags raised in the process, and adults currently located outside the U.S. or still being located.

<sup>217</sup> 26 I&N Dec. 388 (BIA 2014).

<sup>218</sup> *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018) at 346.

<sup>219</sup> 26 I&N Dec. at 388-89.

<sup>220</sup> In order to be eligible for asylum, a noncitizen must demonstrate that he or she meets the definition of "refugee" in the INA, in that he or she is unwilling or unable to return to her country of nationality because of past persecution or a well-founded fear of persecution on account or race, religion, nationality, membership in a particular social group or political opinion. See 8 U.S.C. § 1101(a)(42).

<sup>221</sup> See, e.g., *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015); *Matter of D-M-R* (BIA June 9, 2015); *Matter of E-M* (BIA Feb. 18, 2015).

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be made when violence is perpetuated by non-governmental actors.<sup>222</sup> The opinion characterizes domestic violence and certain gang-related violence as personal interactions, not as victimization due to membership in a particular social group.<sup>223</sup> The opinion also suggests that limited weight should be given to reports and statistics regarding general country conditions, instead requiring noncitizens to specifically demonstrate how the police failed them. This directive emphasizes that a country's inability to enforce its laws does not justify a claim that the government is unwilling or unable to control persecution by private actors.<sup>224</sup> To this end, *Matter of A-B-* directs adjudicators and those conducting credible fear interviews for victims of domestic and certain gang-related violence to consider relocation within the noncitizen's home country as an approach to remedy the threat of persecution, instead of asylum.<sup>225</sup> This direction contradicts previous findings of the BIA and immigration judges that internal relocation is not a viable option due to the culture of violence in many of these countries.

*Matter of A-B-* was decided at a time when increasing numbers of individuals and families are fleeing gang and gender-based violence in Central America. Although the number of noncitizens apprehended near the U.S. – Mexico border in FY 2017 was at its lowest annual total since 1972,<sup>226</sup> the number of undocumented families from the Northern Triangle countries apprehended at this border is increasing.<sup>227</sup> In FY 2015, 26,124 individuals were granted asylum.<sup>228</sup> Guatemala and El Salvador constituted two of the

three leading countries by nationality from which individuals were granted asylum in that period,<sup>229</sup> as more individuals and families are leaving these countries due to rising violence.<sup>230</sup>

Shortly before issuance of this Update Report, the government attempted to further restrict access to asylum in response to a group of Central American asylum seekers approaching to 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 subsection, 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.<sup>231</sup>

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222 27 I&N Dec. at 337-38.

223 *Id.*

224 *Id.*

225 *Id.* at 345.

226 United States Border Patrol, Southwest Border Sectors, Total Illegal Alien Apprehensions by Fiscal Year, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2017.pdf> (last visited Aug. 9, 2018).

227 See CBP, U.S. Border Patrol Southwest Border Apprehensions by Sector FY2017, <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions-fy2017> (last modified Dec. 15, 2017) (71,145 family units from El Salvador, Guatemala and Honduras apprehended at the southwest border in fiscal year 2017 as compared to 70,407 family units in fiscal year 2016).

228 NADWA MOSSAAD, REFUGEES AND ASYLEES: 2015, ANNUAL FLOW REPORT (2016), [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asytees\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asytees_2015.pdf).

229 *Id.* at 6, Table 6.

230 See U.N. HIGH COMM'R FOR REFUGEES, WOMEN ON THE RUN (2015), <http://www.unhcr.org/56fc31864.pdf>.

231 See *East Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810, 2018 WL 6660080 (N.D. Cal. Dec. 19, 2018).

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##### 5. *Matter of Castro-Tum: Restricting Suspension of Immigration Proceedings by Administrative Closure*

On May 17, 2018, then-Attorney General Jeff Sessions issued an opinion in *Matter of Castro-Tum*.<sup>232</sup> The opinion stated that immigration judges and the BIA lack the general authority to indefinitely suspend immigration proceedings by administrative closure.<sup>233</sup> 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.<sup>234</sup> Under pre-*Castro-Tum* precedent, IJs and the Board 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.<sup>235</sup> Now, under *Castro-Tum*, the authority of IJs and the BIA to administratively close removal proceedings is limited to instances where a previous regulation or settlement agreement has expressly conferred this authority.<sup>236</sup>

As a practical matter, the *Castro-Tum* decision may increase the chance that immigrants, especially children, face deportation, as backlogs for the processing of visas such as the Special Immigrant Juvenile Status visa may cause delays beyond those an immigration judge can allow.<sup>237</sup> In addition, unlawful presence waivers may now be unavailable to

individuals in removal proceedings. Prior to *Castro-Tum*, immigrant visa applicants who had an approved petition could qualify to “provisionally waive” the unlawful presence ground of inadmissibility prior to leaving the country to process their visas at a consulate abroad, but only if their removal proceeding had been administratively closed.<sup>238</sup> Absent immigration judge or BIA authority to administratively close immigration cases, otherwise-eligible immigrants will be procedurally barred from applying for an unlawful presence waiver.<sup>239</sup> However, practitioners may argue that DHS regulations expressly reference administrative closure for provisional unlawful presence waiver applicants, and that this authorizes immigration judges and the BIA to administratively close removal proceedings for the purposes of pursuing this waiver.<sup>240</sup>

## IV. 2019 Recommendations

### A. Reduce Burdens and Increase Efficiency in the Removal Adjudication System

**2010 Recommendation:** Increase the use of prosecutorial discretion by DHS officers and attorneys to reduce the number of NTAs served on noncitizens and to reduce the number of issues litigated. Training, guidance, support, and encouragement should be

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232 27 I&N Dec. 271 (A.G. 2018).

233 *Id.* at 283.

234 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.*”

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

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

237 Capital Area Immigrants’ Rights Coalition, Practice Alert: Attorney General Issues Decision Stripping Immigration Judges of Ability to Administratively Close Cases (May 23, 2018), <https://www.caircoalition.org/2018/05/23/practice-alert-attorney-general-issues-decision-stripping-immigration-judges-ability>.

238 See 8 C.F.R. § 212.7(e).

239 USCIS, Form I-601A, Application for Provisional Unlawful Presence Waiver, <https://www.uscis.gov/i-601a> (last updated Sept. 10, 2018).

240 Catholic Legal Immigration Network, Inc., Practice Pointer: *Matter of Castro-Tum* (June 5, 2018), <https://cliniclegal.org/sites/default/files/Castro-Tum-Practice-Pointer-Final-6-5-2018.pdf>; see also Am. Immigration Council & ACLU, Administrative Closure Post-*Castro-Tum*, Practice Advisory (June 18, 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/administrative\\_closure\\_post-castro-tum.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf).



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provided to ensure that DHS officers and attorneys properly exercise prosecutorial discretion.

**2019 Update:** We reaffirm the 2010 recommendation. Additionally, increased training and guidance can 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.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation. Additionally, as suggested by the DHS Inspector General in a 2015 congressional hearing,<sup>241</sup> 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. This would be useful in facilitating further guidance and clarity on the use of discretion at all levels of enforcement and help identify areas for improvement.<sup>242</sup>

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 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.

**2010 Recommendation:** Authorize USCIS asylum officers to review asylum claims that are raised as a defense to expedited removal. The asylum officer would be authorized either to grant asylum if warranted or otherwise refer the claim to the immigration court.

**2019 Update:** We reaffirm the 2010 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).

**2010 Recommendation:** It may also be possible to divert to the Asylum Division defensive asylum claims arising for the first time in removal proceedings in the immigration courts and thereby further reduce the burden on immigration courts and trial attorneys.

**2019 Update:** *See above.*

**2010 Recommendation:** Cease issuing Notices to Appear to noncitizens who are prima facie eligible to adjust to lawful permanent resident status.

**2019 Update:** We reaffirm the 2010 recommendation. Additionally, DHS should clarify which persons are meant to be included when demonstrating prima facie eligibility for relief.<sup>243</sup>

## **B. Implement Mechanisms to Coordinate Immigration Positions and Policies among the Various Components of DHS**

**2010 Recommendation:** Create a position in DHS to oversee and coordinate all aspects of DHS immigration policies and procedures and provide the

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241 Statement of John Roth, Inspector General, Dep't of Homeland Security, Before the Subcomm. on Nat'l Security and the Subcomm. on Health Care, Benefits, and Administrative Rules in the U.S. House of Representatives, A Review of the President's Execution Action on Immigration (June 17, 2015), at 1-6, [https://www.oig.dhs.gov/assets/TM/2015/OIGtm\\_JR\\_061715.pdf](https://www.oig.dhs.gov/assets/TM/2015/OIGtm_JR_061715.pdf).

242 *Id.*; see also OFFICE OF INSPECTOR GENERAL, DHS MISSING DATA NEEDED TO STRENGTHEN ITS IMMIGRATION ENFORCEMENT EFFORTS, OIG-15-85 (May 4, 2015), at 6, [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-85\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-85_May15.pdf).

243 Letter from Numerous Organizations and Individuals, to Jeh Johnson, Sec'y, Dep't of Homeland Security, on Implementation of the November 20, 2014 Prosecutorial Discretion Policy (April 15, 2015), [https://cliniclegal.org/sites/default/files/04-15\\_prosecutorial\\_discretion\\_ltr-1.pdf](https://cliniclegal.org/sites/default/files/04-15_prosecutorial_discretion_ltr-1.pdf).

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position with sufficient resources and authority: (1) to ensure coordination among USCIS, CBP, and ICE; (2) to develop and advance DHS's agenda and goals with respect to immigration policies; and (3) to play a more significant role in developing immigration policies and informing public opinion on these issues.

**2019 Update:** We reaffirm the 2010 recommendation. All interviewees asked about this recommendation highlighted significant concerns that practices are inconsistent across the country. In addition, they noted a strong need for increased transparency regarding any internal coordination within DHS, and opportunity for more input to decision making, which a new DHS position could address.

## C. Amend Unfair Laws that Burden the Removal Adjudication System

### 1. Adjustments to Lawful Permanent Resident Status

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation. In addition ensure provisional unlawful presence waivers to have the intended effect of not separating families for periods that are longer than necessary.

### 2. Removal of Noncitizens Convicted of Aggravated Felonies

**2010 Recommendation:** 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).

**2019 Update:** We reaffirm the 2010 recommendation.

**2010 Recommendation:** Eliminate the retroactive application of aggravated felony provisions in our immigration law.

**2019 Update:** We reaffirm the 2010 recommendation.

### 3. Removal of Noncitizens Convicted of Crimes Involving Moral Turpitude

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation.

**2010 Recommendation:** Withdraw *In re Silva-Trevino*, 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.

**2019 Update:** We reaffirm the 2010 recommendation.

## D. Decrease Reliance on Administrative and Expedited Removal Proceedings, with Insufficient Oversight

### 1. Administrative Removal of Persons Convicted of Aggravated Felonies

**2010 Recommendation:** Curtail the use of the administrative removal process by which DHS officers may order the removal of noncitizens who are alleged to be convicted of "aggravated felonies" and are not lawful permanent residents. Prohibit use of this procedure 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.

**2019 Update:** We reaffirm the 2010 recommendation. Congress has not amended the INA to restrict administrative removal proceedings. Nor is there evidence to indicate that DHS on its own has curtailed its use of administrative removal proceedings in these categories. Overuse of administrative removal with little oversight and extremely limited judicial review continues to raise serious due process concerns.

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**2010 Recommendation:** Authorize the immigration courts to review DHS determinations that the conviction was for an aggravated felony and that the noncitizen is not in any of the protected categories listed above.

**2019 Update:** We reaffirm the 2010 recommendation. Congress has not provided any such authorization, and it has not adopted the foregoing recommendation. Particularly in light of the continued uncertainty about the definition of “aggravated felony” and the continued use of administrative removal even for persons in the protected categories listed above, additional oversight of DHS determinations is needed to ensure proper and uniform application of the definition.

## *2. Expedited Removal of Persons Apprehended at the Border or within the Interior of the United States*

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 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.

**2010 Recommendation:** Permit DHS officers to issue expedited removal orders *only* if they determine that individuals lack proper travel documentation, but the issue of whether an individual with facially valid documents is committing fraud or making a willful misrepresentation to gain entry into the United States should be left to the immigration courts.

**2019 Update:** We reaffirm the 2010 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.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 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.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 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.

**2010 Recommendation:** Expand judicial review (through *habeas* proceedings) of expedited removal orders to allow a court to consider whether the petitioner was properly subject to the expedited removal provisions and to review challenges to adverse credible fear determinations.

**2019 Update:** We reaffirm the 2010 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.



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And the Third Circuit’s recent decision in *Castro v. DHS* indicates that the limited habeas review currently authorized by statute does not provide protection for most individuals ordered removed through expedited removal proceedings.

## E. Reform DHS Detention Policies That Impede Efficiency and Fairness in the Removal Adjudication System

**2010 Recommendation:** Improve and expand alternatives to detention, while using them only for persons who would otherwise be detained. In addition, 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.

**2019 Update:** We reaffirm the 2010 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.

**2010 Recommendation:** 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, parole determinations should be conducted as a matter of course for asylum seekers who have completed the credible fear screening.

**2019 Update:** We reaffirm the 2010 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.

**2010 Recommendation:** Adopt policies to avoid detaining noncitizens in remote facilities far from family members, counsel, and other necessary resources.

**2019 Update:** We reaffirm the 2010 recommendation.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 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.

## F. New Recommendations

### 1. New 2019 Recommendations — Family Detention

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.

### 2. New 2019 Recommendations — Treatment of Families in Detention

Only those families who must as a matter of law be detained, should be placed in a family residential center (“FRC”).

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. Operationally, parents

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would be able to fix their children's breakfast and lunch and other related activities such as launder their clothes, escort them to and from school, worship with them, sleep in the same or an adjacent room, control all lighting but a night light.

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.

All other families in detention should be released to the community. Likewise, newly intercepted families should remain in the community. Only those parents objectively assessed by means of a 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. Normed assessment instruments must be validated prior to adoption and re-validated periodically. ICE should ensure any assessment instruments currently in use should be re-validated.

### *3. New 2019 Recommendations — Facilities*

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.

### *4. New 2019 Recommendations — Family Separation*

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.

### *5. New 2019 Recommendations — Group Border Prosecutions*

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.

### *6. New 2019 Recommendations — Viability of Asylum*

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.

The United States should uphold the asylum laws as currently established in the INA and rescind the November 8, 2018, Presidential Proclamation that would deny asylum eligibility pursuant to INA §§ 212(f) and 215(a) to those who enter the United States outside of an official Port of Entry.



# 2

## Immigration Judges And Immigration Courts

2019 Update Report

### REFORMING THE IMMIGRATION SYSTEM

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

March 2019

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American Bar Association Commission on Immigration



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# Part 2: Immigration Judges And Immigration Courts

## I. Introduction and Summary on 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 conferencing technologies (“VTC”) 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. There were more than 760,000 pending cases at the end of FY 2018 and an additional 330,000 cases that could be returned to active dockets in short order as a result of recent Attorney General decisions.<sup>1</sup> Ballooning dockets have

resulted in increasingly long wait times for cases to be heard.<sup>2</sup>

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.<sup>3</sup> 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.

In short, whereas the 2010 Report characterized the immigration courts as “fac[ing] harsh criticism” for various shortcomings,<sup>4</sup> today the immigration courts are facing an existential crisis. In light of the fundamentally changed nature of the threat to the immigration court system, the overall conclusion of this Update Report, and specifically this Part, is that the current system is irredeemably dysfunctional and on the brink of collapse, and that the only way

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1 TRAC, BACKLOG OF PENDING CASES IN IMMIGRATION COURTS (2018), [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](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.

2 TRAC, BACKLOG OF PENDING CASES, *supra* note 1; 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](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php) (last visited December 7, 2018).

3 See *infra* Section III.

4 2010 Report at ES–27.

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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, the remainder of this Part is 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.

## II. Developments Relating to the Two Systemic Issues Identified in the 2010 Report

### 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.<sup>5</sup> We noted that a noncitizen's success in immigration court depended to a "troublesome extent" upon which judge was assigned to his or her case and that a broad range of observers — including the immigration bar, legal scholars, the press, and even court of appeals judges — expressed concerns regarding a lack of trust in and respect for the immigration courts.<sup>6</sup> The 2010 Report attributed the issue of public skepticism and lack of respect at least in part to the immigration courts' lack of independence from the Department of Justice ("DOJ"), as well as politicized hiring of immigration judges between 2004 and 2007 and the alleged politically motivated "purge" of the Board of Immigration Appeals ("BIA").<sup>7</sup> The 2010 Report noted that reforms had been implemented since then, but questioned whether those reforms would improve the credibility of the immigration courts.<sup>8</sup>

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.<sup>9</sup> The necessary reforms were not, however, enacted, and thus the immigration courts

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<sup>5</sup> *Id.* at ES-27-28, 2-15, 2-16.

<sup>6</sup> *Id.* at 2-16

<sup>7</sup> *Id.* at ES-28.

<sup>8</sup> *Id.* at ES-33.

<sup>9</sup> *Id.* at ES-27-28.



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continue to suffer from lack of public respect and trust as well irreconcilable inconsistencies of asylum grant rates across courts and immigration judges.

### 1. Disparities in Asylum Grant Rates

Available data suggest that wide disparities in asylum grant rates, both between and within particular immigration courts, have continued. In FY 2017, immigration judges granted asylum claims in approximately 20% of cases nationwide.<sup>10</sup> However, a number of immigration courts granted asylum claims at a significantly lower or higher rate than the national average, and at significantly higher or lower rates even when compared to immigration courts of comparable size.

For example, the immigration court in Atlanta granted only 3% of the 811 asylum cases it resolved by any means and only 5% of the 504 asylum cases it resolved on the merits in FY 2017,<sup>11</sup> while the court in Houston granted only 8% of 2,536 asylum cases it heard (11% of the 1,941 cases resolved on the merits) and Dallas granted only 9% of 827 asylum cases it resolved during that period (about 13% of the 585 resolved on the merits).<sup>12</sup> By contrast, the immigration court in New York City granted nearly 80% of the 4,915 asylum cases it resolved on the merits (41% of the 9,649 asylum cases disposed of overall), San Francisco granted 75% of its 1,737 asylum cases resolved on the merits (39% of the 3,313 asylum cases resolved by any means), and Honolulu granted asylum in 80% of 267 asylum cases resolved on the merits (73% of the 292 asylum cases resolved overall).<sup>13</sup>

While higher grant rates in New York may be related to increased rates of representation, as discussed further in Part 5 of this Update Report, as well as a concentration of respondents from countries more likely to be granted asylum, these factors alone do not account for the vast discrepancies between grant rates in various immigration courts.

Grant rates also varied considerably among immigration judges in the same court. For example, from FY 2012 through FY 2017, grant rates among judges in the San Francisco, California immigration court ranged from a low of 2.9% to a high of 90.6%.<sup>14</sup> Similarly, in the Chicago, Illinois immigration court, individual immigration judge grant rates ranged from 4.4% to 71.3% during this period.<sup>15</sup> In FY 2018, the asylum denial rates between immigration judges in the San Francisco immigration court ranged from 97% to 10%.<sup>16</sup> In addition, wide disparities by court location also exist in bond proceedings and in findings of credible fear.<sup>17</sup> Thus, as noted in the 2010 Report, “a noncitizen’s success in immigration court may depend to a troublesome extent upon which judge is assigned his or her case;” that observation remains strikingly true today.<sup>18</sup>

The 2010 Report cited research that suggested that these disparities appeared to be associated at least in part with a judge’s gender (female judges granted asylum applications more often than male judges), prior work experience (immigration judges who worked at Immigration and Customs Enforcement (“ICE”) granted asylum less often than judges with private practice experience), and length of time on

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10 DOJ, Statistics Yearbook Fiscal Year 2017 28, Table 14, <https://www.justice.gov/eoir/page/file/1107056/download> [hereinafter DOJ Statistics Yearbook FY2017]. From FY2011 to FY2017 national grant rates for asylum cases resolved on the merits have ranged from a high of 56% in FY2012 to a low of 43% in 2016. See *id.*; DOJ, FY 2016 Statistics Yearbook K1 (March 2017) <https://www.justice.gov/eoir/page/file/fysb16/download>; DOJ, FY 2015 Statistics Yearbook K1 (Apr. 2016), <https://www.justice.gov/eoir/page/file/fysb15/download>.

11 See DOJ Statistics Yearbook FY2017, *supra* note 10, at 28, Table 14.

12 *Id.*

13 *Id.*

14 TRAC, JUDGE-BY-JUDGE ASYLUM DECISIONS IN IMMIGRATION COURTS FY 2012-2017 (Nov. 20, 2017), <http://trac.syr.edu/immigration/reports/490/include/table2.html>.

15 *Id.*

16 TRAC, ASYLUM DECISIONS AND DENIALS JUMP IN 2018 (Nov. 29, 2018), <http://trac.syr.edu/immigration/reports/539/>.

17 TRAC, THREE-FOLD DIFFERENCE IN IMMIGRATION BOND AMOUNTS BY COURT LOCATION (July 2, 2018), <http://trac.syr.edu/immigration/reports/519/>; TRAC, FINDINGS OF CREDIBLE FEAR PLUMMET AMID WIDELY DISPARATE OUTCOMES BY LOCATION AND JUDGE (July 30, 2018), <http://trac.syr.edu/immigration/reports/523/>.

18 2010 Report at ES-27.



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the bench (longer tenured judges were more likely to grant asylum).<sup>19</sup> In addition, other, more current research notes that disparate grant rates “reflect in part the differing composition of cases assigned to different immigration judges. For example, being represented in court and the nationality of the asylum seeker appear to often impact decision outcome. . . . [G]iven the required legal grounds for a successful asylum claim, asylum seekers from some nations tend to be more successful than others.”<sup>20</sup>

As discussed in Section III.B.1., *infra*, the manner in which new immigration judges are hired may have an effect — positive or negative — on some of the factors that appear to affect these disparities. A more diverse applicant pool, drawn from all segments of immigration practitioners, could assist in reducing grant rate disparities among immigration judges. A greater availability of legal counsel for applicants, as discussed in Part 5, also likely would have a similar effect, as would efforts to retain more experienced immigration judges who may be eligible for retirement.

## 2. Public Skepticism about the Immigration Court Process

Overall, public skepticism about the Immigration Court process has not improved since 2010. Indeed, the reputation of the immigration courts has been severely tarnished by a resurgence in allegations of politicized hiring and the perceived lack of fairness in immigration proceedings, and a broad range of interviewees confirmed that skepticism of and a lack

of respect for the immigration court process remain a significant problem today.<sup>21</sup>

Much of that lack of respect stems from the placement of the immigration courts within DOJ, reinforcing the necessity of carving out an independent Article I court. For example, former Attorney General Sessions’s increased effort to certify immigration cases to himself for decision has highlighted the immigration courts’ lack of independence. Moreover, the imposition of case production quotas for immigration judges that focus on speed over substance have further raised concerns about the immigration court system’s nominal independence when it is situated within and ultimately operates at the direction of the executive branch.<sup>22</sup>

Finally, the dramatic increase in the caseloads of the immigration courts, and the resulting delays in resolving cases, further threaten due process as well as the perception of fairness of the immigration system. The surging backlog of cases before immigration courts has been widely reported in the media and by advocacy organizations, often with examples of the serious consequences of the delays to those seeking relief.<sup>23</sup> Commentators point to insufficient judges and resources for the courts to keep pace with newly filed cases,<sup>24</sup> while others note that lack of representation in immigration courts<sup>25</sup> and specific executive policies have a dramatic impact on the time it takes to resolve matters.<sup>26</sup>

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<sup>19</sup> *Id.* at notes 116 and 117 and associated text.

<sup>20</sup> See, e.g., TRAC, WHY DO DENIAL RATES VARY AMONG JUDGES? . . . NATIONALITY at 2 <http://trac.syr.edu/immigration/reports/judgereports/00298CHI/index.html> (last visited Dec. 7, 2018). As noted in Part 5, whether an individual has representation also greatly affects the individual’s chance of success in immigration court. See Katzmman Immigrant Representation Study Group & Vera Institute of Justice, New York Immigrant Representation Study Preliminary Findings (May 3, 2011), <http://nylawyer.nylj.com/adgifs/decisions/050411immigrant.pdf>.

<sup>21</sup> See Section III.B.1., *infra*.

<sup>22</sup> See Section III.A.2., *infra*.

<sup>23</sup> Julia Preston, Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html> [hereinafter N.Y. TIMES, Deluged Immigration Courts].

<sup>24</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE THE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 2 (2017) [hereinafter 2017 GAO REPORT].

<sup>25</sup> See generally Part 5 for further discussion.

<sup>26</sup> See, e.g., N.Y. TIMES, Deluged Immigration Courts, *supra* note 23; Julia Preston, *Lost in court: A visit to Trump’s immigration bedlam*, TEXAS TRIBUNE, Jan. 19, 2018, (discussing the impact policy decisions surging immigration judges to the border have on home-immigration court dockets), <https://www.texastribune.org/2018/01/19/lost-court-visit-trumps-immigration-bedlam/> [hereinafter Julia Preston, *Lost in court*]; Memorandum from James McHenry, Director EOIR, “Case Priorities and Immigration Court Performance Measures,” (Jan. 17, 2018) (“[T]

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In short, the reputation of and perception of fairness in immigration courts has not improved since the 2010 Report, and if anything, has further deteriorated as a result of actions that undermine judicial independence and due process, as discussed in greater detail below.

## **B. 2019 Recommendations**

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. There are no quick fixes to restore the public's trust in the system; rather, that trust must be earned. The recommendations made below are collectively aimed at improving judicial independence, due process, and ultimately fairness and transparency of the system, which, in turn will breed more public trust and promote consistency across jurisdictions and courts. Most critical among those specific recommendations are those in Part 6 that relate to the establishment of an Article I Court to handle the functions of the immigration courts.

## **III. Urgent Systemic Issues Currently Threatening the Immigration Court System**

### **A. Lack of Judicial Independence and Political Interference with Immigration Courts**

As discussed above, the 2010 Report highlighted the public mistrust and skepticism of the immigration court system as a systemic issue facing the courts at that time. One of the key sources of public mistrust was the immigration courts' lack of independence from DOJ.<sup>27</sup> Despite some modest improvements from 2008 to 2016 relating to politicized hiring,<sup>28</sup> actions during the interceding nine years since the 2010 Report have done little to improve the public's perception or trust in the 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. Below, we describe the many ways in which judicial independence in the immigration courts has been undermined since the 2010 Report and make specific recommendations which, if adopted holistically, will help to restore judicial independence to the immigration court system.

#### *1. Shifting Political Priorities Negatively Impact Immigration Courtroom Management and Proceedings*

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. As one immigration judge lamented, "the shifting political priorities of various administrations

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he frequent shifting priority designations did not enhance docket efficiency."), <https://www.justice.gov/eoir/page/file/1026721/download> [hereinafter Case Priorities and Immigration Court Performance Measures Memorandum].

27 2010 Report at ES-28.

28 This subject is addressed more fully in Section III.B.1., *infra*.

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have turned our courts into dog and pony shows for each administration, focusing the court's scant resources on the case 'du jour,' — e.g., children or recent border crossers — instead of cases that were ripe for adjudication."<sup>29</sup>

In 2014, Executive Office for Immigration Review ("EOIR") announced expedited dockets for people who were apprehended crossing the southwest border in response to the surge of Central American migrants attempting to enter the U.S.<sup>30</sup> Immigration judges were directed to schedule these cases for master calendar hearings within short time periods, e.g., within 21 days of the immigration court's receipt of the charging document for unaccompanied children and 28 days for certain adults with children.<sup>31</sup> Moreover, immigration judges were directed to adjust dockets so that "judges [could] schedule individual calendar hearings for priority cases appropriately, irrespective if docket time [was] available on that date."<sup>32</sup> As a result, immigration judges were denied the ability to manage their dockets effectively, and many non-priority cases, such as asylum cases involving individuals who did not cross the southwest border after May 1, 2014, were

forced to be continued to dates — often years — far into the future.<sup>33</sup>

Currently the immigration courts are similarly being used as an extension of immigration enforcement mechanisms; the current administration is adjusting enforcement priorities to align with the prevailing political agenda. The January 25, 2017 Executive Order stated that "it is the policy of the Executive branch to: . . . (b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations."<sup>34</sup> On January 31, 2017, prior EOIR Memoranda regarding Docketing Practices were rescinded, and new case processing priorities were issued. Pursuant to the January 31, 2017 EOIR Memorandum, immigration judges were directed to prioritize cases involving: (1) all detained individuals; (2) unaccompanied children in the care and custody of the Department of Health and Human Services, Office of Refugee Resettlement who do not have a sponsor identified; and (3) individuals who are released from custody on a *Rodriguez* bond.<sup>35</sup> Further, on June 20, 2018, in

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29 Hon. Dana Leigh Marks, *Commentary: I'm an Immigration Judge. Case Completion Quotas Are A Really Bad Idea.*, FORTUNE MAGAZINE (Apr. 9, 2018), <http://fortune.com/2018/04/09/immigration-judge-quotas-department-of-justice/> [hereinafter Marks, *Commentary: I'm an Immigration Judge. Case Completion Quotas Are A Really Bad Idea*]. See also Case Priorities and Immigration Court Performance Measures Memorandum, *supra* note 26 ("[T]he frequent shifting priority designations did not enhance docket efficiency.").

30 DOJ Announces New Priorities to Address Surge of Migrants Crossing into the U.S., Office of the Deputy AG, (July 9, 2014), <https://www.justice.gov/opa/pr/departments-justice-announces-new-priorities-address-surge-migrants-crossing-us>; see also Pete Kasperowicz, *Pressure: Immigration Court Caseload Nearly Triples in Four Years*, WASH. EXAMINER (Dec. 3, 2015) [www.washingtonexaminer.com/pressure-immigration-court-caseload-nearly-triples-in-four-years/article/2577593](http://www.washingtonexaminer.com/pressure-immigration-court-caseload-nearly-triples-in-four-years/article/2577593) (Juan Osuna testified that "[t]he 2014 border surge put unprecedented pressures on EOIR. . .").

31 Memorandum from Brian M. O'Leary, Chief Immigration Judge to All Immigration Judges, Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities (Mar. 24, 2015), <https://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf>.

32 AILA, EOIR Fall 2014 Liaison Meeting Minutes, at 4.

33 HUMAN RIGHTS FIRST, THE U.S. IMMIGRATION COURT, A BALLOONING BACKLOG THAT REQUIRES ACTION, 1 (Mar. 15, 2016) [hereinafter A BALLOONING BACKLOG]; Pete Kasperowicz, *Pressure: Immigration Court Caseload Nearly Triples in Four Years*, WASH. EXAMINER Dec. 3, 2015 (Juan Osuna testified that "[t]he 2014 border surge put unprecedented pressures on EOIR. . ."), <https://www.washingtonexaminer.com/pressure-immigration-court-caseload-nearly-triples-in-four-years/article/2577593>. This problem is likely to get worse before it gets better. For instance, former Attorney General Sessions's decision in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) eliminated one tool often used by immigration courts to remove matters from their active dockets, namely administrative closure, finding that the practice was not authorized and as a result ordered that the vast majority of some 355,835 cases that had been administratively closed be recalendered. *Id.* at 293. The Attorney General left it up to DHS or the respondent to request recalendering, which would reactivate the case in the immigration court's docket. *Id.*

34 Executive Order: Border Security and Immigration Enforcement Improvements (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>.

35 EOIR OCIJ Memorandum, Case Processing Priorities (Jan. 31, 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf>. Immigrant detainees in the Ninth Circuit who were released on bond after a bond hearing authorized pursuant to the District Court's decision in *Rodriguez v. Holder*, 2013 WL 5229795 (C.D. Cal. Aug. 6, 2013) (aff'd in part and rev'd in part in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015)) are said to have received a "Rodriguez bond." In October 2017, the U.S. Supreme Court reversed the District Court and Ninth Circuit's rulings, ruling that there was no statutory authority that granted bond hearings to noncitizen detainees held pursuant to 8 U.S.C. §§ 1225(b), 1226(a) & (c) and subject to prolonged detention of more than six

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response to mounting pressure over the zero-tolerance policy which resulted in families being separated at the border, a new Executive Order was issued; the new order ended the practice while proposing extended family detention and “to the extent practicable” ordering that these cases be prioritized for adjudication.<sup>36</sup>

In 2017 and 2018, immigration judges from around the country were detailed to the Southwest border to hear removal cases, sometimes in temporary courts or through VTC,<sup>37</sup> in response to continued migration by individuals from Central America.<sup>38</sup> Critics of the move, including at times immigration judges themselves, claim that this directive had the

unintended consequence of further disrupting dockets in the immigration judges’ home courts and delaying resolution of ripe matters with very little benefit or efficiency gained at the border.<sup>39</sup> At other times, immigration judges surged to the border reportedly had too little work to do.<sup>40</sup> EOIR, however, found that, by mobilizing immigration judges to the border, it was able to complete “approximately 2,800 more cases than [it was] projected to have otherwise completed.”<sup>41</sup> Despite the competing narratives, it is irrefutable that thousands of noncitizens, whose matters may have already been ripe for adjudication, have had their cases significantly delayed as a consequence of

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months, and remanded the case to the Ninth Circuit for further consideration of class issues and constitutional arguments relating to prolonged detention. *Jennings v. Rodriguez*, 138 S. Ct. 830, 583 U.S. \_\_ (2018).

36 Executive Order: Affording Congress an Opportunity to Address Family Separation (June 20, 2018), [https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/?utm\\_source=twitter&utm\\_medium=social&utm\\_campaign=wh](https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/?utm_source=twitter&utm_medium=social&utm_campaign=wh).

37 Increased reliance on VTC is addressed in Section III.B.3, *infra*.

38 The current administration has mobilized immigration judges in this fashion several times. *See, e.g.*, 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-s-renewed-commitment-criminal> (DOJ had “surged 25 immigration judges to detention centers along the border”); DOJ, Press Release, Justice Department Announces Additional Prosecutors and Immigration Judges for Southwest Border Crisis (May 2, 2018), <https://www.justice.gov/opa/pr/justice-department-announces-additional-prosecutors-and-immigration-judges-southwest-border> (announcing “the utilization of 18 current supervisory immigration judges to adjudicate cases in immigration courts near the southwest border.”).

39 There are many stories of delay, disarray and confusion arising out of the temporary border courts. For instance, responding to a request for comment to a story detailing rampant delay and disorder in one temporary border court in Laredo, Texas Judge Ashley Tabaddor, president of the National Association of Immigration Judges (“NAIJ”) stated “We have heard frustration across the board” from their members, noting that “they’ve had to reset hundreds of cases from their home docket to go to detention facilities where the docket was haphazardly scheduled, where the case might not have been ready, where the file has not reached the facility yet.” *See* Julia Preston, *Lost in court*, *supra* note 26.

40 For instance, another immigration judge reported that he had nothing to do at the border court to which he was mobilized: “Four judges were sent, Burman said, but there was only enough work for two” and as a result “[d]ozens of cases he was due to hear during the weeks he was away had to be rescheduled, including some that have been winding through court and were ready for a final decision.” *Id.* *See also* Meredith Hoffman, *Trump Sent Judges to the Border. Many Had Nothing to Do*, *Politico Magazine*, Sept. 27, 2017, <https://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649> (stating that “according to internal Justice Department memos, nearly half of the 13 courts charged with implementing Sessions’ directive would not keep their visiting judges busy in the first two months of the new program.”).

41 Memorandum from Attorney General Jeff Sessions, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017), <https://www.justice.gov/eoir/file/1041196/download>. *See also* Press Release, DOJ, Justice Department Releases Statistics on the Impact of Immigration Judge Surge (Oct. 4, 2017), <https://www.justice.gov/opa/pr/justice-department-releases-statistics-impact-immigration-judge-surge> (“comparing the results of the surge to historical scheduling and outcome data, EOIR has projected that the mobilized immigration judges have completed approximately 2,700 more cases than expected if the immigration judges has not been detailed.”). *But see*, DOJ, EOIR LEGAL CASE STUDY SUMMARY REPORT 19 (Apr. 6, 2017) <http://www.aila.org/infonet/foia-response-booz-allen-hamilton-report> (finding “court personnel sent on temporary duty assignments often have difficulty catching up with their own work upon returning due to their home court being similarly understaffed” and recommending that EOIR “conduct a cost-benefit analysis of temporary duty assignments, weighing distribution of staffing against the impact on the home and visiting courts”) [hereinafter 2017 EOIR LEGAL CASE STUDY SUMMARY REPORT]; 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” 3 (Apr. 18, 2018) <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf> (“The DOJ Claimed that the border surge resulted in an additional completion of 2700 cases. This number is misleading as it does not account for the fact that detained cases at the border are always completed in higher numbers than non-detained cases over a given period.”), [hereinafter Judge A. Ashley Tabaddor Testimony before Senate on Strengthening and Reforming America’s Immigration Court System].



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immigration judges being reassigned to adjudicate cases at the border.<sup>42</sup>

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. Further, because the immigration courts are situated within EOIR, under the executive branch, immigration judges are required to comply with such Executive directives regardless of the impact on their dockets. Ultimately, docket reorganization based on enforcement priorities reinforces the confusion between the enforcement of immigration laws and the adjudication of removal cases, creating the perception that immigration judges are simply part of the government's prosecution efforts.

The delays in immigration cases have devastating effects on asylum seekers and others seeking relief, as well as their families. As reported by Human Rights First, "[t]hose who do not have work authorization while awaiting their immigration court dates are unable to support themselves and their families."<sup>43</sup> In addition, "[w]hile they wait for their claims to be heard, many asylum seekers remain separated from spouses and children who may be in grave danger in their home countries."<sup>44</sup> The delays also affect respondents' abilities to preserve evidence and

witnesses and to obtain pro bono representation, and thus threaten due process as well as the independence of the courts.<sup>45</sup>

## 2. Adoption of Controversial Judicial Performance Metrics and Judicial Accountability

While interference with docket management undermines aspects of judicial independence, other EOIR practices create unreasonable limitations on judicial performance, further hindering perceptions of fairness. Commentators, including the National Association of Immigration Judges ("NAIJ"), have long pointed to the "inherent conflict present in pairing the law enforcement mission of the DOJ with the mission of a court of law that mandates independence from all other external pressures, including those of law enforcement priorities" as an underlying structural defect that allows EOIR to impinge on the judicial independence of immigration courts.<sup>46</sup> Specifically, immigration courts as an executive agency within EOIR are subject to performance criteria that 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.<sup>47</sup>

While this has long been a reality of the immigration courts,<sup>48</sup> the dilemma was elevated to

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42 See, e.g., Julia Preston, *Lost in court*, *supra* note 26 (stating that "[d]ozens of cases [Judge Burman] was due to hear during the weeks he was away had to be rescheduled, including some that have been winding through court and were ready for a final decision. But with the enormous backlog in [his home court,] Arlington, Burman had no openings on his calendar before November 2020.")

43 HUMAN RIGHTS FIRST, REDUCING THE IMMIGRATION COURT BACKLOG AND DELAYS 3 (July 7, 2016), <http://www.humanrightsfirst.org/resource/reducing-immigration-court-backlog-and-delays> [hereinafter REDUCING THE IMMIGRATION COURT BACKLOG AND DELAYS].

44 *Id.*

45 *Id.* at 28. In addition, delays in the immigration courts allow respondents without strong claims for relief to stay in the United States for months and sometimes years while their cases are pending. See *id.*

46 Judge A. Ashley Tabaddor Testimony before Senate on *Strengthening and Reforming America's Immigration Court System*, *supra* note 41, at 2 (calling this "the fundamental flaw" of the immigration court system that "may well lead to the virtual implosion of this vital Court.").

47 See *id.* at 2. For further discussion of systemic restructuring of the immigration courts, see Part 6.

48 Performance evaluations introduced in 2009 were fully operational by 2018 when the administration announced the implementation of new performance metrics effective October 2018. The former evaluation system was not without flaws and drew significant criticism from various immigration judges and immigration judge organizations. For instance, critics derided EOIR's decision to adopt a traditional federal employee review system rather than following a judicial model of performance reviews, asserting that the traditional employee model rendered immigration judges acutely susceptible to administrative or procedural edicts that impacted due process and impinged on judicial independence. See, e.g., Judge A. Ashley Tabaddor Testimony before Senate on *Strengthening and Reforming America's Immigration Court System*, *supra* note 41, at 5. While a judicial model is transparent, invites public comment, evaluates judges on temperament and quality, and is not tied to discipline, the traditional federal employee model is the opposite: reviews are not public, are conducted by

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new heights in Spring 2018 when DOJ announced that as of October 1, 2018 each immigration judge would have to meet an individual production quota of 700 removal proceedings annually, to receive a “satisfactory” performance evaluation.<sup>49</sup> Specifically, 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.<sup>50</sup>

The imposition of individual case production quotas and time-based deadlines tied to an immigration judge’s performance evaluation is “unprecedented”<sup>51</sup> and has been widely criticized as a counterproductive step undermining judicial independence and threatening due process.<sup>52</sup> Judge Tabaddor, on behalf of NAIJ, took pains to explain the difference between the prior court-wide “case completion goals” and the new individual production quotas, stating that, while the former are

court-based evaluation metrics not tied to any one immigration judge’s performance or decisions, the latter are “tantamount to transforming a judge into an interested party in the proceeding” and “pits their personal interest against due process considerations.”<sup>53</sup>

Although proponents of the case production quotas view the requirement as a necessary step towards reducing case backlog, critics have denounced the move. They argue that it will undermine judicial independence, expose judges’ decisions to additional legal challenge, create additional backlog, and ultimately threaten due process.<sup>54</sup>

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. The ABA similarly opposes the implementation of mandatory performance metrics for immigration judges.<sup>55</sup> Such an approach pits personal interest against due process and undermines judicial independence in a critical and direct way. Immigration judges are best situated

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management officials who often have little day-to-day interaction with the judge being reviewed, and are directly tied to potential career-ending discipline. *Id.* Immigration judges argue that public faith in performance evaluations is eroded when such evaluations, as well as investigations resulting from public complaints, are shielded from the public. *See id.*; Hon. Denise Noonan Slavin & Hon. Dorothy Harbeck, *A View from the Bench*, *FEDERAL LAWYER* Oct./Nov. 2016at 68, [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2016/OctoberNovember/Features/A-View-from-the-Bench-by-the-National-Association-of-Immigration-Judges.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2016/OctoberNovember/Features/A-View-from-the-Bench-by-the-National-Association-of-Immigration-Judges.aspx?FT=.pdf).

