

REFORMING THE IMMIGRATION SYSTEM

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

EXECUTIVE SUMMARY



AMERICAN BAR ASSOCIATION

Defending Liberty
Pursuing Justice

Commission on Immigration

Reforming the Immigration System

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Executive Summary

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



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Karen T. Grisez
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February 2010

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Background and Study Approach

This study provides a comprehensive review of the current 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 study seeks to determine how well various aspects of the existing system are working and identifies reforms that could improve the system.

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 this Study. Those policy positions are available on the ABA website. Some of these issues include supporting comprehensive immigration reform that fairly and realistically addresses the U.S. undocumented population, the need for immigrant labor, the value of timely family reunification, and the need for an effective and credible immigration strategy; strengthening the DHS Immigration and Customs Enforcement detention standards, adopting them as regulations, and ensuring they apply to all noncitizens who are detained for immigration purposes; supporting due process and access to legal assistance for individuals arrested or detained in connection with immigration enforcement actions; and supporting enabling a U.S. citizen or permanent resident to sponsor a same sex partner for permanent residence in the United States.

Arnold & Porter LLP

In August 2008, the ABA Commission on Immigration requested Arnold & Porter LLP to research, investigate, and prepare this study concerning issues and recommendations for reforms to the United States adjudication system for the removal of noncitizens (the “Study”).

Arnold & Porter LLP (“Arnold & Porter”) is a large, international law firm with about 700 lawyers in eight offices in the United States and Europe practicing in more than 25 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 one year, more than 50 Arnold & Porter lawyers and legal assistants participated in the research, investigation, and preparation of this Study. All of them participated pro bono. As the ABA Commission on Immigration directed, the Arnold & Porter team approached the project without preconceived notions or conclusions and sought information and views from all sources and sides.

Structure and Focus of This Study

To conduct this 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 included:

- (1) 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) What steps could be taken within the existing structure to improve the removal adjudication system?

- (3) Should the current overall structure of the removal adjudication system be changed and, if so, how?

To answer these questions, this Study reviews the problems that have been identified by attorneys, judges, advocacy groups, academics, and others and provides recommendations for addressing those problems.

In formulating recommendations, our goals are 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.

Arnold & Porter lawyers and legal assistants 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, 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 Study and that some of their comments might be included in the Study 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 team and provided materials and information in connection with this Report.

In this Executive Summary, we summarize our key findings and recommendations. In the full Report, we set out our Report in full, with extensive background information, identification and discussion of the issues, and our analysis and recommendations for reform.

Summary of Findings

The history of the development of the removal adjudication system in the United States has taken various twists and turns over the last few decades. The pressures on the system have grown exponentially as the number of people trying to enter and stay in the United States has increased and as political forces and security concerns have resulted in heightened efforts to stem the flow and remove undocumented noncitizens from the country.

The U.S. removal adjudication system involves four major U.S. Government entities:

- The **Department of Homeland Security** enforces U.S. immigration law; initiates removal proceedings; adjudicates expedited and other administrative removals, affirmative asylum applications, and immigration benefit applications; makes “credible fear” and “reasonable fear” determinations; prosecutes removal proceedings in the immigration courts; manages the immigration detention system; and effects removals of noncitizens;
- Under the auspices of the Executive Office for Immigration Review (“EOIR”) in the Department of Justice, the 57 **immigration courts** and 231 immigration judges on those courts handle removal hearings, asylum petitions, bond redeterminations for noncitizens held in detention, and reviews of “credible fear” and “reasonable fear” determinations, among others;
- Also under EOIR, the **Board of Immigration Appeals** reviews decisions by the immigration courts; and
- The **federal circuit courts of appeals** review petitions appealing from the decisions by the Board of Immigration Appeals.

Today, the removal adjudication system handles several hundred thousand matters annually, overwhelming the resources that have been dedicated to the tasks of determining whether undocumented noncitizens in immigration proceedings should be removed from the United States and sent back to their home countries or elsewhere. The numbers are staggering:

- In fiscal year 2008, DHS officers:
 - apprehended at least 791,568 deportable noncitizens;¹
 - initiated 291,217 removal proceedings in the immigration courts against noncitizens by issuing Notices to Appear;²
 - detained 378,582 noncitizens;³ and
 - effected the removal of 358,886 noncitizens, including the expedited removal of 113,462 noncitizens.⁴
- The immigration courts complete more than 280,000 proceedings each year — an average of 1,243 proceedings per year for each immigration judge.
- The Board of Immigration Appeals decides more than 30,000 appeals each year.
- More than 10,000 appeals from BIA decisions were filed in 2008 with the federal circuit courts. Over the past 5 years, these cases have represented about 17% of all the cases handled by those courts. In the circuits with the largest immigration dockets — the Second and Ninth Circuits — appeals from BIA decisions have comprised 35% to 40% of the entire caseload.

But the numbers tell only part of the story, and they tell it in a statistical, impersonal way that hides the many hundreds of thousands of individual lives that

are affected, directly and indirectly, by how well the immigration removal adjudication system works or does not work. A sampling of recent newspaper headlines gives a sense of the impact on individuals:

- *Fast-track Deportations Concern Immigration Attorneys, Advocates*⁵
- *Immigration Courts Face Huge Backlog*⁶
- *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*⁷
- *Immigrants Face Long Detention, Few Rights*⁸
- *ICE Locks 'Em Up, Throws Away Key*⁹
- *ICE Slow to Deport Detained: Illegal Immigrants From Va. Victims of 'Broken' System*¹⁰
- *Immigrant Detention System Ensnarers American Citizens*¹¹
- *Amnesty International Lambastes U.S. for Treatment of Immigrant Detainees*.¹²

The following key findings and conclusions of the Study are based on extensive fact-gathering and analysis.

1. Department of Homeland Security: DHS policies and procedures, along with some substantive provisions of immigration law, have contributed to an exploding caseload that has overwhelmed the removal adjudication system. Other DHS policies and procedures have failed to ensure due process for noncitizens and have served to decrease confidence and trust in the adjudication system. We found, among other things:

- An enormous expansion of immigration enforcement activity and resources, which has not been matched by a commensurate increase in resources for the adjudication of removal cases;
- Insufficient use by DHS officers and attorneys of prosecutorial discretion that could reduce the number of cases entering the removal adjudication system and the number of issues litigated;
- Coordination problems within DHS leading to inconsistent positions taken by different components of DHS on asylum and other issues;

- A dramatic expansion of the grounds for removing noncitizens based on “aggravated felony” convictions;
- The removal of lawful permanent residents based upon misdemeanor convictions for offenses found to be crimes involving moral turpitude, even where no jail sentence was imposed;
- Increasing reliance by DHS, without oversight by immigration courts, on administrative proceedings to remove noncitizens who are not lawful permanent residents on the ground of alleged “aggravated felony” convictions and expedited removal proceedings for persons apprehended at the border or within the United States;
- Barriers preventing noncitizens eligible for lawful permanent resident status from adjusting to such status while in the United States, coupled with statutory bars to re-entering the country even if they leave to attain such status through consular processing;
- The initiation of removal proceedings against noncitizens who are prima facie eligible to adjust to lawful permanent resident status; and
- Growth in the number of individuals detained by DHS, many of whom are housed in detention facilities far from their homes, families, and, in some cases, their legal counsel and other resources needed to defend themselves.

2. Immigration Courts: The existing immigration courts are not doing as good a job as they should in providing fair decision making and due process to those who become subject to the system and in providing efficient and timely decision making by highly qualified and well-trained professionals. We found, among other things:

- Significant disparities in the rates at which immigration judges grant favorable decisions to respondents, even among judges on the same court and for cases involving nationals from the same country. This means respondents’ chances of success are highly dependent upon the judges before whom they appear rather than on the merits of their cases;

- Public skepticism and a low level of respect for the immigration court process, stemming at least in part from the courts' lack of independence from the Department of Justice;
- Shortages of resources for the immigration courts, including too few immigration judges and support staff, including law clerks;
- With these shortages, insufficient time for immigration judges to adequately consider each case, resulting in the issuance of predominantly oral decisions that are not fully researched and lack sufficient bases in law or fact;
- Problems with the hiring, tenure, retention, and process of removing immigration judges;
- Too many judges who display bias and/or intemperate behavior on the bench;
- High levels of stress and burnout experienced by immigration judges;
- Lengthy delays in appointing additional immigration judges and deficiencies in the vetting process for appointing new judges;
- Problems with courtroom technology; and
- Increasing use of videoconferencing in ways that may undermine the fairness of proceedings.

3. Board of Immigration Appeals: The 1999 and 2002 BIA “streamlining” reforms significantly reduced the backlog of unresolved appeals and improved the efficiency of the BIA, but this increased efficiency was accomplished by largely eliminating three-member panels and greatly reducing the number of substantive written decisions. Streamlining also led to a seven-fold increase (from 2001 to 2006) in the number of appeals to the circuit courts (mostly in the Second and Ninth Circuits) and scathing criticism by a number of circuit judges with respect to decisions by the BIA and immigration judges. There have been some recent improvements in the Board’s processes, but the reputation of the Board remains poor. Studies show that the Board has not been able to eliminate unsupportable disparities among immigration judge decisions. Furthermore, studies suggest that single-member review and affirmances without opinion result in decisions that unduly favor the government at the expense of the noncitizen.

4. Judicial Review by Circuit Courts: An inordinate amount of time is spent by the courts of appeals determining the scope of their own jurisdiction, due to the increasing complexity of immigration laws and greater limitations on judicial review (including restrictions on reviewing “discretionary” decisions). The judicial review of removal orders has not become more efficient or just. Instead, there is more confusion and there are more traps for unwary and unrepresented noncitizens.

5. Representation: More than half of respondents in removal proceedings, and 84% of detained respondents, do not have representation. The lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and 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.” A study has shown that whether a noncitizen is represented is the “single most important factor affecting the outcome of an asylum case.”¹³

6. System Restructuring: Concerns about the lack of independence of immigration judges and the BIA, as well as perceptions of unfairness toward noncitizens, have spawned proposals to separate these tribunals from the Department of Justice. These concerns have been exacerbated in the past decade by the exploding caseload, the BIA streamlining reforms, politicized hiring of immigration judges and removal of BIA Members, and the dramatic increase in appeals to the federal circuit courts. An independent body responsible for adjudicating immigration removal cases is also needed to make the immigration judiciary more professional and to improve the efficiency of the system.

We turn now to a summary of our recommendations for addressing these issues.

Summary of Recommendation for System Restructuring

While we provide many recommendations for incremental changes to the immigration removal adjudication system at each stage of the process, we also have considered major structural changes that would make the system independent of any existing executive branch department or agency. These changes would address widespread concerns regarding both political independence and adjudicatory fairness, while promoting greater efficiency and professionalism within the immigration judiciary.

In light of the serious issues facing the current immigration adjudication system for removing noncitizens, and based upon our review of various existing adjudication models in other parts of the federal government, we have considered three basic restructuring options:

- 1. Article I Court:** An independent Article I court system to replace all of EOIR (including the immigration courts and the Board of Immigration Appeals), which would include both a trial level and an appellate level tribunal;
- 2. Independent Agency:** A new executive adjudicatory agency, which would be independent of any other executive department or agency, replace EOIR, and contain both trial level administrative judges and an appellate level review board; and
- 3. Hybrid:** A hybrid approach placing the trial level adjudicators in an independent administrative agency and the appellate level tribunal in an Article I court.

While all three options have significant advantages over the current system, after careful consideration, we do not recommend the hybrid option since it is too complex and too costly relative to the other two options. The remaining two options are both excellent and offer vast improvements over the current system. Both offer greater independence, fairness and perceptions of fairness, professionalism, and efficiency than the current system. The Article I court has been

selected as the preferred restructuring option, with the independent agency option being a close second choice. The Article I model is likely to be viewed as more independent than an agency because it would be a wholly judicial body, is likely, as such, to engender the greatest level of confidence in its results, can use its greater prestige to attract the best candidates for judgeships, and arguably offers the best balance between independence and accountability to the political branches of the federal government.

An Article I court for the entire immigration adjudication system would include an Appeals Division and a Trial Division. The leadership of the court would include a Chief Appellate Judge and Chief Trial Judge. The President would appoint the Chief Appellate Judge and other appellate judges, the Chief Trial Judge, and possibly Assistant Chief Trial Judges, with the advice and consent of the Senate.¹⁴ The other trial judges would be appointed by the Chief Trial Judge or by the Assistant Chief Trial Judge responsible for the court in which the vacancy exists (subject to approval of the Chief Trial Judge).

The appellate and trial judges would be selected from among persons screened and recommended by a Standing Referral Committee. The Committee would include the Chief Appellate Judge, the Chief Trial Judge, the two most senior ranking members of the Appellate Division, and the three most senior ranking Assistant Chief Trial Judges. Other stakeholders (e.g., DHS, DOJ, and academic and immigration bar groups) would be represented on the Committee or have an opportunity to comment on candidates before they were recommended for appointment.

The minimum qualifications of candidates would require that each judge at both the trial and appellate levels be a United States citizen and a member of the bar of any state, the District of Columbia, the Commonwealth of Puerto Rico, or a United States territory, and have a minimum number of years of experience as a licensed attorney or judge involved in

litigation or administrative law matters at the federal, state or local level (e.g., five years for trial judges and seven years for appellate judges). In selecting nominees, the Standing Referral Committee would give particularly strong consideration to candidates who possess a minimum period of experience in the field of immigration law (e.g., five years for trial judges and seven years for appellate judges). Such immigration law experience, however, would not be an absolute requirement, since the goal is to attract lawyers of the highest caliber with the appropriate temperament and demeanor, not necessarily immigration lawyers as such.

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 level judges. For example, the terms could be 8 to 10 years for trial judges and 12 to 15 years for appellate judges. The judges would be removable by the appointing party only for incompetency, misconduct, neglect of duty, malfeasance, or physical or mental disability.

Each trial judge would be supervised by the Assistant Chief Trial Judge responsible for the local

court on which the judge served. Each appellate judge would be supervised by the Chief Appellate Judge. As Article I judges, neither the trial nor appellate judges would be subject to comprehensive performance reviews of the type used for civil service employees. However, their performance would be reviewed using a system 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. The performance review system would stress judicial improvement and could not be used for purposes of discipline.