49 *See* Nick Miroff, *Trump administration, seeking to speed deportations, to impose quotas on immigration judges*, *WASHINGTON POST* (Apr. 2, 2018) (“judges will be expected to clear at least 700 cases a year to receive a ‘satisfactory’ performance rating”), [https://www.washingtonpost.com/world/national-security/trump-administration-seeking-to-speed-deportations-to-impose-quotas-on-immigration-judges/2018/04/02/a282d650-36bb-11e8-b57c-9445cc4dfa5e\\_story.html?utm\\_term=.26aa270fbf73](https://www.washingtonpost.com/world/national-security/trump-administration-seeking-to-speed-deportations-to-impose-quotas-on-immigration-judges/2018/04/02/a282d650-36bb-11e8-b57c-9445cc4dfa5e_story.html?utm_term=.26aa270fbf73); 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*].

50 *Immigration Judge Performance Metrics*, *supra* note 49. The six performance benchmarks are (i) to complete 85% of non-status detained removal cases within three days of the merits hearing; (ii) to complete 85% of non-status, non-detained removal cases within ten days from the merits hearing (unless prohibited by statute or delayed by background check); (iii) adjudicate 85% of motions within 20 days of receipt of the motion; (iv) complete 90% of custody redeterminations on the initially scheduled hearing date (unless DHS fails to produce the noncitizen); (v) complete 95% of individual merits hearings on the initially scheduled hearing date (unless DHS fails to produce the noncitizen); and (vi) complete 100% of credible fear and reasonable fear reviews on the initial hearing date (unless DHS fails to produce the noncitizen).

51 Judge A. Ashley Tabaddor Testimony before Senate on Strengthening and Reforming America’s Immigration Court System, *supra* note 41, at 7-8.

52 *See id.*; Marks, *Commentary: I’m an Immigration Judge. Case Completion Quotas Are A Really Bad Idea*, *supra* note 29 (arguing that DOJ’s “misguided approach will have the opposite effect” than intended and will threaten due process).

53 Judge A. Ashley Tabaddor Testimony before Senate on Strengthening and Reforming America’s Immigration Court System, *supra* note 41, at 8 (“This basic principle is so widely accepted that the NAIJ is not aware of a single state or federal court across the country that imposes the type of production quotas and deadlines on judges like those that EOIR has now announced.”).

54 *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>.

55 *See* Am. Bar Ass’n, *ABA Opposes Trump administration’s proposed mandatory performance metrics for immigration judges* (Oct. 12, 2018), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/november2017/immigrationjudges/](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/november2017/immigrationjudges/).

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to determine the course of the cases before them. The new performance metrics should be rescinded, and if they are not, they should, at a minimum, be carefully monitored to determine the impact they have on judicial independence and due process.

Consistent with the recommendations in the 2010 Report, we continue to support improved accountability and transparency for the immigration court system and immigration judges. While the implementation of case production quotas as part of immigration judges' performance metrics is an undeniable step backwards, it is nonetheless important to identify two noteworthy updates since 2010 that have improved accountability and transparency in the immigration courts.

First, on April 4, 2011, EOIR announced its publication of the Ethics and Professionalism Guide for Immigration Judges.<sup>56</sup> The Guide is binding on all immigration judges, and, as recommended in the 2010 Report, incorporates a section on judicial temperament and professionalism.<sup>57</sup> This standard states that "[a]n Immigration Judge should be patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers and others with whom the Immigration Judge deals in his or her official capacity, and should not, in the performance of official duties, by words or conduct, manifest improper bias or prejudice."<sup>58</sup> Although the guidelines are binding on immigration judges, little has been done to study whether there is widespread compliance with the Guide, or if there are any conflicts with state judicial or ethical Codes of Conduct that should be considered.

Second, since 2010, DOJ has tracked complaints against immigration judges in a central database.<sup>59</sup> In response to a FOIA request and subsequent lawsuit filed by the Immigration Lawyers Group in November

2012, DOJ released over 16,000 pages of documents relating to 767 complaints, some substantiated and others not, filed against various immigration judges.<sup>60</sup> 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" when it directed DOJ to weigh the judges' privacy interests against the public's right to the information.<sup>61</sup> While collecting data on complaints and disciplinary proceedings is a step in the right direction, EOIR should adopt a more nuanced approach when responding to FOIA requests and should further assess ways to publish more detailed information relating to discipline and complaints against immigration judges and court staff without unduly infringing on individuals' right to privacy.

### *3. Elimination of Judicial Tools to Dispose of Cases and Failure to Adopt Practices to Improve Efficiency in Immigration Proceedings*

The potential negative impact of quantitative performance metrics on immigration judges, the courts, and the public's perception of the fairness and impartiality of the immigration courts is further compounded by DOJ policies and actions that discourage the use of other case and docket management tools previously available to immigration judges. Notably in 2017 and 2018 DOJ and EOIR severely limited or eliminated several tools that immigration judges routinely used to manage their caseloads and clear cases from their dockets.

Specifically, DOJ sharply curtailed the use of continuances in immigration proceedings and virtually eliminated the use of administrative closure and termination so as to render them nearly-extinct

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<sup>56</sup> Press Release, DOJ, Executive Office for Immigration Review Releases Immigration Judge Ethics and Professionalism Guide (Apr. 4, 2011), <https://www.justice.gov/eoir/IJEthicsGuide04042011>.

<sup>57</sup> 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).

<sup>58</sup> *Id.*

<sup>59</sup> 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>.

<sup>60</sup> *Id.*; see also *AILA v. EOIR*, 830 F.3d 667, 669-670 (D.C. Cir. 2016).

<sup>61</sup> Tillman, *supra* note 59.



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as avenues to resolve cases.<sup>62</sup> In each decision implementing these changes, the 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” (emphasis added) and that they have no “inherent authority” to use docket management tools unspecified by regulation.<sup>63</sup>

While the immigration court system experimented with various other case management tools in an effort to increase efficiency, such as vertical prosecution,<sup>64</sup> 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.

#### a. Curtailing Continuances

In July 2017, EOIR announced a policy intending to limit immigration judges’ use of continuances in immigration proceedings,<sup>65</sup> citing the tremendous backlog of pending cases and the “strong incentive [for] respondents in immigration proceedings to abuse

continuances” as specific concerns.<sup>66</sup> While not an explicit directive, the obvious implication of this policy was to encourage immigration judges to reduce the number of cases in which they granted continuances.

Furthering this agenda, on August 16, 2018, then-Attorney General Sessions decided *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), a case he referred to himself to reexamine continuance practices in immigration courts.<sup>67</sup> In his decision, Attorney General Sessions expressed deep skepticism about the use of continuances in immigration proceedings and redefined how the standard for granting continuances would be applied to removal cases in which a respondent was seeking relief in collateral proceedings before U.S. Citizenship and Immigration Services (“USCIS”) or other courts.<sup>68</sup>

Specifically, the decision found that immigration courts should focus on two factors — likelihood of success on the collateral relief sought and whether the relief sought would materially affect the outcome of the removal proceedings — to make a determination whether there is good cause for a continuance.<sup>69</sup> It went on to state that additional factors, such as how diligently the noncitizen had pursued relief, DHS’s position on the motion, and the history and length of the proposed continuances, were other relevant factors to consider when deciding to grant or deny a request for continuance.<sup>70</sup> The Attorney General further implied that, while it is “impermissibly arbitrary” “[t]o reach a decision about whether to grant or deny a motion for a continuance based *solely* on

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62 Notably, in redefining the legal landscape for each of these issues DOJ relied to some degree or another on the Attorney General’s referral power pursuant to 8 C.F.R. § 1003.1(h)(1). The potential negative impact such politicized use of this power can have on the immigration court system, and importantly, due process is addressed at Section III.B.2. and Part 3, *infra*.

63 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).

64 In a vertical prosecution model, attorneys are assigned in teams to several judges and team members are charged with responsibility for the cases before the team’s set of judges. The model requires the team of attorneys, as a group, to be aware of the status of all of the cases pending before their assigned judges and to be able to step in on any of the team’s cases. The teams follow the cases from beginning to end.

65 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>.

66 *Id.*

67 *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018). See also *Matter of L-A-B-R*, 27 I&N Dec. 245 (A.G. 2018) (certifying for review issues relating to “when there is ‘good cause’ to grant a continuance for a collateral matter to be adjudicated, [and] ordering cases stayed pending review”).

68 *Matter of L-A-B-R*, 27 I&N Dec. 405, 411 (stating that “[t]he overuse of continuances in immigration courts is a significant and recurring problem.”).

69 *Id.* at 413.

70 *Id.* at 413, 416-17.

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case-completion goals . . .,” there was no barrier to considering such “case-specific factors” along with the other factors when deciding whether to grant or deny a continuance.<sup>71</sup> The decision also states that to succeed on such a request, the noncitizen will usually need to present full evidentiary submissions and requires immigration judges to articulate the specific basis for granting a continuance on the record to aid in the review of such decisions.<sup>72</sup>

The ruling in *Matter of L-A-B-R* thus makes it more difficult and burdensome to obtain a continuance in immigration proceedings in which the respondent is or plans to seek collateral relief,<sup>73</sup> and thereby reduces its utility as a tool to manage the immigration court’s docket.

#### b. Restricting Administrative Closure and Termination

The former Attorney General’s recent decisions in *Matter of Castro-Tum*, 27 I&N 271 (A.G. 2018) and *Matter of S-O-G- & F-D-B*, 27 I&N 462 (A.G. 2018) essentially removed two other effective case management tools — administrative closure and termination of proceedings — from the authority of immigration judges.

Immigration judges commonly used administrative closure as a docket-management tool

to “temporarily” remove matters from the active docket, usually to allow for resolution of a related proceeding that would affect the outcome of the removal proceedings.<sup>74</sup> Administrative closure has been used extensively since at least 1984, encouraged by chief immigration judges and DHS, and codified in regulations since at least 1998.<sup>75</sup> Similarly, immigration judges used terminations to close immigration proceedings where the Notice to Appear (“NTA”) was defective or improvidently issued, where DHS could not sustain the charges alleged in the NTA, or where the respondent was *prima facie* eligible for immediate relief, including naturalization.<sup>76</sup> Despite the fact that both of these tools had been used by immigration judges for decades, recent precedent handed down by the former Attorney General severely curtailed these practices.

In *Castro-Tum*, former Attorney General Sessions rewrote decades of immigration law and practice by finding that neither immigration judges nor the BIA had the authority, express or implied, to suspend cases using the procedure known as administrative closure.<sup>77</sup> Instead, the former Attorney General found that administrative closure is authorized only in a very limited subset of cases in which a previous regulation or judicially approved settlement expressly

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<sup>71</sup> *Id.* at 416-417 (quoting *Hashmi v. Att’y Gen.*, 531 F.3d 256, 261 (3d Cir.2008) (emphasis added)). This is a disturbing invitation. Encouraging or even allowing an immigration judge to consider his or her own self-interest as a factor in determining the merits of a respondent’s request for a continuance encourages that judge to place a thumb on the scales of justice and to tilt the scales in favor of the government. For precisely this reason, critics have loudly decried the performance metrics as a threat to judicial independence and an impediment to due process, as discussed in detail in Section III.A.2., *supra*.

<sup>72</sup> *Matter of L-A-B-R*, 27 I&N Dec. 405, 418.

<sup>73</sup> Indeed, the Attorney General’s decision expressly states that an “immigration judge should not grant a continuance merely because the respondent expressed the intention to file for collateral relief at some future date.” *Id.* at 415-16. This is a significant departure from prior practice and does not seem to take adequate account of the fact that many respondents represent themselves *pro se* and thus may, through no fault of their own, be unaware of potential collateral avenues of relief until shortly before a hearing.

<sup>74</sup> See Aaron Reichlin-Melnik, *Sessions Ends Administrative Closure at the Expense of Due Process in Immigration Courts*, American Immigration Council, Immigration Impact (May 18, 2018), <http://immigrationimpact.com/2018/05/18/sessions-administrative-closure-immigration-court/> (“Administrative closure has long been an uncontroversial management tool used by immigration judges to manage their caseload. It allows a judge to temporarily take a case off the court docket, usually to allow for completion of related proceedings that will impact the outcome of the individual’s removal proceedings.”); Andrew R. Arthur, *Attorney General Ends Administrative Closure*, Center for Immigration Studies (May 18, 2018), <https://cis.org/Arthur/Attorney-General-Ends-Administrative-Closure> (noting that “[t]he Board of Immigration Appeals (BIA) has described [administrative closure] as ‘a procedural tool created for the convenience of the Immigration Courts and the Board.’”) (citing Arthur, *Attorney General Orders Review of Administrative Closure*). While this tool was meant to allow for temporary suspension of proceedings, former Attorney General Sessions points out in his decision that fewer than a third of administratively closed cases since 1980 had been recalendared. *Matter of Castro-Tum*, 27 I&N Dec. 271, 273 (A.G. 2018).

<sup>75</sup> See *Matter of Castro-Tum*, 27 I&N at 274-78 (recounting the history of administrative closure in the immigration courts).

<sup>76</sup> See American Immigration Council, Practice Advisory, Notices to Appear: Legal Challenges and Strategies (June 2014) at 22-27 (advising on instances in which a motion to terminate removal proceedings may be viable), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/notices\\_to\\_appear\\_fin\\_6-30-14.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_fin_6-30-14.pdf).

<sup>77</sup> *Matter of Castro-Tum*, 27 I&N at 272.

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authorized such action.<sup>78</sup> The former Attorney General asserted that administrative closure was used largely to indefinitely suspend immigration proceedings and that “for cases that truly warrant a brief pause, the regulations expressly provide for continuances.”<sup>79</sup> He further distinguished the federal courts’ use of administrative closure, arguing that immigration courts, unlike Article III courts, have “no inherent authority” to exercise judicial powers necessary for the administration of justice.<sup>80</sup>

In *Matter of S-O-G- & F-D-B-*, former Attorney General Sessions similarly restricted the use of termination as a tool to remove cases from the immigration courts’ dockets. There he limited the use of termination to those specific instances in which it is authorized by regulation or where DHS has failed to sustain the charges of removability.<sup>81</sup> To support this conclusion, the former Attorney General again argued that immigration judges “have no inherent authority to terminate or dismiss removal proceedings” for reasons other than those identified in statute or regulation.<sup>82</sup>

As a result of these decisions, immigration judges are severely restricted from using two tools traditionally available to them to manage their

dockets. The decision in *Castro-Tum* alone could result in the recalendaring of some 355,000 cases that had been administratively closed.<sup>83</sup> Because the former Attorney General left it up to DHS or the noncitizen to reactivate,<sup>84</sup> we have yet to see how great an impact this decision will have on the immigration courts. Even before these decisions, ICE attorneys had sought to recalendar 8,400 cases in FY 2017 and 8000 in FY 2018, nearly doubling the pace from the last two years of the prior administration.<sup>85</sup> It is reasonable to suspect that even more cases will be re-calendared in FY 2019.<sup>86</sup>

### c. Failure to Adopt Alternative Court Management Procedures to Improve Efficiency

While implementing measures that will undermine efficiency in the immigration court system, EOIR also has failed to implement many other suggested procedures that would improve efficiency. Stakeholders have broadly suggested the following to improve the efficiency of the immigration courts and to make removal proceedings run more smoothly: (1) assign ICE attorneys to cases when they are filed so that the same ICE attorney manages each case from start to finish;<sup>87</sup> (2) require participation

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78 *Id.*

79 To the extent the Attorney General’s decision appears to offer continuances as a substitute tool for immigration judges to manage their dockets, this offer rings hollow in light of other decisions and policies that directly aim to minimize the use of continuances in immigration proceedings. See Section III.A.3.a., *supra*.

80 *Matter of Castro-Tum*, 27 I&N at 292-93.

81 *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 463 (A.G. 2018).

82 *Id.*

83 *Matter of Castro-Tum*, 27 I&N at 293.

84 *Id.* See also Memorandum from Mayra O’Neill, OPLA Guidance: *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (Jun. 15, 2018), <https://www.aila.org/infonet/ice-guidance-admin-closure-matter-of-castro-tum> (setting forth ICE’s planned recalendaring prioritization).

85 Hamed Aleaziz, *The Trump Administration is Seeking to Restart Thousands of Closed Deportation Cases*, BUZZFEED NEWS (Aug. 15, 2018), <https://www.buzzfeednews.com/article/hamedaleaziz/trump-deportations-immigration-ice-dhs-courts>.

86 While not directly related to the issue of administrative closure, it is worth noting that the *Castro-Tum* case also represents a threat to judicial independence in a more direct and potentially pernicious way. On remand, EOIR *sua sponte* reassigned the matter to a different immigration judge than the one to which it was originally assigned. NAIJ has filed a grievance with EOIR alleging that this action was retaliatory and that such action violated not only the immigration judge’s judicial independence, but also the integrity of the immigration court and the due process rights of noncitizens appearing before them. See NAIJ, *Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ* (Aug. 8, 2018), <https://assets.documentcloud.org/documents/4639659/NAIJ-Grievance-Morley-2018-Unsigned.pdf>. This matter is yet unresolved, but it casts a dark cloud over judicial independence of the immigration courts.

87 See, e.g., CHARLES ROTH & RAIA STOICHEVA, ORDER IN THE COURT, COMMONSENSE SOLUTIONS TO IMPROVE EFFICIENCY AND FAIRNESS IN THE IMMIGRATION COURT, NATIONAL IMMIGRATION JUSTICE CTR. REPORT 5 (Oct. 2014), <https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Order%20in%20the%20Courts%20-%20Immigration%20Court%20Reform%20White%20Paper%20October%202014%20FINAL2.pdf> [hereinafter ORDER IN THE COURT].

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in pretrial conferences to narrow issues before hearings;<sup>88</sup> (3) increase legal orientation presentations for noncitizens; (4) create an online case management system;<sup>89</sup> and (5) appoint chief judges in immigration courts who, rather than having supervisory authority over other immigration judges, hear cases and help manage the dockets and redistribute cases, as necessary (much in the same way that chief judges do in federal district courts).

A recent EOIR audit also found that “EOIR must make organizational changes to effectively meet its mission and address the large volume of pending cases.”<sup>90</sup> The study’s findings echo some of these suggestions and propose analyzing the effect of a court-wide scheduling system incorporating magistrate-style court management and “introduc[ing] in-court ticketing systems for Master Calendar [ ]” hearings.<sup>91</sup>

Since the 2010 Report, EOIR has implemented some stakeholder suggestions. For example, it has expanded the number and role of assistant chief immigration judges (“ACIJs”) to improve supervision of immigration judges and the management of the immigration courts. There are currently 18 ACIJs, nine of which were appointed since January 2017.<sup>92</sup> ACIJs sit in courts around the country, including in Houston,

Los Angeles, Chicago, Atlanta, New York and Tucson, and oversee up to seven immigration courts.<sup>93</sup> 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. Indeed, many ACIJs are far removed from the courts they oversee.<sup>94</sup>

Further, while immigration courts have experimented with various means to improve courtroom efficiency, including vertical prosecution,<sup>95</sup> motions dockets,<sup>96</sup> prehearing conferences,<sup>97</sup> and increased exercise of prosecutorial discretion to better align with to enforcement priorities,<sup>98</sup> none has yielded long-term programmatic changes. One recurring stumbling block encountered in many of the pilot programs was that they relied heavily on the voluntary cooperation and commitment of counsel to capture efficiencies. Such cooperation and commitment, however, generally were not forthcoming.

The reason the immigration courts were forced to rely on voluntary compliance, however, is due to extreme inaction by DOJ. In 1996 — more than 20 years ago — Congress granted immigration judges contempt power, which would allow them to better

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88 *Id.* at 8; *see also* 8 C.F.R. § 1003.21 (allowing immigration judges to hold pretrial hearings but not requiring them to do so).

89 *See* ORDER IN THE COURT, *supra* note 87, at 9. This recommendation is addressed more fully below in Section III.C.3. *infra* relating to technology in the immigration courts.

90 *See* 2017 EOIR LEGAL CASE STUDY SUMMARY REPORT, *supra* note 41, at 3. A partially redacted version of the report, dated April 6, 2017, was produced pursuant to a FOIA request on April 11, 2018. *See* American Immigration Lawyers Association (AILA), FOIA Response: Booz Allen Hamilton Report On Immigration Courts” (April 6, 2017), <http://www.aila.org/infonet/foia-response-booz-allen-hamilton-report>.

91 2017 EOIR LEGAL CASE STUDY SUMMARY REPORT, *supra* note 41, at 19, 23.

92 *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).

93 *See* DOJ, ACIJ Assignments, <https://www.justice.gov/eoir/acij-assignments> (last updated Dec. 3, 2018).

94 *Id.*

95 The Office of the Principal Legal Advisor (OPLA) at ICE piloted “vertical prosecution” in its Los Angeles Office, expanding the program to several other offices thereafter.

96 In eight courts, EOIR also has piloted a motions docket in an attempt to streamline that aspect of immigration proceedings. *See* 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>.

97 In 2012, EOIR implemented a prehearing pilot program in a select number of immigration courts to test the effectiveness of using pretrial conferences to resolve or streamline cases. According to EOIR, however, the program did not succeed because it lacked sufficient buy-in from participants and there was no effective way for immigration judges to require meaningful participation. Many immigration court practitioners and judges, however, strongly believe that holding pretrial hearings in certain cases would vastly improve the efficiency of the immigration court system if meaningful participation could be enforced.

98 *See generally* Part I, Section III.A.

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manage and control their courtrooms.<sup>99</sup> Despite this longstanding authorization, however, DOJ has never issued the required implementing regulations to allow immigration judges to exercise this power. Absent such authority, immigration judges are again rendered powerless to control their own courtrooms and enforce compliance with potential time-saving programs, such as those identified above.

Finally, despite widespread support and evidence suggesting that increased representation in immigration proceedings increases efficiency, recent actions by DOJ have sought to undermine such programs. This issue is addressed in depth in Part 5 of this Update Report and in some detail at Section III.B.4., *infra*.

## B. Policies and Practices that Threaten Due Process

A fundamental tenet of our nation and laws is that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”<sup>100</sup> It is well-established that the due process protection of the Fifth Amendment, including specifically the right to a fair hearing, extends to noncitizens in immigration proceedings.<sup>101</sup> As one immigration judge described it: “The primary job of an immigration judge is to decide each case on its own merits in a fair and impartial way. That is the essence of due process and the oath of office [immigration judges] take.”<sup>102</sup> Yet, recent shifts

in policy and practice have eroded or threaten to erode the fundamental fairness of immigration proceedings.

While the 2010 Report did not always frame the problems identified or the proposed recommendations in terms of due process, many of those recommendations in fact implicate this foundational principle of fairness in immigration proceedings. For instance, efforts that undermine the immigration courts’ ability to independently administer justice free of political interference or fear of retribution raise the question whether respondents are able to receive a fair hearing.<sup>103</sup> Moreover, the disparity of asylum grant rates and the fact that such case outcomes often depend on which immigration judge and court is adjudicating a case also raise due process concerns.<sup>104</sup> It should also go without saying that if a court does not have the necessary resources to devote time, attention, or detailed consideration to the matters before it, as is the case with the immigration courts, it is difficult to ensure due process.<sup>105</sup>

While acknowledging the overlap and interconnectedness of these problems, this Section focuses on several discrete issues that most directly impact due process and fairness in the immigration court system.

### 1. Resurgent Concerns Over Politicized Hiring Practices

As noted in the 2010 Report, “politicized hiring of immigration judges . . . between 2004 and 2007 . . . and the alleged politically motivated ‘purge’ of the [BIA]” negatively affected the public’s perception of the

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99 See 8 U.S.C. § 1229a(b)(1).

100 U.S. CONST. amend. V.

101 See, e.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903))); *Saakian v. I.N.S.*, 252 F.3d 21, 24 (1st Cir. 2001) (same); *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (“Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment’s requirement of due process.”); *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (“A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings.”); *Solis-Chavez v. Holder*, 662 F.3d 462, 466 (7th Cir. 2011) (noncitizens in immigration proceedings “have a due-process right to a fair hearing.” (citing *Kay v. Ashcroft*, 387 F.3d 664, 676 (7th Cir. 2004))).

102 Marks, *Commentary: I’m an Immigration Judge. Case Completion Quotas Are A Really Bad Idea*, *supra* note 29 (arguing that DOJ’s “misguided approach” implementing case completion quotas threatens due process).

103 See Section III.A., *supra*. See also Marks, *Commentary: I’m an Immigration Judge. Case Completion Quotas Are A Really Bad Idea*, *supra* note 29 (“One cannot measure due process by numbers.”); Judge A. Ashley Tabaddor Testimony before Senate on *Strengthening and Reforming America’s Immigration Court System*, *supra* note 41, at 8 (“[Q]uotas pits [immigration judges’] personal interest against due process considerations.”).

104 See Section II.A.1., *supra*.

105 See Section III.C., *infra*.



immigration courts and led to widespread skepticism regarding the overarching fairness of the immigration court system.<sup>106</sup> The 2010 Report noted that, in the wake of the 2004–2007 politicized hiring scandal, EOIR adopted reforms to guard against politicized hiring and firing in the future, although some commentators remained concerned that the newly implemented safeguards did not go far enough.<sup>107</sup>

While the measures adopted from 2007 to 2016 appeared to have stemmed politicized hiring in that period, they had the unintended consequences of slowing hiring to a glacial pace. These measures also did little to address concerns regarding the lack of diversity of immigration judges, as a very high percentage of new immigration judges continued to be former government attorneys.<sup>108</sup> The lack of diversity on the bench is troubling, as the implications for such hiring bias is far reaching. It impacts both practice before the courts and perceptions of fairness in the public eye. An audit of the immigration courts commissioned by EOIR found that “having a body of [immigration judges] largely composed of lawyers who previously worked for DHS, ICE or DOJ branches limits the diversity of perspectives on the bench.” The audit recommended that EOIR “broaden hiring pools and outreach programs to increase diversity of experience of [immigration judges].”<sup>109</sup> Policies and hiring practices adopted and implemented in 2017

and 2018, however, appear poised to frustrate these recommendations.

In April 2017, DOJ announced its plan to “streamline its hiring of [immigration] judges, reflecting the dire need to reduce the backlogs in our immigration courts.”<sup>110</sup> At a high level, EOIR announced that the new hiring process “requires thorough vetting, as before, but also aims to reduce the hiring timeline . . . [by] set[ting] clear deadlines for . . . moving applicants to the next stage . . . [eliminating] steps that did not aid the selection process in order to decrease processing times . . . [and] allow[ing] for temporary appointments pending the completion of full background investigations for both federal and non-federal employees.”<sup>111</sup> EOIR estimated that these changes would result in a hiring timeline of less than six months.<sup>112</sup> That timeline stands in sharp contrast to the time it took applicants to navigate the multi-layered, multi-agency approach that was put in place after 2007.<sup>113</sup> DOJ began implementing this new approach as of February 2018.<sup>114</sup>

While stakeholders broadly agree that improved, faster hiring practices are necessary, DOJ’s new approach has received criticism. A broad range of stakeholders have expressed concerns that DOJ’s current approach will elevate speed over substance, exacerbate the lack of diversity on the bench, and eliminate safeguards that could lead to a resurgence of

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<sup>106</sup> 2010 Report at ES–28.

<sup>107</sup> *Id.* at 2–10, 2–18–19.

<sup>108</sup> 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.”); 2017 GAO Report, *supra* note 24, at 40 (“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.

<sup>109</sup> 2017 EOIR LEGAL CASE STUDY SUMMARY REPORT, *supra* note 41, at 21 (finding at least 41% of immigration judges previously worked for DHS and nearly 20% of immigration judges previously worked at another DOJ branch).

<sup>110</sup> 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-s-renewed-commitment-criminal>.

<sup>111</sup> See 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>.

<sup>112</sup> *Id.*

<sup>113</sup> See 2018 GAO Report, *supra*, note 108.

<sup>114</sup> See *id.* at 11.



politicized hiring. All of these concerns could threaten due process in the immigration courts. For instance, Judge Ashley Tabaddor, the President of NAIJ, accused DOJ of “surreptitiously” making “substantive changes to the qualification requirements of judges” that “over-emphasiz[ed] litigation experience to the exclusion of other relevant immigration law experience.” She also argued that the net effect of DOJ’s changes to the hiring process will be to further skew appointments in favor of individuals with law enforcement backgrounds.<sup>115</sup> While DOJ contests this view, it has not made the hiring criteria public.<sup>116</sup>

In addition to concerns regarding the new hiring criteria, there have been additional reports of overt politicized hiring of immigration judges by DOJ. On April 17, 2018, in a letter to then-Attorney General Sessions, congressional Democrats expressed their “grave concern regarding allegations [they] received from whistleblowers indicating that the Department of Justice may be using ideological and political consideration to improperly — and illegally — block the hiring of immigration judges and members of

the Board of Immigration Appeals (BIA).”<sup>117</sup> On May 8, 2018, Congressional Democrats wrote a letter to the DOJ Inspector General requesting a formal investigation into DOJ’s hiring practices with respect to immigration judges and members of the BIA.<sup>118</sup> While EOIR and DOJ deny these allegations,<sup>119</sup> many commentators remained skeptical.<sup>120</sup>

One of the most troubling aspects of the current hiring regime is the utter lack of transparency. Despite requests, DOJ and EOIR have declined to share the new hiring criteria with stakeholders, instead relying on high-level descriptions and generalities such as those contained in the April 2017 policy announcement.<sup>121</sup> 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 since January 2017.<sup>122</sup> To the extent the new hiring process in fact trades the “qualification requirements of judges” for speed, due process concerns are likely implicated; such an approach

115 Judge A. Ashley Tabaddor Testimony before Senate on *Strengthening and Reforming America’s Immigration Court System*, *supra* note 41, at 5.

116 See 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>.

117 Letter from Senate and House Democrats to Jeff Sessions, Attorney General (Apr. 17, 2018), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-democrats-demand-doj-respond-to-allegations>.

118 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>.

119 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>.

120 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.jeffreychase.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.”)

121 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), *supra* note 111.

122 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>.

arguably removes safeguards designed to protect against politicized hiring, favors certain categories of candidates (which likely undermines the diversity of immigration judges on the bench), and may allow underqualified or potentially-biased judges to be hired due to lack of thorough vetting. Moreover, until the allegations of politically motivated hiring can be resolved, doubt will remain about the perceived and perhaps actual fairness of immigration proceedings.

The most direct route to resolving these reasonable and important concerns would be for DOJ to publicize its hiring criteria, and for the inspector general to conduct an investigation into recent hiring practices.

## 2. Increased Use of Attorney General Certification and Politicization of Process

As discussed in greater detail in Part 3 of this Update Report, immigration law is unique in that the Attorney General is empowered to *sua sponte* refer BIA decisions to him or herself and independently re-adjudicate them.<sup>123</sup> The referral power, if acted upon,

allows the Attorney General to rewrite immigration law. For the last half of a century, Attorney Generals have traditionally used the referral power sparingly.<sup>124</sup> From 2009 to 2017, for instance, the authority was only exercised four times.<sup>125</sup>

This stands in stark contrast to the present administration's approach. In twenty-one months, then-Attorney General Jeff Sessions 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.<sup>126</sup>

These decisions, made unilaterally and with an undeniably ideological bent, threaten not only the viability of certain substantive claims and defenses from noncitizens (most notably asylum claims),<sup>127</sup> but also directly impact immigration court proceedings and due process protections. For instance, in *Matter of Castro-Tum*, the immigration judge hearing the original matter administratively closed the proceedings against the noncitizen minor rather than ordering the non-appearing juvenile removed *in absentia* because of due process concerns.<sup>128</sup> After former Attorney General

<sup>123</sup> 8 C.F.R. § 1003.1(h)(1)(i).

<sup>124</sup> See Sarah Pierce, *Sessions: The Trump Administration's Once-Indispensable Man on Immigration*, MIGRATION POLICY INSTITUTE (MPI), (Nov. 8, 2018), <https://www.migrationpolicy.org/article/sessions-trump-administrations-once-indispensable-man-immigration>; 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> [hereinafter *Advancing Executive Branch Immigration Policy*] (“[B]etween 1953 and 1956, [the] pace [of referrals] dropped to approximately 8 cases per year. . . . Attorney General William Rogers issues 10 decisions between 1958 and 1961, while Attorney General Robert Kennedy issues 11 decisions between 1961 and 1964. Only 5 published decisions were issues throughout the remainder of the Johnson administration, with infrequent decisions occurring during the presidencies of Richard Nixon, Jimmy Carter, Ronald Reagan, and George H.W. Bush. During the latter half of the Clinton administration there was a slight uptick in both order relating to immigration cases (14) and decisions issued (3). Attorney Generals during the George W. Bush administration used the authority with significantly more frequency . . . issuing 16 total decisions . . . . During the Obama administration, the authority has only been exercised four times. . . . Thus from a peak of 37 cases a year through 1952, the authority was exercised on average, only twice per year during the Bush administration, and only 4 times during the 8 years of the Obama administration”).

<sup>125</sup> *Advancing Executive Branch Immigration Policy*, *supra* note 124.

<sup>126</sup> 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 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).

<sup>127</sup> See, e.g., *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018) (overruling prior BIA precedent establishing “social group” membership based on being a victim of domestic violence and containing broad dicta calling into question the viability of asylum claims on the basis of being a victim of domestic or gang violence). But see, *Grace v. Whitaker*, No. 18-cv-01853, 2018 WL 6628081 (D.D.C. Dec. 17, 2018) (permanently enjoining the U.S. from applying certain policies issued by DHS implementing the Attorney General's decision in the *Matter of A-B*, finding the policies to be arbitrary and capricious and in violation of the Administrative Procedure Act (“APA”) and the Immigration and Nationality Act (“INA”).

<sup>128</sup> See Matthew Archambeault, *The Repercussions of How the Administration has Handled Matter of Castro-Tum*, Think Immigration Blog (Aug. 14, 2018), <https://thinkimmigration.org/blog/2018/08/14/the-repercussions-of-how-the-administration-has-handled-matter-of>

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Sessions's broad decision in *Matter of Castro-Tum*, such an option is no longer available to immigration judges.<sup>129</sup>

Irrespective of specific policies implemented by the current administration, the precedential implications of weaponizing the Attorney General's referral power is troubling from a due process and systemic standpoint, particularly for a court system that is already far too disrupted by politics. If this power continues to be exercised unchecked, the rules of the game may change so often and so dramatically that it will be impossible for due process to be served. As addressed in Part 6 and in this Part, the ultimate solution to protect the integrity of our immigration court system and to ensure due process is to move the immigration courts into an Article I court system. However, in the interim, the Attorney General's referral power should return to being used sparingly, and only to clarify immigration law. It should not be used to rewrite immigration law or promote policy goals.

### 3. Expansion of VTC

The 2010 Report highlighted concerns that VTC was undermining the fairness of proceedings, noting that use of such technology "makes it more difficult to establish credibility and . . . makes it harder for respondents to argue their case."<sup>130</sup> The 2010 Report further noted that "use of video teleconferencing 'double[d] the likelihood that an asylum applicant [would] be denied asylum.'"<sup>131</sup> 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.<sup>132</sup>

Despite such recommendations, since 2010 immigration courts have relied more on VTC to resolve all types of matters, and signal that this reliance will only continue to grow.<sup>133</sup> An increasing number of both procedural and substantive immigration proceedings are resolved using VTC, and consent is still not required before it is used in immigration proceedings.<sup>134</sup>

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castro-tum/. The specific due process concern raised in this matter was that of adequate notice of the proceedings. See NAIJ, *Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ* (Aug. 8, 2018) (asserting that EOIR wrongfully interfered with the immigration judge's authority in administering justice, because the immigration judge's initial determination to terminate proceedings against Castro-Tum was related to concerns that the "address furnished to EOIR by the Office of Refugee Resettlement (ORR) for service of the hearing notice may not have been sufficiently reliable based on numerous instances of error that the Court had observed in other cases."). Former Attorney General Sessions further certified, but did not decide before resigning his post, the question of whether certain asylum seekers detained within the U.S. are entitled to a bond hearing before the immigration court. See *Matter of M-S-*, 27 I&N Dec. 476 (A.G. 2018) (presenting the question of whether asylum seekers crossing the U.S. border without authorization that are placed in expedited removal proceedings pursuant to INA § 235(b)(1) and subsequently pass a credible fear interview (and are thus placed into removal proceedings pursuant to INA § 240), have the right to a custody redetermination hearing before an immigration judge) (certifying the matter for review pursuant to 8 C.F.R. § 1003.1(h)(1)(i)). Sessions certified this matter only after the original matter through which he sought to review this issue – *Matter of M-G-G-*, 27 I&N Dec. 469 (A.G. 2018) – was mooted after the respondent was removed to Guatemala. See Migration Policy Institute, Sarah Pierce, *Sessions: The Trump Administration's Once-Indispensable Man on Immigration* (Nov. 8, 2018). Some see this approach as an indication that the former Attorney General certified cases to himself to shape immigration policy rather than to resolve naturally occurring legal disputes. *Id.* *Matter of M-S-*, should it be decided, directly implicates liberty interests of tens of thousands of noncitizens.

129 See Section III.A.3.b., *supra*, for more discussion relating to administrative closure. See also *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (limiting the ability of immigration judges to grant continuances in cases where the noncitizen may obtain permission to stay in the U.S. through other pending applications); EOIR, Memorandum from MaryBeth Keller, Chief Immigration Judge, "Operating Policies and Procedures Memorandum 17-01: Continuances," (July 31, 2017), *supra* note 65 (announcing policy that discourages broad use of continuances in immigration proceedings); and Immigration Judge Performance Metrics *supra* note 49 (adopting mandatory time-based performance metrics for immigration judges' performance evaluations, which may have the practical impact of limited continuances).

130 2010 Report at 2–27.

131 *Id.* (citing Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2008) (emphasis added)).

132 *Id.* at 2–41.

133 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 120 (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 teleconferencing.").

134 *Remote Adjudication*, *supra* note 133, at 945-47, 952-53.

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Advocates continue to raise concerns about the fundamental fairness of resolving substantive issues via videoconferencing, citing a laundry list of problems experienced with the system. 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. Videoconferencing 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.<sup>135</sup> 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. This audit found that "faulty VTC equipment, especially issues associated with poor video and sound quality, [could] disrupt cases to the point that due process issues may arise." It also found 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.<sup>136</sup> Based on these observations, the EOIR study specifically recommends limiting the use of VTC to procedural matters.<sup>137</sup>

A 2015 study further confirmed that VTC is most commonly used in proceedings for detained noncitizens,<sup>138</sup> 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.<sup>139</sup> That study also demonstrated that use of VTC negatively impacts the noncitizen respondents' engagement in the legal proceeding.<sup>140</sup>

Given the massive backlog of cases and potential efficiencies gained by not requiring a noncitizen's physical presence in the courtroom, it is highly unlikely that the use of VTC in immigration proceedings will be discontinued. Indeed, EOIR has worked to make VTC technology available for use in every courtroom, invested in upgrading and expanding VTC technology in its hearing locations, and has begun to hire immigration judges to staff up two immigration adjudication mega-centers designed to hear cases via VTC from all over the country.<sup>141</sup>

The immigration adjudication centers ("IACs") in particular pose interesting questions, the answers to which could have tremendous due process implications. As of the writing of this Update Report, very little information has been publicly shared on how exactly the IACs will function. Because IACs are intended to hear cases from all over the country, however, jurisdictional and logistical issues arise that typically do not exist when matters are adjudicated in the same geographic area as the noncitizen respondent.

First, pursuant to INA § 242(b)(2), any petition for review should be filed in the judicial circuit where

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<sup>135</sup> *Id.* at 941, 994

<sup>136</sup> 2017 EOIR LEGAL CASE STUDY SUMMARY REPORT, *supra* note 41, at 23.

<sup>137</sup> *Id.*

<sup>138</sup> The study found that VTC was used for all hearings in a matter in nearly a third of all detained cases, whereas 97.7% of non-detained cases never had a single hearing conducted by VTC. *See Remote Adjudication*, *supra* note 133, at 953. The fact that VTC is used largely for detained noncitizens should raise some 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. *See id.* at 947, 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.

<sup>139</sup> *Id.* at 953.

<sup>140</sup> *Id.* at 977-1000.

<sup>141</sup> *See* 2017 GAO Report, *supra* note 24, 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-EOIR-11-01-2017.pdf>.



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the immigration judge completed the proceedings. In a video hearing, the judicial district may be different from where the judge and the parties are located. If the law applied to a case is not determined by the location of the noncitizen respondent, due process may be violated by arbitrarily denying the respondent protection of law that he or she would otherwise be entitled to if his or her case were not selected for adjudication via VTC. This is a significant consideration given the vastly varied approach to immigration law adopted by different federal circuits. Moreover, if the law applied is the law of jurisdiction within which the court is situated (as is the usual case) and “the judicial circuit in which the immigration judge completed the proceedings” is deemed to be the location of the IAC,<sup>142</sup> DOJ’s ability to choose where to locate the IACs could allow DOJ to select the law that will apply to a vast number of immigration cases. This would amount to forum-shopping on an immense scale and would raise additional due process concerns.

Second, the expanded use of VTC through IACs poses additional challenges and burdens on noncitizens’ counsel, and may further pose a significant impediment to obtaining counsel in the first place. In ideal circumstances, a client and counsel appear together in the same courtroom as the immigration judge and government attorney. VTC already upsets that balance, forcing attorneys who represent noncitizens whose cases are heard via VTC to choose whether to appear in court or appear with their client. That is not the case for IACs, however. If a noncitizen respondent is fortunate enough to obtain counsel,<sup>143</sup> the chances that her counsel can both meet with her in person and appear in the remote IACs to interact face-to-face with the immigration

judge (and potentially opposing counsel) are slim to none. Notably, the government may not be similarly burdened. This reality could arguably place the government at an unfair advantage and may work to discourage attorneys from taking on clients whose matters are likely to be heard remotely.<sup>144</sup> These challenges undermine the fairness of immigration proceedings and call into question whether the fundamental elements of due process are being met.

The lack of information combined with a looming potential for widespread due process implications is cause for legitimate concern. EOIR should clarify how IACs are intended to function as soon as possible and take into account such concerns in deciding how IACs will operate to ensure due process is met.

Practitioners further report that recently, the courts have initiated video hearings with detained unaccompanied children held in various Office of Refugee Resettlement (“ORR”) shelters with judges located in remote courtrooms.<sup>145</sup> While the practice of using VTC in ORR facilities is not unprecedented, such a practice has serious implications for the ability of a child to understand and meaningfully participate in such proceedings and negatively affects access to counsel for this vulnerable population.

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.<sup>146</sup> It is also imperative that

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<sup>142</sup> See INA § 242(b)(2) (“The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.”).

<sup>143</sup> See Part 5 for further discussion.

<sup>144</sup> See *supra*, note 138.

<sup>145</sup> 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). Stakeholders reported that while VTC had been used in certain ORR facilities prior to 2018 with mixed results, the government’s expanded use of VTC in ORR settings in late 2018 was disorganized and chaotic, and raised concern that due process was not being met for these vulnerable children. The expanded use of VTC in the ORR setting has since been discontinued.

<sup>146</sup> This recommendation is consistent with the EOIR commissioned audit findings but uses different language to clarify that hearings that on their face appear to be procedural but nonetheless require the court to make substantive determinations similarly should not be subject to VTC. One such example would be bond hearings. See also, AM. BAR ASS’N COMM’N ON IMMIGRATION, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES 53-55 (August 2018), [https://www.americanbar.org/content/dam/aba/administrative/immigration/standards\\_for\\_children\\_2018.pdf](https://www.americanbar.org/content/dam/aba/administrative/immigration/standards_for_children_2018.pdf).

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technology be improved to limit disruptions, improve reliability, and increase engagement in proceedings.<sup>147</sup> In addition, a recent Government Accountability Office (“GAO”) Report noted that “EOIR could 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.”<sup>148</sup> EOIR should also 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.

The immigration courts should also be attentive to opportunities to leverage technology when it is mutually acceptable to the stakeholders. For instance, non-detained children seeking relief through agency action that does not require adjudication by the immigration courts must still appear in immigration court from time to time to provide the court with a status update. Many of these children do not live near the courts in which they are ordered to appear, and requiring children to repeatedly appear in person to update the court on the status of pending applications can be disruptive to and burdensome on both the guardian and child respondent. Exploring the possibility of offering a VTC option for children to make their appearances in such non-substantive proceedings could alleviate the burden on the child

respondents with little to no additional burden on the courts and without raising due process concerns.

#### 4. Lack of Representation

While this topic is covered at length in Part 5 of this Update Report, we highlight here that lack of representation has a negative impact on immigration court proceedings, making them less orderly and efficient, and further undermines the perceived and actual fairness of immigration proceedings.<sup>149</sup> It is widely accepted that improving access to counsel promotes due process in immigration proceedings.<sup>150</sup> Yet programs providing access to counsel like the Legal Orientation Program (“LOP”) have increasingly come under attack.<sup>151</sup>

Providing more access to counsel will improve the perception and actual administration of due process in immigration proceedings, as the recommendations made in Part 5 of this Update Report highlight.<sup>152</sup>

#### 5. Lack of Adequate Translation Services

Increased immigration from Central American countries has highlighted a shortage of qualified interpreters for noncitizens in removal proceedings. According to NAIJ President, Judge Tabaddor, only 15 percent of immigration cases are conducted in English.<sup>153</sup> “Due process requires that an applicant be given competent translation services” if he or she does

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<sup>147</sup> See 2017 GAO Report, *supra* note 24, 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).

<sup>148</sup> *Id.* at 51.

<sup>149</sup> See Part 5 for full discussion and recommendations.

<sup>150</sup> See Vera Institute of Justice, *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* (Nov. 2017), <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation> (finding notable improvements to court operations and clients’ access to due process through the program which provided access to government-funded counsel for all indigent noncitizens in removal proceedings in New York City); AILA, *DOJ Cuts Immigrants Access to Counsel in Latest Attack on Due Process* (Apr. 11, 2018), <http://www.aila.org/advo-media/press-releases/2018/doj-cuts-immigrants-access-to-counsel-in-latest-attack-on-due-process> (arguing that program designed to provide legal information to noncitizens in removal proceedings (LOP) is fundamental and that DOJ’s decision to defund LOP will undermine due process and efficiency); see *Franco-Gonzalez v. Holder*, CV 10-02211 DMG (DTBx), Dkt # 593, Partial Judgment and Permanent Injunction (C.D. Cal. Apr. 23, 2013) (granting a permanent injunction requiring the government to provide a “qualified representative” to unrepresented noncitizens who suffer from a severe mental disability based in large part on due process concerns).

<sup>151</sup> See Part 5 for full discussion and recommendations.

<sup>152</sup> See *Id.* for a more complete discussion of LOP and other updates affecting representation in immigration proceedings. Because Part 5 addresses recommendations relating to representation fully, we do not put forth any additional recommendations relating to this topic in this Part of the Update Report.

<sup>153</sup> Judge A. Ashley Tabaddor Testimony before Senate on *Strengthening and Reforming America’s Immigration Court System*, *supra* note 41, at 2.



not speak English.<sup>154</sup> Stakeholders have long noted that a noncitizen's ability to effectively communicate with the immigration court and make her case can be hampered by interpretation failures (be it because the interpreter failed to interpret portions of the hearing, lacked the necessary interpreting skill, or spoke the wrong language) and that these failures can undermine due process.<sup>155</sup>

The lack of qualified interpreters to service the ever-expanding diverse language needs of the immigration courts continues to raise due process concerns. Without reliable, accurate, and consistent translation services, noncitizens, who in many instances are already tasked to represent themselves in these complex legal proceedings, 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, but can also arise in the context of faulty translations of more common languages.

## C. 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.<sup>156</sup> Since that time, the number of cases pending has nearly tripled to an unprecedented high of 768,257 at the end of FY 2018.<sup>157</sup> The backlog of cases has increased every year since 2010, with the greatest increases occurring in the last three years.<sup>158</sup> Moreover, while some additional funding has been allocated to the immigration courts, such funding has not kept pace with funding for increased enforcement.<sup>159</sup>

### 1. Overworked Immigration Judges

At the time of the 2010 Report, there were 253 immigration judges on the bench. Despite the backlog of cases, at the beginning of 2015, the number of active field judges had fallen to below 235, due to several years of sequestration.<sup>160</sup> Since that time, the number of judges has steadily increased, although the increase has not kept pace with the size of the backlog. As of December 2018, Congress had authorized funding for 484 judge positions.<sup>161</sup> While EOIR states that it

<sup>154</sup> *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003).

<sup>155</sup> 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](http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf).

<sup>156</sup> TRAC, BACKLOG OF PENDING CASES, *supra* note 1.

<sup>157</sup> *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/](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”).

<sup>158</sup> TRAC, BACKLOG OF PENDING CASES, *supra* note 1.

<sup>159</sup> ORDER IN THE COURT, *supra* note 87, at 4 (Oct. 2014), (“Congress is spending more to apprehend noncitizens than to adjudicate their rights. It has failed to provide EOIR with adequate appropriations while continually increasing funding for the enforcement arms of DHS, U.S. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP)”); REDUCING THE IMMIGRATION COURT BACKLOG AND DELAYS, *supra* note 43, at 3; Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma, Reconciling Tough and Humane Enforcement*, Migration Policy Institute, 2 (Apr. 2014), <https://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>; Statement of Julie Myers Wood, Former ICE Assistant Secretary, for the Senate Committee on the Judiciary (Apr. 18, 2011), <http://www.judiciary.senate.gov/imo/media/doc/5-18-11%20Wood%20Testimony.pdf>; A BALLOONING BACKLOG, *supra* note 33, at 1 (“[o]ver the last five years, resources for immigration enforcement, including Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), have more than quadrupled — from \$4.5 billion in 2002 to \$18.7 billion in fiscal year 2015. Funding and staffing for the immigration courts lagged far behind, increasing by only 74 percent.”).

<sup>160</sup> NAIJ, SNAPSHOT OF THE CRISIS FACING OUR IMMIGRATION COURTS TODAY, SALIENT FACTS AND URGENT NEEDS 1 (January 2017), <https://www.naij-usa.org/images/uploads/publications/NAIJ-Snapshot-January-2017-final.pdf>.

<sup>161</sup> 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>.

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is committed to filling the funded positions,<sup>162</sup> as of December 2018 and after greatly accelerated hiring, there were only 415 immigration judges on the bench.<sup>163</sup> 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.

Perhaps due to the enormous number of pending immigration cases, there is tremendous pressure for immigration judges to spend the vast majority of their time on the bench, leaving no time for administrative work. If immigration judges had more administrative time to review dockets, submissions, and case law, they could narrow the scope of the hearings, thereby making the system more efficient.

Likewise, because there is so much pressure to move cases along, immigration judges' calendars are packed so tightly that if the case does not conclude in the specific time allocated for a hearing, the case has to be rescheduled, usually for a date well in the future. This undermines the immigration judges' ability to finish cases and can lead to significant due process concerns. If immigration judges had one day a week allocated to administrative time, they could reset hearings that run over their allotted time to dates in the near future, as well as have time to read up on the law and prehearing submissions so that they are better prepared to efficiently resolve their matters. Immigration cases and immigration law are increasingly complex, yet immigration judges do not have sufficient administrative time to conduct research and review case materials.

The lack of administrative time is particularly problematic in an environment where immigration judges' dockets are changed at a moment's notice. For instance, a number of sitting immigration judges

were detailed in 2017 and 2018 to the border to hear border crossing cases, and immigration judges were responsible for rescheduling their dockets in their home courts, causing unreasonable disruption to their home docket.<sup>164</sup> Moreover, due to the emphasis on detained cases, immigration judges with non-detained dockets often get moved to a detained docket at a moment's notice if an immigration judge with a detained docket is unexpectedly absent. The covering immigration judge then has to reschedule all of the cases that were scheduled for his or her non-detained docket. And, as evidenced by the growing backlog and long continuance dates being set in immigration courts, such disruptions are not without a cost to the immigration court system as a whole.

## *2. Insufficient Support Resources to Help Alleviate Burden*

Immigration judges, in addition to maintaining impossible caseloads with very little administrative time, continue to suffer from a lack of resources. The 2010 Report recommended that EOIR hire enough law clerks to provide one clerk per judge. However, as of April 2017, on average immigration judges conducted proceedings with the assistance of only 1/2 to 1/4 of a judicial law clerk's time.<sup>165</sup>

Recently, EOIR has made some progress in this area. According to Director McHenry, as of January 2019, there are 264 law clerks or attorney-advisors assigned to the immigration courts.<sup>166</sup> 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

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<sup>162</sup> 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 [hereinafter EOIR Interview].

<sup>163</sup> While EOIR has made efforts to rehire some retired immigration judges, as of the summer of 2018, none had been rehired. *Id.* 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.*

<sup>164</sup> See Press Release, DOJ, Justice Department Announces Additional Prosecutors and Immigration Judges for Southwest Border Crisis (May 2, 2018) ("In addition to the new AUSA positions, Attorney General Sessions and Executive Office of Immigration Review (EOIR) Direct James McHenry announced the utilization of 19 current supervisory immigration judges to adjudicate cases in immigration courts near the southwest border"), <https://www.justice.gov/opa/pr/justice-department-announces-additional-prosecutors-and-immigration-judges-southwest-border>. See also Section III.A.1., *supra*.

<sup>165</sup> NAIJ Blueprint for Immigration Court Reform 2013, <http://nieman.harvard.edu/wp-content/uploads/pod-assets/Image/microsites/immigration2013/resources/NAIJ%20BLUEPRINT%20-%20Revised%204-13-13%20.pdf> (last visited Dec. 9, 2018); EOIR Interview, *supra* note 162.

<sup>166</sup> EOIR Interview, *supra* note 162.

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that goal.<sup>167</sup> An EOIR-funded independent study of the immigration courts stressed the importance of law clerks and other courtroom staff and found that “many courts of all types and sizes [were] understaffed, which impact[ed] case processing, court morale, and office culture.”<sup>168</sup>

In addition to needing more law clerks, the 2010 Report found that immigration judges lacked sufficient training. There have been some improvements in the area of training since 2010. For example, EOIR has at times provided in-person training for all immigration judges. While the in-person training did not take place in 2017,<sup>169</sup> it did take place in 2018, and Director McHenry informed us that EOIR intends to provide an in-person training in 2019, pending approval of funding.<sup>170</sup> According to Director McHenry, the annual training may not be in-person going forward due to the increasing size of the judge corps and associated costs.<sup>171</sup> Director McHenry noted that EOIR conducts a certain amount of training by VTC, and it sends trainers to the immigration courts to provide specialized training. Moreover, EOIR tries to have ongoing training at least once a quarter for new judges and BIA staff attorneys.<sup>172</sup>

We do not view VTC training or spot training as appropriate substitutes for an annual in-person training, and we encourage EOIR to continue to hold in-person training for immigration judges. Indeed, the independent study commissioned by EOIR recommended that EOIR “continue to hold annual training seminars during which [immigration judges] and appropriate staff can receive in-person training” and to “institute mandatory continuous training on temperament, asylum adjudication, and updates to immigration law for all [immigration judges].”<sup>173</sup>

In January 2013, EOIR established a dedicated ACIJ for vulnerable populations, including unaccompanied minor children, in part to provide training to immigration judges.<sup>174</sup> That ACIJ met with immigration court personnel regularly and determined what training, including specialized training relating to vulnerable populations, the immigration judges needed for their day-to-day operations.<sup>175</sup> Other ACIJs were “portfolio” focused, meaning they are located at headquarters and focus on conduct, professionalism, and training. However, in July 2017, EOIR eliminated all non-supervisory and non-adjudicatory immigration judge positions, including portfolio ACIJs for subjects such

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<sup>167</sup> *Id.*

<sup>168</sup> 2017 EOIR LEGAL CASE STUDY SUMMARY REPORT, *supra* note 41, at 19-21 (recommending EOIR update its standard operating procedures for hiring, post jobs more quickly, conduct internal reviews of job descriptions to better reflect the realities of each job posted, update interview questions to include stronger questions about cultural sensitivity and judicial temperament, coordinate with stakeholders to shorten the hiring process for immigration court teams, allow immigration judge candidates to begin reviewing cases as early as possible, and to broaden the hiring pool to increase diversity on the bench).

<sup>169</sup> *Id.* at 22.

<sup>170</sup> EOIR Interview, *supra* note 162

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 2017 EOIR LEGAL CASE STUDY SUMMARY REPORT, *supra* note 41, at 22 (acknowledging continued issues relating to training and recommending that EOIR continue to develop formal training; create more and better training opportunities, including more in-person training seminars; create standard training literature; and institute mandatory continuous training on temperament, asylum adjudication, and immigration law updates).

<sup>174</sup> 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>. Some have questioned how impactful the role and training have been, however, in the wake of heavily criticized testimony from Judge Weil, then acting ACIJ for vulnerable populations, stating that he has been able to effectively teach three and four year olds immigration law so that they could competently represent themselves in removal proceedings. See American Immigration Council, *Judge Who Believes Toddlers Can Represent Themselves, Only Part of the Problem in the Battle over Representation for Kids*, IMMIGRATION IMPACT (Mar. 9, 2016), <http://immigrationimpact.com/2016/03/09/judge-believes-toddlers-can-represent-part-problem-battle-representation-kids/>.

<sup>175</sup> For example, in April and August 2015, over 40 immigration judges who handle juvenile dockets received in-person supplementary training on the handling of unaccompanied child cases. 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), *supra* note 174.

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as intergovernmental relations, publications, and vulnerable populations.<sup>176</sup> Instead, the responsibilities of the portfolio ACIJs are now spread across all ACIJs, and questions relating to any new policy concerning specific populations are now handled through EOIR's Office of Policy.

Improvements are also needed to the mentoring program for immigration judges. Since 2010, EOIR has implemented a mentoring program in which a mentor immigration judge is assigned to a newly-hired immigration judge for one year.<sup>177</sup> However, it is not clear how mentors are chosen, and there do not appear to be any written criteria for or guidance provided to mentors. Nor does it appear that new immigration judges who have been mentored are asked to rate their mentor when the experience is over. Without more clearly defined expectations and transparent feedback, it is unclear whether this mentoring program is achieving its goals.

### *3. Lagging Technology that Creates Rather than Reduces Work*

Practitioners, immigration judges, and government officials all agree that electronic case management and filing are key to a more efficient and reliable system.<sup>178</sup> An independent 2017 EOIR-

funded audit of the immigration courts recommended moving to an electronic filing system as expeditiously as possible to improve the overall functioning of the immigration courts.<sup>179</sup>

In 2015, EOIR implemented the eInfo and eRegistration systems.<sup>180</sup> eInfo allows attorneys and accredited representatives to view clients' case information.<sup>181</sup> eRegistration allows representatives and attorneys to file NTAs electronically.<sup>182</sup> While EOIR initiated a comprehensive e-filing effort in 2016 for the EOIR Courts and Appeals System ("ECAS"), EOIR acknowledged that, as of December 2017, it had made "little appreciable progress" towards establishing an electronic filing system since 2001.<sup>183</sup>

However, according to Director McHenry, EOIR is highly committed to improving and implementing electronic filing.<sup>184</sup> In July 2018, EOIR launched a pilot e-filing and document storage program in the San Diego Immigration Court.<sup>185</sup> It has since been rolled out in Atlanta, Denver, Charlotte and Baltimore.<sup>186</sup> EOIR's goal is to extend the e-filing and document storage program, ECAS, to all immigration courts in 2019.<sup>187</sup> We commend EOIR for this effort and emphasize the importance of electronic filing for a functioning and efficient court system.

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<sup>176</sup> EOIR Interview, *supra* note 162.

<sup>177</sup> See Statement of Juan P. Osuna, Director of EOIR, before the U.S. House of Representatives Comm. on the Judiciary, Hearing on "Oversight of the Executive Office for Immigration Review," 4 (Dec. 3, 2015), <https://judiciary.house.gov/wp-content/uploads/2016/02/OsunaTestimony.pdf>; see also EOIR Interview, *supra* note 162.

<sup>178</sup> 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].

<sup>179</sup> 2017 EOIR LEGAL CASE STUDY SUMMARY REPORT, *supra* note 41, at 23.

<sup>180</sup> 2017 GAO Report, *supra* note 24, at 46.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> 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/>.

<sup>184</sup> EOIR Interview, *supra* note 162.

<sup>185</sup> See EOIR Launches Electronic Filing Pilot Program, *supra* note 178.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

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#### 4. Inadequate Physical Space for Immigration Courts

In addition to a shortage of immigration judges and law clerks, the immigration courts are also suffering from a lack of physical space.<sup>188</sup> Moreover, some judges complain that the current courtrooms are no longer large enough to accommodate the needs of the ballooning immigration system. As Immigration Judge Denise Slavin explained: “[w]hen the court schedules 20 children to appear on a master calendar, it’s not just 20 people that come into court; it’s 20 children, each with a guardian, some with siblings, and hopefully most with lawyers . . . . So courtrooms designed to have 20 people appear at one time are now expected to hold 60 or more people. It just doesn’t work!”<sup>189</sup>

According to Director McHenry and his team, acquiring space for the 484 funded immigration judge positions is a top priority for EOIR.<sup>190</sup> 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,<sup>191</sup> 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.<sup>192</sup>

## IV. 2019 Recommendations

Given the alarming increase in the number of cases before the immigration courts and the ever-increasing backlog of pending cases, we reaffirm the following 2010 Report recommendations and amend them as indicated:

### A. Lack of Judicial Independence and Political Interference with Immigration Courts

**New 2019 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.

**New 2019 Recommendation:** Minimize political interference with immigration court operations and proceedings.

**New 2019 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.

**New 2019 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.

**2010 Recommendation:** Consolidate, clarify, and strengthen codes of ethics and conduct applicable to immigration judges. EOIR had proposed Codes of Conduct in 2007, but in 2010 we recommended specifically that a new code of conduct, based on the ABA Model Code of Judicial Conduct, be tailored to the immigration adjudication system and subsequently adopted.

**2019 Update:** As noted above, EOIR published the Ethics and Professionalism Guide for Immigration Judges in 2011, which is binding on all immigration judges. Therefore, 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

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<sup>188</sup> 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).

<sup>189</sup> *Id.*

<sup>190</sup> EOIR Interview, *supra* note 162.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*



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and interacts with new performance standards implemented since 2017.

**2010 Recommendation:** Make the disciplinary process for immigration judges more transparent and independent.

**2019 Update:** We reaffirm the 2010 recommendation that the disciplinary process be more transparent and independent.

**2010 Recommendation:** Improve data collection and analysis regarding the performance of immigration judges and immigration courts.

**2019 Update:** We reaffirm the 2010 recommendation that improved data be collected to monitor the performance of immigration judges and immigration courts. Collection and analysis of such data will allow for better analysis and help to identify additional areas in need of improvement.

**2010 Recommendation:** Implement judicial-model performance reviews for immigration judges, based on the ABA's Guidelines for the Evaluation of Judicial Performance and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System.

**2019 Update:** We reaffirm the 2010 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.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation and encourage immigration courts to hold prehearing conferences to narrow issues and provide guidance as to what evidence and testimony will be important to resolve specific cases. 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.<sup>193</sup>

## B. Policies and Practices that Threaten Due Process

**2010 Recommendation:** Provide additional hiring criteria and more public participation in the immigration judge hiring process. We recommended that EOIR ask questions in the application process seeking, in narrative form, information from the candidate about his or her experience and aptitude in areas such as sensitivity to cultural differences and the ability to treat all persons with respect. We further recommended that a candidate's references be asked about that candidate's demonstrated capacity for judicial temperament, cultural sensitivity, respect for peers and subordinates, and any predispositions in making credibility determinations.

**2019 Update:** We reaffirm the 2010 recommendation to institute the additional hiring criteria and public participation in the hiring process as noted above and in the 2010 Report. 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.

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<sup>193</sup> See Section III.A.3., *supra*; see also Part 5 — Representation.



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**2010 Recommendation:** Incorporate more public input into the hiring process, including by inviting certain professional organizations such as the ABA or American Immigration Lawyers Association (“AILA”) to participate in the screening or training of candidates. The 2010 Report recognized that opening up the hiring process to the public may also add to the delay in hiring immigration judges; however, to minimize this risk, we recommended a “reasonably, but fairly narrow, window” within which the comment period would be open.

**2019 Update:** We reaffirm the 2010 recommendation to allow public input and reiterate that such public involvement will ward against politicized hiring and make the hiring process more transparent.

**New 2019 Recommendation:** Until such time as an Article I immigration court can be established, consistent with the recommendations contained in Part 6 and earlier recommendations in this Part of the Update Report, 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.

**2010 Recommendation:** Limit the practice of conducting immigration hearings by videoconference (“VTC”) to use in procedural matters where the noncitizen has given his or her consent.

**2019 Update:** We reaffirm the 2010 recommendation that VTC be limited to use in non-substantive matters where the noncitizen has consented to its use.

**New 2019 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.

**New 2019 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.

**New 2019 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.

**New 2019 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.

**New 2019 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.

## **C. Under-Resourced, Over-Worked Immigration Courts**

**2010 Recommendation:** Bring the caseload down to a level roughly on par with the number of cases decided

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each year by judges in other federal administrative adjudicatory systems (around 700 cases annually).

**2019 Update:** We reaffirm the 2010 recommendation but emphasize that while reducing the number of cases handled by immigration judges is critical to due process, imposing case production quotas as part of an immigration judge's performance review runs counter to that goal and is not an approach endorsed by the ABA.

**2010 Recommendation:** Hire approximately 100 additional immigration judges as soon as possible, but at least within the next three to four years.

**2019 Update:** 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.

**2010 Recommendation:** Provide statutory protection against being removed or disciplined without good cause (as is provided for administrative law judges who adjudicate cases in other the federal agencies).

**2019 Recommendation:** We reaffirm the 2010 recommendation, but reiterate that as many of the immigration judge positions as possible should be filled within the context of the Article I court.

**2010 Recommendation:** Hire enough law clerks to provide one law clerk per judge.

**2019 Update:** We reaffirm the 2010 recommendation.

**2010 Recommendation:** Increase administrative time available to immigration judges, during which they can take advantage of training and professional development resources. For example, under this approach, immigration judges would be encouraged to attend weekly or monthly lunch meetings to discuss their cases or new developments in immigration law.

**2019 Update:** We reaffirm the 2010 recommendation to allow additional administrative time so that immigration judges can participate in training and other professional development, 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.

**2010 Recommendation:** Provide additional training and support for immigration judges, including an increase in funding, so long as it is designated to include in-person experience for new and veteran immigration judges. This recommendation also included a suggestion to facilitate regular meetings among immigration judges, or arrange for immigration judges to observe other judges. Specifically, we recommended that the regular live, in-person trainings focus on at least the following issues: (1) making credibility determinations across cultural divides; (2) identifying fraud; (3) changes in U.S. asylum law; and (4) cultural sensitivity. We also recommended that DOJ and EOIR develop and improve access to information regarding country conditions and human rights reports.

**2019 Update:** We reaffirm the 2010 recommendation to increase regular, in-person trainings. In addition to the four issues listed above, 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. Further, 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).

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**2010 Recommendation:** Improve the supervision of immigration judges by increasing the number of ACIJ's and expanding their deployment to regional courts. The 2010 Report noted EOIR's announcement of a pilot program that deployed ACIJ's to regional courts, and recommended making the program permanent. Before the pilot program, only five ACIJ's were deployed outside of headquarters, and the ratio of immigration judges to ACIJ's was over twenty to one. Thus, we also recommended reducing the ratio of immigration judges to ACIJ's, which would allow each ACIJ to give more attention to each judge under that ACIJ's supervision.

**2019 Update:** EOIR has added nine ACIJ's, most recently in October 2018.<sup>194</sup> Because the influx of these new ACIJ's is relatively recent, we recommend studying the effect of the increase in ACIJ's, and if those results are positive, adding more ACIJ's to regional courts. Ideally adding new ACIJ's will occur under an Article I court. We also recommend that ACIJ's handle cases, rather than simply serving as supervisors, so that they have a better understanding and appreciation of the challenges faced by immigration judges.

**New 2019 Recommendation:** EOIR should fully implement its ECAS system across all immigration courts.

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<sup>194</sup> 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).



# 3

## The Board of Immigration Appeals

2019 Update Report

### REFORMING THE IMMIGRATION SYSTEM

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

March 2019

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



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# Part 3: The Board Of Immigration Appeals

## I. Introduction and Summary on 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, launching an electronic court filing system that will encompass the BIA, expanding the Board, and avoiding significant growth in the Board’s case backlog and wait times.

For example, the 2010 Report encouraged the BIA to increase transparency and public input into its decision making process. We applaud the BIA’s pilot program, launched in June 2015, to increase transparency by soliciting amicus curiae briefs from interested parties. This has proved to be a successful initiative, and stakeholders expressed hope that the program would result in more well-reasoned, and perhaps more precedential, decisions. We also commend the Board for beginning to implement an electronic filing and remote records retrieval system in July 2018 in several pilot locations, with the goal of expanding it nationwide over the course of the next year.<sup>1</sup> This will further enhance transparency efforts

and improve efficiency in the removal adjudication process.

Our current recommendations are intended to support continued reform to help the Board best serve its role of applying immigration laws uniformly throughout the United States to the extent feasible within the existing institutional structure, leaving to Part 6 the broader question of the BIA’s role in a restructured and more independent adjudication system. Our recommended changes would help decrease the number of appeals, decrease the rate of reversals, and improve the overall integrity of the immigration adjudication system. Based on our research and conversations with practitioners and others knowledgeable in this area, 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 low,<sup>2</sup> and although we recognize that oral argument can impose costs for the Board and parties, we believe the option of oral argument should be available to parties involved in significant three-member panel cases. We therefore reiterate, and in some cases expand upon, our recommendations that the Board utilize more oral arguments and three-member panels,

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<sup>1</sup> EOIR Electronic Filing Program, 83 Fed. Reg. 29575 (June 25, 2018).

<sup>2</sup> The BIA and the Attorney General select and designate certain decisions of the Board as precedent. Precedent decisions are legally binding on immigration judges and officers and employees of the Department of Homeland Security in the administration of federal immigration laws. 8 C.F.R. § 1003.1(g). The Board’s precedent decisions may be modified or overruled by the Attorney General, the federal courts, later precedent decisions, or other changes in the law. EOIR posts precedent decisions on its website once they are issued. *See* EOIR, Agency Decisions: Volume 27, <http://www.justice.gov/eoir/ag-bia-decisions> (last updated Dec. 20, 2018). Thirty-eight decisions were published as precedent in 2018. However, these include 15 interim and final decisions by the Attorney General in self-referred cases.

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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.

EOIR has expanded the size of the BIA and hired additional Board Members, consistent with recommendations in the 2010 Report. However, 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. We also include a new recommendation for EOIR to focus on developing a more professionally diverse Board by hiring members from a broader range of professional backgrounds, including practitioners with experience representing noncitizens.

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. To the extent the immigration courts remain within the current structure, DOJ should also establish a more transparent process for the Attorney General’s exercise of his or her authority to self-refer cases decided by the Board. 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.

## II. The 2010 Report and Recommendations

At the time of the 2010 Report, the BIA was the subject of significant focus by commenters and immigration advocates due to the streamlining measures DOJ implemented in 1999 and 2002. These measures fundamentally altered the BIA’s operations in an attempt to streamline the administrative review process and eliminate a mounting case backlog. For example, while cases before the Board had traditionally been heard by three-member panels, the 1999 Streamlining Reforms permitted a single Board member to issue an affirmance of an immigration judge decision without issuing an opinion in a limited category of cases (so-called “affirmances without opinion” or “AWOs”).<sup>3</sup>

The 2002 streamlining regulations further expanded the category of cases in which AWOs were treated as appropriate, requiring that the Board Member to whom a case is assigned must issue an AWO if the Board Member determines: (1) the result reached in the decision under review was correct; (2) any errors in the decision under review were harmless or nonmaterial; and (3) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application

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<sup>3</sup> See Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,141 (Oct. 18, 1999) (allowing an AWO if the Immigration Judge or DHS decision reached the correct result; any errors in the decision were harmless or nonmaterial; and either (a) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of a precedent to a novel factual situation, or (b) the factual and legal issues raised on appeal are so insubstantial that three-member review is not warranted).

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of precedent to a novel factual situation, or the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion.<sup>4</sup> These regulations also significantly expanded the categories of cases that were treated as suitable for review by a single member.<sup>5</sup> The 2002 streamlining reforms also eliminated the Board's traditional authority to conduct de novo fact finding, narrowing fact and credibility determinations to a clearly erroneous standard of review.<sup>6</sup> As part of the 2002 streamlining reforms, then-Attorney General John Ashcroft also reduced the size of the Board from 23 to 11 members.<sup>7</sup>

The 2010 Report examined these streamlining reforms in detail to better understand whether they furthered or undermined the Board's role as an oversight and adjudicative body and its responsibility to correct errors of the decision makers below and craft uniformity in immigration law.<sup>8</sup> The 2010 Report concluded that the streamlining reforms significantly reduced the backlog of unresolved appeals before the Board, but that there was a corresponding increase in the rate of appeals to the federal courts after the 2002 reforms were implemented. For example, the rate of appeals from BIA decisions increased from a low of 5.5% in 2001 to a high of 26.7% in 2006.<sup>9</sup>

The 2010 Report noted that the rate at which the Board was reversed and its decisions were remanded by the federal courts was not substantially different from the rates at which other types of cases are reversed and remanded, but it was difficult to draw conclusions from this data about whether

the Board's processes were generating incorrect results at a higher rate than is typical of other federal administrative bodies. The 2010 Report did conclude, however, that single-member review had become the predominant form of BIA decision making. The 2010 Report also concluded that panel review seemed to generate decisions that favor the asylum seeker at a considerably higher rate than single-member review.<sup>10</sup>

The 2010 Report found that the percentage of AWOs had begun to decline rapidly, from 26% in fiscal year ("FY") 2003, compared to 5% for the first six months of FY 2009,<sup>11</sup> and that short opinions had instead become the dominant form of decision making. Some commenters and interviewees warned that such decisions did not provide applicants or reviewing courts a sufficient explanation of the Board's decision. Moreover, the combination of single-member review and lack of detailed decisions resulted in a dearth of Board precedent decisions. The percentage of decisions issued by the Board that were designated as precedent increased from .02% in 2003 to .13% in 2007, but still fell far short of the percentage of published decisions issued on average by federal appellate courts.<sup>12</sup> The 2010 Report discussed the possibility that more detailed and reasoned opinions, more three-member panel decisions, and more precedent decisions might help reduce the number of BIA decisions that are appealed, and even potentially reduce the number of cases appealed to the BIA from the immigration courts.

The 2010 Report also concluded that the elimination of the Board's authority to conduct de

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4 Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,903 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003.1(e)(4)(i)).

5 *Id.* at 54,886-87.

6 67 Fed. Reg. at 54,888-54,893; *see also* 8 C.F.R. § 1003.1(d)(3)(i). De novo review was retained for questions of law or discretion and for factual determinations by DHS officers. 8 C.F.R. § 1003.1(d)(3)(ii)-(iii).

7 67 Fed. Reg. at 54,893. In 2008 EOIR proposed certain revisions to the streamlining regulations to encourage the use of one-member written opinions and three-member panels and to encourage the publication of precedent. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654 (June 18, 2008). These regulations were never finalized.

8 We also considered criticisms that the Board's status as a body created by regulation and subject to the Attorney General's power resulted in a lack of political and executive independence. The independence issue is addressed in the system restructuring discussion in Part 6 of the 2019 Update Report.

9 *See* 2010 Report 3-22, tbl. 3-3.

10 *See id.* at 3-26.

11 *See id.* at 3-11, tbl. 3-1.

12 *See id.* at 3-18, tbl. 3-2.

novo fact finding inhibited the Board's ability to correct mistakes made by immigration judges and greatly restricted the Board's ability to reconcile disparities among immigration judge decisions in factually similar cases. The 2010 Report noted that the time limits placed on the Board under the 2002 reforms also created incentives for the BIA to issue perfunctory opinions given the press of time, and that the Board faced a significant lack of resources.

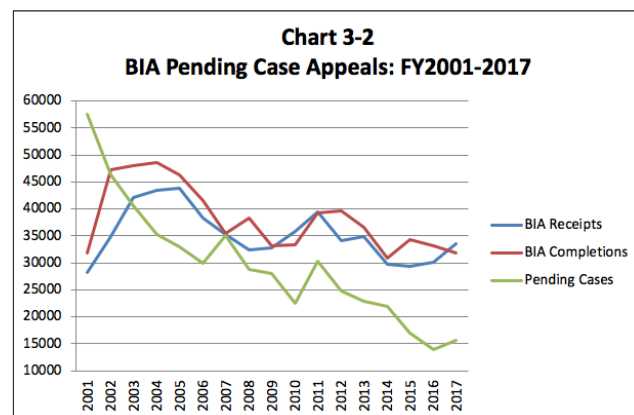
Based on these conclusions, the 2010 Report suggested the following improvements to the Board's processes: (1) requiring three-member panel reviews for non-frivolous appeals; (2) requiring that written decisions respond to all non-frivolous arguments raised by the parties; (3) making affirmances without opinion discretionary rather than mandatory; (4) permitting de novo review by the Board of immigration judge fact findings and credibility determinations; (5) allowing at least 180 days to publish BIA decisions issued by a single-member, as well as three-member panels; (6) encouraging publication of non-precedent decisions; (7) increasing the professional staff resources available to the Board; and (8) applying the new Code of Conduct recommendation for immigration judges based on the ABA Model Code of Judicial Conduct to Board Members as well.

### III. Developments Since 2010

The BIA has continued to improve many aspects of its processes and the quality of its decision making since 2010. From an efficiency standpoint, the Board has thus far avoided the significant growth in backlog and wait time that has burdened the immigration courts.

For example, in FY 2017, the Board exceeded its goal of adjudicating 90% of detained appeals within 150 days by 8%.<sup>13</sup> Between 2012 and 2016, the Board adjudicated more cases each year than it received through new appeal filings, which enabled it to continue to reduce the number of pending BIA appeals (see Chart 3-1<sup>14</sup>). Additionally, the number of pending BIA appeals declined by 48% from FY 2006 to FY 2017, and the cases pending at the start of FY 2015 had a medium pending time of 211 days, which is 19 days shorter than the medium pending time at the start of FY 2006.<sup>15</sup>

However, EOIR's most recently available data indicate that the BIA's case receipts increased from 30,221 in FY 2016 to 33,503 in FY 2017, while case completions fell from 33,241 to 31,820 over the same period.<sup>16</sup> The number of pending cases also rose from 13,955 to 15,638 during that same time, suggesting that the growing caseload in the immigration courts is resulting in additional appeals to the Board.



In June 2015, EOIR also expanded the number of Board members from 15 to 17.<sup>17</sup> EOIR then added an additional four Board member positions, for a total of

<sup>13</sup> DOJ ADMIN. REVIEW & APPEALS, FY 2018 PERFORMANCE BUDGET: CONGRESSIONAL BUDGET SUBMISSION 19 (2017), <https://www.justice.gov/jmd/page/file/968566/download>.

<sup>14</sup> The data displayed in Chart 3-1 for FY 2001 through FY 2017 were compiled from the most recent EOIR Statistics Yearbooks in which such data were available. The number of pending cases for FY 2001 was not available in any EOIR Statistics Yearbook; the number for 2001 was obtained from the 2002 Streamlining Rule. See 67 Fed. Reg. at 54,868.

<sup>15</sup> GAO, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 31-32 (June 2017), [http://www.gao.gov/products/GAO-17-438?utm\\_medium=email&utm\\_source=govdelivery](http://www.gao.gov/products/GAO-17-438?utm_medium=email&utm_source=govdelivery).

<sup>16</sup> EOIR, DOJ, STATISTICS YEARBOOK: FISCAL YEAR 2017, at 36 fig. 27, <https://www.justice.gov/eoir/page/file/1107056/download>.

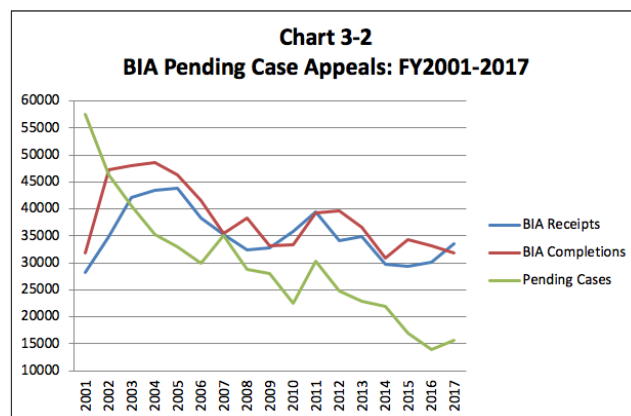
<sup>17</sup> Expanding the Size of the Board of Immigration Appeals, 80 Fed. Reg. 31,461 (June 3, 2015).

21, in February 2018.<sup>18</sup> EOIR explained that expanding the Board was necessary for two reasons. First, EOIR anticipated that the expanding caseload before the immigration courts would result in a corresponding increase in the caseload at the Board.<sup>19</sup> Second, EOIR hired a substantial number of additional immigration judges, which EOIR expected to result in an increased number of immigration judge opinions and, in turn, appeals to the Board.<sup>20</sup> With the potential addition of even more new immigration judges in FY 2019,<sup>21</sup> along with continued increases in the immigration caseload, the number of appeals to the BIA is likely to further increase. EOIR has identified hiring sufficient legal and administrative staff to handle this rising caseload as the greatest challenge facing the Board today.<sup>22</sup>

From a quality standpoint, the Board has continued to reverse several of the more unfortunate trends that followed the 1999 and 2002 streamlining reforms. For example, the number of cases decided through AWOs remains very low. The percentage of AWOs as compared to all cases dropped to 5% in FY 2009, and further declined to 3% in FY 2010 and 2% during the first nine months of FY 2011.<sup>23</sup> The Board has not released recent numbers on the percentage of AWOs, but the practitioners with whom we spoke reported, anecdotally, that the number of AWOs has not noticeably increased from these low levels.