The judges on the Article I court would be subject to a code of ethics and conduct based on the ABA Model Code of Judicial Conduct, tailored as necessary to take into account any unique requirements for the immigration judiciary. For alleged violations, they would be subject to a complaint and disciplinary procedure similar to what is used for other federal judges. Under this procedure, all complaints would be made directly to a reviewing body established specifically for this purpose. The complaints would bypass persons in the chain of supervision.

Summary of Other Recommendations

Whether or not overall structural changes are made, there are many steps that should be taken within the existing structure to improve the removal adjudication system. Many of these steps could be taken by the relevant agencies under existing law, while other steps would require new legislation. A comprehensive list of our recommendations appears in Table ES-1 at the end of this Executive Summary. The following summary describes the higher priority recommendations.

Summary of Other Key Recommendations Requiring Legislation

Some of the recommended steps would require legislation, including the following:

1. Request additional immigration judges. In order to bring the caseload down to a level roughly on par with the number of cases decided each year by judges in other federal administrative adjudicatory systems (around 700 cases per judge annually), we recommend hiring approximately 100 additional immigration judges as soon as possible, but at least within the next three to four years. We also recommend hiring enough law clerks to increase the current ratio of one law clerk per four judges to one law clerk per judge, and increasing the number of support personnel in order to serve the larger number of judges.

2. Permit all eligible noncitizens to adjust to lawful permanent resident status while in the United States, or eliminate bars to reentry. Generally, undocumented noncitizens who are otherwise eligible to become lawful permanent residents can adjust their status only by applying for an immigrant visa at a U.S. consulate outside the United States. However, if a noncitizen leaves the country in order to do this after being unlawfully present in the United States for a certain period of time since April 1, 1997, he or she is

subject to bars on returning to the United States. To encourage eligible noncitizens to legalize their status, they should be allowed to do this while remaining in the United States. Alternatively, the bars on reentry for noncitizens who have accrued unlawful presence in the United States should be eliminated so such noncitizens can become lawful permanent residents by consular processing their applications outside of the United States. This legislative change would reduce the number of noncitizens who are subject to removal proceedings and thereby ease some of the burden on the removal adjudication system.

3. Amend the definition of “aggravated felony” and eliminate the retroactive application of the aggravated felony provisions in our immigration law. The definition of “aggravated felony” has progressively expanded and currently is so broad that DHS has initiated removal proceedings against persons convicted of misdemeanors and other minor crimes. This has burdened the removal adjudication system. The retroactive application of the aggravated felony provisions also has burdened the system, is unfair, and results in the removal of noncitizens with longstanding ties to the United States. Accordingly, the definition of “aggravated felony” should be amended 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); and the retroactive application of the aggravated felony provisions should be eliminated.

4. Curtail the use of the administrative removal process by which DHS officers may order the removal of noncitizens who have been convicted of “aggravated felonies” and are not lawful permanent residents. The expanded definition of “aggravated felony” has been accompanied by the greatly increased use of administrative procedures, without recourse to the immigration courts, to remove

noncitizens convicted of “aggravated felonies” who are not lawful permanent residents. Given the absence of administrative or judicial review and other procedural due process protections such as an evidentiary hearing, this procedure is contrary to current ABA policy. In furtherance of this policy, such proceedings should be eliminated at least for minors, the mentally ill, noncitizens who claim a fear of persecution or torture upon return to their countries of origin, and noncitizens with significant ties to the United States (such as those who are married to U.S. citizens or lawful permanent residents, have children who are U.S. citizens or lawful permanent residents, or have served in the U.S. military). Any noncitizen subjected to the administrative removal process should have the right to a review by the immigration courts of a determination that the conviction was for an aggravated felony and that he or she is not in any of these protected categories.

5. Curtail the use of expedited removal for noncitizens apprehended at the border or within the United States by: (1) eliminating expedited removal for individuals who are already in the United States, unaccompanied minors, and the mentally ill; (2) permitting DHS officers to issue expedited removal orders only if they determine that an individual lacks proper travel documentation; and (3) expanding judicial review of expedited removal orders. Immigration court proceedings have been bypassed not only for non-lawful permanent residents allegedly removable on the ground of “aggravated felony” convictions, but also certain noncitizens apprehended at the border or within the interior of the United States. Given the absence of administrative or judicial review and other procedural due process protections such as an evidentiary hearing, this expedited removal process is also contrary to current ABA policy. In furtherance of that policy, expedited removal should at least be limited to individuals at U.S. ports of entry or those observed illegally crossing a border by DHS officers at the time of their apprehension — not individuals encountered in the interior of the United States — and only if DHS officers determine that such individuals lack proper travel documentation. Furthermore, expedited removal should not be applied under any circumstance to unaccompanied minors and the mentally ill, who often lack the capacity to make informed decisions. Finally,

habeas review should be expanded 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.

6. Amend the definition of “crime involving moral turpitude.” The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) drastically expanded this ground for removal by requiring only that the offense have a *potential* sentence of one year or more. Under this rule, a lawful permanent resident with no other criminal record may be found deportable based upon a single misdemeanor conviction where no jail sentence was imposed, if the offense is found to “involve moral turpitude.” The Immigration and Nationality Act (“INA”) should be amended 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*. In the alternative, the INA should be amended at least to require that the offense carry a *potential sentence* of “more than one year,” rather than the current “one year or longer.”

7. Eliminate or narrow the mandatory detention provisions to target persons who are clearly flight risks or pose a threat to national security, public safety, or other persons. Since the implementation of the mandatory detention provisions in 1996, an enormous and growing system of detention has emerged, which is costly, unmanageable, and overburdened. The increased use of detention by DHS, along with the Department’s exercise of discretion with regard to detainees’ locations, has increased coordination and management problems in the removal adjudication system and raised due process and fairness concerns. Certain categories of noncitizens are subject to mandatory detention by DHS, whether or not they pose a security or flight risk. The mandatory detention provisions are too broad and require the inefficient expenditure of resources. They should, therefore, be eliminated or narrowed to target persons who are clearly flight risks or pose a threat to national security, public safety, or other persons.

8. Restore judicial review of discretionary decisions under an abuse-of-discretion standard. Legislative reforms enacted in 1996 eliminated judicial review over “discretionary” decisions of the Attorney General (other than asylum), including waivers of

inadmissibility for certain crimes under certain conditions, cancellation of removal, voluntary departure, status adjustments, and any other decision designated as discretionary. These decisions, however, have an enormous impact on the lives of noncitizens, and “discretion” need not entail absolute absence of oversight. The INA should be amended to allow for judicial review of these decisions under an abuse-of-discretion standard, which has been a workable standard for judicial review of other kinds of administrative decisions.

9. Amend the INA to permit the courts of appeals to remand cases to the BIA for further fact finding.

With the elimination of habeas corpus jurisdiction in removal cases other than expedited removal cases in 2005, the current system affords no opportunity for an Article III court to engage in any fact finding or to remand a case to the BIA or immigration court for additional fact finding. A court of appeals should be allowed to remand a case to the BIA for fact finding under the standard provided in the Hobbs Act for review of other agency actions — i.e., where the additional evidence is material and there were reasonable grounds for failure to adduce the evidence before the agency.

10. Extend the deadline for filing a petition for review of BIA decisions by the courts of appeals.

The 1996 legislation also reduced the period of time for filing a petition for review of a final removal order before the court of appeals from 90 days to 30 days. The shorter deadline poses significant problems for noncitizens in getting a copy of the full record and securing appellate counsel. Particularly for pro se litigants or those detained in remote areas, where representation usually is difficult to obtain, the 30-day deadline effectively forces an appeal without counsel or adequate review of the underlying record. The INA should be amended 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.

11. Establish a right to representation in adversarial removal proceedings and for individuals in groups with special needs. Congress should enact a statute recognizing a right to representation at government expense in adversarial proceedings where an indigent noncitizen faces the possibility of removal, is potentially eligible for relief from removal, and cannot

otherwise obtain representation. Such proceedings would include any adjudication before an immigration judge, appeals to the BIA and federal appellate courts, and challenges to expedited removal through habeas petitions. For individuals in groups with special needs, including unaccompanied minors and noncitizens with mental disabilities and illnesses, the right to government-funded counsel should extend to all immigration proceedings, whether or not such proceedings may lead to removal. 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.

Summary of Other Key Recommendations Not Requiring Legislation

Apart from legislative changes, there are many steps that should be taken within the existing structure to improve the removal adjudication system. Many of these steps could be taken by the relevant agencies under existing legislation, including the following:

1. Increase the use of prosecutorial discretion by DHS officers and attorneys and give DHS attorneys greater control over removal proceedings.

These DHS personnel should be encouraged to reduce the burden on the removal adjudication system by exercising discretion to not serve a Notice to Appear on noncitizens who are prima facie eligible for relief from removal, to concede eligibility for relief from removal after receipt of an application, to stop litigating a case after key facts develop to make removal unlikely, to offer deferred action or a stay of removal early in the process, or not to file an appeal in certain types of cases (such as relief under the Convention Against Torture). Furthermore, DHS attorneys should have greater control over the initiation of removal proceedings by DHS officers. We recommend that DHS implement a pilot program requiring the prior approval of a DHS attorney on a case-by-case basis for the issuance of all discretionary NTAs. This pilot program should be launched in DHS local offices with sufficient attorney resources and used by DHS to determine the need for and feasibility of extending the system to other offices and the additional resources needed for such extension. Finally, to the extent possible, each removal case in immigration court should be assigned to an

individual DHS trial attorney, which would increase efficiency and facilitate the exercise of prosecutorial discretion consistent with DHS policies.

2. Require that asylum claims arising in expedited removal proceedings be adjudicated by asylum officers. Currently, affirmative asylum claims are presented to DHS asylum officers in non-adversarial proceedings, but asylum claims made in expedited removal proceedings are adjudicated by immigration judges. To reduce the caseload burden on immigration courts and DHS attorneys, asylum claims raised in expedited removal proceedings should be reviewed by asylum officers to determine whether to grant asylum or to refer the case to the immigration court for full adjudication.

3. Reduce the use of detention, expand alternatives to detention, expand use of parole for asylum seekers, and address concerns related to the location and transfers of detainees. We recommend that DHS implement policies with the purpose of avoiding 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.

DHS also should expand the use of alternatives to detention, which can provide an effective and more economical means of ensuring most noncitizens' appearance, and should limit the use of such alternatives to persons who would otherwise be subject to detention. DHS should consider whether its current alternatives to detention constitute custody for purposes of the INA. If so, DHS could extend such 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.

DHS should 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.

DHS should adopt policies to avoid detaining noncitizens in remote facilities located far from family members, counsel, and other necessary resources. Finally, DHS should upgrade its data systems and

processes to permit better tracking of detainees and improve compliance with ICE's National Detention Standard for Detainee Transfers.¹⁵

4. Require more written, reasoned decisions from immigration judges. The issuance of oral decisions in immigration proceedings can have a significant negative impact on the quality of decisions and the quality of subsequent BIA and judicial review. With additional resources and more time for judges to decide each case, judges should be required to provide reasoned written decisions, particularly in proceedings, such as asylum cases, where the complexity of the case requires more thoughtful consideration than can be given during the hearing itself. Immigration judges should, at a minimum, produce written decisions that are clear enough to allow noncitizens and their counsel to understand the bases of the decision and to permit meaningful BIA and judicial review.

5. Increase training opportunities for immigration judges. Some existing training has been cut back due to a shortage of funds. Moreover, heavy caseloads result in a lack of administrative time during which immigration judges could participate in training. We recommend providing additional training opportunities for immigration judges, including training in assessing credibility, identifying fraud, changes to United States asylum and immigration law, and cultural sensitivity and awareness. Sufficient funding should be made available to permit all judges to participate in regular, in-person trainings. With increased resources and the hiring of additional immigration judges, more administrative time should be made available to enable judges to participate in the expanded offerings.

6. Limit the conduct of hearings by videoconference to procedural matters in which the noncitizen has given his or her consent. The current use of videoconferencing for hearings on the merits can undermine the fairness of the proceedings — for example, by preventing the noncitizen from communicating effectively and confidentially with counsel and impairing the immigration judge's ability to make accurate credibility determinations.

7. Increase three-member panel review at the BIA. New regulations should be promulgated to require panel review for: (1) all non-frivolous merits appeals that lack obvious controlling precedent; and

(2) motions that are not purely procedural or unopposed by DHS. The Board’s resources should be increased, with additional staff attorneys and Board Members as necessary to support the expansion of panel review.

8. Require more written BIA decisions. Although current Board practice gives Board Members discretion to decide whether to issue an Affirmance Without Opinion (“AWO”) or to issue a short written opinion, the Department of Justice should formalize this practice by finalizing the portion of the 2008 proposed rule that would make AWOs discretionary rather than mandatory. The Board’s existing regulations should also be amended to require that Board opinions respond to all non-frivolous arguments properly raised by the parties in all cases.

9. Permit de novo review by the BIA of immigration judge factual findings and credibility determinations. This would help reduce the current disparity among immigration judge decisions, decrease the chance that applicants will be harmed by erroneous decision making, and potentially reduce the perceived need to appeal BIA decisions to the circuit courts.

10. Amend regulations to require BIA removal orders in which the government prevails to contain notice of appeal rights. The noncitizen should be provided with adequate notice of the right to appeal, the applicable circuit court, and the deadline for filing an appeal.

11. Expand the Legal Orientation Program to reach additional noncitizens needing legal assistance. This program is almost exclusively limited to detainees and only those located in 25 out of approximately 350

facilities or detention centers under contract with DHS. The program should be established at all detention sites and expanded to immigration courts to reach non-detained persons in removal proceedings.

12. Modify the Legal Orientation Program to incorporate a system that will screen all indigent noncitizens (not only detainees) in removal proceedings and refer them to individuals or groups who can represent them in adversarial proceedings, using a set of standards developed by EOIR. The system also would screen all noncitizens to determine whether they belong to one of several vulnerable groups, including unaccompanied minors and persons with mental disabilities and illness, entitled to representation. Where representation is unavailable, government-paid counsel would be appointed. The enhanced LOP would require an administrative structure to provide counsel at government expense to noncitizens in some cases.

Issues Not Addressed

There have been passionate debates in recent years on whether our immigration policies should be changed in fundamental ways. Those debates have addressed what are the appropriate objectives of enforcement of the immigration laws, whether to provide an eventual path to lawful residence for the estimated 12 million undocumented noncitizens, whether to enact a guest worker program, and whether to increase the number of visas for professionals. This Study does not focus on those types of broad policy issues, but rather (as described above) addresses problems and potential reforms related to the removal adjudication system.