At the same time, there has been a significant reduction in the rate of appeals of BIA decisions to the

federal circuits, while the reversal rate has remained relatively constant, with a slight increase in FY 2014 and a decrease in FY 2017 (see Chart 3-2).<sup>24</sup>



The Board has also taken important steps to increase transparency and public input into its decision making process. For example, in June 2015, the BIA launched a new pilot program to solicit amicus curiae briefs from interested parties.<sup>25</sup> According to EOIR, this pilot reflects “an effort to reach a broader range of the knowledgeable public and, through their contributions, gain greater perspective on more nuanced topics.”<sup>26</sup> The consensus among our interviewees was that this has proved to be a successful pilot; indeed, the BIA continues to solicit amicus briefs, beyond the original one-year term of the

<sup>18</sup> Expanding the Size of the Board of Immigration Appeals, 83 Fed. Reg. 8,321 (Feb. 27, 2018).

<sup>19</sup> *Id.* at 8,321-22.

<sup>20</sup> *Id.*

<sup>21</sup> See DOJ, FY 2019 BUDGET & PERFORMANCE SUMMARY FOR ADMIN. REVIEW & APPEALS 2 (last updated Mar. 15, 2018), <https://www.justice.gov/doj/fy-2019-budget-and-performance-summary>.

<sup>22</sup> Written responses from EOIR on file with the American Bar Association Commission on Immigration (Dec. 6, 2018) [hereinafter EOIR Written Responses].

<sup>23</sup> APPLESEED, REIMAGINING THE IMMIGRATION COURT ASSEMBLY LINE: TRANSFORMATIVE CHANGE FOR THE IMMIGRATION JUSTICE SYSTEM 79 (2012), <http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf>.

<sup>24</sup> The data displayed in Chart 3-2 was compiled from the EOIR Statistics Yearbooks for FY 2006 through FY 2017. The percentage of appeals to the federal courts of appeals was calculated by dividing the annual total BIA completions by the annual total appeals of BIA cases appealed to a federal court. The percentage of reversals made by a Federal Court was calculated by dividing the annual total BIA completions by the annual total reversals of BIA cases made by a Federal Court.

<sup>25</sup> See Press Release, EOIR, EOIR’s Board of Immigration Appeals Launches Pilot Program to Solicit Amicus Curiae Briefs (June 19, 2015), <https://www.justice.gov/eoir/notice-bia-amicus>.

<sup>26</sup> *Id.* Prior to this initiative, the National Immigrant Justice Center estimated that amicus curiae appeared in less than 6% of the cases resulting in published decisions. CHARLES ROTH & RAIA STOICHEVA, ORDER IN THE COURT, COMMONSENSE SOLUTIONS TO IMPROVE EFFICIENCY AND FAIRNESS IN THE IMMIGRATION COURT 24 (Oct. 2014) [hereinafter ROTH & STOICHEVA], <http://www.immigrantjustice.org/research-items/white-paper-order-court-commonsense-solutions-improve-efficiency-and-fairness>.



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pilot.<sup>27</sup> Stakeholders expressed hope that the program would result in better reasoned opinions. However, some stakeholders have also suggested improvements to the process by which the BIA solicits amicus briefs, which we address further below.

Notwithstanding some of the positive steps the Board has taken, several of the areas for improvement identified in the 2010 Report remain unaddressed, and some new issues, warranting new recommendations, have arisen. We summarize these issues below.

## A. Improving Quality of Decision Making Remains a Priority

Short opinions by single members of the Board continue to be the predominant form of decision making by the Board. A 2017 GAO report confirms that annually, from FY 2006 to FY 2015, single members reviewed 90% or more of completed appeals and three-member panels reviewed 10% or less of completed appeals.<sup>28</sup> The continued prevalence of single member decisions over panel decisions raises concerns about the overall quality of the Board's decision making, as "panel decisions diffuse subjective biases, encourage deliberation, promote consensus, minimize inconsistency, and permit dissenting

opinions, which can be important in shaping future law, all of which is even more important given that so many immigration cases are argued pro se and without legal briefs."<sup>29</sup>

Some commenters have also noted that single member opinions frequently fail to adequately address the parties' arguments or, when they do, are often inconsistent with one another.<sup>30</sup> Short opinions that do not address all the key arguments by the parties are concerning because they deny the applicant and a potential reviewing court a sufficient explanation of the Board's decision.<sup>31</sup> Some scholars have argued that appeals of Board decisions are more likely when an appellant's specific arguments are not addressed in the decision.<sup>32</sup> Moreover, inconsistent decisions undermine the legitimacy of and public confidence in the BIA's adjudications.<sup>33</sup> The 2010 Report observed that the deadlines for issuing BIA decisions — 90 days and 180 days for single-member and panel decisions, respectively — are much shorter than other appellate time periods and create incentives for issuing more perfunctory opinions.<sup>34</sup> Formally relaxing these timelines in non-detained cases could help promote further improvement in the quality of the Board's decision making.<sup>35</sup>

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27 EOIR, Agency Invitations to File Amicus Briefs, <https://www.justice.gov/eoir/amicus-briefs> (last updated Dec. 3, 2018).

28 GAO, *supra* note 15, at 32.

29 BANKS MILLER, LINDA CAMP KEITH & JENNIFER S. HOLMES, IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 115-116 (U. PENN. PRESS ED., 2015).

30 See Jason Dzubow, *Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge*, THE GREEN CARD 4 (Winter 2017), <http://www.fedbar.org/Image-Library/Sections-and-Divisions/Immigration/the-green-card-winter-2017.aspx>.

31 See, e.g., *Purveegii v. Gonzales*, 448 F.3d 684, 693 (3d Cir. 2006) ("Resolution of disputed factual and legal issues through summary order deprives litigants of thorough consideration of their claims, deprives the Board of the opportunity to develop its own precedent, and deprives the courts of an adequate basis on which to assess the agency's compliance with statutory mandates"); *Pasha v. Gonzales*, 433 F.3d 530, 533 (7th Cir. 2005) (stating that "when there is no opinion and no brief or statement of grounds in the notice of appeal, it becomes uncertain what exactly the Board decided when it affirmed the immigration judge's decision").

32 See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 385 n. 159 (2007) ("Social psychology studies have found that the perception that the decision maker has given 'due consideration' to the 'respondent's views and arguments' is crucial to individuals' acceptance of both the decision and the authority of the institution that imposes the decision").

33 See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 437 (2007) ("[R]easoned written opinion should, all else equal, enhance consistency").

34 For example, the Board of Veterans Appeals took an average of 247 days to decide an appeal in FY 2017. See U.S. DEP'T OF VETERANS AFFAIRS, BD. OF VETERANS' APPEALS, ANNUAL REPORT TO CONGRESS 2017, at 25 (2017), [https://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2017AR.pdf](https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2017AR.pdf). Similarly, the average processing time for an appeal heard by the Social Security Administration Appeals Council was 364 days in FY 2016. See Soc. Sec. Admin. Data for Average Processing Time of Appeals Council Requests for Review, <https://www.ssa.gov/open/data/Appeals-Council-Avg-Proc-Time.html> (last updated Oct. 2, 2018).

35 These timelines may be relaxed in some cases in practice, as GAO reports that the cases pending at the start of FY 2015 had a medium pending time of 211 days. GAO, *supra* note 15, at 32. However, formally relaxing these standards in non-detained cases would provide Board members with valuable certainty that they will not face sanctions for failure to adhere to the current regulatory timelines at 24.



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The Board also has not taken the opportunity to facilitate more robust decision making by increasing the use of oral argument. The BIA Practice Manual provides that the Board may select cases for oral argument based on criteria such as: (1) the resolution of an issue of first impression; (2) alteration, modification, or clarification of an existing rule of law; (3) reaffirmation of an existing rule of law; (4) the resolution of a conflict of authority; and (5) discussion of an issue of significant public interest.<sup>36</sup> At the same time, however, the BIA Practice Manual cautions that “[o]ral argument is held at the discretion of the Board and is rarely granted.”<sup>37</sup>

Thus, while oral argument was heard in 20% of cases terminated on the merits by the federal appellate courts in FY 2017,<sup>38</sup> oral argument before the BIA continues to be relatively rare. A study by the National Immigrant Justice Center concluded that the Board appears to have scheduled oral argument in only seven cases from 2008 to 2013, corresponding to 3.6% of published decisions and less than .0037% of total decisions.<sup>39</sup> EOIR has noted that although the BIA does not track the number of requests for oral arguments from appellants, the Board has been scheduling an average of eight oral arguments per year; of those cases, however, only 60% proceed to oral argument (in the remaining 40% of cases, the parties frequently jointly move to remand proceedings or the appellant withdraws the appeal).<sup>40</sup>

We recognize that the travel costs and time investment that could be associated with oral argument, not only for litigants but also for the government (particularly if the Board were to travel for field hearings), would be important considerations for EOIR in managing its resources. However, we believe the availability of oral argument is an important component of due process and contributes to the transparency of the Board’s decision making process. For example, appellants’ familiarity with the record can be helpful to the adjudicators in a close case, Board members have the opportunity to question appellants during oral argument on issues the parties may not have fully developed, and hearings provide an opportunity for Board members to persuade each other and facilitate consensus.<sup>41</sup> The Board itself has recognized the potential benefits of oral argument for the crystallization of issues and better articulation of each party’s arguments, while observing that these must be weighed against the countervailing resource considerations that preparation for oral arguments is time and labor intensive for the Board.<sup>42</sup> For those reasons, we recommend that the Board consider providing parties with more opportunities for oral argument in significant cases meeting one or more of the criteria identified in the BIA Practice Manual.

In addition, while we support the BIA’s program to solicit amicus curiae briefs from interested parties, advocates have noted that the quality and value of participation by amici would significantly improve if

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36 EOIR, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 102 (rev. Mar. 23, 2018), <https://www.justice.gov/eoir/page/file/1103051/download> [hereinafter BIA PRACTICE MANUAL].

37 *Id.* at 101.

38 U.S. COURTS OF APPEALS, JUDICIAL BUSINESS — CASES TERMINATED ON THE MERITS AFTER ORAL ARGUMENTS OR SUBMISSION ON BRIEFS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2017, at tbl. B-10 (Sept. 30, 2017), <http://www.uscourts.gov/statistics/table/b-10/judicial-business/2017/09/30>.

39 ROTH & STOICHEVA, *supra* note 26.

40 EOIR Written Responses, *supra* note 22.

41 See AM. ACAD. OF APPELLATE LAWYERS, ORAL ARGUMENT TASK FORCE REPORT 3 (Oct. 2015), [https://www.appellateacademy.org/publications/oa\\_final\\_report\\_10\\_15\\_15.pdf](https://www.appellateacademy.org/publications/oa_final_report_10_15_15.pdf); see also Warren D. Wolfson, *Oral Argument: Does it Matter?*, 35 INDIANA L. REV. 451, 454 (2002) (“Orals help me persuade my colleagues by asking questions I know the answers to—the beginning of a conference. They also give lawyers a chance to lose a case they might have won, not so much by arguing badly, but by not arguing at all an issue I was fond of. Orals give me a chance to ask about issues not raised in the briefs—such as jurisdiction or waiver. Orals provide an escape valve for lawyers and litigants. This is their chance to be heard and to provide an educational experience for everyone involved in the case. The proceeding is more public, less secretive. Finally, and of great importance, oral arguments get me into a courtroom, where I can see, hear, and talk to real people.”).

42 EOIR Written Responses, *supra* note 22.

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the BIA were to post all underlying decisions at issue in amicus requests.<sup>43</sup> Without the underlying decisions at issue, amici do not have the factual context for the questions presented by the Board, nor can they evaluate and offer briefing on whether those questions are in fact the determinative issues in the case. Likewise, without knowledge of the legal arguments addressed in the underlying decisions, amici cannot determine what new arguments should be brought to the Board's attention through briefing. Therefore, we recommend that, as part of its amicus briefing requests, the BIA 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.

## B. The BIA Does Not Generate Enough Precedent Decisions

Given the predominance of single-member decisions (which cannot be used as precedent, per regulation),<sup>44</sup> the amount of precedent issued by the Board remains very low. As shown in Chart 3-3 below,<sup>45</sup> since 2010, the percentage of decisions designated as precedent by the Board has remained fairly steady, at under 0.10%, with a small drop in 2013. Despite the large number of cases before the Board, the proportion of precedent decisions remains low, and falls far short of the approximately 13% of published opinions issued by federal appellate courts.<sup>46</sup>

The continued low level of precedent decisions is concerning, given that one of the key functions of the Board is to “apply[] the immigration and nationality law uniformly throughout the United States.”<sup>47</sup> Additional precedent on a variety of issues is necessary to facilitate uniformly decided opinions under an orderly and comprehensive body of law. When designating an opinion as precedent, however, approval of the full Board should still be required. Careful consideration by the Board as a whole is needed to determine whether a particular opinion offers needed clarification in the law, and is a necessary step to fostering greater uniformity in immigration adjudication.

Moreover, the Board's limited body of precedent is weakened when one of those decisions is invalidated by a circuit court. Under the Board's convention, the Board continues to follow the rule embraced in its precedent decisions when deciding cases originating in any circuit that has not struck down that specific precedent decision.<sup>48</sup> This inconsistency can undermine trust in the system and promote forum shopping.<sup>49</sup> In 2008, EOIR proposed revisions to the streamlining reforms, encouraging the publication of precedent where “there is a need to achieve or maintain national uniformity of interpretation under the immigration law and regulations with respect to the issues presented in the case, or to restore such uniformity of interpretation pursuant to interpretive authority recognized by the Supreme Court in *Brand X Internet*.”<sup>50</sup> These revisions were never finalized. To

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43 See AILA/OCAHO Agenda and Minutes 6 (Apr. 7, 2016), <https://www.justice.gov/sites/default/files/pages/attachments/2016/11/16/ailaspring2016meetingminutes.pdf>; Request to Appear as Amicus Curiae & Brief of Nat'l Immigration Justice Ctr. as Amicus Curiae at 4-8, *In the Matter of L.E.A.*, Amicus Invitation No. 16-01-11 (Mar. 4, 2016), <http://immigrantjustice.org/sites/default/files/content-type/resource/documents/2017-09/NIJC%20BIA%20Amicus%20Invitation%202016-01-11-family-3.4.16.pdf>.

44 8 C.F.R. § 1003.1(g).

45 The data displayed in Chart 3-3 were compiled from the EOIR Statistics Yearbooks for FY 1996 through FY 2017 and the DOJ, Attorney General and BIA Precedent Decisions Listing, available at <https://www.justice.gov/eoir/ag-bia-decisions>. The percentage of precedent decisions was calculated by dividing the annual total precedent BIA decisions published by the annual total BIA completions.

46 U.S. COURTS OF APPEALS, JUDICIAL BUSINESS tbl. B-12 (Sept. 30, 2017), <http://www.uscourts.gov/statistics/table/b-12/judicial-business/2017/09/30>.

47 BIA PRACTICE MANUAL, *supra* note 36, at 1.

48 See Steve Y. Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430, 442-45 (1991) (summarizing relevant Board case law).

49 *Id.* at 445; see also Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 427 (2007).

50 73 Fed. Reg. at 34,661-62; see also *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (“A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

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promote consistency and uniformity, we recommend that the Board establish an internal process for reconsidering a BIA precedent decision that has been overturned by one or more circuit courts, when presented with an appropriate case.

### **C. The Board Could Benefit from Additional, and More Diverse, Hiring**

As described above, EOIR has expanded the size of the BIA and hired a substantial number of additional Board Members, consistent with recommendations in the 2010 Report.<sup>51</sup> The Trump administration has also continued to request additional funding to expand the adjudicative capacity of EOIR's immigration courts.<sup>52</sup> With these additional resources, the BIA has largely managed its backlog and reduced the number of pending cases each year. As described in Section III, however, the Board's pending caseload rose in FY 2017. If the recommendations in Part 2 of this Update Report are implemented and the efficiency of the immigration courts improves, the volume of appeals to the BIA could further increase, causing a surge in the BIA's caseload and staffing needs. Moreover, several of our recommendations (such as increased use of

three-member panels and more oral arguments) will require additional staffing beyond current levels. A restructured court system with enhanced independence, as proposed in Part 6, could improve public confidence in immigration court decisions, potentially resulting in fewer BIA appeals and mitigating some of these upward budgetary pressures.

The BIA could also benefit from greater diversity among Board Members. While DOJ has not removed Board members with higher rates of voting in favor of noncitizens since the Board's downsizing in 2002,<sup>53</sup> and concerns about politicized hiring did not arise during the Obama administration,<sup>54</sup> allegations of politicized hiring practices have again surfaced under the current administration.<sup>55</sup> For example, a letter signed by four Members of Congress, sent in response to whistleblower allegations, requests information and documents from the Attorney General "to determine whether the immigration court hiring process once again has become illegally politicized."<sup>56</sup>

In addition, the Board continues to be comprised largely of former Immigration and Customs Enforcement ("ICE") employees and former government trial lawyers.<sup>57</sup> Although a minority of Board members have experience representing noncitizens, such experience occurred many

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51 As of December 31, 2018, there were 15 permanent and 6 temporary Board Members. EOIR, Board of Immigration Appeals: Biographical Information (last updated Nov. 15, 2018), <https://www.justice.gov/eoir/board-of-immigration-appeals-bios> [hereinafter BIA Bios].

52 See, e.g., DEP'T OF JUSTICE FY 2019 BUDGET AND PERFORMANCE SUMMARY, ADMINISTRATIVE REVIEW AND APPEALS, EOIR, <https://www.justice.gov/doj/fy-2019-budget-and-performance-summary> (hereinafter "EOIR 2019 BUDGET").

53 See Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154 (2004).

54 See OFFICE OF PROF'L RESP. & OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 69 (2008), <http://www.justice.gov/oig/special/s0807/final.pdf>.

55 See, e.g., Tal Kopan, *Immigration Judge Applicant Says Trump Administration Blocked Her Over Politics*, CNN (June 21, 2018), <https://www.cnn.com/2018/06/21/politics/immigration-judge-applicant-says-trump-administration-blocked-her-over-politics/index.html>; Priscilla Alvarez, *Jeff Sessions is Quietly Transforming the Nation's Immigration Courts*, THE ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/10/jeff-sessions-carrying-out-trumps-immigration-agenda/573151/>.

56 Letter from Reps. Elijah E. Cummings, Lloyd Doggett, Joaquin Castro & Donald S. Beyer Jr. to the Honorable Jeff Sessions, Att'y Gen., DOJ (April 17, 2018), <https://cummings.house.gov/sites/cummings.house.gov/files/Dems%20to%20DOJ%20re.%20EOIR%20Politicization.pdf>; see also Letter from Reps. Elijah E. Cummings & Jerrold Nadler, & Senators Richard J. Durbin and Dianne Feinstein to the Honorable Michael E. Horowitz, Inspector General, DOJ (May 8, 2018), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Dems%20to%20Horowitz.pdf> (requesting that the Inspector General initiate an investigation of politicized hiring practices at immigration courts and the BIA).

57 See BIA Bios, *supra* note 51; see also MILLER, KEITH, & HOLMES, *supra* note 29, at 125 (finding a "precipitous decrease" in the liberalism of the BIA following the streamlining reforms with a "slight increase in liberalism when the Obama administration assumes control," and observing that "on average the BIA is more conservative than are the IJs").

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years ago,<sup>58</sup> and none of the biographies of the six temporary Board Members highlights private sector immigration experience.<sup>59</sup> We understand from certain interviewees that these demographics may result at least in part from federal employees' familiarity with the preliminary screening mechanisms used in the federal hiring process. Attorneys either currently working for DOJ or who have prior DOJ experience may also complete the background check process faster than attorneys from other departments or from outside the government. As one scholar explained, "[t]hese demographics are important because adjudicators with prior immigration enforcement experience are significantly more prone to rule in favor of the government than those without such experience."<sup>60</sup> Several interviewees expressed their view that a Board drawn from a more diverse pool of candidates, including practitioners with recent experience representing noncitizens, would bring valuable alternative perspectives and experiences into the decision making process, which would ultimately result in better-reasoned decisions. The Board and the inherent credibility of its decisions would also benefit from efforts to ensure a broader mix of racial, ethnic, gender, gender identity, sexual orientation, disability, religious, and geographically diverse backgrounds.

#### **D. The BIA Should Continue its Transparency Initiatives**

Additionally, we recommend that EOIR continue its efforts to improve transparency and public input into the Board's decision making process. The 2010 Report recommended that the Board make non-

precedential opinions available to noncitizens and their attorneys, but such opinions are not yet available on the Board's website. Currently, EOIR has posted a limited number of unpublished BIA decisions online on its Freedom of Information Act webpage.<sup>61</sup> The BIA also makes some unpublished decisions available in hard copy in a physical reading room at its offices,<sup>62</sup> and some commercial databases copy and publish those decisions, but such listings are not complete or available without charge. Making non-precedent opinions available to the public would increase access to them by noncitizens and their advocates and provide stakeholders with important transparency into the full body of decisions issued by the Board.

EOIR should also continue to expand and implement the Courts & Appeals System ("ECAS") to all remaining courts and the Board. The cases filed in the immigration courts and appealed to the BIA are often comprised of a significant volume of paper, and according to commenters and interviewees, the courts are struggling to manage the sheer amount of paper flowing through the system. Electronic filing and case management systems have many benefits. For example, implementation of an electronic filing and case management system would aid in the efficient implementation of the removal adjudication process. As EOIR has recognized, it has lagged significantly behind its sister administrative courts, and the federal and state judicial systems, in the implementation of an electronic case management system.<sup>63</sup>

We are encouraged, however, that EOIR is currently piloting an electronic filing and case management system, which EOIR's Director anticipates implementing in "a phased nationwide

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<sup>58</sup> BIA Bios, *supra* note 51 (describing that BIA Chairman David Neal practiced immigration law in Los Angeles from 1993 to 1996; Vice Chairman Charles Adkins-Blanch clerked with an immigration firm from 1989 to 1990; and Judge John Guendelsberger represented noncitizens on a pro bono basis).

<sup>59</sup> *Id.*

<sup>60</sup> Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1666 (2010), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1468&context=dlj> (hereinafter "*Legomsky on Restructuring*").

<sup>61</sup> Two of these decisions (*Matter of Garcia-Merino* (BIA 2015) and *Matter of Vitaglione* (BIA 2011)) are posted under "proactive disclosures." <https://www.justice.gov/eoir/proactive-disclosures>. The remaining four decisions (*Matter of Castillo-Perez* (BIA 2018), *Matter of L-A-B-R* (BIA 2017), *Matter of A-B* (BIA 2016) and *Matter of Kasinga* (BIA 1996)) are posted under frequently requested agency records. EOIR, Frequently Requested Agency Records, <https://www.justice.gov/eoir/freedom-information-act-foia> (last updated Dec. 20, 2018).

<sup>62</sup> See EOIR, Library Information and FAQs, <https://www.justice.gov/eoir/library-faqs> (last updated Jan. 24, 2018).

<sup>63</sup> Press Release, EOIR Launches Electronic Filing Pilot Program (July 19, 2018), <https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program>.



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rollout beginning in 2019.”<sup>64</sup> The President’s FY 2019 budget for EOIR also requests \$25 million to enable the agency to continue making improvements in the electronic filing, case management, document management, and schedule management systems.<sup>65</sup> We hope that these steps will enable EOIR to accommodate electronic filing in the near term, but since this transition has yet to be fully implemented, we reiterate our recommendation on electronic case management.

## E. DOJ Should Provide Meaningful Procedural Safeguards For Attorney General Self-Referrals

From January 1, 2018 through October 18, 2018 — less than three weeks before he left office — former Attorney General Sessions certified seven and made final decisions in five BIA cases,<sup>66</sup> a rate significantly higher than his predecessor Attorneys General.<sup>67</sup> The former Attorney General used the immigration adjudication process, as opposed to rulemaking (or legislative recommendations), to establish not only procedural and docket management policies,<sup>68</sup> but also substantive questions of law governing immigration

proceedings and the rights of noncitizens.<sup>69</sup> In keeping with this practice, in December 2018, then Acting Attorney General Matthew Whitaker referred two additional cases to himself for review, both of which raise substantive immigration law questions.<sup>70</sup>

DOJ further indicated in Spring 2018 that it is considering a rule broadly expanding the circumstances under which the Attorney General may refer cases to him or herself. The proposed new scope of referral would include matters the Board has not yet decided, and even matters decided by immigration judges “regardless of whether those decisions have been appealed to the BIA.”<sup>71</sup> Under such a rule, the scope of the Attorney General’s referral authority would go beyond establishing law governing BIA adjudications, and could extend into who is perceived as eligible for asylum by Customs and Border Patrol and who receives a credible fear interview.

The use of the Attorney General’s certification authority has been the subject of considerable debate for a number of years. Former Attorney General Alberto Gonzales and DOJ Senior Litigation Counsel Patrick Glen have argued that the mechanism is preferable to an administration using executive

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64 *Strengthening and Reforming America’s Immigration Court System: Hearing before the Subcomm. on Border Security and Immigration of the S. Comm. on the Judiciary*, 115th Cong. 3 (2018) (statement of James McHenry, Dir., EOIR), <https://www.judiciary.senate.gov/imo/media/doc/McHenry%20Testimony.pdf>.

65 EOIR 2019 BUDGET, *supra* note 52, at 2.

66 See *infra* note 69.

67 Attorneys General in the Obama administration used the certification authority more sparingly, approximately once every two years. See *Matter of Chairez-Castrejon*, 26 I&N Dec. 796 (A.G. 2016); *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015); *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011); *Matter of Comepan*, 25 I&N Dec. 1 (A.G. 2009). Bush administration Attorneys General issued 16 decisions, an average of two per year, more frequently than the Obama administration but far less frequently than the Trump administration to date.

68 See *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

69 Former Attorney General Sessions’ final decisions in 2018 included: *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (holding that hearing not required in asylum case); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (disallowing administrative closure); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (limiting grounds for asylum claims); *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (establishing criteria for “good cause” to grant a continuance for a collateral matter to be adjudicated by an immigration judge); *Matters of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (constraining immigration judge’s inherent authority to dismiss or terminate removal proceedings). The former Attorney General referred seven total cases to himself during the first ten months of 2018, but one of those cases was mooted, *Matter of M-G-G-*, 27 I&N Dec. 475 (A.G. 2018) (rendered moot because the respondent had been removed from the United States), and one has not been finally decided, *Matter of Negusie*, 27 I&N Dec. 481 (A.G. 2018) (relating to whether coercion and duress are relevant to the application of the Immigration and Nationality Act’s persecutor bar).

70 See *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018) (relating to whether, and under what circumstances, an alien may establish persecution on account of membership in a “particular social group” based on the alien’s membership in a family unit); *Matter of Castillo-Perez*, 27 I&N Dec. 495 (A.G. 2018) (relating to the appropriate legal standard for determining when an individual lacks “good moral character” under 8 U.S.C. § 1101(f) and the impact of multiple convictions in determining whether to grant discretionary relief under 8 U.S.C. § 1229b(b)).

71 Referral of Decisions in Immigration Matters to the Attorney General, Dep’t of Justice Spring 2018 Regulatory Agenda, DOJ/EOIR RIN: 1125-AA86, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1125-AA86>.

orders and memoranda to advance immigration policy.<sup>72</sup> Others have raised concerns that the exercise of the authority has disrupted the development of immigration law and policy and altered longstanding practices for partisan purposes,<sup>73</sup> that the Attorney General “is removed from the agency’s expertise in immigration,”<sup>74</sup> and that the Attorney General’s position as the nation’s chief law enforcement officer prevents him from bringing the necessary balance and objectivity to immigration “lawmaking” through the adjudication process.<sup>75</sup> Immigration advocates have also argued that there are significant procedural shortcomings in the Attorney General’s certification process, such as short briefing timelines, lack of alignment between the factual and legal issues presented in the underlying decisions and the question presented by the Attorney General on certification, certification of issues not on appeal to the BIA, and certification of cases where the respondent is not represented by counsel.<sup>76</sup>

The regulations governing certification for review by the Attorney General currently permit self-referral where: (1) the Chairman, a majority of the Board, the Secretary of Homeland Security, or specifically designated Department of Homeland Security (“DHS”) officials refer a matter; or (2) the Attorney General directs the Board to refer the matter to him.<sup>77</sup> The procedures governing self-referral require only that the Attorney General’s decision be in writing and transmitted to the BIA or DHS for service upon

the party affected.<sup>78</sup> They do not establish criteria or specify categories of cases appropriate for the exercise of the certification authority, which would permit more predictability for stakeholders and increase the integrity and public confidence in the process.

We recognize that the BIA’s authority to adjudicate removals is delegated from the Attorney General and subject to Attorney General review under the current framework, and that agency head review of administrative proceedings is not unusual. Agency or Cabinet official level review can help ensure policy coherence and political accountability within an agency.<sup>79</sup> As the chief law enforcement officer of the United States, however, the Attorney General serves as both the prosecutor and the adjudicator in referred cases. As such, the Attorney General is not a neutral arbiter and is not appropriately positioned to provide oversight over the Board’s decision making.

While we reserve the question of restructuring for Part 6 of this 2019 Update Report, we believe the Attorney General’s exercise of the certification authority without more transparency and due process safeguards can undermine the legitimacy and acceptability of the immigration adjudication process. For those reasons, within the current system’s constraints, we believe DOJ should establish standards and procedures for Attorney General review through the rulemaking process, including procedures providing notice and an opportunity for the parties to brief the specific legal questions the Attorney General

72 Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841 (2016).

73 See, e.g., Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, FACULTY SCHOLARSHIP 1599 (2018), [https://digitalcommons.law.umaryland.edu/fac\\_pubs/1599](https://digitalcommons.law.umaryland.edu/fac_pubs/1599).

74 See, e.g., Shah, Bijal, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. 129, 141 (2017) (noting that “because the Attorney General is removed from the agency’s expertise in immigration, scholars might also debate the proper level of judicial deference to administrative decision-making in immigration or perhaps any area of law in which a political official exercises discretion beyond her core competencies”).

75 See, e.g., *Legomsky on Restructuring*, *supra* note 60, at 1672 (“In theory, empowering Attorneys General to review and reverse BIA decisions makes them more politically accountable for the BIA’s shortcomings. In practice, that benefit is of small consolation. As the nation’s chief law enforcement officer, the Attorney General has an inherent incentive to care more about some shortcomings than others. The legitimate interests in enhancing the speed of the decision making, and thus the productivity, of the adjudicators and staff can conflict with other legitimate interests like the accuracy of outcomes and the fairness of procedures.”).

76 See Brief of Amicus Curiae Am. Immigration Lawyers Assoc. 4-11, *Matter of M-S-*, 27 I&N Dec. 476 (A.G. 2018).

77 8 C.F.R. § 1003.1(h)(1).

78 *Id.* § 1003.1(h)(2).

79 Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1768 (2010); see also Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18 (2016).



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intends to review, and for amici to weigh in,<sup>80</sup> before a decision is rendered. For the same reasons described in Section III.A with respect to amicus briefs in BIA cases, EOIR should provide access to the underlying decisions in cases referred to the Attorney General, to provide adequate context for the issues presented and allow more meaningful participation by amici.

## F. EOIR Should Adjust Certain Procedures to Promote Fairness

During the course of updating the 2010 Report, we identified continuing concerns about the need for an automatic stay of removal while a petition for review is pending. Once a BIA order of deportation or removal becomes administratively final,<sup>81</sup> it becomes immediately enforceable, absent a stay from the court of appeals. The noncitizen has 30 days in which to file a petition for review with the circuit court.<sup>82</sup> There is no automatic stay of removal during the 30-day period, and even the filing of a motion for a stay of removal does not temporarily stay removal until the court adjudicates the motion, except in the Ninth and Second Circuits. In these circuits, the filing of a stay motion temporarily stays removal until the motion is adjudicated.<sup>83</sup> In other circuits, however, ICE may remove the petitioner immediately. For individuals who are detained, particularly noncitizens from Mexico and Central America, removal can occur

within days or even hours of the issuance of a removal order.<sup>84</sup>

While a noncitizen is legally entitled to pursue a petition for review of the BIA's decision from abroad, once a noncitizen has been involuntarily removed to his or her home country, the right to pursue an appeal is often moot for all practical purposes. As Judge Reinhardt noted, "[f]or many noncitizens, the ability to pursue a petition for review from abroad is entirely meaningless."<sup>85</sup> Indeed, "it is far from clear that the Attorney General actually has the capability to effectively return such a non-citizen to the United States in the event that a court (or the BIA upon remand from judicial review) were to grant relief to a noncitizen who departed."<sup>86</sup> These concerns highlight the need for a process that balances the right of a noncitizen to appeal that is meaningful against the government's legitimate interest in finality of litigation, and that allows for a temporary stay of removal or deportation pending appeal.

In Part 4 of the 2010 Report, we noted that the 30-day deadline for filing a petition for review of a final removal order with the court of appeals was unduly short, particularly for petitioners in detention or without representation. We recommended that Congress amend the Immigration & Nationality Act ("INA") to provide instead for a 60-day period in which to appeal, as is the case for non-immigration appeals against the government. We further suggested the BIA amend its regulations to provide that each

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80 See Trice, *supra* note 79, at 1876 (recommending that the Attorney General promulgate regulations that require meaningful, adversarial participation by the parties and provide a transparent means of soliciting input from interested amici on issues of broad significance, arguing that "to ask the Attorney General to provide basic procedural protections upon review is to ask no more than many agencies provide as standard practice under the Administrative Procedure Act [5 U.S.C. § 557(c)], which entitles parties to present arguments when the agency reviews a decision of its subordinates."). In his 2018 decisions, former Attorney General Sessions invited amicus briefing in some cases, but not in others. For example, the former Attorney General certified *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), to himself and decided the case on March 5, 2018, without providing the parties or amici the opportunity to brief any of the issues involved.

81 An order of removal becomes final: (1) upon the BIA's dismissal of the noncitizen's appeal; (2) if the case is certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal; or (3) upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General. 8 C.F.R. § 1241.1(a), (d), (f).

82 8 U.S.C. § 1252(b)(1). In Part 4, we recommend that this period be extended to 60 days.

83 The Ninth Circuit has held that the filing of a stay motion automatically confers a temporary stay by operation of law. *Deleon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997); see also 9th Cir. General Order 6.4(c)(1). In the Second Circuit, the court entered into an informal "forbearance" agreement with the Department of Homeland Security. The Department has agreed to delay effectuating the removal of an alien while his or her petition for review is pending with the court, if the petition is accompanied by a motion for a stay of removal. See *Persaud v. Holder*, No. 10-6506, 2011 WL 5326465, at \*1 (W.D.N.Y. Nov. 3, 2011).

84 See T. REALMUTO, J. CHICCO, N. MORAWETZ & B. WERLIN, SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS: STANDARD, IMPLICATIONS OF ICE'S RETURN POLICY AND THE OSC'S MISREPRESENTATION TO THE SUPREME COURT, AND SAMPLE STAY MOTION (May 25, 2012), [https://nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/fed/2012\\_May\\_judicial-stay-remov.pdf](https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2012_May_judicial-stay-remov.pdf).

85 *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 536-37 (9th Cir. 2012) (Reinhardt, J., dissenting).

86 *Id.*

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final removal order in which the government prevails must state the right to appeal, the applicable circuit court, and the deadline for filing the appeal.<sup>87</sup> This recommendation remains unimplemented. If the appeal period is extended to 60 days, a stay will be even more crucial in order to protect litigants from irreparable harm. Before stay procedures are adopted, however, it is important that litigants fully understand the effect of a final removal order. Thus, we retain our recommendations concerning notice in this Part, and add that, pending the finalization of a rule establishing a stay, that final removal orders advise noncitizens that the order takes effect immediately absent the issuance of a stay by the circuit court.

The timelines for filing appeals with the Board can also be restrictive for petitioners in detention or without representation, particularly given that the BIA does not observe the “mailbox rule.” It is similarly difficult for petitioners in detention or without representation to file a timely appeal. Specifically, the BIA Practice Manual provides that: “For appeals and motions that must be filed with the Board, the appeal or motion is not deemed ‘filed’ until it is received at the Board.”<sup>88</sup> This rule can be confusing and unduly burdensome for detained or unrepresented applicants. This is particularly true in the case of detained individuals who can be transferred without notice, and who can be subject to varying rules and requirements concerning receipt of mail while in custody, which can result in significant delays in receiving official correspondence. Therefore, the BIA Practice Manual should give Board Members authority to relax the “mailbox rule” for petitioners in detention or without representation, in the interest of fairness. The difference between filing an appeal and filing a brief may also be confusing for petitioners without representation, and we encourage the Board to excuse the lack of a timely brief for pro se litigants where possible.

## IV. 2019 Recommendations

The reforms in the 2010 Report were designed to address criticisms that, following the 1999 and 2002

streamlining reforms, the Board essentially abdicated its role as an oversight and adjudicative body and became merely a “rubber stamp” of immigration court decisions. While the Board has made commendable progress in addressing these concerns, we believe that continued reform is necessary to help the Board best serve its role of correcting errors below and providing uniformity in immigration law. Our hope is that the resulting increased consistency and uniformity throughout the system brought about by these changes will decrease the number of appeals, decrease the rate of reversals, and improve the overall integrity of the immigration adjudication system. As such, our recommendations apply whether or not the restructuring recommendations in Part 6 are adopted. Accordingly, we recommend as follows:

**2010 Recommendation:** Use three-member panels for all non-frivolous merits cases that lack obvious controlling precedent. Allow single-member review for purely procedural motions and motions unopposed by DHS.

**2019 Update:** We reaffirm the 2010 recommendation, as single-member decisions remain the dominant form of Board decision making. Use of three-member panels promotes critical discussion between Board members, which should ultimately result in better-reasoned, more consistent decisions. Such panels will therefore promote the fairness and legitimacy of Board adjudication and potentially reduce the likelihood of appeal.

**2010 Recommendation:** Relax the limits on the time allowed for Board Members to reach a decision by allowing the same amount of time for single-member review as currently allocated for panel review (i.e., 180 days from receipt of appeal).

**2019 Update:** We reaffirm the 2010 recommendation for non-detained cases, as we believe it will help promote further improvements in the quality of the Board’s decision making.

**2010 Recommendation:** At a minimum, the Board should make affirmances without opinion discretionary rather than mandatory. In addition, the

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<sup>87</sup> 2010 Report 4-21.

<sup>88</sup> BIA PRACTICE MANUAL, *supra* note 36, at 31.

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Board should require that written decisions respond to all non-frivolous arguments raised by the parties.

**2019 Update:** We reaffirm the 2010 recommendation. Although the number of AWOs has declined significantly, some single-member written opinions still fail to address material arguments. Issuance of an increased number of detailed, reasoned decisions would provide both the noncitizen and a reviewing court more information regarding the Board's decision. Therefore, we recommend that the Board implement a policy that written decisions should address all non-frivolous arguments raised by the parties to: (a) provide sufficient information to facilitate federal appeals court review; (b) allow all parties to understand the Board's decisions; and (c) to promote general confidence in the fairness of the Board's decisions. We also recommend the Board utilize more oral arguments, which are still extremely rare.

**New 2019 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.

**2010 Recommendation:** Restore the BIA's ability to conduct de novo review of fact finding and credibility determinations by immigration judges.

**2019 Update:** We reaffirm the 2010 recommendation. The de novo standard of review facilitates the ability of the Board to correct mistakes made by immigration judges and reconcile disparities among immigration judges in factually similar cases.

**2010 Recommendation:** The Board should issue more precedent decisions, expanding the body of law to guide immigration courts and practitioners.

**2019 Update:** We reaffirm the 2010 recommendation. The Board has not increased the publication of precedent decisions since the 2010 Report. Precedent decisions by the Board are important to the overall integrity of the immigration adjudication system, and the Board should continue its efforts to increase the publication of precedent decisions. 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.

**2010 Recommendation:** Regulations should continue to require that the full Board authorize designation of an opinion as precedent. The 2008 proposed rule allowing individual panels to designate opinions as precedent should not be implemented.

**2019 Update:** We reaffirm the 2010 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.

**New 2019 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.

**2010 Recommendation:** Increase the resources available to the Board in order to fund additional support staff.

**2019 Update:** We reaffirm the 2010 recommendation. Since the 2010 Report, DOJ has expanded the size of the Board to 21 Members, and DOJ has requested additional funding to further improve the efficiency of the Board. We applaud these developments. However, several of our recommendations (such as increased use of three-member panels and oral arguments) will necessitate additional staffing beyond these levels.

**2010 Recommendation:** Apply the new code of conduct proposed for Immigration Judges, which is based on the ABA Code of Judicial Conduct, to Board members as well.

**2019 Update:** Interviewees did not express concern regarding the level of professionalism exhibited by Board members. However, written ethics and professionalism standards would provide additional clarity and consistency. As discussed further in Part 2, EOIR announced in 2011 its publication of the

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Ethics and Professionalism Guide for immigration judges. We recommend that the guide apply to Board Members as well as immigration judges.

**New 2019 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.

**New 2019 Recommendation:** We recommend that DOJ amend the certification regulation at 8 C.F.R. section 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.

**2010 Recommendation:** Make non-precedent opinions available to the public. The Board already maintains a database of such opinions, and making the database publicly available would provide additional, non-precedential guidance to those appearing before immigration adjudicators.

**2019 Update:** We reaffirm the 2010 recommendation. The Board has not yet made non-precedent opinions available to the public, but should do so in the future to increase access by noncitizens and their advocates and to provide important transparency into the full body of decisions issued by the Board.

**New 2019 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.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation, which has not been implemented. As addressed in Part 4 of this Report, we continue to think that clear notice of the right to appeal, the deadline within which a petition for review must be filed, and where the appeal must be filed is critical particularly for petitioners who are proceeding pro se. In addition, we also recommend that final orders of removal or deportation issued by the BIA must make clear that the order is effective immediately barring the issuance of a stay by the circuit court, until regulations providing for a temporary stay have been made final.