Summary of the Six Parts of this Study

In the following pages of this Executive Summary, we briefly summarize the major issues that we have examined and describe our recommendations with respect to each of the six major topics of our Study. In the full Report, for each of these topics, we provide a detailed review of the existing system, the problems and challenges facing this system, and recommendations for improving the removal adjudication system in order to make it more independent, fair, efficient, and professional.

1

Department of Homeland Security

The Department of Homeland Security (“DHS”) is a cabinet-level agency that provides U.S. immigration benefit services and enforcement functions through the following three components:

- 1. U.S. Citizenship and Immigration Services (“USCIS”),** which provides benefit services and adjudicates noncitizens’ applications for adjustment of status, naturalization, and asylum;
- 2. Customs and Border Protection (“CBP”),** which is responsible for enforcing immigration laws at the nation’s borders and ports of entry and for inspecting individuals seeking admission into the United States at any port of entry; and
- 3. Immigration and Customs Enforcement (“ICE”),** which enforces immigration laws in the interior of the United States, prosecutes removal cases before the immigration courts, manages the immigration detention system, and effects the removal of noncitizens.

The first step in a typical removal proceeding is when a DHS officer from any of these three components serves a Notice to Appear (“NTA”) upon a noncitizen and files the NTA with an immigration court. USCIS, CBP, and ICE play other important roles in the removal of noncitizens:

- CBP and ICE officers, with only limited administrative or judicial review, may order the removal of a non-lawful permanent resident convicted of an “aggravated felony” and the expedited removal of certain other noncitizens;
- USCIS asylum officers adjudicate affirmative asylum applications of noncitizens and have authority to grant asylum to such applicants;
- CBP and ICE officers may grant voluntary departure relief to noncitizens who are subject to removal;

- ICE attorneys prosecute removal proceedings in immigration courts; and
- ICE officers (and sometimes CBP officers) make decisions regarding the detention of noncitizens and are responsible for the removal of noncitizens subject to a removal order.

In short, DHS personnel (including officers in the field) regularly make important and difficult decisions regarding the removal of noncitizens, and these decisions have material effects on these individuals and their families.

We have identified five sets of problems in the DHS phase of removal adjudication, which raise efficiency issues, fairness/due process issues, or both. We summarize below these issues and our recommendations for addressing each.

A. Overburdening the Removal Adjudication System without Adequate Resources

The number of noncitizens removed from the United States increased from 69,680 in fiscal year 1996 to 356,739 in fiscal year 2008 — a more than 400% increase.¹⁶ The number of cases commenced in the immigration courts to expel noncitizens grew by 23% from 231,502 combined deportation and exclusion proceedings in fiscal year 1996¹⁷ to 285,178 removal proceedings in fiscal year 2008.¹⁸ The number of NTAs issued by DHS grew by 36% in just two years, from 213,887 in fiscal year 2006 to 291,217 in fiscal year 2008.¹⁹

This enormous expansion of immigration enforcement activity and resources has not been matched by a commensurate increase in resources for the adjudication of immigration cases. As a result, the adjudication system has been overwhelmed by the increasing caseload, and it has been extremely challenging to adjudicate cases fairly. While this problem is in part a function of insufficient funding and

staffing for the immigration courts, some DHS policies and practices contribute to the burden.

An important reason for the increase in proceedings is the increasing focus on apprehending and removing all criminal noncitizens, including such actions taken in coordination with state and local law enforcement agencies under section 287(g) of IIRIRA (in which local law enforcement officers participate in immigration enforcement efforts); the Criminal Alien Program (in which local law enforcement agencies notify DHS of foreign-born detainees in their custody); and the Secure Communities initiative (in which foreign-born persons detained by local law enforcement agencies are identified by DHS when such agencies run their detainees' fingerprints through the Federal Bureau of Investigation's and DHS's databases as part of the typical booking process). Thus, the number of NTAs issued by ICE has grown from 44,015 in fiscal year 2005 to 168,299 in fiscal year 2009.²⁰ DHS is planning to significantly expand the scope of Secure Communities, with the goal of having the immigration status checked for virtually every person booked into every local jail in the United States, using a biometric identification system. Therefore, the caseload burden on the immigration courts may very well increase further in the future.

Another reason for the increasing caseload for the immigration courts and DHS attorneys is the increase in the number of NTAs issued by officers in USCIS's Domestic Operations Directorate. Following a shift in policy announced in 2006, USCIS officers have been issuing NTAs to noncitizens who have applied for immigration benefits but who are "out of status" — even if they are clearly eligible to become lawful permanent residents and, in some cases, even following the approval of employment-based immigrant visa petitions filed for their benefit.

It is estimated that, in 2003, approximately 5,000 defensive asylum claims were added to the workload of the immigration courts by the expedited removal process. Asylum or relief under the Convention Against Torture was granted in about 1,400 of those cases. If those claims initially had been reviewed by asylum officers, most of these meritorious claims would have been granted and never reached the immigration courts. In addition, in fiscal year 2008, the immigration courts received approximately 11,000 removal

proceedings in which asylum applications were made defensively. If these defensive asylum claims had been referred to asylum officers for review, and if the asylum officers had granted asylum with respect to these cases at the immigration court's grant rate of 26% for defensive asylum cases in fiscal year 2008, then approximately 4,000 asylum claims would have been disposed of by asylum officers and would not have required adjudication by the immigration courts.

Attorney staffing is reportedly deficient at DHS. ICE attorneys have had as little as 20 minutes on average to spend per case in the immigration courts. Also contributing to the caseload for ICE attorneys and the immigration courts is the insufficient use of discretion to not initiate removal proceedings, to concede eligibility for relief from removal after receipt of an application, to stop litigating a case after key facts develop to make removal unlikely, to offer deferred action or a stay of removal early in the process, or not to file an appeal in certain types of cases (such as relief under the Convention Against Torture). This failure to exercise prosecutorial discretion appears to be due in part to a lack of training and guidelines for DHS officers and attorneys, as well as the lack of tolerance for mistakes in judgment made in exercising discretion.

One barrier to the effective exercise of prosecutorial discretion and the efficient handling of cases by DHS trial attorneys is the current practice of assigning attorneys on a hearing-by-hearing basis in removal proceedings at the immigration courts. The result is that several attorneys may have to become familiar with the same case, with no single attorney having overall responsibility for the case.

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

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 the issuance of all discretionary NTAs by DHS officers.

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.

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. 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.

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

B. Coordination Problems in DHS

DHS's enforcement and application of immigration law have often been inconsistent and confusing. This is unfair to those affected, limits the ability of DHS to take a leadership role on immigration policies, and decreases confidence and trust in the immigration adjudication system.

The structure of the immigration functions in DHS makes coordination and consistency in this area challenging. The immigration service and enforcement functions are divided among three co-equal components in DHS, each of which is headed by a Presidential appointee reporting directly to the Secretary of DHS through the Deputy Secretary. For example, USCIS, CBP, and ICE are all involved to some degree in asylum claims arising in expedited removal proceedings,²¹ but there is no mechanism or structure to ensure that they address similar asylum issues in the same way. The DHS Assistant Secretary for Policy and the General Counsel of DHS play important roles in immigration matters. Each of USCIS, CBP, and ICE has its own policy office reporting directly to the head of such component, while each has its own general counsel, who reports directly to the General Counsel of DHS.

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

C. Unfair Laws that Burden the Adjudication System

While this Study has focused on the *procedures* for removing noncitizens from the United States, we also have identified some substantive provisions of immigration law that are not only unfair to noncitizens but also burden the immigration removal adjudication system. These include: (1) restrictions on the ability of noncitizens to adjust to lawful permanent resident ("LPR") status, coupled with statutory bars on reentry into the United States; (2) the law authorizing removal of noncitizens convicted of aggravated felonies; and (3) the law authorizing removal of noncitizens convicted of crimes involving "moral turpitude."

1. Adjustments to Lawful Permanent Resident Status

Generally, undocumented noncitizens who are otherwise eligible to become lawful permanent residents cannot adjust their status while remaining in the United States and instead must apply for an immigrant visa at a U.S. consulate outside the United States. However, if a noncitizen has been unlawfully present in the United States since April 1, 1997, he or she is subject to the following bars on returning to the United States (unless waived):

- Three years if the noncitizen was unlawfully present for more than 180 days but less than one year during a single stay and voluntarily leaves the country before the commencement of removal proceedings;
- Ten years if the noncitizen was unlawfully present for at least one year during a single stay; and
- A permanent bar if the noncitizen was unlawfully present for more than one year in the aggregate (during one or more stays), leaves the United

States, and subsequently enters or attempts to enter the United States without being lawfully admitted.

These bars on admission discourage many undocumented noncitizens who are eligible to become LPRs from departing voluntarily or legalizing their status because, unless they have obtained a waiver or been granted other relief, they would be barred from returning to the United States for the applicable period of time if they left the country to apply for an immigrant visa at a U.S. consulate abroad.

Recommendation: Enact statutory changes to permit all eligible noncitizens to adjust to lawful permanent resident status in the United States. In the alternative, eliminate the bars on reentry for otherwise eligible noncitizens who have accrued unlawful presence in the United States so they can become lawful permanent residents by consular processing their applications outside of the United States.

2. Removal of Noncitizens Convicted of Aggravated Felonies

The INA provides that a noncitizen is removable if he or she has been convicted of an aggravated felony. The provision was first enacted in 1988 and defined “aggravated felony” to mean murder, any drug trafficking crime as defined in 18 U.S.C. § 924(c)(2), or any illicit trafficking in any firearms or destructive devices, in each case committed in the United States. Since 1988, the definition of “aggravated” has been expanded so significantly that DHS has initiated removal proceedings on the basis of convictions for misdemeanors and other minor offenses, such as shoplifting, that are not consistent with any common understanding of the term “aggravated felony.” These have included even misdemeanor convictions in which no jail sentence was ordered or served. Moreover, these provisions have been applied to noncitizens *retroactively* to include persons who were convicted or pleaded *nolo contendere* prior to 1988 for misdemeanors and other minor infractions without any reason to believe that deportation was a potential consequence, since such crimes were not a basis for removal at the time of conviction.

There is evidence that removal proceedings brought on aggravated felony grounds have increased greatly since 1988. The number of such removal orders more than doubled from 10,303 in 1992 to 26,074 in

2005. From mid-1997 to May 2006, removal proceedings on the ground of aggravated felony convictions were initiated against 156,713 noncitizens in immigration courts.²² Removal orders issued on the ground of aggravated felony convictions have generated a significant amount of litigation, including appeals to the federal circuit courts. Still additional costs for the adjudication system result from mandatory detention, which also hinders the ability of these noncitizens to defend themselves.

Noncitizens removable for aggravated felony convictions are subject to consequences under U.S. immigration law that are more severe than if they were removable on a different basis. These consequences include mandatory detention during removal proceedings, a lifetime bar on admission to the United States, a bar to naturalization, administrative removal of non-LPRs, and ineligibility for almost all forms of relief from removal, including cancellation of removal, voluntary departure, asylum, and relief for victims of domestic violence under the Violence Against Women Act.

The bar on any discretionary relief or consideration of equities, combined with the significant expansion in the number of offenses that qualify as aggravated felonies, has resulted in the automatic removal of thousands of permanent residents and other noncitizens with extensive ties to the United States, with the attendant family and societal disruption.

Recommendation: Amend the definition of “aggravated felony” to require that any such conviction must be of a felony and that a term of imprisonment of more than one year must be imposed (excluding any suspended sentence).

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

3. Removal of Noncitizens Convicted of Crimes Involving Moral Turpitude

A noncitizen is removable if, within five years after his or her admission into the United States, he or she has been convicted of a “crime involving moral turpitude” for which a sentence of one year or longer may be imposed. “Crime involving moral turpitude” is a vaguely defined term that has been held to

encompass a wide range of crimes, including minor offenses such as shoplifting and turnstile-jumping to avoid paying a subway fare. For decades leading up to 1996, a permanent resident could be found deportable based upon a single conviction of a crime involving moral turpitude only if a sentence of at least one year was actually imposed for the conviction. The 1996 AEDPA drastically expanded this deportation ground by requiring only that the offense have a *potential* sentence of one year or more. Under this rule, a lawful permanent resident with no other criminal record may be found deportable based upon a single misdemeanor conviction where no jail sentence was imposed, if the offense is found to “involve moral turpitude.”²³

In some cases, LPRs are eligible for a waiver of the minor offense, which will likely be granted after a hearing on the merits. In other cases, LPRs are barred from applying for any discretionary relief for technical reasons, and they will engage in extended litigation to defend against removal. If an LPR is removed, his or her removal will often be accompanied by hardship to the family and attendant societal disruption.

For almost 100 years, courts and the BIA have employed the categorical approach to determine whether a prior conviction was of a crime involving moral turpitude.²⁴ This approach combines concerns for adjudicatory efficiency — by avoiding testimony of witnesses and other evidence to “re-try” the criminal case — and for fairness and predictability. Moreover, the categorical approach is consistent with the INA’s statutory language, which provides that a noncitizen is inadmissible if he or she is “convicted” of a crime involving moral turpitude.

In November 2008, in *In re Silva-Trevino*, former Attorney General Mukasey modified the traditional categorical approach by requiring an immigration judge, under certain circumstances, to look beyond the record of conviction and review extrinsic evidence to make this determination.²⁵ This is likely to add to the burdens of immigration courts and potentially cause delay in a significant number of immigration court proceedings. Moreover, *Silva-Trevino* has created uncertainty as to the immigration consequences of criminal convictions, which may result in increased unwillingness by defendants and their legal counsel to dispose of criminal cases by pleas and uncertainty and disruption in the criminal justice system.

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*. In the alternative, at least require that the offense carry a *potential sentence* of “more than one year,” rather than the current “one year or longer.” Either change will ensure that a single misdemeanor conviction is not the sole basis for removal of a noncitizen (including a lawful permanent resident).

Recommendation: Withdraw *Silva-Trevino* and reinstate the categorical approach in removal and other immigration proceedings for determining whether a criminal conviction is of a crime involving moral turpitude, rather than holding open-ended hearings on the facts underlying past convictions.

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

Over the last five years, DHS has relied increasingly on streamlined administrative removal procedures for noncitizens convicted of aggravated felonies and the expedited removal of persons apprehended at the border or within the United States. These procedures produce removal decisions made by DHS line officers, rather than immigration judges. The procedures are not open to public scrutiny and are subject to very limited judicial review.²⁶ As currently implemented, such procedures raise due process concerns and serve to decrease confidence and trust in the removal adjudication system.

The lack of oversight and transparency is especially important given the significant consequences of the decisions. Noncitizens who are deemed aggravated felons and administratively removed are permanently barred from returning to the United States for any reason. In addition, a noncitizen with a valid nonimmigrant visa, such as a tourist or business person, may be erroneously removed and barred from reentry for five years after his or her removal, with no recourse to correct the error. Finally, noncitizens in expedited removal proceedings who face persecution or torture upon return to their countries of origin have no recourse if they are erroneously ordered removed.

Expedited removal originally was intended to deal

with a crisis-type situation on our southern border, but its use has greatly expanded to include not only noncitizens at ports of entry, but also individuals already in the country. The expansion of expedited removal to individuals in the interior of the United States appears inconsistent with the due process rights to which noncitizens within the country are entitled, regardless of immigration status.²⁷

The United States Commission on International Religious Freedom and the United Nations High Commissioner for Refugees have found significant problems in the inspection process at ports of entry with respect to the treatment of noncitizens who fear persecution or torture upon return to their countries or origin.²⁸

The ABA has taken the position that Congress should enact legislation to restore authority to conduct removal proceedings solely by immigration judges and that such proceedings should include the right to have a decision that is based on a record and subject to meaningful administrative and judicial review.²⁹ The rationale for this policy was recently stated as follows:

All of these systems [including expedited removal and administrative removal], although they address serious problems in the immigration enforcement system, implicate due process concerns. They expressly exclude the oversight of an impartial adjudicator; they are radically accelerated; they are largely insulated from public scrutiny and judicial review. The continuation and expansion of such hidden systems of administrative procedure violate many of the most fundamental norms of due process.³⁰

In furtherance of this ABA position, we make the following recommendations, which would limit the use of administrative and expedited removal proceedings and provide a complementary avenue for judicial review.

1. Administrative Removal of Persons Convicted of Aggravated Felonies

Recommendation: Prohibit the use of administrative removal proceedings to remove noncitizens who are alleged to be convicted of aggravated felonies if they

are minors, mentally ill, claim a fear of persecution or torture upon return to their countries of origin, or have significant ties to the United States (such as a non-LPR who can demonstrate that he or she is married to a U.S. citizen or LPR, has a minor child who is a U.S. citizen or LPR, or has served in the U.S. military).

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 in the foregoing recommendation.

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

Recommendation: Eliminate expedited removal for individuals who are already in the United States, unaccompanied minors, and the mentally ill.

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.

Recommendation: To ensure proper treatment of noncitizens who fear persecution or torture upon return to their countries of origin, improve 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.

Recommendation: Make available a copy of any videotape or other recording of the interview of a noncitizen during expedited removal proceedings to such noncitizen and his or her representative for use in his or her defense from removal.

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.

E. DHS Detention Policies that Create Problems for the Removal Adjudication System

The stated purpose of detention of a noncitizen in a removal proceeding is to ensure that this noncitizen appears for his or her removal proceeding. However, since the expansion of the mandatory detention provisions in 1996, an enormous and growing system of immigration detention has emerged, which is costly, extremely difficult to manage, and overburdened. The average daily population of detained noncitizens increased from 9,011 in fiscal year 1996³¹ to 31,345 in fiscal year 2008.³² The number of noncitizens detained over the course of a year increased from approximately 209,000 in fiscal year 2001³³ to 378,582 in fiscal year 2008.³⁴ It was estimated that by the end of fiscal year 2009, DHS would have detained approximately 380,000 noncitizens.³⁵ As a result of this rapid growth in ICE's detainee population, ICE currently operates the largest detention and supervised release program in the United States.³⁶

The increasing use of detention by DHS and its current detention policies and practices raise a number of concerns and problems:

- The rapid growth in the number of detainees has led DHS to house them in facilities over which DHS lacks control or supervision and, in some cases, under inhumane conditions, and ICE is not able to track on a real-time basis the location of all detainees;
- The mandatory detention provisions of the INA force DHS to detain many noncitizens who do not pose flight risks or threats to national security, public safety, or other persons, and may result in a decreased ability to detain noncitizens who are not subject to mandatory detention but do pose such risks;
- Even where detention is not mandatory, DHS detains noncitizens in situations where detention is not necessary; and
- Detainees are often housed far from friends and family and have difficulty obtaining effective legal representation. Such detention impairs the ability of noncitizens subject to removal proceedings to

defend themselves, particularly if they are detained in locations far from key witnesses and evidence.

DHS detention policies have increased coordination and management problems in the removal adjudication system and have raised due process and fairness concerns.

In response to current detention conditions and problems, ICE recently announced a number of reforms intended to improve custodial conditions and medical care of detainees (including special populations such as women, families, and detainees who have medical issues or are mentally ill), fiscal prudence, and ICE's oversight of the immigration detention system.³⁷ The effects of such reforms remain to be seen.

The mandatory detention provisions of the INA require the detention of large numbers of people, including individuals convicted of certain criminal offenses, national security risks, arriving asylum seekers who lack proper documentation until they can demonstrate a credible fear of persecution, persons subject to expedited removal, arriving noncitizens who appear inadmissible, and persons under final orders of removal for a limited period of time. These provisions are too broad and require the government to spend resources inefficiently. They should, therefore, be eliminated or narrowed to target persons who are clearly flight risks or pose a threat to national security, public safety, or other persons.

In any event, we recommend that DHS implement policies with the purpose of avoiding 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. In addition, we recommend the following changes:³⁸

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.

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.³⁹

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

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.

2

Immigration Judges and Immigration Courts

The immigration courts in the United States sit in 57 locations in 28 states and hear several hundred thousand matters each year. The matters include, among others, removal proceedings, asylum petitions, bond redeterminations for noncitizens held in detention, reviews of credible fear determinations, and rescission hearings to determine whether a lawful permanent resident was wrongfully granted permanent resident status. The vast majority of the matters are removal proceedings. With a low rate of appeal from the decisions of immigration courts, most noncitizens' cases end in those courts.

Since 1983, the immigration courts have been part of the Executive Office for Immigration Review ("EOIR"), which is housed within the U.S. Department of Justice ("DOJ") and answers directly to the Attorney General. The Attorney General appoints a director, who supervises the two offices within EOIR — the Board of Immigration Appeals ("BIA" or "Board") and the Office of the Chief Immigration Judge ("OCIJ"). The OCIJ supervises the immigration courts and the immigration judges. In addition, nine Assistant Chief Immigration Judges ("ACIJs"), five of whom are assigned to the various regional courts, aid in the administration of such courts.

Immigration judges are career attorneys appointed by the Attorney General as administrative judges under Schedule A of the excepted civil service and are employed for indefinite terms. As Schedule A appointees, immigration judges are exempted from many of the laws and regulations governing appointment, evaluation, discipline, and removal of civil service employees.

In recent years, the immigration courts have faced harsh criticism — including by federal appellate judges — for inadequate decisions and reasoning and improper behavior by immigration judges. In 2006, then-Attorney General Alberto Gonzales announced 22 reform measures designed to improve the

functioning of the immigration courts and the BIA. Some of these measures have been implemented, representing a promising start toward improving the performance and reputation of the immigration courts. However, over three years later, a number of reforms remain incomplete, and numerous problems with the immigration court system remain.

Some problems facing the immigration courts are of a systemic nature, while others affect particular aspects of the system. After briefly describing two systemic issues, we discuss six types of specific issues and make recommendations for each.

A. Systemic Issues

One system-wide problem is the existence of stark disparities in asylum grant rates among immigration judges. Recent studies have demonstrated that more than a quarter of immigration judges grant asylum or other favorable relief to noncitizens at rates that vary from the mean grant rate of judges at their home court by more than 50%. Striking disparities exist even when focusing only on decisions pertaining to nationals from a single country. For example, one study found that Colombian asylum applicants who appeared before the immigration court in Miami had a 5% chance of prevailing before one judge and an 88% chance of prevailing before another judge in the same court.⁴⁰ Disparities appear to be associated with a judge's gender, prior work experience, and length of time on the bench. This indicates that a noncitizen's success in immigration court may depend to a troublesome extent upon which judge is assigned his or her case.

A number of experts have already suggested specific recommendations to address this problem. While we do not add any recommendations directly addressing the disparity problem, we believe that improvements made through the implementation of this Report's recommendations will help lead to more

professional and consistent decision making.

Another system-wide problem is public skepticism and a lack of respect for the immigration court process, which is attributable at least in part to the courts' lack of independence from DOJ. Some of this skepticism no doubt flows from the politicized hiring of immigration judges and other DOJ employees between 2004 and 2007 and the allegedly politically motivated "purge" of the Board of Immigration Appeals. This set of issues is addressed in our proposal for system restructuring described above.

B. Specific Issues and Recommendations

1. Large Caseloads and Inadequate Resources

The immigration courts have too few immigration judges and support staff, including law clerks, for the workload for which they are responsible. In 2008, immigration judges completed an average of 1,243 proceedings per judge and issued an average of 1,014 decisions per judge. To keep pace with these numbers, each judge would need to issue at least 19 decisions each week, or approximately four decisions per weekday. A recent report indicated that the average time immigration judges have to dispose of cases is at its lowest point in more than a decade.⁴¹ In comparison, Veterans Law Judges decided approximately 729 veterans benefits cases per judge (approximately 178 of which involved hearings) in 2008, and Social Security Administration administrative law judges decided approximately 544 cases per judge in 2007.⁴²

A lack of adequate staff support for the immigration judges compounds the problem. On average, there is only one law clerk for every four immigration judges, and the ratio is even worse in some immigration courts.

The shortage of immigration judges and law clerks has led to very heavy caseloads per judge and a lack of sufficient time for judges to properly consider the evidence and formulate well-reasoned opinions in each case. In fact, judges generally have been limited to issuing oral decisions shortly after the merits hearing is completed.

Recommendation: In order to bring the caseload down to a level roughly on par with the number of cases decided each year by judges in other federal

administrative adjudicatory systems (around 700 cases per judge annually), we recommend hiring approximately 100 additional immigration judges as soon as possible, but at least within the next three to four years. Based on budget data for EOIR, the cost of adding 100 immigration judges is estimated to be \$18.5 million for the initial year.

Recommendation: Hire enough law clerks to provide one law clerk per judge. This would entail hiring approximately 269 additional law clerks (assuming that 100 additional immigration judges are hired). Based on budget data for EOIR, the cost of doing so is estimated to be \$18.8 million for the initial year.

2. Insufficient Training and Professional Development

Insufficient resources also contribute to inadequate opportunities for judicial training and professional development. Although training of newly hired and existing judges has been increased and improved over the past few years, some of the existing training has been cut back due to a shortage of funds. Moreover, heavy caseloads result in a lack of administrative time during which immigration judges could participate in training and network with other judges.

Recommendation: Provide additional training opportunities for immigration judges, including training in assessing credibility, identifying fraud, changes to U.S. asylum and immigration law, and cultural sensitivity and awareness.

Recommendation: Provide sufficient funding to permit all judges to participate in regular, in-person trainings on a wide range of topics in immigration law.

Recommendation: Designate an administrator to facilitate increased communication among immigration judges, including setting up formal and informal meetings among judges and opportunities for judges to observe other judges in their own courts or in other courts.

Recommendation: With increased resources and the hiring of additional judges, increase the administrative time available to judges. This would allow them to participate in live trainings and interact with other immigration judges on their courts.

3. Problems with Selection and Qualification of Immigration Judges

The standards used to hire judges are incomplete and opaque, open positions are not filled quickly, and there is a lack of public input into the hiring decisions. As a result, some judges are hired with inadequate experience, there is a general lack of diversity in the professional backgrounds of judges, and there are problems with inappropriate judicial temperament.

EOIR has recently made significant improvements to the process of hiring immigration judges. We generally recommend allowing those reforms time to take effect, while suggesting a few additional improvements.

Recommendation: Add questions to applications, interviews, and reference checks designed to evaluate a candidate's background, judicial temperament, and ability to demonstrate cultural sensitivity and treat all persons with respect.

Recommendation: Allow more public input in the hiring process by permitting organizations within the profession to participate in screening candidates who reach final levels of consideration.

4. Inadequate Supervision and Discipline

Inadequate experience and problems with judicial temperament theoretically could be addressed with proper supervision and discipline, but we have found that inadequacies exist in those areas as well. For instance, many observers have noted that there are too few ACIJIs (nine) supervising the more than 220 other immigration judges spread throughout the country. In addition, supervision of immigration judges suffers from a lack of appropriate feedback mechanisms such as performance reviews.

In terms of discipline, the standards of ethics and conduct applicable to the judges are currently numerous and unclear, and the disciplinary system lacks transparency. The disciplinary system also lacks independence, since it rests within EOIR and DOJ. The lack of independence and clarity raises a concern about the potential for improper political influence on judges' decisions.

Recommendation: Significantly increase the number of ACIJIs to permit a more appropriate ratio of judges to supervisors, rather than the current 20 to one ratio, and

expand their deployment to the regional courts. This reform would allow ACIJIs more time to give focused attention to each immigration judge while maintaining their own dockets and other administrative duties.

Recommendation: Implement a judicial model for performance review based on the ABA's Guidelines for the Evaluation of Judicial Performance and the model for judicial performance proposed by the Institute for Advancement of the American Legal System.

Recommendation: Adopt a new single, consolidated code of conduct for immigration judges, based on the ABA Model Code of Judicial Conduct and tailored to the immigration adjudication system.

Recommendation: Establish a new, more independent and transparent system to manage complaints and the disciplinary process. The key components of such a system include establishing a new office within EOIR that would segregate the disciplinary function from other supervisory functions, creating and following publicly available procedures and guidelines for complaints and discipline, fully implementing a formal right of appeal/review for adverse disciplinary decisions, and allowing public access to statistical or summary reporting of disciplinary actions (individual disciplinary records would not be made public).

Recommendation: Implement the Government Accountability Office's recommendations that EOIR develop and maintain appropriate procedures to accurately measure case completion data, identify and examine cost-effective options for acquiring the data, and acquire the expertise necessary to perform useful and reliable analyses of immigration judges' decisions.