**New 2019 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.

# 4

## Judicial Review

2019 Update Report

### REFORMING THE IMMIGRATION SYSTEM

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

March 2019

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



AMERICAN BAR ASSOCIATION

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Pursuing Justice

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# Part 4: Judicial Review

## I. Introduction and Summary on 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—as described in depth in the 2010 Report—severely restrict 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. 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.

## II. The 2010 Report and Recommendations

The 2010 Report described the provisions of AEDPA and IIRIRA, followed by the REAL ID Act in 2005, that impose formidable barriers to judicial review of removal orders.

AEDPA and IIRIRA together deprive the federal courts of jurisdiction to review removal orders for noncitizens convicted of certain crimes, bar challenges to certain discretionary acts of the Attorney General, restrict all judicial review—to the extent still permitted—to the courts of appeals, and impose a 30-day deadline for a petitioner to appeal a final removal order to the court of appeals.<sup>1</sup> Filing a petition for review in the court of appeals does not stay a removal order.<sup>2</sup> The petitioner must file—and the court of appeals must grant—a separate motion for stay of removal.<sup>3</sup> And in 2005, Congress enacted the REAL ID Act to decisively eliminate habeas jurisdiction over removal orders (other than expedited removal orders), but permitted review by the courts of appeals of constitutional claims and questions of law that were previously subject to habeas review.

The 2010 Report also highlighted the high volume of immigration cases before the circuit courts. In

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1 See 2010 Report 4-6–4-7.

2 See 8 U.S.C. § 1252(b)(3)(B); see also 2010 Report 4-15. While filing a petition for review does not entitle petitioner to an automatic stay of removal, a number of the courts of appeals—in particular, the Ninth and Second Circuits—have introduced their own rules under which the filing of a stay motion confers a temporary stay by operation of law. See note 38, *infra*.

3 The Supreme Court set forth the standard governing stays of removal in *Nken v. Holder*, 556 U.S. 418 (2009).

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2008, immigration cases comprised 16.8% of the civil docket of the courts of appeals; the proportion was particularly high in the Second and Ninth Circuits (41.5% and 34.0% respectively). While recognizing that any expansion of the scope of judicial review must consider the resulting caseload in the courts of appeals, the 2010 Report concluded that the availability of judicial review should not fluctuate depending on the burden imposed on federal courts. Moreover, the 2010 Report concluded that expanding judicial review would not necessarily increase the caseload in the courts of appeals, provided that prior steps in the administrative process were also reformed and adequately funded, as recommended. Conversely, restrictions on judicial review alone would be unlikely to reduce the caseload in the courts of appeals.<sup>4</sup>

Accordingly, the 2010 Report identified three specific issues that the jurisdiction-stripping provisions of AEDPA, IIRIRA, and the REAL ID Act created, and made recommendations for reform aimed at addressing each of these problems.

First, the 2010 Report observed that the elimination of federal jurisdiction to review certain discretionary decisions of the Attorney General had prompted the executive and legislative branches to insulate an ever wider range of acts from judicial review by labeling them “discretionary.”<sup>5</sup> While recognizing the need for flexibility in administering the immigration laws, the 2010 Report noted that committing decisions—many of which are of immense consequence to hundreds of thousands of families residing in the United States—to the Attorney General’s unreviewable discretion left important liberty interests without adequate safeguards. Accordingly, the 2010 Report recommended that Congress repeal those provisions of AEDPA and IIRIRA that restrict judicial review of discretionary decisions, and restore the “abuse of discretion” standard of review that was in effect prior to 1996. The 2010 Report further recommended that Congress enact legislation requiring courts to apply a presumption

in favor of judicial review, and to reject attempts to insulate more and more actions from judicial oversight by labeling them as discretionary.

Second, the 2010 Report concluded that the elimination of habeas review of removal orders and the passage of § 1252(a)(1), which precludes the court of appeals from remanding a case to the BIA or the immigration court for further fact-finding, had severely restricted petitioners’ ability to present new evidence before the federal courts. The 2010 Report recommended that Congress restore the pre-1996 standard, which permitted courts to remand for additional fact-finding when additional evidence was material and there were reasonable grounds for the failure to submit the evidence before the agency.<sup>6</sup>

Third, the 2010 Report noted that the 30-day deadline for filing a petition for review of a final removal order with the court of appeals was unduly short, particularly for petitioners in detention or without representation. The 2010 Report recommended that Congress amend the INA to provide for a 60-day period in which to appeal, as is the case for non-immigration appeals against the government.<sup>7</sup> The 2010 Report further suggested the BIA amend its regulations to provide that each final removal order in which the government prevails must clearly state the right to appeal, the applicable circuit court, and the deadline for filing the appeal.<sup>8</sup>

### III. Developments Since 2010

In the last nine years, the landscape for judicial review of removal orders has remained mostly unchanged. Congress has passed no legislation altering the scope of judicial review or restoring the possibility of courts of appeals remanding to the agency for further fact-finding in appropriate circumstances. As in 2010, courts of appeals currently have jurisdiction to review all constitutional questions and questions of law related to a final order of

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<sup>4</sup> See 2010 Report 4-18.

<sup>5</sup> See *id.* at 4-9–4-10.

<sup>6</sup> *Id.* 4-21.

<sup>7</sup> *Id.* 4-21–4-22.

<sup>8</sup> *Id.* 4-21.

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removal, and habeas review in the district court of final orders of removal (other than in cases of expedited removal) is unavailable.

While there have been no legislative changes to the scope of the federal court's jurisdiction to review removal decisions, the Supreme Court in *Kucana v. Holder* articulated some limits on the Attorney General's unreviewable discretion.<sup>9</sup> In *Kucana*, the Court held that § 1252(a)(2)(B)(ii)'s proscription on judicial review of discretionary acts of the Attorney General applied only to acts designated as discretionary by statute; the provision does not foreclose judicial review of actions made discretionary by the Attorney General only.<sup>10</sup> The Court emphasized the presumption favoring judicial review of administrative action<sup>11</sup> and stressed that interpreting § 1252(a)(2)(B)(ii) to strip the courts of jurisdiction to review acts made discretionary by regulation would give "the Executive . . . a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.' Such an extraordinary delegation of authority cannot be extracted from the statute Congress enacted."<sup>12</sup> The Supreme Court thus reversed the Seventh Circuit's decision finding that it lacked jurisdiction to review the BIA's denial of petitioner's motion to reopen. The Court expressed no

opinion, however, on whether the courts may review BIA decisions not to reopen a case *sua sponte*.<sup>13</sup>

Five years later, in *Mata v. Lynch*, the Supreme Court confirmed that the courts of appeals have jurisdiction to review the BIA's rejection of a motion to reopen, regardless of the reason for the BIA's denial.<sup>14</sup> Thus, courts of appeals may review, for example, BIA decisions rejecting motions to reopen as untimely. The Supreme Court specifically rejected the Fifth Circuit's approach of recharacterizing pleadings in such a way as to "constru[e] away adjudicative authority."<sup>15</sup> But the Court left unanswered the question whether courts may review the BIA's decision not to exercise its *sua sponte* authority to reopen a case.<sup>16</sup>

The Supreme Court's decision in *Kucana* curtailed aspects of unilateral executive expansion of discretionary authority and encroachment on the courts of appeals' jurisdiction. Nevertheless, statutory barriers to judicial review of removal orders remain formidable. As the Court itself noted in *Kucana*, Congress has specifically designated other decisions as "in the discretion of the Attorney General" and therefore insulated from review.<sup>17</sup> Those decisions include waivers of inadmissibility based on certain criminal offenses, fraud or misrepresentation,<sup>18</sup> cancellation of removal,<sup>19</sup> permission for voluntary departure,<sup>20</sup> and adjustment of status,<sup>21</sup> as well as the admission of refugees "determined to be of special

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9 558 U.S. 233 (2010).

10 *Id.* at 253.

11 *See id.* at 251–52.

12 *Id.* at 252.

13 *Id.* at 251 n.18.

14 135 S. Ct. 2150 (2015).

15 *Id.* at 2156.

16 *See id.* at 2155 (assuming *arguendo* that courts lack jurisdiction over such decisions); *see also Morones-Quinones v. Lynch*, 637 F. App'x 513 (Mem.) (10th Cir. 2016) (holding that the court of appeals lacked jurisdiction to consider whether the BIA erred in deciding not to reopen proceedings *sua sponte*).

17 *See* 558 U.S. at 837.

18 8 U.S.C. § 1182(h)–(i).

19 *Id.* § 1229b.

20 *Id.* § 1229c.

21 *Id.* § 1255.

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humanitarian concern to the United States”;<sup>22</sup> waiver of the requirement of documentation for readmission;<sup>23</sup> and waiver, in certain circumstances, of inadmissibility of aliens who have affiliated with a totalitarian party.<sup>24</sup> *Kucana* also left undisturbed the preclusion in § 1252(a)(2)(C) of judicial review of orders of removal for noncitizens convicted of certain crimes, and § 1252(a)(2)(A)’s elimination of judicial review of expedited removal orders.<sup>25</sup>

Moreover, after *Kucana* and *Mata*, whether courts may review BIA decisions not to reopen a case *sua sponte* remains an open question.<sup>26</sup> While most circuit courts have, post-*Kucana*, applied their pre-2010 precedents to find that they lack jurisdiction to review such decisions, a number of courts have expressed doubts about their pre-*Kucana* case law and called for revisiting those cases.<sup>27</sup>

Immigration cases continue to make up a significant proportion of the federal courts of appeals’ civil docket nationwide (10% in 2017).<sup>28</sup> Nonetheless, the percentage of BIA decisions appealed has seen a steady decline from 28.7 % of all BIA cases completed at its apex in 2006 to 16% in 2016.<sup>29</sup> And while the Second and Ninth Circuits continue to handle the greatest proportion of immigration appeals, the flood of immigration cases in the early to mid-2000s has somewhat abated in those circuits, as well. Possible reasons for the decline in caseload include improvements at the agency level, as well as a system-wide decrease in the number of immigration

cases, a decrease in asylum denials, an increase in representation, a backlog in the immigration courts, and a rise in detained cases.<sup>30</sup>

The courts of appeals have adopted various streamlining measures to cope with the volume of cases. In the Second Circuit, for example, most asylum-related appeals are decided on the briefs, unless a member of the panel considers that the case warrants oral argument. Cases that are not designated for argument are “worked up by staff attorneys, who prepare bench memoranda” and draft summary orders.<sup>31</sup> Most immigration cases in the Third Circuit are decided on the briefs by special panel.<sup>32</sup> In the Ninth Circuit, many cases—including many immigration cases—are decided without argument by “screening panels,” after presentation by staff attorneys. In addition, the Ninth Circuit uses “batching” procedures in which staff attorneys review and, where appropriate, group cases presenting the same or similar issues and assign those cases to the same panel. If appropriate, the court may designate a lead case with qualified immigration counsel.<sup>33</sup> The First and Fourth Circuits also use similar screening and batching procedures with varying levels of involvement by staff attorneys (most cases from the BIA tend to be decided without argument), though batching occurs infrequently.<sup>34</sup>

Many interviewees noted the importance of legal representation to the efficient and fair disposition of immigration appeals. A number of circuits —

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22 *Id.* § 1157(c)(1).

23 *Id.* § 1181(b).

24 *Id.* § 1182(a)(3)(D).

25 *See Moral-Salazar v. Holder*, 708 F.3d 957 (7th Cir. 2013) (declining to extend *Kucana*’s holding to § 1252(a)(2)(C)).

26 *Kucana*, 558 U.S. at 251 n.18.

27 *See, e.g., Mejia-Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011) (noting that the “overall thrust” of *Kucana* indicates that *sua sponte* reopening should be reviewable, and that, “were [it] an issue of first impression, a right to review might be recognized”); *Gor v. Holder*, 607 F.3d 180, 182 (6th Cir. 2010) (applying its pre-*Kucana* case law to deny review of the denial of the motion to reopen *sua sponte*, but urging the *en banc* court to revisit those precedents).

28 *See* Table 4-1.

29 *Compare* 2010 Report Table 4-1 *with* Table 4-1.

30 *See, e.g., Stacy Caplow, After the Flood: The Legacy of the “Surge” of Federal Immigration Appeals*, 7 NW J. L. & Soc. Pol’y 1 (2012).

31 *See* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 Duke L.J. 315, 348-49 (2011).

32 *Id.* at 379.

33 *See* 2010 Report 4-18 n.141.

34 Levy, *supra*, at 336, 338.

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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.<sup>35</sup> These programs have proven extremely popular and successful, with many more volunteer attorneys than cases each year.

## IV. 2019 Recommendations

The recommendations in the 2010 Report were anchored on the notion that meaningful judicial review is a critical structural check on the exercise of administrative authority and essential to upholding the rule of law.<sup>36</sup> The statutory barriers that prevented meaningful judicial review in 2010 are still in place. Accordingly, and as explained in further detail below, we renew the recommendations in the 2010 Report to (1) repeal those provisions of AEDPA and IIRIRA that restrict judicial review of the Attorney General’s discretionary decisions; (2) restore the courts’ ability to remand cases for further fact-finding in appropriate cases; (3) amend the INA to extend to 60 days the 30-day deadline for filing a petition for review; and (4) amend agency regulations to require that every decision in which the government prevails clearly inform the petitioner of the right to appeal, the applicable circuit court, and the deadline for filing an appeal.

**2010 Recommendation:** Enact legislation restoring judicial review of discretionary decisions under the “abuse-of-discretion” standard that was in effect prior to the 1996 amendments.

**2019 Update:** We reaffirm the 2010 recommendation. No such legislation has been passed. Nor have there been any changes in the circumstances that would obviate the need for systemic revision of the availability and standard of review. The flexible abuse-of-discretion standard applied prior to 1996 strikes a more appropriate balance between deference to agency discretion and judicial

oversight, and we continue to recommend that Congress enact legislation restoring that standard.

**2010 Recommendation:** Require that the courts apply a presumption in favor of judicial review and specifically reject attempts to insulate more and more actions by labeling them as discretionary.

**2019 Update:** The Supreme Court’s decision in *Kucana* provides helpful guidance in this regard, invoking the presumption in favor of interpreting statutes to allow judicial review of administrative action. Moreover, in foreclosing the Attorney General’s ability to unilaterally declare acts discretionary and thus to evade judicial review, the Supreme Court has mitigated the concerns raised in our previous report to a considerable degree. Nevertheless, uncertainty persists in the courts regarding the reviewability of BIA decisions declining to exercise *sua sponte* authority to reopen. Before *Kucana*, the courts of appeals determined that such decisions were committed to agency discretion by law. But no statute indicates that review of such decisions is unavailable. We recommend that Congress enact legislation confirming that the courts of appeals have jurisdiction to review BIA decisions to exercise *sua sponte* authority to reopen a case.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation. There has been no such legislative action, nor any change in the circumstances that make the restrictions on petitioners’ ability to obtain remand for additional fact-finding any less harsh. Although some courts have noted that a petitioner may file a motion to reopen based on changed country conditions in order to present material new evidence,<sup>37</sup> this narrow provision does not address the full range of situations in which a stale administrative record — and the court’s inability to

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<sup>35</sup> *Pro Bono Program*, U.S. Court of Appeals for the Ninth Circuit, <http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf> (last accessed 10/24/2018); *Pro Bono Counsel Plan*, U.S. Court of Appeals for the Second Circuit, [http://www.ca2.uscourts.gov/clerk/attorneys/pro\\_bono\\_counsel\\_plan.html](http://www.ca2.uscourts.gov/clerk/attorneys/pro_bono_counsel_plan.html) (last accessed 10/24/2018).

<sup>36</sup> See 2010 Report 4-20.

<sup>37</sup> See 8 U.S.C. § 1229a(c)(7)(C)(ii); *Japarkulova v. Holder*, 615 F.3d 696, 702 (6th Cir. 2010).



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remand for further fact-finding — leads to unfair results.

**2010 Recommendation:** Amend the INA to provide 60 days for filing a petition for review, with the possibility of a 30-day extension where the petitioner is able to show excusable neglect or good cause.

**2019 Update:** We reaffirm the 2010 recommendation, which has not been implemented. Petitioners who may be detained or who are unrepresented continue to face significant difficulties meeting the 30-day appeal deadline. Providing petitioners additional time to file a petition for review would be appropriate. In addition, while filing a petition for review does not entitle petitioner to an automatic stay of removal, a number of the courts of appeals — in particular, the Ninth and Second Circuits — have introduced their own rules under which the filing of a stay motion confers a temporary stay by operation of law.<sup>38</sup> These rules have mitigated the harsh effects of IIRIRA’s elimination of the automatic stay of removal. Other courts of appeals should consider enacting similar rules.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation, which has not been implemented, but it remains an appropriate suggestion. Clear notice of the right to appeal, where the appeal must be filed and the deadline within which a petition for review must be filed is still critical, particularly for petitioners who are proceeding pro se or are in detention. In addition, we recommend that the final removal order inform a petitioner of the need to file a motion for stay of removal.

**New 2019 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.

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<sup>38</sup> In the Ninth Circuit, a temporary stay takes effect upon filing of a motion to stay removal, and remains in place until further order of the Court. *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997); Ninth Circuit General Order 6.4(c)(1). The Second Circuit has an informal agreement with DHS under which the government agrees that, upon notification by the court that a stay motion has been filed, the petitioner will not be removed until the motion is adjudicated. *In re Immigration Petitions for Review Pending in the U.S. Court of Appeals for the Second Circuit*, 702 F.3d 160 (2d Cir. 2012) (mem.).



Table 4-1

BIA Decisions Appealed to Courts of Appeals: 2009-2016					
Fiscal Year	Total Appeals Filed in U.S. Court of Appeals	Total Appeals of BIA Decisions Filed in U.S. Court of Appeals	Percentage of Total Appeals that are from BIA	Total Number of BIA Decisions	% of BIA Decisions Appealed
2009	57,740	7,518	13%	38,890	19%
2010	55,992	6,750	12%	38,089	18%
2011	55,126	6,333	11%	39,256	16%
2012	57,501	7,035	12%	39,594	18%
2013	56,475	7,225	13%	36,689	20%
2014	54,988	5,982	11%	30,823	19%
2015	52,698	5,901	11%	34,244	17%
2016	58,976	5,215	9%	33,240	16%

Sources: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf> (BIA cases completed FY09-13)  
<https://www.justice.gov/eoir/page/file/fysb15/download> (BIA cases completed FY11-15)  
<https://www.justice.gov/eoir/page/file/fysb16/download> (BIA cases completed FY16)  
<http://www.uscourts.gov/file/12806/download> (Table B3) (appeals filed 2009-2013)  
<http://www.uscourts.gov/file/19490/download> (Table B3) (appeals filed 2011-2015)  
[http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b3\\_0930.2017.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2017.pdf) (appeals filed 2016)

Table 4-2

Total Appeals by Circuit: 2009-2017									
	2009	2010	2011	2012	2013	2014	2015	2016	2017
Total Appeals	57,740	55,992	55,126	57,501	56,475	54,988	52,698	60,357	50,506
BIA	7,518	6,750	6,333	7,035	7,225	5,982	5,901	5,215	5,210
BIA as percent of total	13%	12%	11%	12%	13%	11%	11%	9%	10%
DC Circuit									
Total Appeals	1,097	1,178	1,132	1,193	1,105	1,003	1,125	1,197	951
BIA	1	1	2	-	1	1	-	1	-
BIA as percent of total	0.1%	0.1%	0.2%	0.0%	0.1%	0.1%	0.0%	0.1%	0.0%
First Circuit									
Total Appeals	1,746	1,530	1,507	1,587	1,578	1,421	1,504	1,704	1,296
BIA	173	137	152	186	153	144	113	83	68
BIA as percent of total	10%	9%	10%	12%	10%	10%	8%	5%	5%
Second Circuit									
Total Appeals	5,747	5,371	5,541	5,531	5,093	5,044	4,416	4,640	4,337
BIA	1,624	1,299	1,405	1,430	1,226	837	752	743	705

Total Appeals by Circuit: 2009-2017									
BIA as percent of total	28%	24%	25%	26%	24%	17%	17%	16%	16%
Third Circuit									
Total Appeals	3,750	3,951	3,645	3,766	3,893	4,029	3,251	3,618	2,941
BIA	578	484	386	393	320	224	225	202	284
BIA as percent of total	15%	12%	11%	10%	8%	6%	7%	6%	10%
Fourth Circuit									
Total Appeals	5,311	4,854	4,576	5,002	5,061	4,765	4,662	6,411	4,497
BIA	235	191	173	199	236	161	195	168	183
BIA as percent of total	4%	4%	4%	4%	5%	3%	4%	3%	4%
Fifth Circuit									
Total Appeals	7,246	7,462	7,401	7,641	7,439	7,886	7,443	8,664	7,099
BIA	429	440	362	411	420	416	372	311	352
BIA as percent of total	6%	6%	5%	5%	6%	5%	5%	4%	5%
Sixth Circuit									
Total Appeals	4,859	4,954	4,725	4,855	5,137	4,698	4,478	5,242	4,591
BIA	343	327	266	306	317	237	232	194	196
BIA as percent of total	7%	7%	6%	6%	6%	5%	5%	4%	4%
Seventh Circuit									
Total Appeals	3,337	3,124	3,038	2,994	2,949	3,016	2,926	3,382	2,787
BIA	107	123	105	101	113	100	118	64	69
BIA as percent of total	3%	4%	3%	3%	4%	3%	4%	2%	2%
Eighth Circuit									
Total Appeals	3,113	2,878	2,876	3,080	2,937	2,927	2,952	3,665	2,957
BIA	76	83	90	111	137	101	101	113	104
BIA as percent of total	2%	3%	3%	4%	5%	3%	3%	3%	4%
Ninth Circuit									
Total Appeals	12,211	11,982	12,141	12,684	12,826	12,061	11,870	11,473	11,096
BIA	3,351	3,169	2,963	3,501	3,881	3,419	3,441	3,063	2,980
BIA as percent of total	27%	26%	24%	28%	30%	28%	29%	27%	27%

Total Appeals by Circuit: 2009-2017									
Tenth Circuit									
Total Appeals	2,328	2,270	2,311	2,170	2,091	1,986	1,956	2,338	1,856
BIA	65	69	60	73	80	89	79	47	40
BIA as percent of total	3%	3%	3%	3%	4%	4%	4%	2%	2%
Eleventh Circuit									
Total Appeals	6,995	6,438	6,233	6,998	6,366	6,152	6,115	8,023	6,098
BIA	536	427	369	324	341	253	273	226	229
BIA as percent of total	8%	7%	6%	5%	5%	4%	4%	3%	4%

Sources: <http://www.uscourts.gov/file/12806/download> (Table B3) (appeals filed 2009-2013)  
<http://www.uscourts.gov/file/19490/download> (Table B3) (appeals filed 2011-2015)  
[http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b3\\_0930.2017.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2017.pdf) (appeals filed 2016-2017)

**Table 4-3**

Reversal and Remand Rates for Asylum Cases by Circuit Court (%)											
Circuit	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
All	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9	15.9	13.1	11.2
First Circuit	7.1	3.8	4.2	5.6	8.6	19	10.4	10.5	16.3	13.9	7.3
Second Circuit	22.6	18	11.8	5.5	4.9	4.9	4.8	7.8	12.1	6.9	5.8
Third Circuit	15.8	10	9	16.4	10.7	11.3	6.7	8.5	15.5	11.1	15.1
Fourth Circuit	5.2	7.2	2.8	3.3	5.2	5.2	4.6	2.9	12.3	6.3	5.3
Fifth Circuit	5.9	8.7	3.1	4	13.5	2.9	7.5	1.9	5.9	2.5	6.5
Sixth Circuit	13	13.6	12	8.6	8.7	6.8	6.6	3.1	7.1	6.9	17.4
Seventh Circuit	24.8	29.2	17.1	14.3	21	19.4	8.5	25.7	19.6	25	22.5
Eighth Circuit	11.3	15.9	8.2	7.7	8.1	7.5	7.5	6.3	1.6	4.3	6.3
Ninth Circuit	18.1	16.4	16.2	17.2	15.9	18.6	14.4	13.9	22.8	18.1	13.7
Tenth Circuit	18	7	5.5	1.8	4.9	9.5	6.3	11.4	5.6	16.4	19.4
Eleventh Circuit	8.6	10.9	8.9	7.1	6.5	6.8	5.8	16.3	5.6	8.5	7.7

Source: <https://www.justice.gov/eoir/page/file/934171/download>



# 5

## Representation

2019 Update Report

### REFORMING THE IMMIGRATION SYSTEM

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

March 2019

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



AMERICAN BAR ASSOCIATION

Defending Liberty  
Pursuing Justice

American Bar Association  
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# Part 5: Representation

## I. Introduction and Summary on Representation

*“[R]emoval 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.”<sup>1</sup>*

Expanded representation in immigration proceedings has long been a priority for the ABA, and was central to the 2010 Report recommendations. In the years since the 2010 Report, the evidence that “access to a lawyer changes everything” in immigration removal proceedings has steadily grown. Efforts to expand access to counsel have also increased, but there is still no systemic, guaranteed right to access to counsel in immigration proceedings, nor is there the necessary framework for ensuring that existing programs are administered consistently and

fairly across all parts of the country. As enforcement actions increase, this vital component of ensuring due process in immigration matters is ever more crucial.

Representation is associated with dramatically more successful case outcomes for immigrant respondents.<sup>2</sup> Data shows that “it is nearly impossible”<sup>3</sup> for noncitizens to win their deportation cases without representation: in all cases in which the noncitizen won relief between 2007 and 2012, in “[o]nly 5 percent of cases . . . did [the noncitizen do] so without an attorney; 95 percent of successful cases were represented.”<sup>4</sup> Indeed, represented detained noncitizens were 10.5 times more likely to succeed in removal proceedings than their pro se counterparts.<sup>5</sup> Another analysis showed that representation made a fourteen-fold difference in respondent success rates in removal proceedings involving women with children.<sup>6</sup>

Representation also creates efficiencies for the immigration courts.<sup>7</sup> It is widely acknowledged that “[p]ro se respondents face difficulty representing themselves [in removal proceedings] and may contribute to delays in court processing.”<sup>8</sup> Studies

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1 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>.

2 See *id.*; 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581161).

3 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*], [https://storage.googleapis.com/vera-web-assets/downloads/Publications/why-does-representation-matter/legacy\\_downloads/why-does-representation-matter.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/why-does-representation-matter/legacy_downloads/why-does-representation-matter.pdf).

4 *Id.*

5 2015 *National Study of Access to Counsel*, *supra* note 2 at 57 (Released respondents were also 5.5 times more likely to succeed, and never-detained respondents were 3.5 times more likely to succeed. After controlling for factors including detention status, nationality, charge year and city, noncitizens with representation were 15 times more likely to seek relief, 5.5 times more timely to have relief granted, and almost 2 times as likely to have their case terminated).

6 TRAC, REPRESENTATION MAKES FOURTEEN-FOLD DIFFERENCE IN OUTCOME: IMMIGRATION COURT “WOMEN WITH CHILDREN” CASES (July 15, 2015), <http://trac.syr.edu/immigration/reports/396/>.

7 2015 *National Study of Access to Counsel*, *supra* note 2 at 2.

8 EOIR, LEGAL CASE STUDY SUMMARY REPORT 24-25 (Apr. 6, 2017) (recommending expansion of informational programs and further investigation into “the effect of representation on case processing, including public defender programs like in criminal proceedings.”) [hereinafter EOIR, LEGAL CASE STUDY], [https://www.americanimmigrationcouncil.org/sites/default/files/foia\\_documents/immigration\\_](https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_)

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confirm that noncitizens represented by counsel seek more meritorious relief and are more likely to appear at subsequent case hearings, resulting in fewer *in absentia* orders.<sup>9</sup> Surveys of immigration judges further indicate widespread agreement that competent representation by counsel helps the immigration courts to adjudicate cases “more efficiently and quickly.”<sup>10</sup> For instance, immigration judges report that when respondents are not represented by counsel, immigration judges have to “go beyond their traditional judicial duties” to explain court processes and procedures, which “slows down the hearing, introduces inefficiencies that could easily be handled by an attorney outside of court hours, and hinders the court from operating at its full potential.”<sup>11</sup> Counsel also help to quickly identify cases with no viable relief and process them expediently, while simultaneously helping to focus the immigration court’s limited resources where they are most needed.<sup>12</sup>

In sum, evidence shows that noncitizens represented by counsel seek more meritorious relief, and have higher success rates than their pro se counterparts. Immigration judges and commentators also agree that the presence of counsel helps courts adjudicate cases more fairly, efficiently, and quickly. Efficiency, expediency, and due process are important

considerations in light of the tremendous backlog of cases in the immigration courts, and are even more critical as the government continues to aggressively pursue immigration enforcement as a priority.<sup>13</sup>

However, despite these considerations, Congress has not taken legislative action since the 2010 Report to expand the right to representation in the immigration context. In this legislative vacuum, a variety of initiatives have developed to work towards ensuring increased and improved representation for noncitizens in removal proceedings. Optimism over anticipated expansion of such initiatives has, however, been replaced with fear for their survival, as recent executive actions signal a strong intent to eliminate programs that provide information and access to counsel for noncitizens facing removal proceedings.<sup>14</sup> Such actions emphasize the need for legislative action to promote and protect these programs, which provide access to critical services that help ensure due process and allow immigration courts to function more fairly and efficiently.

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.<sup>15</sup>

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judge\_performance\_metrics\_foia\_request\_booz\_allen\_hamilton\_case\_study.pdf.

9 2015 *National Study of Access to Counsel*, *supra* note 2 at 49, 57-58; *Impact of Legal Representation in Immigration Court*, *supra* note 3 at 2 (citing and summarizing research that “shows that representation has a positive effect on a person’s likelihood of appearing for subsequent court appearances.”).

10 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>.

11 NYIFUP ASSESSMENT, *supra* note 1 at 34 (citing interviews with Immigration Judges). *See also* 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*” (Apr. 18, 2018) at 6 (“Competent counsel, when available, can assist the Court in efficiently adjudicating cases before it.”), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>.

12 NYIFUP ASSESSMENT, *supra* note 1 at 37-38, 61.

13 *See, e.g.*, DHS, Enforcement Memorandum, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

14 *See* Maria Sacchetti, *Justice Dept. to halt legal-advice program for immigrants in detention*, WASHINGTON POST, Apr. 10, 2018, [https://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef\\_story.html?utm\\_term=.de029d5936e2](https://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef_story.html?utm_term=.de029d5936e2); Joshua Breisblatt, *Justice Department Will Not Halt Legal Orientation Program for Detained Immigrants, Reversing Course for Now*, AMERICAN IMMIGRATION COUNCIL IMMIGRATION IMPACT, Apr. 25, 2018, <http://immigrationimpact.com/2018/04/25/justice-department-legal-orientation-program-not-halt/> (last visited Dec. 20, 2018); EOIR, LEGAL ORIENTATION PROGRAM: COHORT ANALYSIS (Sept. 5, 2018) [hereinafter LOP COHORT ANALYSIS], <https://www.justice.gov/eoir/file/1091801/download>.

15 *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> [hereinafter Universal Representation for Detained Immigrants] (last visited Dec. 20, 2018).

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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.<sup>16</sup> Doing so vastly improved not only individual outcomes for detained noncitizens and their families, but helped to ensure due process and enhanced the overall functioning and efficiency of the overburdened immigration courts.<sup>17</sup> Even without centralized federal support or funding, 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.<sup>18</sup>

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.<sup>19</sup> Unlike universal representation programs modeled on NYIFUP, the

expansion of which has been constrained by local funding and political will, the *Franco-Gonzalez* decision directly led to the Department of Justice (“DOJ”) and Department of Homeland Security (“DHS”) announcing a nationwide policy to provide safeguards for unrepresented immigrant 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.<sup>20</sup>

Efforts to bring about similar change through litigation on behalf of detained noncitizen children have thus far been unsuccessful, however.<sup>21</sup> Instead, 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.<sup>22</sup> 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 Report. While elements of the remaining program are, as a practical matter, somewhat insulated from shifting

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16 NYIFUP ASSESSMENT, *supra* note 1 at 7.

17 *Id.* at 5-6.

18 *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](https://storage.googleapis.com/vera-web-assets/downloads/Publications/a-year-of-being-safe/legacy_downloads/a-year-of-being-safe.pdf).

19 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).

20 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/departments-justice-and-department-homeland-security-announce-safeguards-unrepresented> [hereinafter EOIR Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions] (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://clinicalegal.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) [hereinafter EOIR, Phase I of NQRP]; DOJ, EOIR, National Qualified Representative Program (NQRP), <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).

21 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).

22 See Section III.A.2.b.

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politics by virtue of the Trafficking Victims Protection Reauthorization Act (“TVPRA”), absent further legislative action to ensure continued funding, and more broadly to protect its existence, the scope and effect of such a project has an uncertain future.

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. Although recent actions by DOJ call the future of the program into question,<sup>23</sup> since the release of the 2010 Report, the Legal Orientation Program (“LOP”) has expanded to several new detention facilities.<sup>24</sup> The LOP program, funded by the Executive Office for Immigration Review (“EOIR”) and administered by the Vera Institute of Justice (“Vera”), serves to educate detained immigrants and asylum seekers about their rights and responsibilities, various aspects of immigration law, and the immigration court process. In 2016, the government also funded five Immigration Court Helpdesks (“ICHs”) to provide legal education and resources on the immigration process to non-detained immigrants in several of the busiest immigration courts in the country.<sup>25</sup> On April 10, 2018, however, DOJ abruptly announced that it was halting LOP, as well as the newly initiated ICH program.<sup>26</sup> DOJ’s

action was widely criticized.<sup>27</sup> Despite DOJ’s continuing “concern” about LOP, just 15 days after its original announcement it reversed course, stating before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, that “there would be no pause” in LOP services while DOJ studied the initiatives.<sup>28</sup> Despite surviving the initial threat, LOP’s future is hardly clear in the face of skepticism and scrutiny. Nevertheless, both LOP and ICH continue to operate at full capacity under Vera’s management as of the writing of this Update Report.

In 2015, EOIR also issued a final rule providing a more robust framework for the recognized organization and accredited representative program, which allows representation by non-lawyers who meet certain qualifications, and continued to pursue initiatives to combat fraud and ineffective assistance of counsel in immigration cases.<sup>29</sup> Recent proposed rule changes to further such efforts to issue ineffective assistance of counsel regulations, however, have been stalled since 2016.

While we continue to support the recommendations set forth in the 2010 Report, we broaden our recommendations in this Update Report to expressly support stabilizing, standardizing, and expanding programs that provide high-quality

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<sup>23</sup> See generally note 14, *supra*.

<sup>24</sup> 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). [hereinafter Vera Institute of Justice, LOP Facilities].

<sup>25</sup> See 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](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 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].

<sup>26</sup> See Press Release, Vera Institute of Justice, Statement on DOJ’s Decision to Halt Legal Orientation Program (Apr. 11, 2018), <https://www.vera.org/newsroom/press-releases/statement-regarding-legal-orientation-program>. In later reports, DOJ softened its messaging, stating that it was temporarily suspending the programs to audit their cost effectiveness.

<sup>27</sup> See, e.g., Maria Sacchetti, *supra* note 14 (“This is a blatant attempt by the administration to strip detained immigrants of even the pretense of due process rights,” quoting Mary Meg McCarthy, executive director of the National Immigrant Justice Center); Press Release, American Immigration Lawyers Association (“AILA”), DOJ Cuts Immigrants’ Access to Counsel in Latest Attack on Due Process (Apr. 11, 2018) [hereinafter AILA Press Release: Attack on Due Process] (DOJ’s decision to defund LOP will undermine due process and efficiency and is contrary to “Congress’ express instruction to continue such programming.”), <http://www.aila.org/advo-media/press-releases/2018/doj-cuts-immigrants-access-to-counsel-in-latest>; Letter from Twenty-Two U.S. Senators to U.S. Attorney General Jeff Sessions (April 18, 2018) (expressing “strong opposition” to DOJ decision), <https://www.cantwell.senate.gov/imo/media/doc/LOP%20Letter%20to%20DOJ.pdf>; Letter from 105 Members of Congress to U.S. Attorney General Jeff Sessions (April 18, 2018) (same), <https://quigley.house.gov/sites/quigley.house.gov/files/LOPICHLetter.pdf>. See Section III.B.2 for further discussion.

<sup>28</sup> DOJ, Opening Statement of Attorney General Jeff Sessions Before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies (April 25, 2018), <https://www.justice.gov/opa/speech/opening-statement-attorney-general-jeff-sessions-senate-appropriations-subcommittee> (last modified Apr. 25, 2018). See *infra* Section III.B.2. for further discussion.

<sup>29</sup> See EOIR, Fraud Prevention and Attorney Discipline Program, <https://www.justice.gov/eoir/fraud-and-abuse-prevention-program> (last modified Oct. 19, 2017); EOIR Fact Sheet, EOIR’s Fraud Abuse Prevention Program (June 2016), <https://www.justice.gov/sites/default/files/pages/attachments/2016/06/22/fraudandpreventionprogramfactsheet.pdf>.



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information and increased access to counsel for noncitizens facing removal proceedings. 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 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 increased access to 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.

## II. The 2010 Report and Recommendations

Increased representation of noncitizens will benefit both the respondents and other stakeholders in the removal adjudication system, including the immigration courts, by making the system fairer and more efficient.

At the time of the 2010 Report, less than half of the noncitizens whose immigration proceedings had been completed in the prior several years were represented. For example, in 2008, approximately 57% of these noncitizens were unrepresented; in 2007, the figure

was about 60%.<sup>30</sup> An even higher percentage (about 84%) of immigrants in detention were unrepresented.<sup>31</sup>

The 2010 Report identified barriers that impeded access to representation or other legal resources for noncitizen respondents. These included the unavailability of LOP for non-detained individuals in removal proceedings, as well as to many detainees held in facilities without a LOP program; the inability of many persons to afford or identify reputable private counsel; and the presence of systemic impediments facing detainees, like remote detention facilities, short visiting hours, restrictive telephone policies, and the practice of transferring detainees from one facility to another without notice.

Data presented in the 2010 Report showed that representation has a positive effect on the outcome of an immigrant's case. For example, noncitizens who are represented by counsel achieve better outcomes in their proceedings.<sup>32</sup> In contrast, the lack of adequate representation diminishes the prospects for fair adjudication for the noncitizen, causes delays, raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by "immigration consultants" and "notarios."

The 2010 Report also highlighted how the provision of representation to noncitizens restores legitimacy and levels the playing field in the immigration courts. A lawyer helps a noncitizen understand and effectively navigate the complexities of the U.S. immigration system, a process that can be especially daunting and difficult where language and cultural barriers are present. Moreover, representation for indigent noncitizens would help ameliorate legal

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30 See DOJ, EOIR, FY 2008 STATISTICAL YEAR BOOK G1 (2009), <https://www.justice.gov/sites/default/files/eoir/legacy/2010/03/04/fy09syb.pdf>.

31 See VERA INSTITUTE OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM 1 (May 2008), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy\\_downloads/LOP\\_Evaluation\\_May2008\\_final.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy_downloads/LOP_Evaluation_May2008_final.pdf).

32 For example, from January 2000 through August 2004, asylum seekers before the immigration courts were granted asylum 45.6% of the time when represented, compared to a 16.3% success rate when they proceeded pro se. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340-41 (2007). For an expanded version of the Refugee Roulette study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication & Proposals for Reform* (NYU Press 2009). More recently, in asylum cases at the affirmative application stage, the grant rate for applicants was 39% for those with representation and only 12% for those without it. See U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYS.: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS & JUDGES, 49 & fig. 6 (2008), <http://www.gao.gov/new.items/d08940.pdf>. The 2010 Report contains other similar statistics. See, e.g., 2010 Report, Part 5, Section III.C.

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errors and unnecessary appeals associated with pro se litigants.

The 2010 Report further explained how representation has the potential to increase the efficiency, and thereby reduce the costs, of at least some adversarial immigration proceedings. Pro se litigants can cause delays in the adjudication of their cases and, as a result, impose a substantial financial cost on the government. Immigration professors, judges, practitioners, and government officials surveyed for the 2010 Report observed that the presence of competent, well-prepared counsel on behalf of both parties helps to clarify the legal issues and allows courts to make more principled and better-informed decisions. In addition, representation can speed the process of adjudication, reducing detention costs.<sup>33</sup> This latter point is particularly important given the current immigration case backlog.

In short, the 2010 Report concluded that enhancing access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with pro se litigants, and more just outcomes for noncitizens. Against this backdrop, the 2010 Report made a number of recommendations aimed at improving: (1) the right to representation; (2) sources of representation; and (3) the quality of representation.