5. Tenure, Retention, and Removal of Immigration Judges

Immigration judges serve as career attorneys in DOJ with no fixed term of office and are subject to the discretionary removal and transfer authority of the Attorney General. The immigration judges have no statutory protection against removal without cause or reassignment to less desirable venues.

This arrangement raises a number of issues. An unlimited term that can result in essentially life tenure limits the accountability of the judges. On the other

hand, the lack of fixed terms or actual life tenure raises the possibility that judges may be subject to removal or discipline based on politics or for other improper reasons. This erodes judicial independence and provides a basis to undermine public opinion regarding the competence and impartiality of immigration judges.

Recommendation: In order to protect immigration judges from retribution for engaging in ethical and independent decision making, we recommend that they be provided statutory protection against being removed or disciplined without good cause (as is provided for administrative law judges who adjudicate cases in other federal agencies).

6. Problems with Immigration Court Proceedings

Problems affecting the immigration court proceedings include extensive use of oral decisions made without sufficient time to conduct legal research or thoroughly analyze the issues and evidence; problems with courtroom technological resources and support services for judges (including unreliable recording equipment and the lack of timely transcripts); and the use of videoconferencing in ways that may undermine the fairness of proceedings.

Recommendation: With additional resources and more time for judges to decide each case, judges should be required to provide more formal, reasoned written decisions, particularly in proceedings, such as asylum cases, where the complexity of the cases requires more thoughtful consideration than can be given during the hearing itself. Immigration judges should at a minimum produce written decisions that are clear enough to allow noncitizens and their counsel to understand the bases of the decision and to permit meaningful BIA and appellate review.

Recommendation: Give priority to completing the rollout of digital audio recording systems.

Recommendation: Limit the practice of conducting immigration hearings by videoconference to use in procedural matters where the noncitizen has given his or her consent.

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.

3

Board of Immigration Appeals

The Board of Immigration Appeals (“BIA” or “Board”) is the highest administrative body that interprets the immigration laws. The Board has jurisdiction to review all appeals of removal and other decisions rendered by immigration judges, as well as certain decisions made by DHS officers.

In the last decade, the standards governing the Board’s review and the review process have changed significantly as a result of “streamlining” measures implemented in 1999 and 2002. Those measures were designed to reduce delays in the review process, focus the Board’s resources on cases presenting the most significant legal issues, and eliminate a mounting backlog that had reached more than 60,000 cases by 2000.⁴³ The key changes were as follows:

- (1) While cases before the Board previously were considered by a minimum of three Members, the 1999 streamlining reforms enabled a single Board Member to affirm a decision of an immigration judge without opinion in a limited category of cases.
- (2) The 2002 streamlining regulations expanded the category of cases in which affirmances without opinion and single-member review were treated as appropriate.
- (3) The 2002 reforms eliminated the Board’s authority to conduct de novo fact finding, limiting review of fact and credibility determinations to a “clearly erroneous” standard.
- (4) The 2002 reforms imposed time limits for rendering decisions, requiring single-member decisions to be issued within 90 days of receipt of the file and panel decisions to be rendered within 180 days.
- (5) As part of the 2002 reforms, then–Attorney General Ashcroft reduced the size of the Board from 23 to 11 Members. The Board was subsequently increased to 16 Members.

The 1999 and 2002 streamlining reforms were successful in reducing backlogs and delays in

adjudication by the Board. As shown in the table below, the reforms have increased the number of cases decided by the Board annually and reduced the number of appeals pending before the Board:

BIA Pending Case Appeals: FY 1998-2008⁴⁴

Fiscal Year	BIA Receipts	BIA Completions	Pending Cases
1998	28,475	28,763	44,504
1999	31,087	23,011	52,580
2000	30,049	21,380	61,249
2001	28,148	31,800	57,597
2002	34,834	47,326	46,350
2003	42,038	48,042	40,662
2004	43,407	48,698	35,264
2005	43,924	46,338	33,063
2006	38,284	41,475	29,870
2007	35,295	35,394	35,139
2008	32,432	38,369	28,874

The reforms also helped reduce the average time taken for each appeal. In 2000, it took an average of 1,100 days for the Board to render a decision after an appeal in an asylum case was filed; by 2006 the average duration was down to 400 days.⁴⁵

But this increase in Board efficiency has come at a substantial cost, including the reduced likelihood of finding immigration judge error, the lack of precedent guidance coming from the Board, significant burdens imposed on Board Members, and increased burdens on the federal appellate courts as more BIA decisions are appealed. In fact, the 1999 and 2002 rule changes have led some to question whether the BIA as currently structured adequately serves as an oversight and adjudicative body. Such critics have characterized the BIA as acting merely as a “rubber-stamp” of immigration court decisions, having abdicated its

responsibility to correct errors of the decision makers below and provide uniformity in immigration law.

The discussion below summarizes specific problems arising from or compounded by the streamlining reforms and our recommendations for addressing those problems. We also briefly discuss other issues and recommendations relating to Board resources and the Board's lack of independence.

A. Issues and Recommendations Relating to Streamlining Reforms

1. Single-Member Review

Most BIA cases are now decided by a single Board Member. Single-member review precludes the issuance of precedent, makes it less likely that the Board will catch errors made by immigration judges, and precludes dissent and the interplay of diverse legal minds. Moreover, the shift to single-member decisions may have affected the outcome of appeals, as single-member review appears to generate fewer decisions that favor asylum seekers. Two academic studies found a sudden reduction in the rate at which the Board issued decisions favorable to asylum applicants after the 1999 and 2002 reforms were adopted.⁴⁶ Similarly, a 2008 GAO Report found that only 7% of single-member decisions favored the alien in asylum appeals, compared to 52% of panel decisions.⁴⁷ Absent some rational explanation for this discrepancy, these findings support making changes to ensure that the method of review does not impact the outcome of an appeal.

In 2008, DOJ proposed revisions to the streamlining regulations that would encourage the use of three-member panels, but these reforms have not yet been finalized.

Recommendation: Amend the Board's regulations to make review by three-member panels the default form of adjudication and to allow single-member review only in very limited circumstances. Require panel review for all non-frivolous merits cases that lack obvious controlling precedent. Allow single-member review for purely procedural motions and motions unopposed by DHS. For this reform to be implemented, additional staff attorneys and Board Members will be needed.

2. Lack of Detailed Decisions

Following adoption of the 2002 streamlining reforms, the Board relied heavily on affirmances

without opinion ("AWOs"). This practice has declined more recently, with AWOs constituting only about 5% of Board decisions for the first six months of fiscal year 2009, compared to 36% in fiscal year 2003.⁴⁸

However, short opinions by single members are now the dominant form of decision making. Since the Board is not required to issue decisions responding to all arguments by the parties, they can be as short as two or three sentences, even when the issues would appear to merit a longer discussion. As maintained by some commentators and interviewees, this shift from affirmances without opinion to short opinions is insufficient as a quality improvement for decisions issued by the Board. The lack of detailed, reasoned decisions denies both the noncitizen and a reviewing court a sufficient explanation of the Board's decision.

Recommendation: At minimum, finalize the portion of the 2008 proposed rule that would make affirmances without opinion discretionary rather than mandatory.

Recommendation: Written decisions should address all non-frivolous arguments raised by the parties, thus providing sufficient information to facilitate review by federal appeals courts, to allow participants to understand the Board's decision, and to promote their confidence in the fairness of the decision.

3. Standard of Review

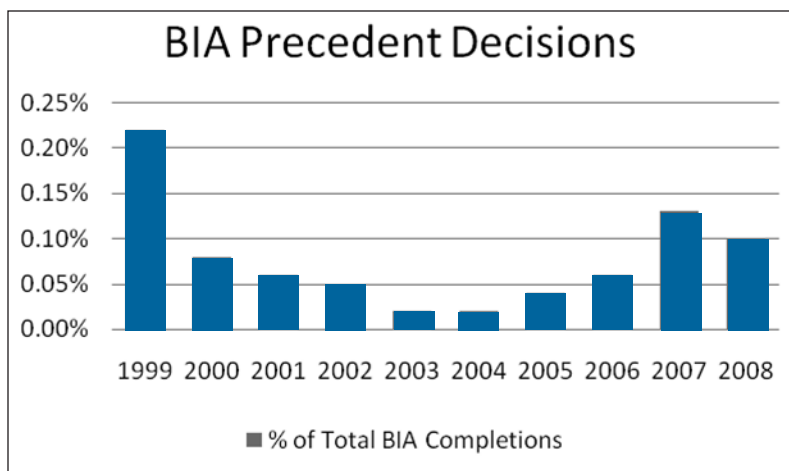
The stricter "clearly erroneous" standard of review in effect at the BIA since 2002 inhibits the Board's ability to correct mistakes made by immigration judges, which are increasingly difficult to avoid given the enormous caseload and time pressures imposed on these judges. This standard also inhibits the Board's ability to serve as a check against unwarranted disparities among immigration judges in factually similar cases. The current limitation has impeded the Board's oversight role and increased the chances that an applicant could be harmed by erroneous decision making.

Recommendation: Restore the Board's ability to conduct a de novo review of factual findings and credibility determinations by immigration judges.

4. Lack of Precedent

The combination of single-member review and lack of detailed decisions has given rise to a dearth of Board precedent and guidance for the immigration

courts. Since only decisions issued by a three-member panel or the Board en banc may be designated as precedential, the vast majority of the Board's decisions are now unpublished, and, although binding on the parties, do not serve as precedent.⁴⁹



The number of precedent decisions has recently increased, due in part to a recognition of the need for such decisions, but it still falls short of the percentage of published opinions (over 15%) issued by federal appellate courts.

A greater body of precedent is needed to provide a solid, orderly body of law, to facilitate efforts to reduce disparity among immigration judges, to decrease the number of appeals and rates of reversals, and to decrease the frustration and cost of prosecuting and defending aliens in the removal adjudication process.

Recommendation: The Board should issue more precedential decisions, expanding the body of law to guide immigration courts and practitioners.

Recommendation: Regulations should continue to require that the full Board authorize the designation of an opinion as precedential. The 2008 proposed rule allowing individual panels to designate opinions as precedential should not be implemented.

Recommendation: Make non-precedential opinions available to noncitizens and their attorneys. Currently, the Board maintains a database of such opinions. Making this database publicly available would provide additional, non-precedential guidance to those appearing before immigration adjudicators.

5. Impact on Courts of Appeals

Many have argued that the streamlining reforms shifted the decisions backlog from the BIA to the federal circuit courts, perhaps because the reforms left respondents dissatisfied with the quality of the Board's adjudication. The rate at which respondents appealed to the federal courts increased dramatically from 9.4% in 2002, to 18.4% in 2003, to 26.7% in 2008.⁵⁰

Notwithstanding this increased caseload for the appeals courts, the streamlining reforms have not necessarily led to a high reversal rate. The rate at which the Board is reversed and remanded has ranged between 12% and 17% between FY 2004 and FY 2008 and is not substantially different from the rates at which other types of cases are reversed and remanded.⁵¹

Some circuits, however, seem more inclined to reverse or remand to the BIA than others. Although the Second and Ninth Circuits together accounted for nearly 80% of all reversals in 2008, the reversal rate is higher in some of the circuits, such as the Seventh Circuit, which hear a relatively low volume of appeals.⁵²

While we have no recommendations separately addressing the impact on the federal appeals courts, the proposals for more detailed and reasoned opinions, more three-member panel decisions, and more precedential decisions may help reduce the number of BIA decisions that are appealed, and even potentially the number of cases appealed to the BIA. We also would encourage the publication of more data regarding appeal statistics, as we had difficulty in performing these analyses in our Study.

6. Time Limits

The time limits placed on the Board under the 2002 reforms, while less criticized than the other reforms, place an unreasonable burden on respondents and practitioners by creating incentives for the BIA to issue perfunctory opinions given the press of time.

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 the appeal).

B. Other Issues and Recommendations

1. Limited Resources, Training, and Disciplinary Mechanisms

Apart from problems arising from the streamlining reforms, the most often cited problem facing the Board is a lack of resources, specifically in staffing. EOIR has recognized the need for additional resources and requested funding from Congress in March 2007 for an additional 20 staff attorneys. Congress did not appropriate the funds in FY 2008. For FY 2009, EOIR did receive additional funding, which should have allowed the Board to hire only about six additional staff attorneys. However, our research and discussions suggested that the addition of 40 staff attorneys, with significant additional funding, would minimally be necessary assuming no changes in existing caseload or procedures.

The Board also has been criticized for a lack of expertise and for providing insufficient training. The 22 reforms announced by EOIR in 2006 included several measures designed to improve Board Member performance, including performance evaluations and immigration law exams, improved training, and a code of conduct and ways to enforce it. Performance evaluations, immigration law exams, and increased training began in 2008. A Code of Conduct and an accompanying enforcement mechanism have yet to be implemented, although EOIR has requested comments on a draft version of a code.

Recommendation: Increase the resources available to the Board in order to fund additional support staff. This reform is necessary not only to support the Board in its current form, but also to support the other reforms we propose.

Recommendation: Apply the new Code of Conduct recommended for immigration judges, based on the ABA Model Code of Judicial Conduct, to Board Members as well.

2. Lack of Independence

The Board's status as a body created by regulation (not by statute) and subject to the Attorney General's power has led to frequent criticism regarding its lack of political and executive independence. Board Members are appointed by the Attorney General and serve at his or her discretion. Decisions of the Board are reviewable de novo by the Attorney General, who may vacate decisions and substitute his or her own decisions.

This structure has generated concern that Board adjudication can be politicized either directly through the firing of members whose decisions the Attorney General disagrees with or indirectly through the threat of reversal of opinions that do not comport with the implied policy direction of the Attorney General. The downsizing of the Board in 2002 reinforced such criticism. Members who appeared to have the highest rate of voting in favor of the noncitizen were removed from the Board.⁵³

The threat of removal may have the potential to affect the decision making of Board Members, although it is not clear how much this actually occurs in practice. Still, the very perception that Board Members are subject to political influence harms morale, impugns the Board's reputation with both noncitizens and practitioners, and undermines the legitimacy of the Board's decisions.

The independence issue is addressed by the system restructuring proposal described in this Executive Summary and in Part 6 of the full Report.

4

Judicial Review by Circuit Courts

The federal judiciary acts as a check on executive power to ensure that administrative adjudication satisfies fundamental standards of fairness and due process. In 1996, Congress fundamentally restructured judicial review for immigration decisions, restricting noncitizens' access to the federal courts and limiting the judiciary's ability to protect noncitizens' rights. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") barred judicial review of removal orders for noncitizens convicted of certain crimes; barred challenges to certain discretionary acts of the Attorney General; directed all federal court review, to the extent still permitted, to the courts of appeals; and imposed a 30-day deadline for appealing a final removal order to the court of appeals.

The Supreme Court held in 2001 that the preclusion of direct review in the courts of appeals did not bar challenges to removal orders within the traditional scope of habeas corpus jurisdiction in the district courts, but noted that such jurisdiction might be precluded if an adequate substitute was provided.⁵⁴ In 2005, the REAL ID Act decisively eliminated habeas jurisdiction for removal orders (except expedited removal), but provided for review by the circuit courts of constitutional claims and questions of law that were previously available under habeas.

A. General Problems and Approach to Recommendations

Our review of case law and interviews with scholars, practitioners, and judges at all levels indicate that the layering of rules, exceptions, and jurisdictional deadlines have significantly increased the complexity of immigration law. While some variation among the courts of appeals in interpreting this complex body of law is to be expected, many experts and judges have noted myriad issues, especially relating to jurisdiction,

on which the circuit courts are split. Some stakeholders have suggested that, rather than dealing with the merits of a challenge to removal, the courts of appeals now spend an inordinate amount of time determining the scope of their own jurisdiction. The restrictions on judicial review have not made execution of removal orders more efficient or just but have instead caused confusion and created traps for unwary and unrepresented noncitizen.

Notwithstanding the statutory limitations on their jurisdiction, the courts of appeals have been faced with an explosion of immigration appeals on their dockets, as discussed in Part 3.A.5 above. In 2008, more than 10,000 BIA decisions were appealed, comprising 16.8% of the entire civil appeals docket of the courts of appeals. This figure is largely representative of the rate since 2004. The Second and Ninth Circuits have been the most significantly impacted, with immigration cases accounting for approximately 35% to 40% of their civil appeal dockets in the last few years.

The Commission and experts have attributed the increase in appeals to a number of factors, including an increase in immigration cases overall and a qualitative change in the decision making at the administrative level, particularly the BIA's use of summary affirmances and streamlining, that fosters the perception that the process is not fair.⁵⁵

The ABA has noted that AEDPA, IIRIRA, and REAL ID Act "restrictions on federal judicial review are exceptional in scope and establish a dangerous precedent of unreviewable government action. As such, they are incompatible with the basic principles upon which this nation's legal system was founded."⁵⁶ The ABA has called for legislation restoring judicial review of immigration decisions to ensure that noncitizens are treated fairly in the adjudication process and also to provide oversight for the government's decision making process.⁵⁷

Our recommendations for judicial review in the circuit courts are in accordance with that policy and apply even if administrative adjudication by the immigration courts and BIA is moved into an independent agency or restructured as an Article I court.⁵⁸ The responsible agencies, noncitizens, and Article I court, if implemented, will benefit from the involvement of the courts of appeals in immigration matters. Generalist courts help counteract the inevitable tendency of specialist courts and agencies to become narrowly focused. Immigration matters, which frequently involve issues relating to personal liberty and human rights, should not be jurisdictionally precluded from the full scope of court of appeals review, whether the adjudicative process is carried out by an administrative agency or by a specialized Article I court. While this Report does not recommend restoration of habeas review, we have given weight to the fact that historically habeas jurisdiction and appeal to the circuit court, or two levels of Article III judicial review, were available. Moreover, the proposed restructuring of the immigration adjudication system is unlikely to be implemented or achieve its goals for a number of years. The availability in the interim of expanded review in the courts of appeals proposed herein will facilitate the transition by providing necessary oversight.

B. Specific Issues and Recommendations

1. Unreviewable Discretion

As amended in 1996 and 2005, the INA precludes judicial review of certain discretionary waivers from removal, as well as any other discretionary decision except for the grant of asylum, while constitutional claims and questions of law remain reviewable by the courts of appeals. The executive and legislative branches have sought to insulate more and more decisions from review by labeling them as “discretionary.” (After completion of this Report, the Supreme Court issued *Kucana v. Holder*, No. 08-911, January 20, 2010, limiting the ability of the executive branch to insulate discretionary decisions from judicial review.)

While administrative discretion is unquestionably necessary in the application of immigration laws to an enormous number of noncitizens each year, it does not follow that the courts should be divested from reviewing the exercise of such discretion. The

stakes in immigration cases are often high. Immigration courts determine whether a noncitizen will be forced to leave the United States, whether a family will be broken up, and whether someone will be returned to a country suffering from violence, political instability, and economic disaster. Such decisions have an enormous impact on hundreds of thousands of families residing in the United States and should not be undertaken arbitrarily, yet these decisions, unlike discretionary decisions by other federal agencies, are unreviewable even under the deferential “abuse of discretion” standard. We recommend the following changes, given the liberty interests at stake, in order to strike a more appropriate balance between the exercise of agency discretion and judicial review:

Recommendation: Enact legislation restoring judicial review of discretionary decisions under the “abuse of discretion” standard that was in effect prior to the 1996 amendments.

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.

2. Barriers to Fact Finding

The definitive elimination of habeas corpus jurisdiction in 2005 ignores the seminal and historic importance of habeas review of executive action when a person’s liberty is at stake. Unlike the review available in the courts of appeals, a district court reviewing a habeas petition from a noncitizen prior to 2005 was empowered to “hear and determine the facts, and dispose of the matter as law and justice require.”⁵⁹ District courts thus could hold evidentiary hearings to supplement the record when necessary. Moreover, prior to IIRIRA, a court of appeals could, under the Hobbs Act, remand the case to the agency for further inquiry and findings.⁶⁰

Under the current system, there is no opportunity for an Article III court to engage in any fact finding or to remand a case to the BIA or immigration court for additional fact finding.

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 — i.e., where the additional evidence is material and there were reasonable grounds for failure to adduce the evidence before the agency.

While this proposal does not restore historical habeas review, it attempts to obtain one of the benefits of habeas jurisdiction by allowing the record to be supplemented where appropriate so that the parties will have a full and fair opportunity to develop evidence and present issues of law and practice affecting the outcome of the removal proceeding.

3. Deadline for Filing a Petition for Review

IIRIRA reduced the period of time for filing a petition for review of a final removal order before the court of appeals from 90 days to 30 days. The shorter deadline poses significant problems for noncitizens,

particularly those who proceed pro se or are detained in remote areas, where representation may be difficult to obtain. Moreover, petitioners who may be in detention or are without counsel may not be aware of their appeal rights and the deadline within which an appeal must be filed or the circuit court in which the appeal must be filed.

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.

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.

Increased representation of noncitizens has the potential to benefit both these individuals and other stakeholders in the removal adjudication system by making the system not only fairer, but also more efficient.

EOIR has put in place some measures to provide noncitizens with assistance in obtaining representation. These include a Legal Orientation Program (“LOP”) for detainees in removal proceedings; a Model Hearing Program, which provides immigration law training to attorneys and law students who agree to provide a certain amount of pro bono representation annually; an Unaccompanied Alien Children Initiative; and the issuance of a new policy for pro bono activities in immigration courts, designed to facilitate the functions of pro bono counsel.

Despite EOIR’s efforts, less than half of the noncitizens whose proceedings were completed in the last several years were represented. In 2008, approximately 57% of these noncitizens were unrepresented; in 2007, the figure was about 60%.⁶¹ For those in detention, the figure is even higher — about 84% are unrepresented.⁶² Rates of representation for proceedings before the BIA are somewhat better than for those before the immigration courts, but a substantial number of noncitizens are unrepresented there as well.

Barriers impeding access to representation include the unavailability of the LOP to persons who are not detained, as well as many detainees; the inability of many persons to afford private counsel; and a number of systemic impediments, including remote detention facilities, short visiting hours, restrictive telephone policies, and the practice of transferring detainees from one facility to another — often remote — location without notice and with DHS routinely seeking changes of venue.

There is strong evidence that representation affects the *outcome* of immigration proceedings. In fact, a

study has shown that whether a noncitizen is represented is the “single most important factor affecting the outcome of [an asylum] case.”⁶³ 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.⁶⁴ 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.⁶⁵ In defensive asylum cases, 27% of applicants who had representation were granted asylum, while only 8% of those without representation were successful.⁶⁶ In expedited removal cases, 25% of represented asylum seekers were granted relief, compared to only 2% of those who were unrepresented.⁶⁷

Meanwhile, the stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members, or even persecution or death if deported to their native countries. Against this backdrop, representation is arguably at least as critical in the immigration context as in the criminal context.

The lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and 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.”

Adequate legal representation is a hallmark of a just system of law, and this is no less true in the context of removal proceedings. A lawyer can help 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 the legal errors and inadvertent waivers associated with pro se litigants. In these ways, providing representation to noncitizens would help restore legitimacy and a level playing field to the immigration adjudication system.

Representation also 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. As a number of immigration educators, judges, practitioners, and government officials surveyed for this Study have observed, 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.⁶⁸ Increased representation for noncitizens thus would lessen the burden on immigration courts and facilitate the smoother processing of claims.

In short, 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.

The following discussion summarizes our findings and recommendations with respect to three aspects of the overall problem of insufficient and inadequate representation of noncitizens in removal proceedings: (1) the absence of a right to representation at government expense; (2) limitations on the sources of representation; and (3) representation by unqualified or ineffective representatives.

A. Right to Representation

Current regulations establish a noncitizen's right to obtain representation in a removal proceeding but do not *require* the government to provide representation. The INA states that any representation that a noncitizen may obtain shall be at "no expense to the government."⁶⁹ Some knowledgeable commentators point out that the statute does not preclude the agencies from funding counsel on a voluntary basis from general appropriations. The courts apply a case-by-case approach to determine whether the Fifth Amendment requires counsel to be appointed for noncitizens in certain immigration cases.

The noncitizen must show that the assistance of counsel would be necessary to provide "fundamental fairness." The application of this standard, however, has led to the denial of appointed counsel in every published case. The ABA has previously criticized this case-by-case approach, noting that it is "unworkable because, as a practical matter, there is no way to know if the absence of counsel has been harmless or not."⁷⁰ Accordingly, the ABA has stated its support for extending a right of representation to indigent noncitizens in removal proceedings who are potentially eligible for relief from removal and for unaccompanied minors and persons with mental disabilities and illnesses.⁷¹

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.

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.

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.

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.

B. Sources of Representation

Under current regulations, noncitizens may be represented by attorneys admitted to the bar of any state or the District of Columbia; by law students, subject to certain requirements; and by “accredited representatives” or “reputable individuals” authorized by the BIA. LOP is a source of referrals but currently is limited in scope, and there are too few accredited representatives in BIA-recognized (or certified) agencies to fill the need for representation.

1. Legal Orientation Program

EOIR established LOP in 2003 to assist detained individuals in removal proceedings. This program provides individuals who appear before immigration agencies and tribunals with information regarding basic immigration law and procedure before immigration courts. Depending on the noncitizen’s potential grounds for relief, LOP also provides a referral to pro bono counsel, self-help legal materials, and a list of free legal service providers organized by state. This last aspect of LOP provides a critical link between those who need representation and those willing to provide it.

However, LOP currently does not reach the majority of noncitizens who may need assistance. First, it operates at only 25 of the approximately 350 detention facilities currently under contract with DHS.⁷² Second, it does not reach *non*-detained persons and those who might have special need for legal representation, such as unaccompanied minors and persons with mental disabilities and illnesses. Finally, LOP may not be able to reach those noncitizens who are placed into expedited removal.

Recommendation: Expand LOP to provide services to all detainees, thereby enabling those placed in detention to find representation.

Recommendation: Expand LOP in order to reach non-detained noncitizens in removal proceedings.

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, entitled to 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.

Recommendation: Establish an administrative structure for the enhanced LOP that enables it to provide counsel, at government expense, for noncitizens in some cases.

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.

2. Recognized Agencies

Accredited representatives are non-attorneys who are approved by the BIA to represent noncitizens and who are employed by a BIA-recognized nonprofit religious, charitable, social service, or similar organization established in the United States. There are currently fewer than 750 recognized agencies, fewer than 900 accredited representatives in total, and an even smaller number of “second level” accredited representatives who are available to represent the approximately 380,000 noncitizens detained by ICE annually.⁷³ Part of the problem may be that the regulations allow recognized agencies to charge only a “nominal” fee for their assistance.

Recommendation: Permit recognized nonprofit agencies to charge “reasonable and appropriate fees,” as opposed to “nominal charges,” for their services.

3. Pro Bono Program

EOIR has supported the appointment of a pro bono liaison judge and the creation of a pro bono committee at various immigration courts. These liaison judges meet regularly with local pro bono legal service providers to ensure continuing improvement in the

level and quality of representation at the court, facilitate communication between pro bono counsel and government attorneys, and consult with the EOIR LOP to strengthen the agency’s public outreach.

Recommendation: Expand and improve the EOIR pro bono program to facilitate and encourage attorney participation.

C. Quality of Representation

A meaningful right to representation means a right to *effective* representation. DOJ has recognized a noncitizen’s right to effective assistance of counsel on due process grounds.⁷⁴ In January 2008, former Attorney General Mukasey reviewed the issue *sua sponte* and decided that noncitizens in removal proceedings do not have a Fifth Amendment right to effective counsel.⁷⁵ That decision, in turn, was vacated on June 3, 2009 by Attorney General Holder, who acknowledged the high stakes of immigration proceedings and the vulnerability of noncitizens to abuse.⁷⁶ He stated that “[t]he integrity of immigration proceedings depends in part on the ability to assert claims of ineffective assistance of counsel.”⁷⁷

1. Pro Bono Service Providers List

EOIR maintains a roster of pro bono service providers, updated quarterly, and is required under statute and regulation to provide this list to all individuals in removal proceedings. Updated and properly maintained, the list provides an invaluable source of assistance for noncitizens facing removal. EOIR has announced plans to develop regulations to strengthen the requirements for attorneys and organizations who wish to be included on this list.⁷⁸ Appropriate regulations should be adopted promptly that facilitate the process of connecting noncitizens to competent counsel.

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.