## III. Developments Since 2010

### A. Right to Representation

While overall representation rates in immigration court have increased from 43% in 2011 to 61% in 2016, these statistics alone provide an incomplete picture of the state of representation in immigration proceedings.<sup>34</sup> “Notwithstanding [the] increase, the raw number of unrepresented immigrants facing deportation in recent years is at historic highs.”<sup>35</sup> Indeed, in 73,524 cases that were completed in fiscal year 2016, the respondents lacked representation.<sup>36</sup> Commentators note that EOIR statistics on representation rates are inflated due, at least in part, to a corresponding decline in completed immigration cases as well as EOIR’s methodology for compiling the statistics, which uses individual hearings as the basis to determine whether a noncitizen is represented regardless of whether or not the individual secured representation for all or even most of his or her immigration proceedings.<sup>37</sup>

The statistics also 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’s case is adjudicated.<sup>38</sup> Indeed, “lack of representation in deportation proceedings is felt most acutely by detained immigrants.”<sup>39</sup> For example, one study found that during the six-year study period from 2007 to 2012, only 14% of detained

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33 See CATHOLIC LEGAL IMMIGRATION NETWORK, INC. ET AL., PETITION FOR RULEMAKING TO PROMULGATE REGULATIONS GOVERNING APPOINTMENT OF COUNSEL FOR IMMIGRANTS IN REMOVAL PROCEEDINGS 6-8 (June 29, 2009), [https://www.immigrantjustice.org/sites/default/files/Petition\\_for\\_Rulemaking\\_for\\_Appointed\\_Counsel%20June%202009.pdf](https://www.immigrantjustice.org/sites/default/files/Petition_for_Rulemaking_for_Appointed_Counsel%20June%202009.pdf). This finding has been verified in subsequent studies. See, e.g., 2015 *National Study of Access to Counsel*, *supra* note 2 at 2 (“involvement of counsel was associated with certain gains in court efficiency: represented respondents brought fewer unmeritorious claims, were more likely to be released from custody and, once released, were more likely to appear at their future deportation hearings”).

34 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>.

35 See NYIFUP ASSESSMENT, *supra* note 1 at 8 (citing Office of Immigration Statistics, 2015 *Yearbook of Immigration Statistics* (Washington, DC: Department of Homeland Security, 2016), 103 & Table 39, <https://perma.cc/9UT8-37UV>).

36 *Impact of Legal Representation in Immigration Court*, *supra* note 3 at 1 (citing FY 2016 STATISTICS YEARBOOK at F1).

37 See 2015 *National Study of Access to Counsel*, *supra* note 2 at 7-8, 16-18.

38 See *id.* at 30-47 (cataloging the unequal access to representation for noncitizens based on detention status, geographic location, and country of origin).

39 NYIFUP ASSESSMENT, *supra* note 1 at 8; see also *id.* at note 12 (compiling studies and articles showing that detained immigrants are significantly less likely than their non-detained counterparts to obtain representation in removal proceedings).



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respondents were represented by counsel, whereas 66% of their non-detained counterparts obtained representation.<sup>40</sup> Comparatively, the study further found that the highest representation rates for non-detained immigrants during the period occurred in New York (87%), while a shockingly low rate of detained immigrants in Tucson, Arizona (0.002%) obtained counsel.<sup>41</sup> Families and children negotiating complex removal proceedings are also substantially less likely to secure representation.<sup>42</sup> “In 2016, 70 percent of family units (adults and accompanying children in adjoined cases) were unrepresented at the time their cases closed” and “[a]s of August 2018, slightly more than half of all pending children’s cases were unrepresented.”<sup>43</sup> Furthermore, the court before which a noncitizen proceeds can reduce the individual’s chance of success by more than 70%.<sup>44</sup>

Because Congress has not taken action to expand the right of representation in the immigration context,<sup>45</sup> stakeholders have pursued various approaches, including private and public funding and litigation, in an effort to ensure 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. Furthermore, without legislative action, programs that are neither supported by statute nor mandated by law are at the mercy of changing political will.

### 1. A Universal Representation Model

One major accomplishment in the last nine years was the launch of the first publicly-funded universal representation project in New York City for indigent immigrants in removal proceedings. In 2014, the New York City Council fully funded NYIFUP, the first representation system in the country to provide government-funded legal counsel to all indigent, detained noncitizens in removal proceedings who meet certain financial eligibility requirements.<sup>46</sup> This program has had tremendous success.<sup>47</sup> A 2017 study evaluating NYIFUP found notable improvements to court operations and clients’ access to due process through the program. Specifically, the study found “a direct and causal relationship between representation

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40 2015 *National Study of Access to Counsel*, *supra* note 2 at 32.

41 *Id.* at 38-39, Figures 10a & 10b.

42 *Impact of Legal Representation in Immigration Court*, *supra* note 3 at 1.

43 *Id.*

44 See, e.g., FY 2017 STATISTICS YEARBOOK, *supra* note 34 at 29, Table 14 (asylum granted in 3% of all asylum cases resolved before the Atlanta immigration court and in 5% of cases resolved on the merits in FY 2017, 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 34 at K2 (the asylum grant rate for the Atlanta immigration court was only 2% in FY 2015 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>.

45 Immigration & Nationality Act (“INA”), 8 U.S.C. § 1362 (establishing the right to representation in immigration proceedings at “no expense to the government”).

46 See Universal Representation for Detained Immigrants, *supra* note 15. This model of representation is sometimes referred to as the public defender model.

47 Data from the NYIFUP pilot program showed that clients represented by counsel were more likely than their unrepresented counterparts to achieve favorable results in removal proceedings. For instance, 69% of noncitizens represented by counsel during the NYIFUP pilot won their merits hearings (20 of 29) and 42% of the 190 clients represented through the pilot were released from detention and reunited with their families. See Brooklyn Defender Servs., *New York Immigrant Family Unity Project (NYIFUP) Improving Access to Justice In Deportation Proceedings Presentation* at 8 (May 15, 2015), <http://www.national-consortium.org/~media/Microsites/Files/National%20Consortium/Conferences/2015/Materials/Improving-ATJ-in-Deportation-Proceedings.ashx>. NYIFUP was piloted in 2013 after a 2011 study found that detained unrepresented immigrants stood only a three percent chance of succeeding in removal cases. See Press Release, Speaker Quinn, Council Members & Immigration Rights Groups Announce Pilot Program Providing Legal Counsel for Immigrants Facing Deportation (July 19, 2013), <http://council.nyc.gov/press/2013/07/19/471/>; NYIFUP ASSESSMENT, *supra* note 1 at 10 (citing, Stacy Caplow et al., *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, *New York Immigrant Representation Study*, 33 CARDOZO L. REV. 357 (Dec. 2011) [hereinafter *Accessing Justice I*]), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1551&context=faculty>).

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through NYIFUP and successful case outcomes,”<sup>48</sup> and projected a 48% success rate for NYIFUP clients. This figure represents a 1,100% increase in successful case outcomes over pre-NYIFUP rates for a comparable cohort without representation.<sup>49</sup>

The study further documented that the presence of NYIFUP attorneys helped immigration proceedings run more efficiently and smoothly, which benefited all stakeholders.<sup>50</sup> Indeed, even ICE attorneys representing the federal government found that providing counsel to noncitizens in removal proceedings “is beneficial, as it allows for easier communication about issues that can be resolved with agreement.”<sup>51</sup> NYIFUP has also “proven successful at facilitating efficient court operations by quickly resolving large numbers of cases with no viable relief early.”<sup>52</sup> And while NYIFUP cases seeking relief lasted longer on average than the cases of unrepresented detained noncitizens, this finding was itself indicative of the role counsel plays in ensuring due process by evaluating and pursuing all potentially meritorious forms of relief.<sup>53</sup> NYIFUP was further instrumental in reducing detention time, reunifying families, and ultimately allowing noncitizens to return to life as contributing members of their communities.<sup>54</sup> Indeed,

the study found that NYIFUP helped obtain or maintain work authorization for more than 400 New Yorkers who are projected to produce \$2.7 million each year in tax revenue, a figure that is expected to be compounded with each generation of successful NYIFUP clients who return to their communities.<sup>55</sup>

NYIFUP proves that a universal representation model providing indigent, detained immigrants with counsel in removal proceedings is not only achievable, but ensures due process and creates efficiencies and benefits for respondents, the courts, and the community at large.<sup>56</sup>

NYIFUP’s success has inspired and will hopefully continue to inspire similar projects and movements throughout the country. The New York State Legislature funded the expansion of NYIFUP to Batavia and Ulster, New York from 2014 to 2016 on a limited basis,<sup>57</sup> and as a result of the full funding of NYIFUP in 2017, today every detained indigent noncitizen in immigration proceedings in New York State is afforded representation.<sup>58</sup> More recently, twelve additional cities and counties funded representation programs for indigent noncitizens in removal proceedings, and the hope is that momentum

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48 NYIFUP ASSESSMENT, *supra* note 1 at 29.

49 *Id.* at 6, 27-28.

50 *Id.* at 34-35.

51 *Id.* at 35 (quoting Khalilah Taylor, ICE’s Deputy Chief Counsel at Varick Street Immigration Courthouse in New York City).

52 *Id.* at 37-38.

53 *Id.* at 38-39. *See also id.* at 29 (quoting retired Immigration Judge Sarah Burr stating that “the most ‘significant part of [NYIFUP’s impact] is that it provides due process.’”); *id.* at 32 (retired Immigration Judge Alan Page remarking that “NYIFUP is a crucial player in the delivery of justice.”)

54 *Id.* at 49-52 (“NYIFUP obtains significantly higher rates of release for clients compared to unrepresented individuals, and with lower bond amounts. More than 750 clients, as of the data cutoff of Jun 30, 2016, have been reunited with their families”).

55 *Id.* at 6, 54-59.

56 *See Accessing Justice I, supra* note 47; *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings, New York Immigrant Representation Study Report: Part II* (Dec. 2012), <https://cardozo.yu.edu/sites/default/files/New%20York%20Immigrant%20Representation%20Study%20II%20-%20NYIRS%20Steering%20Committee%20%281%29.pdf>; Dr. John D. Montgomery, NERA Econ. Consulting, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings* (May 28, 2014), [http://www.nera.com/content/dam/nera/publications/archive2/NERA\\_Immigration\\_Report\\_5.28.2014.pdf](http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf) (analyzing fiscal cost savings achievable through providing representation in removal proceedings). Stakeholders also report that interactions within the New York Immigration courts are improved and that proceedings are more efficient upon the introduction of NYIFUP, which contributes to more professionalism in the courtrooms and increased counsel involvement.

57 Grace Paras & Marina Caeiro, Vera Institute of Justice, *Gaining Momentum: The New York Family Unity Project expands to the Ulster Immigration Court*, THINK JUSTICE BLOG (Dec. 7, 2015), <https://www.vera.org/blog/rss-feed-gaining-momentum-the-new-york-immigrant-family-unity-project-expands-to-the-ulster-immigration-court> (last visited Dec. 20, 2018).

58 *See* Press Release, Vera Institute of Justice, New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation (Apr. 7, 2017), <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation>.

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will continue to grow for such programs on the local- and state-wide level.<sup>59</sup>

One notable limitation to the widespread expansion of projects like NYIFUP is the current form of funding, which comes entirely from either local governments or private charitable sponsors. Such funding models, while achievable in geographic locations with high immigrant populations and communities sympathetic to immigrants, may be less successful in remote geographies or communities without similar support. It is thus unlikely that universal representation models can be replicated in all parts of the country absent some sort of centralized federal funding, ideally achieved through Congressional action to ensure the uniformity and stability of support for representation for all qualifying indigent noncitizens in removal proceedings.

## 2. Vulnerable Populations

### a. People Living with Mental Health Conditions

Another major advancement towards providing counsel to vulnerable noncitizens facing removal proceedings resulted from the 2010 class action lawsuit *Franco-Gonzalez v. Holder*.<sup>60</sup> In April 2013, the District Court for the Central District of California entered a permanent injunction in *Franco* requiring the U.S. government to provide unrepresented noncitizens who are found mentally incompetent to represent themselves due to a serious mental health condition and who are detained in California, Arizona, or

Washington with a qualified representative to provide legal representation in immigration proceedings.<sup>61</sup> The ruling further required that eligible class members be provided a bond hearing after 180 days of detention, even if held under mandatory detention provisions of the Immigration and Nationality Act (“INA”).<sup>62</sup> DOJ and DHS then contemporaneously announced a nationwide policy to provide safeguards for unrepresented immigrant detainees with serious mental disorders or conditions.<sup>63</sup> The policy provides for screening procedures and other measures to identify qualifying noncitizens, including the availability of court-ordered forensic competency exams designed to aid the immigration judge in the competency determination process. It also commits to “make available qualified representatives to detainees who are deemed mentally incompetent to represent themselves in immigration proceedings” and provide “bond hearings for detainees who were identified as having a serious mental disorder or condition that may render them mentally incompetent to represent themselves and have been held in immigration detention for at least six months.”<sup>64</sup> Over the following year, the resulting National Qualified Representative Program (“NQRP”) was established to provide legal representation to detained immigrants suffering from mental disabilities who were found not competent to represent themselves.<sup>65</sup>

EOIR’s proactive response in implementing a nationwide representation program to protect this vulnerable population and improve court efficiency

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59 SAFE Cities Network, *supra* note 18; Vera Institute of Justice, Project Page, *Safety and Fairness for Everyone (SAFE) Network*, <https://www.vera.org/projects/safe-network> (showing Denver, Colorado in addition to the eleven locations originally announced) (last visited Dec. 20, 2018). See also California Coalition for Universal Representation, *California’s Due Process Crisis: Access to Legal Counsel for Detained Immigrants* (June 2016), <http://www.publiccounsel.org/tools/assets/files/0784.pdf> (urging California to adopt universal representation for indigent, detained noncitizens in removal proceedings); Lori A. Nessel & Farrin Anello, Working Group on Immigrant Representation in New Jersey, *Deportation Without Representation: The Access-to-Justice Crisis Facing New Jersey’s Immigrant Families* (June 2016), <http://www.immigrationresearch-info.org/system/files/SSRN-id2805525.pdf> (urging the same and discussing a 2015 pilot program by the Friends Representation Initiative of New Jersey to provide universal indigent representation for detained immigrants in removal proceedings in New Jersey). See also EOIR, *LEGAL CASE STUDY*, *supra* note 8 at 25 (recommending that EOIR “analyze and assess the effect of representation on case processing, including public defender programs”).

60 *Franco-Gonzalez*, 2:10-cv-02211-DMG (DTBx) (C.D. Cal. 2010).

61 See *id.*, Dkt # 593, Partial Judgment and Permanent Injunction (C.D. Cal. Apr. 23, 2013). A partial settlement in the case was given preliminary approval on July 24, 2015, and final approval on September 25, 2015. See American Civil Liberties Union (ACLU), *Franco v. Holder*, Case Developments, <https://www.aclusocal.org/en/cases/franco-v-holder> (last visited Dec. 20, 2018).

62 See *Franco-Gonzalez*, 2:10-cv-02211-DMG (DTBx) (C.D. Cal. 2010), Dkt # 593, Partial Judgment and Permanent Injunction (C.D. Cal. Apr. 23, 2013) at 1-2.

63 See EOIR *Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, *supra* note 20.

64 *Id.*; EOIR, Phase I of NQRP, *supra* note 20.

65 See DOJ, EOIR, National Qualified Representative Program (NQRP), *supra* note 20.

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should be applauded. Nonetheless, there is still room and need for improvement. For instance, a noncitizen's rights may vary depending on whether they are a *Franco* class member or only eligible for NQRP through the nationwide policy. Under the *Franco* Settlement, class members are entitled to continuing and funded representation in immigration proceedings until there is a final administrative order, regardless of whether the noncitizen has been released from immigration detention. Conversely, qualifying noncitizens subject to the nationwide policy are only eligible for continuing and funded representation for 90 days after release from detention or the completion of the case, whichever occurs first.<sup>66</sup> If the case is still open after the 90-day period, counsel representing a non-*Franco* NQRP client may either continue the case pro bono, or attempt to withdraw representation.

Nor does NQRP provide services to noncitizens in all immigration courts as NQRP is currently only available in a limited number of immigration courts.<sup>67</sup> Stakeholders have also expressed concern over whether NQRP-eligible noncitizens are accurately identified in the first instance, and even if identified, whether that identification occurs early enough in the process to provide meaningful assistance. Stakeholders also suggest that additional protections or ethical guidance may be required in the context of NQRP representation.<sup>68</sup> For instance, complicated questions can arise regarding when and to what degree informed consent is required, as well as what the appropriate allocation of authority is between a lawyer and a client when the client has been found incompetent to represent himself in immigration proceedings, but retains decisional competence in other domains. NQRP-eligible noncitizens also

are not provided with guardians *ad litem* to assert the noncitizens' rights in a case where counsel may be subject to conflicting instructions or ethical obligations.<sup>69</sup>

As NQRP becomes more established, it will be important to expand the program to provide more complete coverage to all noncitizens suffering from severe mental disabilities and illness. NQRP should also continue to be evaluated to ensure it is meeting its goals, including assessing whether noncitizens that qualify for representation are being correctly identified, whether they are identified early enough to minimize delays and ensure due process concerns are satisfied, and whether additional measures are needed to provide meaningful representation and resolve ethical concerns that may arise.

#### b. Unaccompanied Children

Another vulnerable population of noncitizens for whom significant changes have taken place since the 2010 Report are unaccompanied immigrant children ("UICs" or sometimes referred to as unaccompanied alien children ("UACs")). 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."<sup>70</sup> While 2014 to 2017 saw an expansion of programs to provide government-funded representation to unaccompanied children, federally-supported programs have been scaled back significantly, in both number and scope. And, none of the programs cover or covered all unaccompanied children, let alone all children, entering the United States. Irrespective of their age, noncitizen children who do not fall within the

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66 See Amelia Wilson, Natalie H. Prokop & Stephanie Robins, *Addressing All Heads of the Hydra: Reframing Safeguards For Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. OF LAW & SOCIAL CHANGE 313, 317-318 n.10 (2015) [hereinafter *Safeguards for Mentally Impaired Detainees*], <https://socialchangenyu.com/wp-content/uploads/2015/09/wilsonprokoprobins-2.pdf>. If the court grants counsel's request to withdraw due to the discontinuation of NQRP funding, the noncitizen, who has already been found incompetent to represent him or herself, is again left without legal counsel. If the court denies a counsel's request to withdraw, funding continues to be provided until the court grants a motion to withdraw or the case is closed.

67 See Vera Institute of Justice, National Qualified Representative Program, Project Locations Map, <https://www.vera.org/projects/centers-programs> (last visited Dec. 20, 2018) (stating that as of July 2016, NQRP operated in six states, but was expanding with the goal of eventual nationwide operations).

68 See, e.g., *Safeguards for Mentally Impaired Detainees*, *supra* note 66 at 342-46.

69 See *id.* at 354-57. Appointment of a guardian *ad litem* is consistent with the American Bar Association's Model Rules of Professional Conduct. AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 1.14, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_14\\_client\\_with\\_diminished\\_capacity/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/).

70 See NIJC Immigration Court Helpdesk, *supra* note 25; TRAC, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURT (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/>.



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boundaries of the sole remaining federal program providing government-funded representation to children are left to represent themselves in adversarial removal proceedings with trained government attorneys on the other side. Further, the current administration's policies have been roundly criticized as being hostile towards child immigrants and their families, thus making an already difficult situation even worse.<sup>71</sup>

As noted in the 2010 Report, the Department of Health and Human Services ("DHHS") Office of Refugee Resettlement ("ORR") began to support projects aimed at procuring pro bono representation for certain children in immigration proceedings prior to 2010.<sup>72</sup> While ORR funded some limited direct representation prior to 2014, it was not until that year that government agencies, either on their own

accord or through private-public partnerships, began more widespread efforts to fund direct representation for certain unaccompanied children in immigration proceedings.<sup>73</sup> From 2014 to 2017, the level of funding and depth of services further expanded in large part in response to an overwhelming surge of child migration.

In 2014, the United States saw a dramatic increase in immigration across its Southwest border, including a large influx of Central American children, more than 60,000 of whom were unaccompanied.<sup>74</sup> EOIR was directed to prioritize resolving such cases.<sup>75</sup> Several government-funded programs emerged or expanded to provide direct representation and guidance to unaccompanied children who would otherwise have to navigate the complex immigration system alone. These programs included the Unaccompanied Children Program ("UCP"),<sup>76</sup> justice

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71 See Kids in Need of Defense (KIND), *Death by a Thousand Cuts The Trump Administration's Systematic Assault on the Protection of Unaccompanied Children* (May 2018) at 2, [https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts\\_May-2018.pdf](https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts_May-2018.pdf) ("President Trump, through a series of executive orders and published immigration priorities, categorized unaccompanied children in need of protection as opportunistic, and laws designed to give these children a fair opportunity to have their stories heard by our legal system as 'loopholes.'") [hereinafter *Death by a Thousand Cuts*].

72 See 2010 Report, Part 5, Section IIC.3.

73 See American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses* (June 26, 2015) (noting that in June 2014 justice AmeriCorps secured government funding to provide representation to certain children in immigration court and that funding for that program was increased in FY 2014 and FY 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> (last visited Dec. 20, 2018).

74 See U.S. Customs & Border Protection, *Southwest Border Unaccompanied Alien Children FY 2014*, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014> (last modified Nov. 24, 2015); see also CONGRESSIONAL RESEARCH SERVS., UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (Jan. 18, 2017), <https://fas.org/sgp/crs/homsec/R43599.pdf>.

75 See Memorandum from Brian M. O'Leary, Chief Immigration Judge, regarding Docketing Practices Relating to Unaccompanied Children Cases in Light of New Priorities (Sept. 10, 2014), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/30/Docketing-Practices-Related-to-UACs-Sept2014.pdf>; Memorandum from Brian M. O'Leary, Chief Immigration Judge, regarding Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities (Mar. 24, 2015), <https://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf>. Expedited proceedings for UACs coming during the surge had already been in effect since July, 2014.

76 Vera coordinates UCP with funding from ORR. The UCP's mission is to provide independent, quality legal services to unaccompanied children in removal proceedings. To accomplish this goal, Vera partners with a network of 36 legal service providers in 17 states and the District of Columbia. These providers inform children of their legal rights and responsibilities under U.S. law, provide individual screenings of their eligibility for legal relief, and defend some of them in their removal proceedings both directly and through pro bono placement with mentoring. See Vera Institute of Justice, *Legal Services for Unaccompanied Children* [hereinafter *Legal Services for Unaccompanied Children*], <https://www.vera.org/projects/legal-services-for-unaccompanied-children> (last visited Dec. 20, 2018).

AmeriCorps,<sup>77</sup> the Baltimore Representation Initiative for Unaccompanied Children (“BRIUC”),<sup>78</sup> and the Remote Access Initiative (“RAI”).<sup>79</sup> These programs provided legal information and screenings, referrals to pro bono attorneys, direct representation and/or friend of court assistance to unaccompanied children appearing in immigration court proceedings. As of the writing of this Update, however, only UCP remains intact; the others were quietly discontinued in 2017.<sup>80</sup>

Furthermore, while the current *ad hoc* system of providing representation to unaccompanied children is meaningful, it still leaves significant numbers of children without coverage, often based on circumstances beyond their control. For instance, while unaccompanied children from non-contiguous countries are automatically referred to ORR, placed in removal proceedings under section 240 of the INA, provided with legal information and screenings, and sometimes provided representation, children

<sup>77</sup> justice AmeriCorps was a strategic partnership between DOJ, through EOIR, and the Corporation for National and Community Service. This program provided representation to unaccompanied children in locations where grants had been awarded, but, until 2017, the program limited representation to children under the age of 16, among other restrictions. See Corporation for National & Community Service, Justice AmeriCorps Announcement of Federal Funding Availability, [https://www.nationalservice.gov/sites/default/files/documents/2015\\_justice\\_AmeriCorps\\_Notice\\_FINAL\\_5\\_28\\_2015.pdf](https://www.nationalservice.gov/sites/default/files/documents/2015_justice_AmeriCorps_Notice_FINAL_5_28_2015.pdf). A two-year study of the program, a copy of which was obtained by the ABA through a Freedom of Information Act request, found that justice AmeriCorps was “achieving its primary goal of increasing levels of representation for unaccompanied children in removal proceedings” and “positively affected the efficiency of hearings and the appearance rates of children.” VERA INSTITUTE OF JUSTICE, OUTCOME EVALUATION OF THE JUSTICE AMERICORPS LEGAL SERVICES PROGRAM FOR UNACCOMPANIED CHILDREN ii-iii (Oct. 2016), [https://www.americanbar.org/content/dam/aba/administrative/immigration/justice\\_ameriCorps\\_outcome\\_evaluation.pdf](https://www.americanbar.org/content/dam/aba/administrative/immigration/justice_ameriCorps_outcome_evaluation.pdf). Nonetheless funding for this program was terminated in June 2017. See *Death by a Thousand Cuts*, *supra* note 71 (noting the program expanded eligibility to children 18 and under shortly before the program was terminated under the current administration). See also Office of Management and Budget, *America First: A Budget Blueprint to Make America Great Again* at 11 (Mar. 15, 2018) (budget proposal eliminating funding for the justice AmeriCorps program along with agency that oversees such community programs), [https://www.whitehouse.gov/wp-content/uploads/2017/11/2018\\_blueprint.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/11/2018_blueprint.pdf); Erica L. Green, *Trump’s Budget, Breaking Tradition, Seeks Cuts to Services Programs*, N.Y. TIMES, Mar. 25, 2018, <https://www.nytimes.com/2017/05/25/us/politics/trump-budget-ameriCorps-peace-corps-service.html>; Kaitlin Mulhere, *Trump’s Budget Would Kill the Beloved Volunteer Program AmeriCorps*, MONEY MAGAZINE, Mar. 16, 2017, <http://time.com/money/4703924/trump-budget-ameriCorps-college-funding-cut/>.

<sup>78</sup> BRIUC was established in 2014 to offer direct representation funded by EOIR and the Office of Legal Access Programs (“OLAP”). To qualify for representation and other related services under this program the child must have been under the age of 16, released from ORR custody, served with a notice to appear in Baltimore Immigration Court, and not have had their case consolidated with a parent or legal guardian. DOJ, Baltimore Representation Initiative for Unaccompanied Children (BRIUC), <https://www.justice.gov/eoir/baltimore-representation-initiative-unaccompanied-children-briuc> (last modified Nov. 16, 2016). Funding for this program was discontinued as of 2017.

<sup>79</sup> RAI was an EOIR/OLAP sponsored program piloted in 2015, fully established in 2016, and discontinued in 2017. It had the same eligibility requirements as BRIUC, except that RAI provided representation to unaccompanied children in the Southeast who lived in remote area and had their immigration proceedings heard before the Memphis Immigration Court. EOIR Fact Sheet, EOIR Office of Legal Access Programs (Aug. 2016) at 3, <https://www.justice.gov/sites/default/files/pages/attachments/2016/08/08/olapfactsheet082016.pdf>; Legal Services for Unaccompanied Children, *supra* note 76.

<sup>80</sup> See *supra* notes 76-79. UCP, the single remaining federally-funded program providing representation to unaccompanied children, is arguably assured some level of protection by the Trafficking Victims Protection Reauthorization Act (“TVPPRA”). TVPPRA requires that children held in ORR custody be provided with counsel “to the greatest extent practicable.” 8 U.S.C. § 1232(a)(5)(D)(iii), (c)(5). (“The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters . . . . To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”). As currently structured, the UCP program provides representation to mostly detained UACs, and at a minimum, cannot be completely eliminated or defunded unless the government is able to identify and secure sufficient pro bono representation for qualifying UACs at no cost to the government. This is an unlikely scenario. See *id.* However, the elimination of other government-funded programs to support representation and access to counsel for unaccompanied minors puts into sharp focus how susceptible such programs are to changing political will. Where federal funding has all but dried up, state and local governments have in some instances bridged the gap by funding representation for indigent noncitizen children in immigration proceedings. See, e.g., Gloria Pazmino, *Over 100 unaccompanied minors gain legal status through City Council program*, POLITICO, Aug. 11, 2016 (discussing New York City Council’s private-public partnership to fund Immigrant Children Advocates’ Relief Effort (ICARE) in 2014 to provide representation to children in immigration proceedings), <https://www.politico.com/states/new-york/city-hall/story/2016/08/unaccompanied-minors-secure-legal-status-through-councils-legal-representation-program-104674>; Gloria Pazmino, *California sets up fund for legal representation of immigrant children*, REUTERS, Sept. 27, 2014 (“California will spend \$3 million to provide legal representation for unaccompanied immigrant children . . . becom[ing] the only U.S. state along the Mexican border to provide special funds for the legal representation in federal immigration court of children from an influx of unaccompanied, Central American minors . . .”), <https://www.reuters.com/article/us-usa-immigration-california/california-sets-up-fund-for-legal-representation-of-immigrant-children-idUSKCN0HN00B20140928>. Such local efforts are laudable and should be encouraged, but are no substitute for uniform federal legislative action providing representation to unaccompanied children, or even all children, in immigration proceedings.



from contiguous countries, such as Mexico, are generally returned to their home country with no access to legal services unless they are screened into the ORR system.<sup>81</sup> Similarly, children who cross the border with an adult or guardian do not qualify for representation under the available programs *unless* they are separated from that parent or guardian upon entry to the U.S., and deemed an unaccompanied child. This happened with much greater frequency over the summer of 2018 as a result of recent policy shifts, discussed further below.<sup>82</sup>

Recent policy positions adopted by DHS and EOIR have created confusion and sowed doubt as to how these programs operate. For instance, new DHS and EOIR policy call into question whether an unaccompanied alien child retains his or her UAC designation, and the special protections that flow from such a designation, if an eligible parent or legal guardian in the United States is identified to provide care and physical custody for the child.<sup>83</sup> According to a 2017 EOIR memorandum, immigration judges may redetermine a child's status as a UAC, and thus his or her eligibility for access to counsel, even where DHS and DHHS have already decided that the child is subject to protection under TVPRA.<sup>84</sup> As of

May 2018, non-profit service providers contracted to provide representation to UACs through UCP were further instructed to not take on any prospective cases of unaccompanied children if the child has been released from detention to a sponsor or guardian.<sup>85</sup> The possibility that a child's designation and rights can arbitrarily change mid-way through his or her immigration case is extremely disruptive and traumatic to the child, as well as inefficient for the system.

Moreover, the interplay between this and other recent immigration policy changes post-2017 have created some unusually cruel quandaries for immigrant families and communities. For instance, executive branch policies mandating criminal prosecution of parents or guardians entering without prior authorization — in many instances against asylum seekers — resulted in the forcible separation of families on the border. Adults were funneled into criminal proceedings and children into separate removal proceedings. This “zero tolerance” policy, discussed in Part 1 of this Update Report, resulted in approximately 2,700 children, some merely infants, being separated from their parents, placed in ORR custody, and rendered unaccompanied children (while

81 The immigration laws allow DHS to immediately return a child from a contiguous country to his or her home country after a cursory screening unless the child fears return to the home country, has been a victim of trafficking or is at risk of trafficking upon return, or the child is unable to make an independent decision to return. Compare 8 U.S.C. § 1232(a)(2)(A) with 8 U.S.C. § 1232(a)(3) and 8 U.S.C. § 1232 (b)(3). See also 8 U.S.C. § 1232(a)(5)(D); CONGRESSIONAL RESEARCH SERVS., UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW, *supra* note 74; First Focus, *Legal Protections for Unaccompanied Minors in the Trafficking Victims Protection Act of 2008* (July 2014), <https://firstfocus.org/wp-content/uploads/2014/08/Legal-Protections-for-Unaccompanied-Minors-in-the-Trafficking-Victims-Protection-Act-of-2008.pdf>.

82 In April 2018, former Attorney General Sessions announced the administration's “zero tolerance” policy, under which all immigrants caught crossing the border without authorization would be referred for criminal prosecution. Press Release, DOJ, Office of Public Affairs, Attorney General Announces Zero-Tolerance Policy of Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>. Pursuant to this policy change, the government began an unprecedented campaign that resulted in approximately 2,700 children being separated from their parent or guardian at the border. These children were thus rendered UACs by virtue of the government's actions. Courts subsequently ordered DOJ to cease separating families at the border in June 2018 and to attempt to reunite those children that were separated from their parents or guardians. *Ms. L. v. ICE*, 18-cv-0428 DMS (MDD), Dkt # 83, Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction (S.D. Cal. Jun. 26, 2018).

83 See DHS Enforcement Memorandum, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017) at 10-11 [hereinafter DHS Enforcement Memo, *Implementing Border Security*], [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf); Memorandum from James R. McHenry III, Acting Director EOIR, regarding Legal Opinion re: EOIR's Authority to Interpret the term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sept. 19, 2017), <https://cliniclegal.org/sites/default/files/resources/King-9-19-17-UAC-TVPRA.pdf>.

84 Memorandum from James R. McHenry III, Acting Director EOIR, *supra* note 83 at 3-4.

85 See U.S. SENATE, STAFF REPORT, OVERSIGHT OF THE CARE OF UNACCOMPANIED ALIEN CHILDREN 37-38 (Aug. 15, 2018), <https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf> (stating “HHS has directed its grantee legal service providers to stop accepting new clients from the population of UACs already released to sponsors. According to ORR Director Scott Lloyd, HHS's authority to provide legal services to children released to sponsors is ‘shaky.’ This interpretation is contrary to law.”). See also Meredith Hoffman, *Trump has Quietly Cut Legal Aid for Migrant Kids Separated from Parents*, VICE MAGAZINE, May 31, 2018, [https://www.vice.com/en\\_us/article/a3a798/trump-has-quietly-cut-legal-aid-for-migrant-kids-separated-from-parents](https://www.vice.com/en_us/article/a3a798/trump-has-quietly-cut-legal-aid-for-migrant-kids-separated-from-parents) (“The Office of Refugee Resettlement, a federal program that for over a decade has funded organizations representing unaccompanied minors in immigration court while those children live with adult relatives or guardians, told the groups to stop taking new cases just days after the family separation policy began. . .”).

their parents faced criminal charges).<sup>86</sup> In addition to the sheer trauma of such an event, this policy places significant additional burdens on ORR and needlessly multiplies the number of cases before the already overburdened immigration courts.<sup>87</sup> Such policies, which penalize children and families, are not only morally reprehensible, but also frustrate the efficient and fair resolution of cases.<sup>88</sup>

Meanwhile, efforts to establish a constitutional right to counsel for indigent children through litigation have been unsuccessful.<sup>89</sup> In 2014, a class of unrepresented minors in immigration detention brought suit asserting a right to appointed counsel. They argued that the government's failure to provide representation in immigration proceedings to children as young as one year old violated the children's Fifth

Amendment right to Due Process.<sup>90</sup> After preliminary discovery,<sup>91</sup> the suit was ultimately dismissed for lack of jurisdiction.<sup>92</sup>

The harsh reality of this situation was recognized in a special concurring opinion in *J.E.F.M. v. Lynch*.<sup>93</sup> Judges McKeown and Smith stated that "as of September 2015 children in more than 32,700 pending immigration cases were unrepresented" and that the programs that existed at the time were "a drop in the bucket in relation to the magnitude of the problem — tens of thousands of children will remain unrepresented" in removal proceedings absent executive or congressional action.<sup>94</sup>

The continued denial of representation to children in immigration proceedings, some mere infants and toddlers, raises serious due process concerns and

<sup>86</sup> See Memorandum from Attorney General Jeff Sessions, regarding Zero-Tolerance for Offenses Under 8 U.S.C. § 1322(a) (Apr. 6, 2018), [https://www.justice.gov/opa/press-release/file/1049751/download?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/opa/press-release/file/1049751/download?utm_medium=email&utm_source=govdelivery); Brett Samuels, *Sessions unveils 'zero tolerance' policy at southern border*, THE HILL, May 7, 2018, ("Attorney General Jeff Sessions on Monday announced that the Department of Justice (DOJ) has enacted the previously announced 'zero tolerance' policy for individuals who cross the southern border illegally, warning that children who are apprehended may be separated from their family."), <http://thehill.com/homenews/administration/386634-sessions-illegal-border-crossers-will-be-prosecuted-families-may-be>. See also Daniella Diaz, Kelly: DHS is considering separating undocumented children from their parents at the border, CNN, Mar. 7 2017, <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>; Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From parents at U.S. Border*, N.Y. TIMES, Apr. 20, 2018, <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>.

<sup>87</sup> See *Death by a Thousand Cuts*, *supra* note 71 at 2-3. Despite President Trump's executive order, issued on June 20, 2018, rescinding the former policy, the impacts remain. See Executive Order: Affording Congress an Opportunity to Address Family Separation (June 20, 2018), [https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/?utm\\_source=twitter&utm\\_medium=social&utm\\_campaign=wh](https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/?utm_source=twitter&utm_medium=social&utm_campaign=wh) (last visited Dec. 20, 2018).

<sup>88</sup> In addition, other recent policies may make it less likely that non-detained family members or qualified guardians, particular those lacking documentation themselves, will come forward to claim unaccompanied children. A DHS memorandum implementing President Trump's border security and immigration enforcement priorities makes clear that parents or family members may be prosecuted and, if removable, subject to deportation if they "directly or indirectly" facilitate the illegal smuggling of a child to the United States. DHS Enforcement Memo, *Implementing Border Security*, *supra* note 83 at 11. When viewed in the context of the above DHS and EOIR policies terminating UAC status and the attendant benefits including right to counsel, an adult who may otherwise seek to reunite with a child is faced with an impossible choice: risk one's own freedom and the child's best chances at prevailing in his or her immigration case, or risk losing the child forever to ensure one's own safety and improve the likelihood that the child will be provided access to counsel and thereby dramatically increase that child's likelihood of winning his or her immigration case? The effect of such policies is yet unknown.

<sup>89</sup> See *J.E.F.M.*, *supra* note 21 at 1038 (holding that the district court lacked jurisdiction to decide the minors's claims that they were entitled to court-appointed counsel because those claims arose from their removal proceedings and thus had to be resolved through the process set forth in 8 U.S.C. § 1252).

<sup>90</sup> See *J.E.F.M. v. Holder* Complaint, Case 2:14-cv-01026-TS, Dkt # 1, (Jun. 9, 2014), [https://www.americanimmigrationcouncil.org/sites/default/files/litigation\\_documents/flb\\_v\\_lynch\\_complaint.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/flb_v_lynch_complaint.pdf).

<sup>91</sup> In connection with this case, Assistant Chief Immigration Judge Jack H. Weil, appearing on behalf of EOIR, testified that he taught three- and four-year-olds immigration law such that those children were able to receive a fair hearing. This testimony was met with incredulity and was widely criticized. See, e.g., AFL-CIO, *Former Immigration Judge Responds: No, Toddlers Can't Represent Themselves in Court* (Mar. 9, 2016), <https://aflcio.org/2016/3/9/former-immigration-judge-responds-no-toddlers-cant-represent-themselves-court> (last visited Dec. 20, 2018); Jerry Markon, *Can a 3-year old represent herself in immigration court? This judge thinks so*, WASHINGTON POST, Mar. 5, 2016, [hereinafter Markon, *Can a 3-year old represent herself in immigration court?*], [https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d\\_story.html?utm\\_term=.9d5d701acfec](https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?utm_term=.9d5d701acfec).

<sup>92</sup> See *J.E.F.M.*, *supra* note 21.

<sup>93</sup> See *J.E.F.M.*, *supra* note 21 at 1026 (dismissing class action on behalf of indigent noncitizen children for lack of jurisdiction).

<sup>94</sup> See *id.* at 1040, n.8.

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eviscerates the illusion of fairness such proceedings may have otherwise maintained in the public eye.<sup>95</sup>

### 3. Recommended Legislative Action

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 EOIR, and, if necessary, to advise such individuals of their rights to appeal to the federal Circuit Courts of Appeals.<sup>96</sup> 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 pro bono counsel or the financial means to hire private counsel, prioritizing government-funded counsel for detained individuals in removal proceedings. We further recommend that legislative action be taken to stabilize, standardize and expand programs designed to provide noncitizens in removal proceedings, particularly vulnerable populations like children and individuals with mental disabilities, with more high-quality information and representation.

In order to limit controversy over whether the provision of government-funded representation is permitted, the 2010 Report recommended that Congress take action to eliminate the “no expense to the government” limitation of section 292 of the 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

### 1. Access to Pro Bono Service Providers

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.<sup>97</sup> While lists of pro bono service providers are available through LOP service providers, immigration courts, and the EOIR website, the onus is often on the immigrant to proactively reach out to obtain further assistance. This can be particularly problematic for certain classes of noncitizens or those detained in remote facilities. Immigration judges should make particular efforts to facilitate pro bono representation on behalf of 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.<sup>98</sup>

In September 2015, EOIR published a final rule enhancing eligibility requirements for the service providers included on its pro bono service providers list.<sup>99</sup> The final rule permits EOIR’s Director to add or remove providers from the list, and requires approved providers to re-certify their eligibility every three years.<sup>100</sup> The aim of the rule change was to improve the functioning and integrity of the list by providing immigrants in removal proceedings a

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<sup>95</sup> See, e.g., Markon, *Can a 3-year old represent herself in immigration court*, *supra* note 91; Melissa Locker, *John Oliver Puts Immigration Courts on Trial on Last Week Tonight*, TIME MAGAZINE, Apr. 2, 2018, <http://time.com/5224255/john-oliver-immigration-courts-last-week-tonight/>.

<sup>96</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/board_of_governors/2018_2019_policy_and_procedures_handbook.pdf).

<sup>97</sup> See 2015 *National Study of Access to Counsel*, *supra* note 2 at 25-28 (finding that “pro bono legal services in removal proceedings are extremely scarce” and that fewer than two percent of all immigrants facing removal during the study period received pro bono representation from nonprofit organizations, law school clinics, or large law firms).

<sup>98</sup> AM. BAR ASS’N, MODEL RULES OF JUDICIAL CONDUCT R. 3.7, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_3/rule3\\_7participationineducational/](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3/rule3_7participationineducational/).

<sup>99</sup> 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).

<sup>100</sup> See *id.*

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reliable resource listing individuals and entities that provide a significant and consistent source of pro bono representation in immigration cases.<sup>101</sup>

In addition to proceedings before EOIR, appointment of pro bono counsel to immigration cases appealed to the courts of appeals is invaluable both for the noncitizen and the courts. The Ninth Circuit has maintained a robust pro bono program which provides counsel to pro se parties with meritorious or complex appeals, including a significant number of immigration cases. The Ninth Circuit also provides additional resources, including an immigration outline and additional assistance through the Immigration Legal Resource Center.<sup>102</sup> Such programs to increase pro bono representation and distribute information allow the courts of appeals to make more effective, well-reasoned, and fair decisions. Such efforts are laudable, and other courts of appeal should be encouraged to examine and adopt similar programs to increase representation for pro se litigants in immigration appeals.