2. Unaccredited Representatives (Notarios)

There are numerous examples of unqualified

individuals who take advantage of noncitizens seeking assistance in immigration matters. These individuals go by a variety of titles, but are commonly referred to as “visa consultants,” “immigration consultants,” or “notarios publicos” (collectively referred to as “notarios” in common parlance). These individuals are explicitly not permitted to represent noncitizens before immigration courts or the BIA. Despite this fact, notarios are ubiquitous in immigrant communities and routinely offer promises of legal advice and assistance that they are sometimes unqualified to give. There are reports claiming that notarios defraud tens of thousands of noncitizens every year.⁷⁹ These persons also cause immigration officials to waste valuable time weeding out the false or incomplete information they frequently submit.

According to DOJ, EOIR has established a Fraud Program, appointed an anti-fraud officer to identify fraud and coordinate interagency responses, and trained immigration court and BIA staff about the program.

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.

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.

3. Attorney Discipline

Civil contempt authority has been authorized by legislation since 1996 but has not been implemented by the Attorney General. Contempt authority could provide immigration judges with an important tool to enforce DHS compliance with its orders and empower judges to meaningfully sanction attorneys for contemptuous behavior, such as willful late filings or ignoring of judicial orders, that slows down the court and makes just adjudications more difficult.

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.

6

System Restructuring

While we provide many recommendations for incremental changes to the immigration removal adjudication system at each stage of the process, we also have considered major structural changes that would make the system independent of any existing executive branch department or agency. These changes would address widespread concerns about both political independence and adjudicatory fairness, while also promoting greater efficiency and professionalism within the immigration judiciary.

A. Goals of Restructuring

Any major system restructuring should be aimed at attaining the following goals:

- **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.

B. The Case for Restructuring

Concerns about the lack of independence of immigration judges and the BIA, as well as perceptions of unfairness toward noncitizens, have spawned proposals to separate these tribunals from the Department of Justice. The National Association of Immigration Judges (“NAIJ”) and others have 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. NAIJ currently favors the Article I court alternative.

Changes in recent years have only exacerbated these concerns, as resources devoted to enforcement of immigration laws have increased the burden on immigration judges without increasing the resources allocated to adjudication. The calls for independence have become more urgent in this decade in response to politicized hiring of immigration judges (see Part 2 of the Report) and the removal of BIA members most sympathetic to noncitizens (see Part 3 of the Report). In addition, as discussed in Part 2 of the Report, DOJ has taken the view that immigration judges are 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 the Department as their “client.” In such circumstances, the immigration judges can hardly be viewed as independent.

In addition, as discussed in Part 3 of the Report, several reforms directed at the BIA have, according to the ABA, “resulted in a loss of confidence in the fairness of review at the BIA and generated a massive number of appeals to the federal courts.”⁸⁰ Indeed, the ABA has noted that the lack of independence of immigration courts and the BIA is a problem, and has expressed the view that a number of problems with immigration adjudication “can best be addressed by

moving toward a system in which immigration judges are independent of any executive branch cabinet officer.”⁸¹ Applesseed has echoed the call for independence in its newly released report on reform of the nation’s immigration court system.⁸²

In providing greater independence, such a restructuring will promote the achievement of the other three goals articulated above — fairness and improved perceptions of fairness, a more professional immigration judiciary, and greater efficiency in the adjudication of removal cases.

Fairness and Perceptions of Fairness. Critics note that a perception of unfairness plagues the current system. A perceived lack of independence means that those going through the system do not consider the decisions rendered to be fair or impartial. Although the adjudicators’ agency, DOJ, no longer has primary enforcement responsibility for immigration matters, it remains the nation’s principal law enforcement agency overall, and its lawyers prosecute immigration cases before the federal courts of appeal. For some, the Attorney General’s power over the members of the BIA and immigration judges gives the impression of unfairness and does not give those going through the process confidence in the decision making. The DOJ position that immigration judges are merely DOJ staff attorneys with a duty of loyalty to the Department (as noted above) can only add to the perception that impartiality is lacking. Removing the immigration adjudication functions from DOJ would leave it free to focus on law enforcement, terrorism, civil rights, and other critical missions unrelated to immigration.

Professionalism. We recognize that in order to have better quality judgments, better quality judges are necessary, regardless of how this is 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, we recommend such increases in resources and training and the strengthening of qualifications — all of which should help make the immigration judiciary more professional. We also believe it is necessary to make this judiciary independent in order to attract the highest quality judges who can do their jobs and make decisions without fear of arbitrary termination, transfer, or other sanctions.

Efficiency. By attracting and selecting the highest quality lawyers as judges, an Article I court or independent agency is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of the proceedings in a highly professional manner, should improve the perception of the fairness and 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 Article I court or independent agency. 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 the proceedings.

The push for an independent body for immigration adjudication is not unanimous. However, the main thrust of most criticisms or doubts expressed about an independent court or agency seems to be that it will not necessarily solve *all* of the current problems with the existing system. That, however, does not diminish the case for attacking problems that *can* be addressed by creating an independent immigration judiciary.

C. Options Considered

We have examined three basic restructuring options:

- 1. Article I Court:** An independent Article I court system to replace all of EOIR (including the immigration courts and BIA), which would include both a trial level and an appellate level tribunal;
- 2. Independent Agency:** A new executive 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
- 3. 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, we have explored the differences between Article I courts and independent agencies generally, reviewed current examples of each, reviewed prior proposals, and then defined the specific features of each option.

General Similarities and Differences. From a legal perspective, the distinction between Article I courts and independent agency adjudicatory bodies is not entirely clear. It appears that the distinction may be in name only and that whatever forum Congress decides is appropriate dictates.

The similarities between the two types of bodies are striking. In both forums, members are often appointed by the President with the advice and consent of the Senate, serve for set terms, and are removable only in very limited circumstances. Like Article I courts, agency adjudicatory bodies are, despite their name, specialized judicial entities that can create precedent and issue final decisions appealable to Article III courts. Both structures provide statutorily recognized independence, job security, and stature, which are missing from the current immigration adjudication system.

In practice, however, there are many differences between the two types of forums. Adjudicatory agencies often consist of a board or commission, small in size, with members appointed by the President, who serve as an appellate layer of review over decisions made by some type of administrative judge at the initial, trial-type level. Article I courts generally consist only of a trial level, with appeals proceeding directly to an Article III court without an intermediate level of review, or only an appellate level that reviews decisions of an administrative agency. We are not aware of any Article I court system that includes both trial and appellate levels (except for bankruptcy courts in four federal circuits). Additionally, agencies employ administrative judges or Administrative Law Judges (“ALJs”), whose employment terms and hiring procedures differ from those used for Article I judges.

For whatever reason, Article I courts tend to be viewed as more independent and prestigious than agency adjudicatory bodies.⁸³ Article I judges “most closely approximate the formal independence of federal judges.”⁸⁴ Article I courts also have “low political profiles” as compared to administrative agencies; thus, the President is unlikely to deny reappointment of judges for strictly political reasons.⁸⁵

In addition, the long length of the terms of Article I judges serves to reduce the attractiveness of seeking reappointment versus retirement.⁸⁶

Examples of Each Type of Structure. We studied several specialized courts that help inform consideration of an Article I immigration court. These are the United States Tax Court, the United States Bankruptcy Court, the United States Court of Federal Claims, and the Court of Appeals for Veterans Claims.

We focused on three systems of adjudication in an independent administrative agency: the Occupational Safety and Health Review Commission, the Merit Systems Protection Board, and the National Labor Relations Board.

Finally, we studied the system for granting and assessing veterans’ benefits as a hybrid adjudication model, consisting of an agency within the executive branch for trial-level proceedings and an Article I court for initial appellate review.

Others’ Proposals. Several immigration experts and groups have called for the creation of an Article I court. For example, NAIJ recommends a court with both trial and appellate level judges, with appeal remaining in the circuit courts of appeal. Judges would be appointed by the President with the advice and consent of the Senate. NAIJ recommends using the Tax Court as a model.

After the 2008 presidential election, the American Immigration Lawyers Association (“AILA”) submitted draft legislation to the Obama transition team recommending the creation of an independent immigration adjudication agency. The proposal would create a new agency in the executive branch called the Immigration Court System, containing both appellate and trial level forums. We understand that AILA focused on defining the specific features of an independent body for immigration adjudication, rather than the choice between an Article I court and an independent administrative agency.

Most recently, Appleseed has called for the creation of an Article I court in its newly released study on reform of the immigration court system.⁸⁷ Appleseed proposes to reconstitute the BIA as the appellate division of a new United States Immigration Court under Article I, and to establish the current immigration courts as the trial division of the new court. To promote impartiality, Appleseed proposes

that the federal courts of appeals appoint the appellate division members of the new court, who in turn would appoint a Chief Judge from among themselves. Immigration judges would also be appointed by the Chief Judge of the appellate division “after a rigorous competitive appointment process that is similar to that used to appoint Administrative Law Judges.”⁸⁸

Specific Features. It is theoretically possible to define the features of an Article I court system and an independent agency model almost interchangeably, since there is no clear legal distinction between the two. However, we believe models for restructuring immigration adjudication should draw from existing models for other adjudication systems as much as possible. Accordingly, we define features of an Article I immigration court that resemble existing Article I courts and, similarly, draw from existing independent agencies in constructing the features of an independent agency for immigration adjudication.

The key features that we have defined for each of the three models are the method of selection and qualifications of judges and their tenure, removal, supervision, evaluation, and discipline. These features are summarized in Table ES-2 at the end of this Executive Summary.

The most significant differences among the three models involve the method of selection, tenure, and removal of the judges, as described below.

Article I Court for Entire System. 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 Assistant Chief Trial Judges would be appointed either by the President (with Senate confirmation) or by the Chief Trial Judge with the concurrence of the Chief Appellate Judge. The other trial judges would be appointed either by the Chief Trial Judge or by the Assistant Chief Trial Judge responsible for the court in which the vacancy exists, subject to approval of the Chief Trial Judge.⁸⁹

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 level 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.

Independent Agency for the Entire System. The Chairperson and members of a Board of Immigration Review, as well as the Chief Immigration Judge of an Office of Immigration Hearings, would be appointed by the President with the advice and consent of the Senate, from among persons recommended by a Standing Referral Committee.

The Chairperson would be appointed for a single, non-renewable term of five to seven years. Other Board Members would be appointed for fixed, renewable terms of five to seven years, as is typical in independent agencies and commissions. The Chief Immigration Judge would be appointed for a single, non-renewable term of five years.

All immigration judges other than the Chief Immigration Judge would be selected using a competitive, merit-based process similar to the one currently used to hire Administrative Law Judges, but administered through the agency’s own personnel office rather than the Office of Personnel Management. They would serve without term limits and would be removable only for good cause after an opportunity for a hearing before the Merit Systems Protection Board under the same procedures that apply to removal of an ALJ, and subject to judicial review. By contrast, Board Members and the Chief Immigration Judge could be removed by the President prior to the end of their fixed terms for inefficiency, neglect of duty, or malfeasance.

Hybrid Approach. In the hybrid model, only the BIA would be converted to an Article I court while the immigration courts would be placed in an independent administrative agency. The features of this hybrid approach would be a combination of those for the Appellate Division of an Article I court and the Office of Immigration Hearings in an independent agency. It would combine a “Court of Immigration Appeals” with an “Immigration Review Agency.”

D. Comparative Analysis

We have compared the three alternative models for restructuring the immigration adjudication system primarily based on six criteria. The comparison is summarized in Table ES-3 and discussed below.

1. Independence

All three models would provide a forum for adjudication that is independent from any executive branch department or agency. An Article I court may be viewed as more independent than an administrative agency since it would be a wholly judicial body. However, the method of selection, unlimited tenure, and protection against removal for immigration judges in the agency model would give them greater independence than in an Article I court (as defined here). The hybrid model combines this type of independence at the trial court level with the more judicial features of an Article I appellate court.

2. Perceptions of Fairness

All three models should increase public confidence in the fairness of immigration adjudication, compared to the current system. As a wholly judicial body, an Article I court is likely to engender the greatest level of confidence in the results of adjudication. The professionalization of the immigration judiciary in an independent agency also would go a long way toward increasing public confidence.

3. Quality of Judges and Professionalism

All three models should attract higher caliber judges and help professionalize the immigration judiciary. The greater prestige of an Article I judicial office may attract more qualified candidates than an administrative judgeship. However, the method of selection, unlimited tenure, and protection against removal without cause in the agency model, which is based on the ALJ system, offers greater job security and a proven approach to creating a highly professional judiciary at the trial court level. The hybrid approach offers a combination of such professionalism at the trial court level and greater prestige at the appellate court level.

4. Efficiency: Relative Cost and Ease of Administration

All three models should make the adjudication system for removal cases more efficient for the reasons set forth in Part 6.B above. By doing so, they will reduce the total time and cost required to fully adjudicate removal cases and also should reduce costs elsewhere in the system, such as detention costs. The resources needed in terms of judgeships and law clerks

also should be similar under all three options. The cost of establishing and administering a new system should not differ significantly between an Article I court and a new independent agency. The hybrid model is the least cost-efficient option, since it requires the creation and operation of two new distinct institutions.

5. Accountability

To some degree, accountability to the political branches is the flip side of independence. Thus, the trial judges in an Article I court, with fixed terms, generally would be more accountable than those in an independent agency where they would have the equivalent of life tenure. The Article I court thus arguably provides greater balance between independence and accountability than an independent agency would.

6. Impact on Article III Courts

This factor is impacted by independence and perceptions of fairness, since greater independence is likely to lead to greater confidence in results, which in turn is likely to reduce the number of appeals to the circuit courts. To the extent the Article I court may be perceived as more independent and may engender greater confidence than an independent agency, its favorable impact on appeals court caseloads should also be greater.

E. Choice Among Options

Although the hybrid option has intellectual appeal, it would be the most complex and costly restructuring option to implement, since it would require the creation and operation of two new and separate institutions. We found no advantages of the hybrid option significant enough to outweigh these major disadvantages. We, therefore, do not recommend the hybrid option, and we focus instead on the choice between an Article I court or an independent administrative agency for the entire immigration adjudication system.

The key attractions of the independent agency model, as defined here, are: (1) the independence and professionalism that would result from the treatment of trial judges in a manner similar to Administrative Law Judges with respect to selection, tenure, evaluation, and discipline; (2) the agency's ability to fill and maintain a

large number of judgeships through a civil service type of process; and (3) the likely perception that an independent agency is a less drastic departure from the current system and one that has many precedents in other independent adjudicatory agencies.