## 2. Expansion and Subsequent Attack on LOP

LOP is one important means through which noncitizens in removal proceedings are provided access to high-quality legal information and help accessing pro bono representation. According to the National Association of Immigration Judges (“NAIJ”), “[t]he overwhelming majority of judges that are presiding over cases in . . . detention facilities have told [the NAIJ] that LOP has been a very effective tool in making sure the cases are handled

in a fair manner and that there is due process for the immigrant.”<sup>103</sup> Through LOP, representatives from nonprofit organizations provide individuals who appear before immigration agencies and tribunals with information regarding basic immigration law and procedure before immigration courts.<sup>104</sup> LOP involves four levels of service. Information is provided through group orientations, individual one-on-one sessions, self-help workshops, and, depending on the noncitizen’s potential eligibility for relief and existing capacity, placement with pro bono counsel. This last aspect of LOP provides a critical link between those who need representation and those willing to provide it. However, the availability of legal services for noncitizens, including pro bono counsel, remains limited.<sup>105</sup>

At the time of the 2010 Report, LOP operated at only 25 of the approximately 350 detention facilities under contract with DHS.<sup>106</sup> Moreover, LOP did not reach any non-detained persons or target those who might have special need for legal representation, such as unaccompanied minors and persons with mental disabilities and illnesses.

In the last nine years, LOP expanded in three major ways. First, LOP grew by more than 40% to serve 38 detention facilities,<sup>107</sup> including two family detention facilities.<sup>108</sup> Nonetheless, detainees in the vast majority of ICE detention facilities still have no access to LOP services.

Second, LOP-like services were extended to non-detained immigrants for the first time through the creation of the Immigration Court Helpdesk Program

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<sup>101</sup> See 79 Fed. Reg. 55,662; 80 Fed. Reg. 59,503.

<sup>102</sup> See United States Court of Appeals for the Ninth Circuit, *Pro Bono Program Handbook* at 2, <http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf>.

<sup>103</sup> Massoud Hayoun, *Immigration Judges Are Bewildered by the DOJ’s decision to Slash Legal Guidance for Detainees*, PACIFIC STANDARD, Apr. 18, 2018, <https://psmag.com/social-justice/immigration-judges-are-bewildered-by-the-doj-s-decision-to-slash-legal-guidance-for-detainees> (quoting Judge Ashley Tabaddor, president of the National Association of Immigration Judges).

<sup>104</sup> See Statement of Juan P. Osuna, Director EOIR Before the United States House of Representatives Committee on the Judiciary Hearing on Oversight of the Executive Office for Immigration Review (Dec. 3, 2015), <https://www.judiciary.senate.gov/imo/media/doc/02-23-16%20Osuna%20Testimony.pdf>.

<sup>105</sup> See Vera Institute of Justice, *Legal Orientation Program, Learn More*, <https://www.vera.org/projects/legal-orientation-program/learn-more> (last visited Dec. 20, 2018). See also Section III.B.1, *supra*.

<sup>106</sup> See 2010 Report, Part 5, Section II.C.1. See also News Release, U.S. Department of Justice, *EOIR Adds Twelve New Legal Orientation Sites 1* (Oct. 15, 2008), <http://www.ilw.com/immigrationdaily/news/2008,1021-EOIR.pdf>.

<sup>107</sup> Vera Institute of Justice, *LOP Facilities*, *supra* note 24.

<sup>108</sup> See *id.* The two family facilities are Karnes Family Residential Center in Texas and the Berks County Family Shelter in Pennsylvania. LOP services also were provided at South Texas Family Residential Center, but have since ceased operation.



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“ICH”).<sup>109</sup> Born out of a pilot program in Chicago,<sup>110</sup> the goal of ICH is to serve non-detained immigrants by educating them about the removal hearing process, available remedies, and legal resources. Congress provided funding to launch ICH at five of the busiest immigration courts, located in Chicago, Los Angeles, Miami, New York, and San Antonio. ICH provides individual and group in-person information sessions, self-help resources, and information on available pro bono legal assistance.

Third, in the fall of 2010, pursuant to statutory mandate, EOIR launched the Legal Orientation Program for Custodians of Unaccompanied Alien Children (“LOPC”). This program provides legal orientation presentations to the adult caregivers (custodians) of reunified children in removal proceedings.<sup>111</sup> The purpose of this program is to inform children’s custodians of their responsibilities in ensuring the child’s appearance at all immigration proceedings, as well as protecting the child from mistreatment, exploitation, and trafficking, as required under the TVPRA.<sup>112</sup> EOIR works with DHHS, ORR, and non-governmental partners to carry out this program nationally.<sup>113</sup> Given the particular vulnerabilities of children and the challenges facing newly-reunified families, these programs are critical to ensuring children do not get lost in the system.

These programs are also important because evidence demonstrates that LOP creates efficiency and cost savings. A 2012 EOIR study found that:

“detained aliens’ participation in LOP significantly reduced the length of their immigration court proceedings. On average during FY2009-2011 . . . , detained aliens who participated in LOP completed their detained immigration court proceedings an average of 12 days faster than those who did not participate in LOP. ICE data showed that these same LOP participants spent an average of six fewer days in ICE detention than the aliens in the comparison group.”<sup>114</sup>

The reduction in detention days for immigrants in LOP resulted in cost savings of more than \$19.9 million annually and a net savings to the government of more than \$17.8 million.<sup>115</sup>

In a more recent 2017 study commissioned by EOIR, the independent consultant group Booz Allen Hamilton similarly recommended “expanding ‘know your rights’ and legal representation programs, such as the Legal Orientation Program . . .” to improve efficiencies and streamline proceedings in immigration courts.<sup>116</sup> In a November 30, 2017 memorandum, ICE concurred with these findings, stating that “[e]xperience has shown that LOP attendees are positioned to make better informed decisions, are more likely to obtain legal representation, and complete their cases faster than detainees who have not received the LOP.”<sup>117</sup>

Finally, Vera, pursuant to contractual instructions from DOJ, published a memorandum and study

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109 See EOIR Notice, EOIR Announces Creation of Information Helpdesks, *supra* note 25.

110 See NIJC Immigration Court Helpdesk, *supra* note 25.

111 See 8 U.S.C. § 1232(c)(4) (directing DHHS to cooperate with EOIR “to ensure that custodians receive legal orientation presentations” and that “at a minimum, such presentations shall address the custodian’s responsibility to attempt to ensure the child’s appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking”); DOJ, Legal Orientation Program for Custodians of Unaccompanied Alien Children [hereinafter DOJ LOPC Announcement], <https://www.justice.gov/eoir/legal-orientation-program-custodians-unaccompanied-alien-children> (last modified Apr. 13, 2018).

112 8 U.S.C. § 1232(c)(4); DOJ LOPC Announcement, *supra* note 111.

113 See DOJ LOPC Announcement, *supra* note 111. LOPC currently partners with local non-profits in 14 cities (Atlanta, Boston, Charlotte, Dallas, Harlingen, Houston-Galveston, Los Angeles, Memphis, Miami, Newark, New York, Philadelphia, San Francisco, and Washington, D.C.-Arlington). EOIR, LOPC Providers Contact Information - English, <https://www.justice.gov/sites/default/files/pages/attachments/2015/12/02/lopcoverview-english.pdf>. The local non-profit services provider conduct the orientations and provide a local social service point of contact for the custodians and children. DOJ LOPC Announcement, *supra* note 111.

114 EOIR, COST SAVINGS ANALYSIS: THE EOIR LEGAL ORIENTATION PROGRAM 2 (Apr. 4, 2012), [https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP\\_Cost\\_Savings\\_Analysis\\_4-04-12.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf).

115 See *id.* at 3.

116 EOIR, LEGAL CASE STUDY, *supra* note 8 at 24-25.

117 Memorandum from Tae Johnson, Assistant Director for Custody Management, U.S. Immigration and Customs Enforcement (“ICE”), regarding Updated Guidance: ERO Support of the U.S. Department of Justice Executive Office for Immigration Review of Legal

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analyzing the relationship between LOP and case completion times.<sup>118</sup> The memorandum, dated April 1, 2018 and submitted to EOIR, highlights that LOP is associated with faster case completions and that statistically, on any given day it is more likely that LOP cases will complete than non-LOP cases.<sup>119</sup> The study, published September 14, 2018, further elucidates these findings. It showed that LOP participants received fewer *in absentia* orders than non-LOP groups, completed cases in higher percentages than non-LOP cohorts (despite higher rates of continuances for LOP recipients) after the first month of the case, and completed 50% of their cases three times as quickly as it took for the non-LOP cohort to complete 50% of their cases (140 days for LOP recipients as compared to 421 days for the non-LOP cohort). These results were statistically valid with 99% certainty.<sup>120</sup>

However, optimism regarding the successful expansion of LOP over the past nine years has been severely tempered by the current administration's actions. In the Spring of 2018, DOJ challenged the results of studies showing the benefits of LOP, and announced intended action that would threaten or terminate LOP in its entirety.

Despite its demonstrated benefits and the modest-but-steady expansion of LOP since 2010, on April 10, 2018, DOJ announced that it intended to cease funding for LOP services as of April 30, 2018, while it audited the benefits of the program.<sup>121</sup> Stakeholders from across the spectrum were surprised and dismayed by the move, causing many to decry the announcement as a backwards step that would undermine due process and further burden the already overburdened courts.<sup>122</sup> Fifteen days after the original announcement, DOJ reversed its decision, stating that “there would be no pause” in LOP services while DOJ studied the program. DOJ said, however, that it continued to have unspecified “concerns” about LOP.<sup>123</sup>

EOIR released the results of the first phase of DOJ's study of LOP on September 5, 2018.<sup>124</sup> In its Phase I analysis, EOIR concluded that LOP participants stayed longer in detention, were less likely to receive representation, did not have greatly differing case outcomes or completion rates from non-LOP respondents, and consumed more judicial resources in terms of length and number of hearings.<sup>125</sup> The Phase I analysis further found that hearing location, custody status, and other factors were statistically significant confounding factors for

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Orientation Program (Nov. 30, 2017), <https://www.aila.org/infonet/ice-memo-on-ero-support-of-the-eoirs-legal>.

118 VERA INSTITUTE OF JUSTICE, LOP CASE TIME ANALYSIS, FISCAL YEARS 2013-2017 (Sept. 14, 2018) [hereinafter VERA LOP CASE TIME ANALYSIS], <https://www.tahirih.org/wp-content/uploads/2018/10/2018-51777-Doc-02-21-pgs.pdf>; Vera Institute of Justice, Memorandum from Nina Siulc, Vera Institute of Justice, to Steven Lang, EOIR, regarding Update on Performance Indicators: LOP Case Time Analysis (Apr. 1, 2018) [hereinafter Vera LOP Memo], [https://www.tahirih.org/wp-content/uploads/2018/09/Vera-LOP-2018-Reports-combined-8-pgs\\_FINAL.pdf](https://www.tahirih.org/wp-content/uploads/2018/09/Vera-LOP-2018-Reports-combined-8-pgs_FINAL.pdf).

119 Vera LOP Memo, *supra* note 118.

120 VERA LOP CASE TIME ANALYSIS, *supra* note 118.

121 See Maria Sacchetti, *supra* note 14. DOJ's announcement came just nine days after EOIR received Vera's LOP memorandum highlighting LOP's benefits to completing immigration cases. See Vera LOP Memo, *supra* note 118.

122 See, e.g., AILA Press Release: Attack on Due Process, *supra* note 27 (stating that DOJ's decision to defund LOP will undermine due process and efficiency and is contrary to “Congress’ express instruction to continue such programming, along with the provision of funding in the fiscal year 2018 appropriations bill, recently signed by the president”); Letter from Twenty-Two U.S. Senators to U.S. Attorney General Jeff Sessions, *supra* note 27 (expressing “strong opposition” to DOJ decision and incredulity at the asserted rationale, stating “the decision belies the Department of Justice’s (“DOJ”) stated goal of reducing the backlog in our immigration courts. Halting LOP and the ICH will severely undermine due process for people who are facing deportation but cannot afford an attorney”); Letter from 105 Members of Congress to U.S. Attorney General Jeff Sessions, *supra* note 27 (same, and noting action was contrary to congressional directive); Massoud Hayoun, *supra* note 103 (quoting Judge Ashley Tabaddor, president of the National Association of Immigration Judges: “It certainly raises questions about their stated goal of wanting to bring greater efficiencies to the court and the management of the docket. This has been a proven tool of bringing about due process and efficiencies to an otherwise cumbersome system.”).

123 Opening Statement of Attorney General Jeff Sessions Before the Senate Appropriations Subcommittee, *supra* note 28.

124 See LOP COHORT ANALYSIS, *supra* note 14. 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 completion times. See VERA LOP CASE TIME ANALYSIS, *supra* note 118.

125 LOP COHORT ANALYSIS, *supra* note 14 at 4. It is notable that the Phase I analysis attempted to examine LOP's impact on issues outside of case completion times, the sole subject Vera had been requested to study. See VERA LOP CASE TIME ANALYSIS, *supra* note 118.



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certain results, and included the caveat that the study was complicated by missing or incomplete data.<sup>126</sup> EOIR's methodology has been roundly criticized and stakeholders have expressed concern regarding the government's approach and results.<sup>127</sup> As of the writing of this Update Report, EOIR has not published any additional phases of its analysis.<sup>128</sup>

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

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 of indigent immigrants.<sup>131</sup>

### *3. The Recognition and Accreditation Program for Non-Attorney Representatives*

Unlike in other areas of the law, noncitizens in immigration proceedings may be represented by non-lawyers, including accredited representatives.<sup>132</sup> Since 2010, stakeholders have pushed for guidance and enhanced standards to promote quality non-lawyer representation and protect noncitizens from falling prey to unscrupulous practitioners. In December 2016, EOIR formally announced its final rule for Recognition and Accreditation Programs ("R&A final rule").<sup>133</sup> 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."<sup>134</sup>

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.<sup>135</sup> For instance, the rule

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<sup>126</sup> *Id.*

<sup>127</sup> See, e.g., Press Release, Tahirih Justice Center, Statement on DOJ Analysis of Legal Orientation Program (Oct. 16, 2018) ("The Tahirih Justice Center is deeply concerned about a report published on September 5, 2018 by the Executive Office for Immigration Review (EOIR) that seeks to discredit the Legal Orientation Program (LOP), and here shares contradictory information obtained through a Freedom of Information Act request."), <https://www.tahirih.org/wp-content/uploads/2018/10/Tahirih-Statement-on-LOP-Analysis-002.pdf>; Press Release, Vera Institute of Justice, Statement on DOJ Analysis of Legal Orientation Program (Sept. 5, 2018) ("There are insurmountable methodological flaws in EOIR's analysis. Our own analysis, which will be submitted to EOIR next week at their request, has starkly different findings that prove the efficiencies LOP yields, to say nothing of the other benefits of this program."), <https://www.vera.org/newsroom/press-releases/statement-on-doj-analysis-of-legal-orientation-program>. See also VERA LOP CASE TIME ANALYSIS, *supra* note 118.

<sup>128</sup> See LOP COHORT ANALYSIS, *supra* note 14 at 5 (stating that Phase II of the analysis was "tentatively expected to be completed by the end of September 2018" and that Phase III was expected to be completed by "the end of October 2018").

<sup>129</sup> 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>.

<sup>130</sup> Indeed, it is notable that 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).

<sup>131</sup> See *infra* Section IV.A (2019 Updated recommendation).

<sup>132</sup> See 8 C.F.R. § 1292.1. Accredited representatives are authorized to provide immigration legal services in connection with an approved recognized organization. Organizations that may qualify for this status are federally tax-exempt non-profit religious, charitable, social service, or similar organizations that are primarily serving low-income or indigent clients.

<sup>133</sup> 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.*

<sup>134</sup> *Id.* For more discussion about fraud and abuse prevention, see Section III.C.1, *infra*.

<sup>135</sup> See 81 Fed. Reg. 92,346-73.

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requires recognized organizations to have “access to adequate knowledge, information, and experience in all aspects of immigration law and procedure,”<sup>136</sup> and clarifies that recognized organizations must have, or be in the process of hiring, at least one accredited representative.<sup>137</sup> Similarly, accredited representatives must also prove that they possess adequate knowledge and skill to represent individuals in immigration proceedings.<sup>138</sup> Applicant organizations and individuals must submit evidence establishing “adequate knowledge,” which may include resumes, letters of recommendation, or a list of courses completed relating to immigration law and procedure.<sup>139</sup> The R&A final rule also requires the Office of Legal Access Programs (“OLAP”)<sup>140</sup> to “develop and administer a system of legal orientation programs to provide education regarding administrative procedures and legal rights under immigration law.”<sup>141</sup>

The R&A final rule also significantly updates eligibility and procedural elements of the program to address administrative concerns. For example, the final rule eliminates the requirement that a “substantial portion” of a recognized organization’s budget be from sources other than dues or fees for services, as well as the requirement that such organizations only charge a “nominal fee” for services, opting instead to focus on the organization’s purpose to serve low-income or indigent clients and its status as a federal tax-exempt entity.<sup>142</sup> The rule also

unlinks and clarifies renewal periods for recognized organizations and accredited representatives;<sup>143</sup> updates reporting requirements and procedural mandates, including updating and adding to the rule’s disciplinary process;<sup>144</sup> and further defines the scope of authority and eligibility thresholds for recognized organizations and accredited representatives.<sup>145</sup>

These changes are laudable in their aim: to increase access to qualified non-lawyer representation for 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.

Second, we recommend that, in addition to introductory courses on immigration law and administrative procedure, EOIR and OLAP develop and require accredited representatives to participate in continuing education relating to immigration law. Immigration law is complicated and dynamic.

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<sup>136</sup> *Id.* at 92,351, 92,367. 8 C.F.R. § 1292.11(e).

<sup>137</sup> Under the new rule, if a recognized organization loses its active accredited representative on staff, it is moved to an inactive list where the organization can remain for two years before the organization’s status is terminated. 81 Fed. Reg. 92,347-48. Organizations on the inactive list may not provide immigration legal services while inactive unless they have at least one attorney on staff. *Id.* at 92,348.

<sup>138</sup> *Id.* at 92,368; 8 C.F.R. § 1292.12(c). The R&A final rule also aligned the character and fitness standard for accredited representatives with that applicable to attorneys. 81 Fed. Reg. 92,351.

<sup>139</sup> *Id.* at 92,368; 8 C.F.R. §§ 1292.11(e), 1292.12(c).

<sup>140</sup> The R&A final rule also transferred responsibility for administration of the program from BIA to OLAP. 81 Fed. Reg. 92,347 (discussing the transfer).

<sup>141</sup> *Id.* at 92,361-66; 8 C.F.R. §1003.0 *et seq.*

<sup>142</sup> See 81 Fed. Reg. 92,348-49.

<sup>143</sup> The rule requires accredited representatives to renew their status every three years, while recognized organizations need only renew their status every six years (unless they have only conditional recognition which is valid for only two years). *Id.* at 92,354.

<sup>144</sup> *Id.* at 92,354-57, 92,361-62.

<sup>145</sup> See, e.g., *id.* at 92,353, 92,368 (restricting accreditation to employees or volunteers of a recognized organization who are not attorneys, are not suspended from the practice of law, and have not been convicted of a serious crime); *id.* at 92,353 (permitting OLAP to extend an organization’s recognition to offices outside of the headquarters or designated office from which the organization offers immigration legal services).

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Regular continuing education is thus critical to ensure quality information and guidance is being provided to noncitizens relying on the assistance of accredited representatives.

## C. Quality of Representation

### 1. Continued Efforts to Fight Fraud and Ineffective Representation in Immigration Proceedings

The unauthorized practice of immigration law has been a problem for decades and is a critical issue today given the immigrant community's uncertainty and fear resulting from shifting policies and procedural changes. Unauthorized practice of immigration law occurs when a non-attorney who is neither authorized nor qualified to practice immigration law offers immigration and other legal services to noncitizen consumers. The repercussions the unauthorized practice of law can be devastating, both financially and in terms of severe immigration consequences such as deportation. Moreover, victims of such fraud often face difficulties reporting abuses. Continued efforts to identify, punish, and deter this type of fraud, as well as to disseminate information on qualified providers who can assist noncitizens with legal issues is critical.

Stakeholders, including EOIR, recognize that unqualified providers of immigration legal services, such as *notarios*<sup>146</sup> and unscrupulous counsel, threaten to undermine the integrity of immigration hearings and jeopardize immigrants' lives.<sup>147</sup> EOIR has several initiatives to combat fraud and ineffective assistance

and has continued using these tools to root out fraud in immigration proceedings over the last nine years.

One such program is EOIR's Fraud and Abuse Prevention Program. This program works to deter fraud and abuse in the immigration system by receiving referrals concerning fraud and suspected fraud and coordinating with federal and state entities to investigate and prosecute referrals.<sup>148</sup> EOIR also leads a departmental working group designed to fight *notarios* and other unscrupulous practitioners. The working group's efforts have had "a tangible positive effect," including assisting in the prosecution of a number of *notarios* around the country.<sup>149</sup> EOIR also administers the Attorney Discipline System, which receives complaints from immigration judges, the Board of Immigration Appeals ("BIA"), clients, and other practitioners. Complaints are resolved either through confidential discipline or formal disciplinary proceedings.<sup>150</sup> Since EOIR assumed responsibility for the program in 2000, more than 1,500 practitioners have been disciplined.<sup>151</sup>

EOIR also is currently drafting a regulation concerning ineffective assistance of counsel in immigration proceedings.<sup>152</sup> In July 2016, EOIR announced its proposed rule, which established standards regarding when a case should be reopened based upon ineffective assistance of counsel.<sup>153</sup> The rule would require an individual seeking to reopen his or her case to establish through affidavits or other evidence that counsel's conduct was "unreasonable, based on the facts of the particular case, viewed as of the time of the conduct" and that he or she was

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146 The literal translation of "notario," or "notario publico," is "notary public." While a notary public in the United States is authorized only to witness the signing of forms, such is not the case in all countries. Problems arise when individuals act as a notary public to prey on immigrant populations that ascribe a vastly different meaning to the term.

147 See EOIR Fact Sheet, EOIR's Programs to Fight Fraud, Abuse, and Ineffective Representation in Immigration Proceedings (March 2016), <https://www.justice.gov/sites/default/files/pages/attachments/2016/03/30/eoirsprogramstofightfraudabuseandineffectiverepresentationfactsheet032016.pdf> [hereinafter EOIR Fact Sheet (March 2016)].

148 See ; EOIR Fact Sheet, EOIR's Fraud and Abuse Prevention Program (June 2017), <https://www.justice.gov/eoir/page/file/eoirfraudprogramfactsheetjune2017/download>.

149 Testimony of Juan Osuna, Director, EOIR, Before Subcommittee on Immigration and Border Security of the Committee on the Judiciary House of Representatives (Dec. 3, 2015), <https://www.govinfo.gov/content/pkg/CHRG-114hrg97727/html/CHRG-114hrg97727.htm> (last visited Jan. 7, 2019).

150 EOIR Fact Sheet (March 2016), *supra* note 147.

151 *Id.*

152 The Attorney General directed EOIR to take this action in *In re Compean, Bangaly & J-E-C-*, 25 I&N Dec. 10 (A.G. 2009).

153 See EOIR Notice, EOIR Publishes Proposed Rule Regarding Ineffective Assistance of Counsel (July 28, 2016), [https://www.justice.gov/sites/default/files/pages/attachments/2016/07/28/nrprmonineffectiveassistanceofcounseljuly282016\\_0.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2016/07/28/nrprmonineffectiveassistanceofcounseljuly282016_0.pdf).

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prejudiced as a result.<sup>154</sup> A showing of prejudice would be established where there was “a reasonable probability that, but for counsel’s ineffective assistance, the result of the proceeding would have been different.”<sup>155</sup> EOIR proposed that the rule would apply to ineffective assistance of counsel claims in removal or exclusion proceedings, as well as asylum-only and withholding-only proceedings. EOIR also proposed that the rule amend regulations to provide that ineffective assistance of counsel may constitute “extraordinary circumstances” excusing a failure to timely file an asylum application within the required one-year period from date of arrival.<sup>156</sup> Despite publishing the proposed rule in mid-2016, no action has been taken to implement the proposed change to regulations.

Victims of fraud also continue to face confusion reporting abuses. One source of confusion is that formal complaints regarding fraud or abuse involving immigration representation may be reported to a number of local, state, or federal authorities. These include EOIR, law enforcement, the Federal Trade Commission, private committees, or state licensing offices. The result is a lack of clear direction as to whom complaints should be directed, or how such complaints will be treated. The above proposed rule would provide some clarity on this issue by defining, for the purposes of an ineffective assistance of counsel claim, “appropriate disciplinary authorities.”<sup>157</sup> But, as mentioned above, this rule has not been finalized. Furthermore, it is difficult, and at times impossible,

for immigrants who are deported to effectively lodge complaints.<sup>158</sup> 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 could be an important next step in protecting victims and deterring the destructive practice of ineffective or unauthorized practice of law in the immigration context.<sup>159</sup>

EOIR should continue to investigate and prosecute fraud and unauthorized practice of law through various mechanisms, including the Fraud and Abuse Prevention Program, the departmental working group on *notarios*, and the Attorney Discipline System. EOIR also should finalize the rule concerning ineffective assistance of counsel in immigration proceedings. Finally, 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.

## 2. Enhanced Eligibility Requirements for Pro Bono Service Providers

The 2010 Report noted that EOIR had announced plans to develop regulations to strengthen requirements for attorneys to be included on the pro bono service providers list and recommended that immigration judges consult with stakeholders in the interim to help flesh out the criteria for inclusion on the list. In September 2015, EOIR published a final

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154 See 81 Fed. Reg. 49,570. A showing of prejudice would not be required where a removal order was made *in absentia*. *Id.* at 49,566. The proposed rule would also impose certain procedural requirements to ensure proper evidence is before the court hearing the motion to reopen. Specifically, to prove ineffective assistance of counsel the rule proposes requiring submission of a sworn statement of facts, copy of retention agreement (if any), notice to former counsel of proceedings and complaint to the appropriate authority. *Id.* at 49,558. These procedural requirements are modeled on those announced in the *Matter of Lozado*, 19 I&N Dec. 637 (BIA 1988).

155 See 81 Fed. Reg. 49,570.

156 *Id.* at 49,556, 49,559, 49,569.

157 *Id.* at 49,562, 49,571 (“The appropriate disciplinary authorities are as follows: (i) With respect to attorneys in the United States: The licensing authority of the state, possession, territory, or commonwealth of the United States, or of the District of Columbia that has licensed the attorney to practice law. (ii) With respect to accredited representatives: The EOIR disciplinary counsel pursuant to Sec. 1003.104(a). (iii) With respect to a person whom the individual reasonably but erroneously believed to be an attorney or an accredited representative and who was retained to represent him or her in proceedings: The appropriate Federal, State, or local law enforcement agency with authority over matters relating to the unauthorized practice of law or immigration-related fraud.”).

158 Additionally, victims may be unaware that making a formal complaint could trigger limitations periods related to other legal rights. See, e.g., American Immigration Council, *Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases* (Jan. 2016) at 7-10 (discussing impact of filing a formal complaint on deadlines for motions to reopen), [https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking\\_remedies\\_for\\_ineffective\\_assistance\\_of\\_counsel\\_in\\_immigration\\_cases\\_practice\\_advisory.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_remedies_for_ineffective_assistance_of_counsel_in_immigration_cases_practice_advisory.pdf).

159 EOIR does publish a list of immigration practitioners that have been disciplined. See EOIR, List of Currently Disciplined Practitioners (Dec. 18, 2018), <https://www.justice.gov/eoir/list-of-currently-disciplined-practitioners> (last modified Dec. 18, 2018).

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rule enhancing eligibility requirements for the service providers included on its pro bono service providers list.<sup>160</sup> The final rule permits EOIR's Director to add or remove providers from the list, and requires approved providers to re-certify their eligibility every three years.<sup>161</sup> As discussed above, the aim of the rule change was to improve the functioning and integrity of the list by providing immigrants in removal proceedings with a reliable resource listing individuals and entities that provide a significant and consistent source of pro bono representation in immigration cases.<sup>162</sup> We support such continued efforts to expand access to high-quality pro bono representation in immigration proceedings.

### 3. Attorney Discipline

The Attorney General has not taken any action to enact regulations to allow immigration judges the ability to exercise their contempt power, despite recommendations encouraging him to do so. Congress granted this authority more than 20 years ago in 8 U.S.C. § 1229a(b)(1). Absent implementing regulations, however, this authorization has no teeth, and immigration judges are unable to exercise the authority granted to them by Congress.<sup>163</sup>

## IV. 2019 Recommendations

### A. Right to Representation

**2010 Recommendation:** 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. This right should apply at all levels of the adjudication process, including immigration court adjudications, appeals at the BIA and the federal appellate courts, and habeas petitions challenging expedited removal.

**2019 Update:** We reaffirm the 2010 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 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.<sup>164</sup>

**2010 Recommendation:** Provide representation at government expense to noncitizens who are unaccompanied minors and persons with mental disabilities and illnesses at all stages of the adjudication process, whether or not the proceeding may necessarily lead to removal.

**2019 Update:** We reaffirm the 2010 recommendation to expand representation to vulnerable noncitizens at the government's expense for all stages of the adjudication process, whether or not the proceeding may lead to a removal order. We encourage evaluation of current gaps in coverage for providing representation to vulnerable noncitizens and support the adoption of comprehensive nationwide programs to provide more uniform, complete

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<sup>160</sup> See DOJ, EOIR Publishes Rules Regarding Legal Representation, *supra* note 99.

<sup>161</sup> See *id.*

<sup>162</sup> See 79 Fed. Reg. 55,662; 80 Fed. Reg. 59,503.

<sup>163</sup> See also Statement of Judge A. Ashley Tabaddor Before the Senate Judiciary Committee, *supra* note 11 at 4 ("One of the most egregious and long-standing examples of the structural flaw of the Courts' placement in the DOJ is that Immigration Judges have never been able to exercise the congressionally mandated contempt authority statutorily authorized by Congress in 1996 . . . Just a couple of months ago, when I confronted an attorney for his failure to appear at a previous hearing, he candidly stated that he had a conflict with a state court hearing, and fearing the state court judge's sanction authority, chose to appear at that hearing over the immigration hearing in my court. Similarly, when I asked a DHS attorney why she had failed to engage in the Court mandated pre-trial conference or file the government's position brief in advance of the hearing, she defiantly responded that she felt that she had too many other work obligations to prioritize the Court's order. These examples represent just a small fraction of the problems faced by Immigration Courts, due to the failure of the DOJ, in over 20 years, to implement the Congress approved even-handed contempt authority.").

<sup>164</sup> See AM. BAR ASS'N, POLICY AND PROCEDURES HANDBOOK, *supra* note 96.



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representation to all noncitizens from 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.

**New 2019 Recommendation:** 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.

**2010 Recommendation:** Require such representation 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 for those challenging an expedited removal order. In other instances, such as adjudications in front of an immigration judge (i.e., where a claim depends on a factual determination), in addition to attorneys, "second-level" accredited representatives (those non-attorneys certified to represent noncitizens in immigration court) would continue to be able to represent a noncitizen.

**2019 Update:** We reaffirm the 2010 recommendation. Representation in such substantive immigration proceedings will create a better record while enabling immigration courts to more efficiently and fairly adjudicate complex legal claims. Adoption of such measures is better for all participants in the system, including the noncitizens and the courts themselves.

**2010 Recommendation:** In order to limit controversy over whether the provision of government-funded representation is permitted under current law, legislative action should eliminate the "no expense to the government" limitation of section 292 of the INA.

**2019 Update:** We reaffirm the 2010 recommendation. Eliminating this restrictive language will bring the statute in line with the

current state of operations with respect to certain categories of noncitizens, will allow for further advances towards expanding representation in immigration proceedings to ensure due process, fairness, and efficiency in future immigration proceedings, and will bring more legitimacy to the immigration system.

## B. Sources of Representation and Legal Guidance

### 1. *Pro Bono Program*

**2010 Recommendation:** Expand and improve EOIR pro bono program to facilitate and encourage attorney participation.

**2019 Update:** We reaffirm the 2010 recommendation.

**New 2019 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.

**New 2019 Recommendation:** Since 1993, the Ninth Circuit has maintained a robust pro bono program, which provides counsel to pro se parties with meritorious or complex appeals, including in a significant number of immigration cases. Given the complexity of immigration law, the Ninth Circuit has also provided additional resources, including an immigration law outline and additional assistance through the Immigration Legal Resource Center. Other circuits should adopt similar programs to assist pro se litigants in immigration appeals.

### 2. *Legal Orientation Program*

**2010 Recommendation:** Expand LOP to provide services to all detainees, thereby enabling those placed in detention to find representation.

**2019 Update:** We reaffirm the 2010 recommendation. LOP should be Congressionally mandated and expanded to additional facilities to provide greater coverage to those in detention. By providing more information to detained



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immigrants, LOP not only enhances their ability to make more informed decisions about their rights but also provides them with important resources that improves their ability to retain counsel. The evidence to date shows that LOP will pay for itself and simultaneously facilitate due process and efficient courtroom administration.

**2010 Recommendation:** Expand LOP in order to reach non-detained noncitizens in removal proceedings.

**2019 Update:** We reaffirm the 2010 recommendation. Congress should statutorily authorize and increase funding of the ICH, which will allow for expanded access to legal guidance for non-detained immigrants.

**2010 Recommendation:** Modify 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 several vulnerable populations, including unaccompanied minors and persons with mental disabilities and illness, who may be entitled to or eligible for representation. Under such a system, qualifying cases could be referred to charitable legal programs or pro bono counsel. Where these services were unavailable, government-paid counsel would be appointed.

**2019 Update:** We reaffirm the 2010 recommendation.

**2010 Recommendation:** Establish an administrative structure for the enhanced LOP that enables it to provide counsel, at government expense, for noncitizens in some cases.

**2019 Update:** We reaffirm the 2010 recommendation and stress that the expansion of LOP should complement, rather than detract from, the overarching goal of direct government-funded representation to indigent immigrants.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation.

### *3. The Recognition and Accreditation Program for Non-Attorney Representatives*

**2010 Recommendation:** EOIR should move forward with and publish the in-progress regulation concerning ineffective assistance of counsel in immigration proceedings.

**2019 Update:** EOIR should monitor progress under the new regulations relating to the recognized organizations and accredited representatives program to ensure they are meeting the dual goals of improving access to qualified non-lawyer representation and protecting noncitizens from unscrupulous practices.

**New 2019 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 by participating in at least two legal trainings annually).

## **C. Quality of Representation**

### *1. Continued Efforts to Fight Fraud and Ineffective Representation in Immigration Proceedings*

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation. EOIR should continue to investigate and prosecute fraud and the unauthorized practice of law 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

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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.

**2010 Recommendation:** 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.

**2019 Update:** We reaffirm the 2010 recommendation.

## *2. Pro Bono Service Providers List*

**2010 Recommendation:** At a minimum, require immigration judges to consult with local bar associations and other local stakeholders in determining the criteria for inclusion on the pro bono service providers list.

**2019 Update:** In September 2015, EOIR published a final rule enhancing eligibility requirements for the service providers included on its pro bono service providers list. The final rule permits EOIR’s Director to add or remove providers from the list, and requires approved providers to re-certify their eligibility every three years. The rule also allows for public comment on eligible applicants. Given that EOIR published a final rule, our 2010 Recommendation suggesting that immigration judges take certain action in the interim is moot.

## *3. Attorney Discipline*

**2010 Recommendation:** Amend EOIR’s Rules of Conduct to allow for civil monetary penalties to be imposed by immigration judges against both private and government attorneys.

**2019 Update:** We reaffirm the 2010 recommendation. It has been over 20 years since Congress enacted 8 U.S.C. § 1229a(b)(1), which granted immigration judges the “authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority.” Yet, no implementing regulations have been adopted. Implementing regulations should be adopted to enable immigration judges to use the power already authorized by 8 U.S.C. § 1229a(b)(1).

# 6

## System Restructuring

2019 Update Report

### REFORMING THE IMMIGRATION SYSTEM

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

March 2019

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



AMERICAN BAR ASSOCIATION

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Pursuing Justice

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# Part 6: System Restructuring

## I. Introduction and Summary on 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.

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.

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 denial 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 completion 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 the Executive Office for Immigration Review ("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.

We also have considered the restructuring proposals of various stakeholder groups and scholars, including especially a proposal from the Federal Bar Association ("FBA") to establish an Article I court with specific features designed to de-politicize the appointment of judges and decentralize court administration.

Following this review, we continue to recommend the restructuring of the current immigration court system to be independent of the Department of Justice ("DOJ") or any other federal department or agency and the creation of an Article I court system for the entire immigration judiciary as the preferred approach, but not necessarily with the specific features of an Article I court described in our 2010 Report.



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## II. The 2010 Report and Recommendations

### A. The Case for Restructuring

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.

#### 1. Independence

The 2010 Report discussed numerous reasons for separating the immigration judiciary from DOJ. Concerns about the lack of independence of immigration judges and the Board of Immigration Appeals (“BIA”), as well as perceptions of unfairness toward noncitizens, had spawned proposals to separate these tribunals from DOJ. The National Association of Immigration Judges (“NAIJ”) and others had long advocated for the establishment of an independent body, either an independent agency or an Article I court, as a necessary step in reforming the immigration adjudication system.

Changes in recent years prior to 2010 exacerbated those concerns, as resources devoted to enforcement

of immigration laws increased the burden on immigration judges without increasing resources allocated to adjudication, resulting in EOIR’s inability to manage its caseload. The calls for independence had become more urgent in response to politicized hiring of immigration judges and the removal of BIA members viewed as most sympathetic to noncitizens.

DOJ had taken the view that immigration judges were merely staff attorneys of the department. As such, they would be required to comply with rules of conduct applicable to DOJ attorneys, rather than rules of judicial conduct, and would owe their ethical obligations to DOJ as their “client.” In such circumstances, the immigration judges could hardly be viewed as independent.

Various “streamlining” reforms directed at the BIA had resulted in a loss of confidence in the fairness of review at the BIA and generated a large increase in appeals to the federal appellate courts.

We described how a major restructuring, by providing greater independence, also would promote the achievement of the other three goals articulated above, as explained below.

#### 2. Fairness and Perceptions of Fairness

In the years prior to the 2010 Report, critics had noted that a perception of unfairness plagued the immigration adjudication system as a result of its control by the nation’s chief law enforcement agency. A perceived lack of independence means that those going through the system do not consider the decisions to be fair or impartial. Although the adjudicators’ agency, DOJ, no longer had primary responsibility for immigration matters overall, it remained the nation’s principal law enforcement agency overall, and its lawyers prosecuted immigration cases before the federal courts of appeal. For some, the Attorney General’s power over immigration judges and members of the BIA gave the impression of unfairness and did not give those going through the process confidence in the decision making. The DOJ position that immigration judges were merely staff attorneys with a duty of loyalty to the Department (as noted above) could only add to the perception that impartiality was lacking.

#### 3. Professionalism

The 2010 Report recognized that in order to have better quality judgments, better quality

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judges were necessary, regardless of how that was achieved. Moving existing judges to an Article I court or separate agency without increasing resources, training, and qualifications would not alone ensure sufficient improvement in the quality of decisions. Elsewhere in the 2010 Report, we recommended such increases in resources and training and the strengthening of qualifications — all of which should make the immigration judiciary more professional. We also believed it was necessary to make this judiciary independent in order to attract the highest quality judges who could do their jobs and make decisions without fear of arbitrary termination, transfer, or other sanctions.

#### 4. Efficiency

As noted in the 2010 Report, by attracting and selecting the highest quality lawyers as judges, an independent immigration judiciary is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of proceedings in a highly professional manner, should improve the perception of fairness and the accuracy of the result. Perceived fairness, in turn, should lead to greater acceptance of the decisions without the need to appeal to the federal circuit courts. Similarly, there should be fewer appeals from decisions at the trial level to the appellate level of the independent court. When appeals *are* taken, more articulate decisions should enable the reviewing body at each level to be more efficient in its review and decision making and should result in fewer remands requesting additional explanations or fact finding.

Such improvements in efficiency should reduce the total time and cost required to fully adjudicate a removal case and thus help the system keep pace with expanding caseloads. They also should produce savings elsewhere in the system, such as the cost of detaining those who remain in custody during proceedings.

#### 5. Additional Benefits

The 2010 Report pointed out that an independent immigration judiciary would have still other benefits. For example, it would:

- With proper resources, be better equipped to keep clear records and transcripts of proceedings;

- Provide an independent source of statistical information to assist the public in evaluating its performance;
- Submit its own funding requests to Congress, allowing it to request adequate resources without relying on a parent agency;
- Provide better focus on the adjudication function by separating it from a large department whose attention and resources are widely diffused; and
- Leave DOJ free to concentrate on law enforcement, terrorism, civil rights, and other important missions unrelated to immigration.

## B. Alternative Approaches

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 EOIR (including the immigration courts and 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
- (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.

In examining these options, the 2010 Report explored the differences between Article I courts and independent agencies generally, reviewed current examples of each, reviewed proposals put forth by stakeholders and academics, and then defined the specific features of each option. We defined features of an Article I immigration court that resembled existing Article I courts and drew from existing independent agencies in constructing the features of an independent agency for immigration adjudication.

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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 concluded that the Article I court model was the preferred option, but that the independent agency model also would be an enormous improvement over the current system and offered a strong alternative if the Article I court was deemed infeasible or unacceptable to Congress and/or the President. We rejected the hybrid option as the most complex and costly restructuring option to implement, since it would require the creation and operation of two new and separate institutions.

### C. Specific Features

In the Article I court model that we recommended in 2010, the President would appoint the Chief Trial Judge of a Trial Division, the Chief Appellate Judge of an Appellate Division, and the other appellate judges, with the advice and consent of the Senate. The other trial judges would be appointed either by the Chief Trial Judge or by the Assistant Chief Trial Judges with the approval of the Chief Trial Judge, from candidates screened and recommended by a Standing Referral Committee.<sup>1</sup> Fixed terms would be established for judges at both the trial and appellate levels. The terms would be relatively long like those of Article I judges in other courts, although the terms could be longer for the appellate judges than for the trial judges. For example, the terms would be 8 to 10 years for trial judges and 12 to 15 years for appellate judges. Judges at both levels could be removed only by the appointing authority for incompetency, misconduct, neglect of duty, malfeasance, or disability. Trial judges would be supervised by their local Assistant Chief Trial Judge, while appellate judges would be supervised by the Chief Appellate Judge.

The specific features of the independent agency would differ mainly with respect to the appointment, tenure and removal of trial judges. Other than the Chief Immigration Judge, they would be appointed based on a merit selection system (including testing) similar to the one now used for Administrative Law Judges (“ALJs”), but administered by the new agency rather than the Office of Personnel Management. Like ALJs, the immigration judges (other than the Chief Immigration Judge) would have unlimited tenure and could be removed only for good cause after a hearing before the Merit Systems Protection Board, subject to judicial review.

## III. Recent Developments

While the basic structure of the immigration adjudication system has not changed since 2010, we have considered a number of recent developments that could affect our 2010 proposals. These developments are discussed in detail in this Update Report in Part 2 (on Immigration Judges and Immigration Courts) and Part 3 (on the BIA).

First, the immigration courts have experienced a rapidly growing case backlog, with immigration court resources becoming increasingly inadequate in relation to increased enforcement activity. As noted in Part 2, the number of cases pending before the immigration courts (which stood at about 262,000 cases at the time of our 2010 Report) has increased to unprecedented levels, with more than 760,000 pending cases at the end of 2018 and an additional 330,000 cases that could be returned to active dockets as a result of recent Attorney General decisions – resulting in more than one million pending immigration cases.<sup>2</sup> Moreover, while some additional funding has been allocated to the immigration courts, such funding has not kept pace with funding for increased enforcement. EOIR, immigration judges, and practitioners acknowledge that the backlog of cases is affecting the proper functioning of the immigration courts.

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<sup>1</sup> The Committee would include certain appellate judges and trial judges from the court. Other governmental and non-governmental stakeholders would be represented on the Committee or have an opportunity to comment on candidates before they were recommended for appointment.

<sup>2</sup> *Backlog of Pending Cases in Immigration Courts*, TRAC Immigration (2018), [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php) (last visited Nov. 6, 2018); *Immigration Court Backlog Surpasses One Million Cases*, TRAC Immigration (Nov. 6, 2018), <http://trac.syr.edu/immigration/reports/536/>.

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Second, politically motivated prioritization of cases has interfered with the courts' ability to control their dockets and complete cases. In 2014, EOIR announced expedited dockets for people who were apprehended crossing the southwest border in response to the surge of Central American migrants attempting to enter the United States. As explained in Part 2, from 2017 onward, the immigration courts have similarly been used as an extension of immigration enforcement mechanisms by adjusting enforcement priorities to align with the political agenda. For example, in 2017, the administration detailed immigration judges from around the country to the Southwest border to hear removal cases, sometimes in temporary courts or through video teleconferencing technology ("VTC"), in response to continued Central American migration. 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. Ultimately, docket reorganization based on enforcement priorities reinforces the confusion between the enforcement of immigration laws and the adjudication of removal cases, creating the perception that immigration judges are simply part of the government's prosecution efforts.

Third, there has been a systematic elimination or undermining of tools that could be used by immigration judges to control their dockets, along with a continued failure of DOJ to issue regulations giving the judges contempt power. Notably, in 2017 and 2018, DOJ sharply curtailed the use of continuances in immigration proceedings and virtually eliminated the use of administrative closure and termination as to render them nearly-extinct as avenues to resolve cases. In each decision implementing these changes, the Attorney General reasserted his authority, power and influence over immigration judges, stating that they have no

"inherent authority" to use docket management tools unspecified by regulation to administer justice in their courts.<sup>3</sup>

Fourth, immigration judges have been subjected to newly-imposed case completion quotas that have interfered with their independence by emphasizing speed over fairness in deciding cases. The immigration courts, as an executive agency within DOJ, are subject to performance criteria that are often informed by politics and policy rather than neutral, objective concern over the fair and unbiased functioning of the courts. This puts immigration judges 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. The recently announced quotas have exacerbated this structural problem by applying completion quotas and other metrics to individual judges. As noted in Part 2, the ABA opposes the implementation of mandatory performance metrics for immigration judges.<sup>4</sup> Such an approach pits personal interest against due process and undermines judicial independence in a critical and direct way.

Fifth, as discussed in Part 2, policies and hiring practices adopted and implemented in 2017 and 2018 arguably have sacrificed diversity and due process for the sake of speedy hiring, and as a result, there has been a notable resurgence of concern over politicized hiring. A broad range of stakeholders have expressed concerns that DOJ's current approach will elevate speed over substance, exacerbate the lack of diversity on the bench, and eliminate safeguards which could lead to resurgence of politicized hiring, all of which will threaten due process. While DOJ contests this view, it has not made the hiring criteria public to allow independent assessment.<sup>5</sup> Moreover, whistleblowers have alleged that DOJ may be using ideological and political considerations to improperly —and

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3 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).

4 See AM. BAR ASS'N, *ABA Opposes Trump administration's proposed mandatory performance metrics for immigration judges* (Oct. 12, 2018), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/november2017/immigrationjudges/](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/november2017/immigrationjudges/).

5 See 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>.

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illegally—block the hiring of immigration judges and members of the BIA.<sup>6</sup>

Sixth, EOIR has reassigned cases when it disagreed with an immigration judge's decision. In August of 2018, EOIR removed an immigration judge from a case due to the judge's decision to delay the case in the interest of due process. Judge Steven A. Morley had decided to continue the high-profile case, *Matter of Castro-Tum*, to ensure adequate time for proper notice. EOIR interceded in the case and sent an Assistant Chief Immigration Judge to Philadelphia to conduct a single preliminary hearing. Subsequently, EOIR transferred dozens of other cases from the judge's docket, allocating them to an immigration judge that would be more likely to deny relief. NAIJ filed a formal grievance against DOJ and EOIR seeking redress for the unwarranted removal of cases, asserting that such action violated not only the immigration judge's judicial independence, but also the integrity of the immigration court and the due process rights of noncitizens appearing before the immigration court.<sup>7</sup> This matter is yet unresolved.

Seventh, as discussed in greater detail in Part 3 (on the BIA) of this Update Report, the Attorney General has increased the certification of cases to himself on both substantive and procedural matters, without adequate transparency and due process safeguards. The Attorney General is empowered to *sua sponte* refer BIA decisions to him or herself and independently re-adjudicate them.<sup>8</sup> As the nation's chief law enforcement officer, however, the Attorney General is not a neutral arbiter. While this power has been used sparingly in the past, former Attorney General Jeff Sessions and Acting Attorney General Matthew Whitaker have greatly expanded its use and used this process, as opposed to rulemaking (or legislative recommendations), to establish not only procedural and docket management policies, but also substantive questions of law governing immigration proceedings

and the rights of noncitizens. Moreover, DOJ indicated in the Spring of 2018 that it is considering a rule broadly expanding the circumstances under which the Attorney General may refer cases to him or herself. The proposed new scope of referral would include matters the Board has not yet decided, and even matters decided by immigration judges "regardless of whether those decisions have been appealed to the BIA."<sup>9</sup>

## IV. Review of 2010 Recommendations

We have revisited the 2010 recommendations in light of the subsequent developments described in Section III above, as well as the proposals of various stakeholder groups and scholars.

### A. 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 in Section III above tend to strengthen the need for an independent immigration judiciary. Further, there are significant concerns over (a) the anticipated continued expansion of VTC hearings, which are widely reported to be riddled with technical and logistical difficulties, particularly when used in hearings in which witness credibility is paramount; (b) lack of representation for immigrants; and (c) variation among the immigration courts and judges with respect to case outcomes. Each of these concerns calls into question the fundamental fairness of the system and implicates due process.

Professor Philip Schrag of Georgetown University summarized the continuing need for an independent Article I court system in 2016, as follows:

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<sup>6</sup> Letter from Senate and House Democrats to Jeff Sessions, Attorney General (Apr. 17, 2018), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-democrats-demand-doj-respond-to-allegations>.

<sup>7</sup> See NAIJ, *Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ* (Aug. 8, 2018), <https://assets.documentcloud.org/documents/4639659/NAIJ-Grievance-Morley-2018-Unsigned.pdf>.

<sup>8</sup> 8 C.F.R. § 1003.1(h)(1)(i).

<sup>9</sup> Referral of Decisions in Immigration Matters to the Attorney General, Dep't of Justice Spring 2018 Regulatory Agenda, DOJ/EOIR RIN: 1125-AA86, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1125-AA86>.



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“It is needed now more than ever, both because of the closed process for selection of immigration judges, most of whom these days are drawn from the ranks of ICE, and because the immigration judges lack the independence to manage their growing caseloads efficiently. In addition, an Article I court might have more independence to seek the funding and personnel positions that it needs.”<sup>10</sup>

More recently, Professor Schrag has commented:

“An independent court is needed now more than ever, in view of the unprecedented extent to which the Attorney General has decided to exercise personal control over the immigration courts - through denying judges the option of terminating cases; forcing the judges to decide cases quickly, without thorough consideration of the issues, by tying their annual performance reviews to the number of cases they close; and personally overruling the precedential decision of the Board of Immigration Appeals that allowed victims of horrific domestic violence to obtain asylum in the United States.”<sup>11</sup>

NAIJ, the immigration judges’ union, has made the following statement in support of an independent Article I court:

“It is inherently problematic to place any court in a law enforcement department. The Immigration Court has proven to be no exception. The apparent conflicts of interest have time and time again proven to be actual conflicts of interest between protecting the integrity of the court and the independence of the Immigration Judges from infringement by the perspectives and positions of a law enforcement agency. The Immigration Court has been used as a political pawn by various administrations on both sides of the aisle. From the streamlining regulations to the surge dockets to the mass details of immigration judges to ‘border

courts,’ we have repeatedly seen encroachment on the integrity of the Immigration Court system. And now, the unprecedented move by the Agency to tie individual performance evaluations to case completion quotas and deadlines has shattered any veneer of judicial independence.”<sup>12</sup>

The American Immigration Lawyers Association (“AILA”), the national bar association of more than 15,000 attorneys and law professors who practice and teach immigration law, has offered the following views in support of an independent Article I court:

“The U.S. immigration court system does not meet the standards which justice demands. Chronic and systemic problems have resulted in a severe lack of public confidence in the system’s capacity to deliver just and fair decisions in a timely manner. Years of disproportionately low court funding levels – as compared to the rapid expansion of immigration enforcement funding for Immigration and Customs Enforcement (ICE) and U.S. Customs & Border Protection (CBP) – have contributed to an ever-growing backlog of cases that is now approaching 700,000. The lack of adequate resources has not only resulted in overworked staff but also compromised the system’s ability to assure proper review of every case.

“As a component of the Department of Justice (DOJ), the Executive Office for Immigration Review (EOIR) has been particularly vulnerable to political pressure. Immigration Judges, who are currently appointed by the Attorney General and are DOJ employees, have struggled to maintain independence in their decision making. In certain jurisdictions, the immigration court practices and adjudications have fallen far below acceptable norms. The grant rates for cases are highly disparate among judges—asylum grant rates are less than 5 percent in some jurisdictions yet higher than 60 percent in others—thus giving

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<sup>10</sup> Email dated August 29, 2016, on file with the ABA Commission on Immigration.

<sup>11</sup> Email dated July 9, 2018, on file with the ABA Commission on Immigration.

<sup>12</sup> Letter from A. Ashley Tabaddor, President, NAIJ, to Elizabeth Stevens, President, Federal Bar Association, Immigration Law Section, March 15, 2018, on file with the ABA Commission on Immigration.



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rise to criticism that outcomes may turn on which judge is deciding the case rather than established principles and rules of law.

“Despite the well-documented flaws in the current immigration court system, the DOJ and EOIR have failed to propose any viable plan to address these concerns. Instead of working to improve the system, the administration has implemented a series of policies that will undermine the independence of immigration judges and due process for the sole purpose of accelerating deportations.”<sup>13</sup>

The FBA, a professional association for attorneys who practice law before the federal courts and federal administrative agencies, with over 19,000 members, has put forth the following arguments regarding the need for an independent Article I court:<sup>14</sup>

There is broad consensus that the current system for adjudicating immigration claims is irretrievably broken and requires systemic overhaul;

EOIR’s costly bureaucracy and inefficiency have contributed to a backlog of over 600,000 cases, with some cases not scheduled for hearings until 2022;

Increasing bureaucratic scrutiny and political pressure to improve productivity will only further erode the integrity of the immigration adjudication system;

EOIR today represents a pale reflection of the kind of professionally administered adjudicative system that Congress and the American people expect;

Immigration judges and BIA members lack independence to freely decide the matters before them and, indeed, are subject to discipline if the Attorney General disagrees with their decisions;

The potential for political influence puts due process and rule of law at risk;

A broad perception exists that immigration judges and DHS attorneys are working together, or that the immigration courts act merely as “rubber stamps” to approve and uphold DHS actions; and

The history of existing Article I courts (e.g., the United States Tax Court, United States Court of Appeals for Veteran Claims, and United States Court of Appeals for the Armed Forces) demonstrates repeated recognition by Congress that independent review by “real” judges is the *sine qua non* of faithfully adjudicating rights and responsibilities in matters governed by public law.

The ABA itself has testified in support of an independent immigration judiciary, as follows:<sup>15</sup>

“The health of all our nation’s court systems is of paramount importance to the ABA. One of the distinctive hallmarks of our democracy is our tradition of an independent judiciary – the principle that all those present in our country are entitled to fair and impartial consideration in legal proceedings where important rights and privileges are at stake. The immigration courts issue life-altering decisions each day that may deprive individuals of their freedom; separate families, including from U.S. citizen family members; and, in the case of those seeking asylum, may be a matter of life and death. Yet, this system lacks the basic structural and procedural safeguards

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13 Statement of the American Immigration Lawyers Association Submitted to the Senate Judiciary Subcommittee on Border Security and Immigration Hearing on “Strengthening and Reforming America’s Immigration Court System,” April 18, 2018 (AILA Doc. No. 18041646, posted 4/16/18).

14 Letter from Kip T. Bollin, National President, and Elizabeth Stevens, Chair, Immigration Law Section, to the Honorable John Cornyn, Chairman, and The Honorable Richard Durbin, Ranking Member, Subcommittee on Border Security and Immigration, Senate Committee on the Judiciary, Re: April 18, 2018 Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System” (April 16, 2018) (hereinafter, “FBA Testimony”).

15 Statement of Hilarie Bass, President of the American Bar Association, for the Subcommittee on Border Security and Immigration, Committee on the Judiciary, United States Senate, on “Strengthening and Reforming America’s Immigration Court System” (April 18, 2018).

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that we take for granted in other areas of our justice system. . . . [Most] of the factors that led us to determine [previously] that the immigration removal adjudication system needed fundamental reform still exist. The case backlog has risen to an all-time high, public confidence in the fairness of adjudications appears to be further declining, and the rate of legal representation for those in the system remains abysmal. . . . It is time to take the final step and restructure the system to be fully independent of any executive branch agency.”

EOIR has continued to oppose the creation of an independent immigration judiciary. In response to questions from the Senate Subcommittee on Border Security and Immigration, Director James McHenry issued the following statement:<sup>16</sup>

“The forerunner to the current immigration court system came to the Department of Justice (Department) in 1940 where it has remained for almost eight decades. Proposals to reconfigure immigration courts as Article I courts and remove them from the Department do not address any of the core challenges currently facing the immigration courts. Their significant shortcomings, without any countervailing positive equities, do not warrant the massive overhaul of the federal administrative system required to carry them out.

“The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further. An Article I immigration court system would require an entire new cadre of judges that must be appointed, confirmed, and trained. Such a change would do nothing to address the pending backlog of cases; rather, the backlog would likely grow even faster with less accountability and less oversight. Further, immigration judges already exercise independent judgment and discretion in deciding cases, and placing them in an Article I setting would significantly undermine uniformity in interpreting and administering the immigration laws with no

commensurate gain of independence. Immigration judges also exercise sensitive functions in deciding cases that implicate questions of foreign relations, and it would therefore be better that their decisions remain subject to direct review by a principal officer—the Attorney General—who is subject to plenary presidential supervision.

“Finally, there are thousands of other administrative judges within the federal system who perform similar functions to immigration judges. Because there is no reason to single out immigration judges from among the thousands of other federal administrative judges, making immigration judges Article I judges would inevitably lead to calls to make *every* administrative judge an Article I judge, and no proposal has reckoned with the ramifications of such a wholesale transformation of the federal administrative state. In short, the concept of reconstituting immigration courts as Article I courts carries both significant costs and unexplored risks with no apparent offsetting benefits. Accordingly, the Department opposes any proposal to make immigration courts Article I courts.”

We disagree with EOIR’s analysis for the following reasons:

- The most basic flaw in the EOIR response is its failure to recognize any “positive equities” or “offsetting benefits” of the proposal to make the immigration judiciary independent of DOJ. These benefits have been described at length above. Similarly, the EOIR statement fails to acknowledge independence, fairness, perceptions of unfairness, professionalism, efficiency, politicization, and threats to due process as “core challenges currently facing immigration courts.”
- On the flip side, we believe the EOIR statement overstates the costs and hurdles of restructuring. No responsible proposal has called for the

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<sup>16</sup> See 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 Executive Office for Immigration Review Director James McHenry (Apr. 18, 2018), <https://www.judiciary.senate.gov/imo/media/doc/McHenry%20Responses%20to%20QFRs.pdf>

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replacement of all current immigration judges with “an entire new cadre of judges that must be appointed, confirmed, and trained.” Rather, judges now serving within EOIR would be transferred to the new court and continue to serve there during a defined transition period.

- The statement that “immigration judges already exercise independent judgment and discretion in deciding cases” fails to acknowledge the threats to such independence and judgment arising from their status as DOJ staff attorneys, their inability to control their dockets, the new case completion quotas, the ability of EOIR to reassign cases away from judges when EOIR disagrees with their decisions, the ability of the Attorney General to certify decisions to himself, and DOJ’s use of the immigration courts to carry out the administration’s enforcement agenda.
- The assertion that placing immigration judges in an Article I setting “would significantly undermine uniformity in interpreting and administering the immigration laws” ignores the lack of uniformity that exists now, as evidenced by wide disparities in asylum grant rates from court to court and judge to judge (as discussed in Part 2).
- The foreign policy argument fails to describe the role of the Attorney General (as opposed to the Secretary of State) in foreign policy matters and, more importantly, misconstrues the role of the immigration courts — which is to apply the immigration statutes and regulations in a fair and impartial manner, not to carry out the shifting political priorities of a particular President or Attorney General. An Article I court is capable of fulfilling this role without being housed in DOJ, just as the United States Tax Court applies federal tax legislation and regulations without being housed in the Treasury Department. Moreover, the decisions of immigration judges in an Article I court would be reviewable by the appellate judges therein, who (like the Attorney

General) would be principal officers of the United States.

- Finally, the argument that “making immigration judges Article I judges would inevitably lead to calls to make *every* administrative judge an Article I judge” is highly speculative. EOIR has not supported this claim with any evidence that the creation of Article I courts in the past has led to such a massive demand for other Article I courts or that other groups of administrative judges stand waiting to make such demands.

In sum, we are not persuaded by the EOIR position and instead agree with the views of scholars and stakeholders recited above. As we indicated in Part 2, 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 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 — i.e., the principle that the courts and judicial process ensure that everyone is treated in the same way, that we are all accountable to the same laws, and that we can rest assured that our fundamental rights will be protected. 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.

Accordingly, we continue to recommend that the immigration court system be restructured to be independent of DOJ or any other federal department or agency.

## **B. Choice Between Article I Court and Administrative Agency**

As indicated, experts and major stakeholder groups, including AILA, NAIJ, and the FBA now favor the Article I court model over an administrative agency. The Government Accountability Office (“GAO”), in its review of potential restructuring

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alternatives, reported that a majority of immigration court experts and stakeholders supported the Article I court alternative.<sup>17</sup>

In recommending an Article I court, Russell Wheeler, a Visiting Fellow in the Brookings Institution's Governance Studies Program, summarized the competing considerations between an Article I court and an administrative agency, as follows:

"The most significant principled barrier to an independent immigration court established under Article I is the view that immigration removal adjudication is inextricably linked to national security policy and the conduct of international relations and is, accordingly, properly a function of and under the control of an executive branch department. . . Implicit in such proposals [i.e., for an independent Article I court] are concerns that executive agencies that administer courts—whether or not they litigate in those courts—may use, or be perceived as using, administrative favors and sanctions to influence judicial decisions in favor of executive branch policies. Moreover, judges probably have a greater self-interest in effective management of the courts in which they serve full time than do executive officials, for whom the courts within their departments or agencies are but one of many responsibilities. . . Finally, executive branch administration can subject courts to executive branch personnel regulations that are inconsistent, incompatible, or otherwise impractical for judicial institutions."<sup>18</sup>

Mr. Wheeler more recently pointed to DOJ's April 2018 requirement that all immigration judges terminate 700 cases per year as evidence of using

sanctions to produce executive-branch favored dispositions.<sup>19</sup>

Meanwhile, Professor Stephen Legomsky of Washington University School of Law has made persuasive arguments in proposing an administrative agency for the trial-level judiciary,<sup>20</sup> but we do not think these outweigh the benefits of an Article I court structure for both the trial and appellate levels. As indicated in his law journal article and our interview with him in 2016,<sup>21</sup> Professor Legomsky's main reason for this approach was to provide unlimited tenure and protections against removal without cause for the trial judges as Administrative Law Judges. In the 2010 Report (at 6-22 to 6-26), we examined and rejected the ALJ option for immigration judges but recommended similar protections against removal without cause. We also noted (at 6-34) that the fixed, renewable terms provided for trial judges in an Article I court system would strike a greater balance between independence and accountability than the unlimited terms in an agency model. Finally, Professor Legomsky has recently clarified that the main focus of his proposal was to establish an Article III court at the appellate level and that he has no strong preference between an Article I court and an administrative agency for the trial functions.<sup>22</sup>

The FBA's rationale for specific features of an Article I court discussed in Part IV.C.2 also would apply to the choice between an Article I court and administrative agency. 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.

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17 United States Government Accountability Office, *IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES*, GAO-17-438 (June 2017) at 80.

18 Russell Wheeler, *CHARACTERISTICS OF AN IDEAL IMMIGRATION COURT (DRAFT)* (March 4, 2015), on file with the ABA Commission on Immigration, at 4-5.

19 R. Wheeler, *Amid turmoil on the border, new DOJ policy encourages immigration judges to cut corners* (June 2018) <https://www.nytimes.com/2018/07/13/business/economy/wages-workers-profits.html?ref=collection%2Fissuecollection%2Ftoday-s-new-york-times&action=click&contentCollection=todayspaper&region=rank&module=package&version=highlights&contentPlacement=1&pgtype=collection>

20 Stephen Legomsky, *Fortieth Annual Administrative Law Issue: Immigration Law and Adjudication: Restructuring Immigration Adjudication*, 59 Duke L.J. 1635 (2010).

21 Telephone call with Stephen Legomsky, Aug. 16, 2016.

22 Email from Professor Legomsky dated July 9, 2018, on file with ABA Commission on Immigration.

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## C. Specific Features of an Article I Court

In light of recent developments and recent proposals from other stakeholders, the Article I court structure and features recommended in 2010 warrant reconsideration. The 2010 Report recommended that the President appoint, with Senate confirmation, the Chief Trial Judge, possibly Assistant Chief Trial Judges, the Chief Appellate Judge, and the other appellate judges in an Article I court system for immigration. The other trial judges would be appointed by the Chief Trial Judge from nominations submitted by a Standing Referral Committee.

The FBA recently has developed a detailed proposal to implement its decision in 2013 to support efforts to create an Article I federal immigration court outside the Justice Department.<sup>23</sup> The new court would be comprised of a trial division operating at various locations and an appellate division based in the Washington, D.C. area. The trial division's jurisdiction would correspond to matters now addressed in EOIR by immigration judges and administrative law judges, while the appellate division's jurisdiction would correspond to matters now addressed by the BIA. Specific features would be as follows:

*Number and Appointment of Appellate Judges.* The appellate division would have 18 "immigration appeals judges" with no more than 9 judges belonging to the same political party. They would be appointed by the President subject to Senate confirmation.

*Appointment of Trial Judges.* The trial judges would be appointed by the appellate division using a merit-selection process. For each geographic area served by the trial division, the appellate division would establish a merit selection panel that would be responsible for advertising vacant positions, reviewing applications, conducting interviews, and recommending applicants for appointment.

*Tenure of Judges.* The judges at both levels would have fixed, 15-year terms and would be removable

only for cause. The terms of the immigration appeals judges would be staggered so that six judges would come up for appointment every five years.

*Discipline.* An immigration appeals judge would be removable from office by the President, and an immigration trial judge would be removable from office by the appellate division, on grounds of misconduct, neglect of duty, engaging in the practice of law, or violating certain residency requirements, and for no other cause.

*Court Administration.* The appellate division, *en banc*, would have overall governance responsibility for the new court, including the determination of geographic areas served by judges in the trial division. The chief judge of the court would be a judge in the appellate division determined by seniority and would serve for a five-year term. Each geographic area served by the court's trial division would have a chief trial judge, also determined by seniority, who may exercise administrative authority locally as delegated by the appellate division.

*Funding.* The court would be empowered to seek appropriations to satisfy its administrative needs directly or to secure administrative support services on an agreed-upon, reimbursable basis from the Administrative Office of the United States Courts, another Article I court or any executive agency.

*Judicial Review.* Final decisions of the new court would be subject to review in the regional federal courts of appeals under the same circumstances as for the BIA's decisions now, but only with respect to constitutional claims, issues of statutory or regulatory interpretation or other questions of law. Findings of fact by the new court would not be subject to further judicial review.

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<sup>23</sup> Federal Bar Association, Summary of Proposed "Immigration Court Act" (as of 2-6-2018), on file with ABA Commission on Immigration.



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The following considerations influenced the FBA proposal and particularly the proposal to have the trial judges appointed by the appellate court:<sup>24</sup>

- The court would be structured to operate collegially, in a manner similar to the existing Article III and Article I courts, rather than the more hierarchical approach followed in administrative agencies like EOIR;
- Accordingly, the chief judge of the new court (a/k/a chief immigration appeals judge) would not hold a separate office to which he/she is appointed for an entire term on the court, but instead fulfill a more limited, temporary role that rotates among the immigration appeals judges on the basis of seniority;
- Under this collegial model of court governance, most key administrative decisions would be taken by the appellate division as a whole, and so the appellate judges would appoint the trial judges by majority vote, much as Article III district judges (who collectively govern their courts) now appoint each district court's magistrate judges by majority vote;
- Rotating chief judge service among the appellate judges would also prevent any one presidential appointee to the court from becoming too powerful; and
- Requiring a majority vote of the appellate judges for trial judge appointments would better ensure the non-partisan, merit-based selection process for those positions since the FBA proposal would also prohibit the affiliation of more than half of

the immigration appeals judges with the same political party.

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. Our 2010 proposal, for the most part, would essentially transplant the hierarchical EOIR agency structure into an Article I court, while the FBA proposal would represent more of a judicial model and would better distinguish an Article I court from an administrative agency. Our 2010 proposal also would place tremendous power in the hands of a single person, the Chief Trial Judge, appointed by the President. The FBA proposal would disperse that power among the immigration appellate judges, who also would be appointed by the President but with staggered terms and political party balance requirements.

The FBA proposal has been endorsed by NAIJ.<sup>25</sup> Meanwhile, AILA recommends that Congress create an independent immigration court system in the form of an Article I court, modeled after the U.S. Bankruptcy Court.<sup>26</sup> Under the AILA proposal, the new Article I immigration courts would include trial and appellate level courts with further review to the U.S. Circuit Courts of Appeals. Judges would be appointed for 10-year terms (with the possibility of reappointment) by the U.S. Court of Appeals for the federal circuit in which the immigration court resides. The AILA proposal is based on the bankruptcy court model, in which Article I bankruptcy judges are appointed by the Article III courts of appeals.<sup>27</sup> Similar approaches were proposed by Appleseed in its 2009 report<sup>28</sup> and by Professor Legomsky in his 2010 article.<sup>29</sup>

There are a number of issues raised by this approach. First, in our 2010 Report (at 6-27),

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24 Email from Jeff Hennemuth, July 12, 2018, on file with ABA Commission on Immigration. *See also* FBA Testimony, *supra* note 14.

25 Letter from A. Ashley Tabaddor, President, NAIJ, to Elizabeth Stevens, President, Federal Bar Association, Immigration Law Section, March 15, 2018. *See also* [https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f\\_story.html?utm\\_term=.2506519a59b1](https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?utm_term=.2506519a59b1)

26 Statement of the American Immigration Lawyers Association Submitted to the Senate Judiciary Subcommittee on Border Security and Immigration Hearings on "Strengthening and Reforming America's Immigration Court System," April 18, 2018.

27 28 U.S.C. § 151.

28 APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 35 (2009), <http://www.appleseeds.net/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf>.

29 *See supra* note 20.

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we pointed out that this approach (involving appointment of immigration court trial judges by U.S. courts of appeals) may be inconsistent with the judiciary's generally limited role in immigration and naturalization matters. Second, the U.S. Judicial Conference opposes the placement of an Article I immigration court in the federal judiciary or the administration of such a court by the federal judiciary.<sup>30</sup> Third, the method of appointment may be vulnerable to challenge under the Appointments Clause of the Constitution.<sup>31</sup>

In a recent call, AILA representatives acknowledged potential issues with the bankruptcy court model, emphasized that AILA's main focus is to replace the current structure with an Article I court insulated as much as possible from political pressure, and indicated flexibility to work with other organizations to reach a consensus approach to structuring an Article I court.<sup>32</sup>

We believe the ABA Commission now should adopt a similar posture — i.e., endorsing the creation of an Article I court to replace the current immigration court system that operates within EOIR, but without prescribing specific features for that court pending an attempt to reach a consensus on such features with other stakeholders.

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.

## V. 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:

**2010 Recommendation:** Create an Article I court with trial and appellate divisions, headed by a Chief Trial Judge and Chief Appellate Judge, respectively. The President would appoint the Chief Appellate Judge, other appellate judges, the Chief Trial Judge, and possibly Assistant Chief Trial Judges, with the advice and consent of the Senate, from among persons screened and recommended by a Standing Referral Committee. Other trial judges would be appointed by the Chief Trial Judge or Assistant Chief Trial Judges, also using a Standing Referral Committee. Fixed terms would be provided for both appellate judges (12-15 years) and trial judges (8-10 years). Judges would be removable by the appointing authority only for incompetency, misconduct, neglect of duty, malfeasance, or disability. Existing judges could serve out the remainder of the new fixed terms (which would be deemed to have begun at the time of their prior appointment to their current positions) and would be eligible for reappointment.

**2019 Update:** We reaffirm the 2010 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 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.

**2010 Recommendation:** In the alternative, if an Article I court is not established, create an

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<sup>30</sup> REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, September 13, 2016 (JCUS-SEP 16) at 18-19; [http://www.uscourts.gov/sites/default/files/2016-09\\_0.pdf](http://www.uscourts.gov/sites/default/files/2016-09_0.pdf).

<sup>31</sup> U.S. CONST., ART. 2, SEC. 2. Under the Appointments Clause, “principal officers” of the United States may be appointed only by the President with the advice and consent of the Senate, while Congress may by law vest the appointment of “inferior officers” in the President alone, in the courts of law, or in the heads of departments. Under the AILA proposal, the appellate immigration judges may be viewed as principal officers because they are not supervised by a Presidential appointee, in which case they would have to be appointed by the President, rather than Circuit Courts of Appeals. It is possible that the immigration trial judges also could be classified as principal officers, since they would be supervised by the immigration appellate division judges, who would not be Presidential appointees.

<sup>32</sup> Telephone call with Laura Lynch, Jeremy McKinney, and Merlyn Hernandez, September 12, 2018.

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independent agency for both trial and appellate functions.

**2019 Update:** We now view an Article I court system for the entire immigration judiciary as much superior to an independent agency in the Executive Branch.



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# Acronyms and Glossary

## Common Acronyms

<b>ABA</b>	American Bar Association
<b>ACIJ</b>	Assistant Chief Immigration Judge
<b>ATD</b>	(ICE/DRO) Alternatives to Detention
<b>AEDPA</b>	Antiterrorism and Effective Death Penalty Act (1996)
<b>AG</b>	Attorney General
<b>AILA</b>	American Immigration Lawyers Association
<b>AIC</b>	American Immigration Council
<b>ALJ</b>	Administrative Law Judge
<b>APA</b>	Administrative Procedure Act
<b>AWO</b>	Affirmance Without Opinion
<b>BCIS</b>	Bureau of Citizenship and Immigration Services (formerly in INS, now USCIS)
<b>BIA</b>	(DOJ/EOIR) Board of Immigration Appeals
<b>CBP</b>	(DHS) Customs & Border Patrol
<b>CAIR Coalition</b>	Capital Area Immigrants' Rights Coalition
<b>CAM</b>	(DHS) Central American Minors Refugee and Parole Program
<b>CAP</b>	(ICE/DRO) Criminal Alien Program
<b>CAT</b>	Convention Against Torture
<b>CIMT</b>	Crime involving moral turpitude in the INA
<b>DACA</b>	Deferred Action for Childhood Arrivals
<b>DAPA</b>	Deferred Action for Parents of Americans and Lawful Permanent Residents



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<b>DHHS</b>	Department of Health and Human Services
<b>DHS</b>	Department of Homeland Security
<b>DOJ</b>	U.S. Department of Justice
<b>DOS</b>	U.S. Department of State
<b>DRO</b>	(ICE) Office of Detention and Removal Operations
<b>ECAS</b>	EOIR Courts & Appeals System
<b>EMP</b>	(ICE/DRO) Electronic Monitoring Program
<b>EOIR</b>	(DOJ) Executive Office for Immigration Review
<b>FBA</b>	Federal Bar Association
<b>FPS</b>	(DHS) Office of Federal Protective Service
<b>FRC</b>	Family Residential Center
<b>FY</b>	Fiscal Year
<b>GAO</b>	U.S. Government Accountability Office
<b>GULC</b>	Georgetown University Law Center
<b>IAC</b>	Immigration adjudication center
<b>ICE</b>	(DHS) Immigration and Customs Enforcement
<b>ICH</b>	Immigration Court Helpdesk
<b>IJ</b>	Immigration Judge
<b>IIRIRA</b>	Illegal Immigration Reform and Immigrant Responsibility Act (1996)
<b>INA</b>	Immigration and Nationality Act (1952)
<b>INS</b>	(DOJ) Immigration and Naturalization Service
<b>ISAP</b>	(ICE/DRO) Intensive Supervision Appearance Program
<b>LOP</b>	Legal Orientation Program
<b>LOPC</b>	Legal Orientation Program for Custodians of Unaccompanied Alien Children
<b>LPR</b>	Lawful permanent resident

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<b>NAIJ</b>	National Association of Immigration Judges
<b>NFOP</b>	(ICE/DRO) National Fugitive Operations Program
<b>NGO</b>	Non-governmental organization
<b>NQRP</b>	National Qualified Representative Program
<b>NSEERS</b>	National Security Entry-Exit Registration System
<b>NYIFUP</b>	New York Immigrant Family Unity Project
<b>OCIJ</b>	(DOJ/EOIR) Office of the Chief Immigration Judge
<b>OI</b>	(ICE) Office of Investigations
<b>OIA</b>	(ICE) Office of International Affairs
<b>OIG</b>	(DHS or DOJ) Office of the Inspector General
<b>OLAP</b>	Office of Legal Access Programs
<b>OPR</b>	(DOJ) Office of Professional Responsibility
<b>ORR</b>	Office of Refugee Resettlement
<b>PEP</b>	(DHS) Priority Enforcement Program
<b>TRAC</b>	Transactional Records Access Clearinghouse, Syracuse University
<b>TVPRA</b>	Trafficking Victims Protection Reauthorization Act
<b>UIC/UAC</b>	Unaccompanied Immigrant Children/Unaccompanied Alien Children
<b>USCIS</b>	U.S. Citizenship and Immigration Services (formerly BCIS)
<b>VTC</b>	Video conferencing technology



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## Glossary of Terms

**Admission or admitted:** The lawful entry of an alien into the United States after inspection and authorization by an immigration officer.

**Alien:** A foreign national; a person who is not a citizen or national of the United States.

**Board of Immigration Appeals (BIA or Board):**

A component of the Executive Office for Immigration Review (EOIR), with up to 15 Board Members, that is the highest administrative body for interpreting and applying immigration laws. The Board has nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges and by District Directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the United States is one party and the other party is either an alien, a citizen, or a business firm.

**Consulate:** A U.S. government office in a foreign country that issues U.S. visas and passports; a similar office of a foreign country government, located in the United States, that issues visas for travel to that country.

**Department of Homeland Security (DHS):** A government entity to which the functions of the Immigration and Naturalization Service were transferred on March 1, 2003. DHS was created by combining more than 20 federal agencies under the Homeland Security Act of 2003. Its primary goal is “creating a more effective, organized and united defense of our homeland” by integrating departmental functions, bolstering federal support for state and local emergency preparedness, streamlining and strengthening information sharing among various government entities, establishing private sector partnerships, and improving immigration practices.

**Department of Justice (DOJ):** A government entity that includes the Executive Office for Immigration Review, which operates under the authority and supervision of the Attorney General.

**Deportation or removal:** The expulsion of an alien from the United States based on a violation of immigration laws.

**Executive Office for Immigration Review (EOIR):** An office of the Department of Justice that adjudicates immigration cases, including cases involving detained aliens, criminal aliens, and aliens seeking asylum as a form of relief from removal.

**Foreign-born:** A person born outside the United States to noncitizen parents.

**Immigrant or lawful permanent resident:** A foreign national who has obtained the right to reside permanently in the United States. Individuals usually qualify for permanent residence on the basis of ties to close family members or a U.S. business.

**INS:** Immigration and Naturalization Service, an agency of the U.S. Department of Justice that, until March 1, 2003, administered and enforced immigration and nationality laws. After March 1, 2003, INS functions were transferred to DHS bureaus including U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE) below.

**Naturalization:** A process by which individuals may obtain U.S. citizenship. With some limited exceptions, generally only permanent residents and noncitizen nationals are eligible for naturalization.

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**Noncitizen:** (See “alien.”)

**Nonimmigrant:** A foreign national who is admitted to the United States for a temporary period and a specific purpose (such as tourism or study).

**Office of the Chief Immigration Judge (OCIJ):** An office within the Executive Office for Immigration Review that is responsible for providing overall program direction, articulating policies and procedures, and establishing priorities for the immigration judges and the immigration courts. The Chief Immigration Judge carries out these responsibilities with Deputy and Assistant Chief Immigration Judges, a Chief Clerk’s Office, a Language Services Unit, and other functions that coordinate management and operation of the immigration courts.

**Refugee or asylee:** A person who is outside his or her country of nationality or last residence and who is unable or unwilling to return to that country 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. A person obtaining refugee or asylee status in the United States is entitled to remain in the United States, and may apply for permanent residence.

**Removal proceeding:** An immigration court proceeding to determine whether a person can be admitted to or removed from the United States.

**Respondent:** A person in removal or deportation proceedings.

**Undocumented person (also sometimes called “unauthorized” or “illegal” alien):** A person who lacks U.S. government authorization to enter or remain in the United States.

**U.S. citizen:** A person who owes permanent allegiance to the United States, and who enjoys full civic rights (for example, the right to vote in elections and to run for elective office).

**U.S. Citizenship and Immigration Services (USCIS):** A bureau of the Department of Homeland Security responsible for the administration of immigration benefits and services, such as processing applications for residency and citizenship.

**U.S. Customs and Border Protection (CBP):** A bureau of the Department of Homeland Security responsible for patrolling the borders and monitoring the movement of goods and people into and out of the U.S.

**U.S. Immigration and Customs Enforcement (ICE):** A bureau of the Department of Homeland Security responsible for handling deportations, investigating immigration law violations and enforcing customs laws within the interior of the U.S.

**U.S. noncitizen national:** A person who owes permanent allegiance to the United States, but who does not enjoy full civic rights. For example, citizens of Guam, the Northern Mariana Islands and other U.S. territories are nationals, but not citizens, of the U.S.

**Visa:** A document issued by a government that establishes the bearer’s eligibility to seek entry into that government’s territory. A visa can be for a temporary period, such as for study or tourism (nonimmigrant visas), or for lawful permanent residence (immigrant visas). U.S. consulates abroad issue visas to foreign nationals, permitting them to travel to the United States and request admission at the border. U.S. citizens need visas to travel to foreign countries for certain purposes.



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