The Article I court model is likely to be viewed as more independent than an agency because it would be a wholly judicial body; is likely, as such, to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal government.

Given these advantages, along with the others discussed in Section III.C of Part 6 of the full Report, the Article I court model has been selected as the preferred option. The independent agency model also would be an enormous improvement over the current system and offers a strong alternative if the Article I court is deemed infeasible or unacceptable to Congress and/or the President.

F. Transitional Measures

Since selection, tenure, and removal of the judges of an Article I court would differ significantly from the current system in DOJ, transitional measures would be needed for the existing judges employed by EOIR. We suggest the following:

- (1) The Chairman of the BIA would serve as Chief Appellate Judge of the Article I court until replaced by Presidential appointment (with Senate confirmation).
- (2) The current members of the BIA would become the appellate judges of the Article I court and would serve out the recommended fixed terms (e.g., 12 to 15 years), which would be deemed to have begun at the time of their prior appointment to the BIA. Thereafter, these

judges would be eligible for reappointment by the President with the advice and consent of the Senate.

- (3) Any vacancy in the appellate division created by a decision not to reappoint a former BIA member, as well as other vacancies, would be filled by Presidential appointment with Senate confirmation and an opportunity for stakeholder groups to comment on candidates.

- (4) The Chief Immigration Judge in EOIR would serve as Chief Trial Judge of the new Article I court until replaced by Presidential appointment (with Senate confirmation).

- (5) The current Assistant Chief Immigration Judges in EOIR would serve as Assistant Chief Trial Judges in the Article I court until replaced by the new method of appointment adopted — i.e., either by the President (with Senate confirmation) or by the Chief Trial Judge with the concurrence of the Chief Appellate Judge.

- (6) Sitting immigration judges in EOIR would be allowed to stay on as trial judges in the new court for the remainder of their fixed terms (e.g., eight to ten years), which would be deemed to have begun when they were first selected as immigration judges in EOIR. At the end of such terms, these judges would be eligible for reappointment through the new system — i.e., by the Chief Trial Judge or by the Assistant Chief Trial Judges for each region (with the approval of the Chief Trial Judge), in either case from recommendations provided by a Standing Referral Committee.⁹⁰

- (7) Once appointed to a fixed term through the new system, both appellate judges and trial judges could be removed only for incompetency, misconduct, neglect of duty, malfeasance, or physical or mental disability. The removal power would reside with the party that appointed the judge.

Endnotes

- 1 OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 91 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf.
- 2 *See infra* note 20.
- 3 OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.
- 4 *Id.* at 4.
- 5 Jeremy Roebuck, VALLEY MORNING STAR, Mar. 11, 2009, *available at* http://www.valleymorningstar.com/news/guevara_47675__article.html/immigrants_stipulated.html.
- 6 Brad Heath, USA TODAY, Mar. 30, 2009, *available at* http://www.usatoday.com/news/nation/2009-03-29-immigcourt_N.htm.
- 7 Nina Bernstein, N.Y. TIMES, Mar. 12, 2009, *available at* <http://www.nytimes.com/2009/03/13/nyregion/13immigration.html?scp=11&sq=immigrant%20federal%20judge&st=cse>.
- 8 Michelle Roberts, AP, Mar. 16, 2009, *available at* <http://www.msnbc.msn.com/id/29706177/>.
- 9 Albor Ruiz, N.Y. DAILY NEWS, Mar. 26, 2009, *available at* http://www.nydailynews.com/ny_local/2009/03/26/2009-03-26_ice_locks_em_up_throws_away_key_immigrat.htm.
- 10 Nick Miroff & Josh White, WASHINGTON POST, Oct. 5, 2008, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/10/04/AR2008100402051_pf.html.
- 11 Opinion, USA TODAY, Mar. 25, 2009, *available at* <http://blogs.usatoday.com/oped/2009/03/our-view-on-sta.html>.
- 12 Ken McLaughlin, MERCURY NEWS, Mar. 24, 2009.
- 13 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, please see JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (NYU Press 2009).
- 14 Alternatively, the Assistant Chief Trial Judges would be appointed by the Chief Trial Judge with the concurrence of the Chief Appellate Judge.
- 15 We recognize that DHS and ICE have announced new initiatives as part of the comprehensive immigration detention reforms, and some of these new initiatives are in accordance with our recommendations. *See* Press Release, U.S. Immigration & Customs Enforcement, Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives (Oct. 6, 2009), *available at* <http://www.ice.gov/pi/nr/0910/091006washington.htm>. However, the implementation and details of these reforms, and their effectiveness in dealing with the acknowledged problems in the immigration detention system, remain to be seen.
- 16 OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 5 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 8 (2009), *available at* http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf.

17 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICAL YEAR BOOK 2000 D1 (2001). Prior to the effectiveness of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), the United States government expelled deportable or inadmissible noncitizens from the United States through deportation and exclusion proceedings. IIRIRA replaced deportation and exclusion proceedings with removal proceedings. *See* IIRIRA, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-587-97 (codified at 8 U.S.C. §§ 1229-1229c).

18 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK C3 (2009), *available at* <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

19 *See* data provided by the Office of Immigration Statistics, U.S. Department of Homeland Security, and the Office of Policy, Immigration and Customs Enforcement, in November 2009 (on file with the American Bar Association Commission on Immigration).

20 *See* data provided by the Office of Policy, Immigration and Customs Enforcement, in November 2009 (on file with the American Bar Association Commission on Immigration).

21 Asylum officers at USCIS conduct credible fear interviews. During secondary inspection of individuals without travel documents at ports of entry, CBP officers ask questions of these individuals to determine whether they may be asylum seekers. ICE officers make parole decisions affecting asylum seekers in removal proceedings.

22 TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, NEW DATA ON THE PROCESSING OF AGGRAVATED FELONS (2007), <http://trac.syr.edu/immigration/reports/175/>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, HOW OFTEN IS THE AGGRAVATED FELONY STATUTE USED? (2006), *available at* <http://trac.syr.edu/immigration/reports/158/>.

23 *See* INA § 237(a)(2)(A)(i)(II), 8 U.S.C. § 1227(a)(2)(A)(i)(II).

24 Under the categorical approach, the adjudicator looks to the applicable criminal statute to determine whether the conduct necessary to violate this criminal statute is a crime involving moral turpitude, and if the statute is "divisible" (i.e., criminalizes different acts, some of which are crimes involving moral turpitude and others of which are not), then the adjudicator may inquire into the individual's record of conviction for the purpose of determining the applicable subpart of the statute under which such individual's conviction falls. Any inquiry, however, into the particular acts of such individual is prohibited.

25 24 I. & N. Dec. 687, 704 (AG 2008).

26 For example, expedited removal orders generally are not subject to review by the immigration courts and the BIA, and judicial review through habeas corpus proceedings is limited to very few types of issues (for example, whether the person is a citizen or LPR, refugee, or asylee).

27 *See* *Yamatama v. Fisher*, 189 U.S. 86, 101 (1903); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

28 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXECUTIVE SUMMARY 5-6 (2005); Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COL. HUM. RTS. L. REV. 323, 333 (2005) (reporting findings from UNITED NATIONS HIGH COMM'R FOR REFUGEES, STUDY OF THE U.S. EXPEDITED REMOVAL PROCESS: REPORT TO THE U.S. DEPARTMENT OF HOMELAND SECURITY (2003) (unreleased)).

29 ABA, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS (2008) [hereinafter ENSURING FAIRNESS], *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf; *see also* Letter from Robert D. Evans, Dir., Governmental Affairs Office, Am. Bar Assoc., to Senators (Apr. 4, 2006), *available at* http://www.abanet.org/publicserv/immigration/cir_senate_ltr4406.pdf; ABA, DUE PROCESS & JUDICIAL REVIEW (2006), *available at* http://www.abanet.org/poladv/priorities/immigration/p_p_duep_judrev.pdf; Letter from Robert D. Evans, Dir., Governmental Affairs Office, Am. Bar Assoc., to Regulations Branch, Office of Regulations and Rulings, Bureau of Customs & Border Prot. (Oct. 12, 2004), *available at* <http://www.abanet.org/poladv/letters/108th/immigration101204.pdf>.

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- 30 ENSURING FAIRNESS, *supra* note 29, at 7.
- 31 ALISON SISKIN, CRS REPORT FOR CONGRESS, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES CRS-12 (2004), *available at* <http://www.fas.org/irp/crs/RL32369.pdf>.
- 32 U.S. Immigration & Customs Enforcement, Detention Management (Nov. 20, 2008), http://www.ice.gov/pi/news/factsheets/detention_mgmt.htm (includes individuals detained in ICE, Office of Refugee Resettlement, and Bureau of Prison facilities).
- 33 U.S. IMMIGRATION & NATURALIZATION SERVICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 235 (2003), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf>.
- 34 OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.
- 35 See DORA SCHIRO, DIR., OFFICE OF DETENTION POLICY & PLANNING, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009), *available at* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.
- 36 *Id.* at 2.
- 37 See Fact Sheet, U.S. Dep't of Homeland Sec., ICE Detention Reform: Principles and Next Steps (Oct. 6, 2009), *available at* http://www.ice.gov/doclib/10-06-09-fact_sheet_ice_detention_reform.pdf; Press Release, U.S. Immigration & Customs Enforcement, ICE Announced Major Reforms to Immigration Detention System (Aug. 6, 2009), *available at* <http://www.ice.gov/pi/nr/0908/090806washington.htm>; Press Release, U.S. Immigration & Customs Enforcement, 2009 Immigration Detention Reforms (Aug. 6, 2009), *available at* http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm.
- 38 See *supra* note 15.
- 39 We recognize that ICE will change its parole policy, effective as of January 4, 2010, in a manner consistent with this recommendation. See U.S. Immigration & Customs Enforcement, News – Revised Parole Policy for Arriving Aliens with Credible Fear Claims (Dec. 16, 2009), <http://www.ice.gov/pi/news/factsheets/credible-fear.htm>. It remains to be seen whether the application of this revised parole policy by ICE will be consistent with this recommendation.
- 40 Ramji-Nogales et al., *supra* note 13, at 296.
- 41 TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CASE BACKLOGS IN IMMIGRATION COURTS EXPAND, RESULTING WAIT TIMES GROW (2009), <http://trac.syr.edu/immigration/reports/208/>.
- 42 BD. OF VETERANS' APPEALS, FISCAL YEAR 2008 REPORT OF THE CHAIRMAN 3 (2009), *available at* <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf>; U.S. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT 2008, at 2.F (2009), *available at* <http://www.ssa.gov/policy/docs/statcomps/supplement/2008/index.html>.
- 43 Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999); Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. 54,878 (Aug. 26, 2002).
- 44 For the sources and methodology underlying this Table, see Table 3-1 and the accompanying discussion in Part 3 of the full Report.
- 45 U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 49 & fig. 6 (2008), *available at* <http://www.gao.gov/new.items/d08940.pdf>.
- 46 David Martin, *Major Developments in Asylum Law over the Past Year*, 83 INTERPRETER RELEASES 1889 (2006); John R.B. Palmer, et al., *Why are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. L.J. 1 (2005).
- 47 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 55.
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48 According to former BIA Chairman Juan Osuna, the AWO rate was 36% in FY 2003, 32% in FY2004, 30% in FY2005, 15% in FY2006, and 9% in both FY2007 and FY2008. For the first six months of FY 2009, the rate was 5%. See July 28, 2009 email from Deputy Assistant Attorney General Juan Osuna (on file with the American Bar Association Commission on Immigration); see also Interview with Philip G. Schrag, Professor, Georgetown University Law Center (AWOs represent just 5% of the BIA's decisions in 2008); Fact Sheet, Executive Office for Immigration Review, U.S. Dept. of Justice, EOIR's Improvement Measures – Update 3 (June 5, 2009) (“EOIR decreased the issuance of AWOs to approximately 4 percent by the beginning of calendar year 2009.”), available at <http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf>.

49 For the data underlying this graph, see Table 3-2 and accompanying discussion in Part 3 of the full Report.

50 See Table 3-3 and accompanying discussion in Part 3 of the full Report.

51 See Table 3-4 and accompanying discussion in Part 3 of the full Report.

52 See Table 3-5 and accompanying discussion in Part 3 of the full Report.

53 See Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154 (2004).

54 *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001) (“Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas corpus] through the courts of appeals.”).

55 ABA COMM'N ON IMMIGRATION POLICY, PRACTICE & PRO BONO, SEEKING MEANINGFUL REVIEW: FINDINGS AND RECOMMENDATIONS IN RESPONSE TO DORSEY & WHITNEY STUDY OF BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS 2-4 (2003), available at <http://www.abanet.org/publicserv/immigration/bia.pdf>.

56 ENSURING FAIRNESS, *supra* note 29, at 8.

57 *Id.*

58 See *infra* Part 6: System Restructuring.

59 28 U.S.C. § 2243 (1994).

60 28 U.S.C. § 2347(c) (1994).

61 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK, at G1 (2009), available at <http://www.justice.gov/eoir/statpub/fy08syb.pdf>.

62 See Improving Efficiency and Promoting Justice in the Immigration System: Lessons From the Legal Orientation Program 1 (May 2008), available at http://www.vera.org/download?file=1780/LOP%2Bevaluation_May2008_final.pdf.

63 Ramji-Nogales et al., *supra* note 13, at 340-41.

64 *Id.*

65 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 30. Statistics cited are for the period from 1995 through 2007. An affirmative asylum case is where the noncitizen files a Form I-589 Application for Asylum, which is reviewed by USCIS in a non-adversarial process.

66 *Id.* A defensive case is where an individual requests asylum before an immigration judge in response to an expedited removal or other removal action by DHS.

67 See Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in 2 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 239, 244-50 (2005), available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolIII.pdf.

68 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), available at http://www.bc.edu/centers/humanrights/meta-elements/pdf/Petition_for_Rulemaking_for_Appointed_Counsel.pdf.

69 INA § 292, 8 U.S.C. § 1362.

70 ABA COMM'N ON IMMIGRATION, THE QUEST TO FULFILL OUR NATION'S PROMISE OF LIBERTY AND JUSTICE FOR ALL: ABA POLICIES ON ISSUES AFFECTING IMMIGRANTS AND REFUGEES 6 (2006), available at http://www.abanet.org/leadership/2006/midyear/daily_journal/107a.doc.

71 ENSURING FAIRNESS, *supra* note 29, at 2.

72 See News Release, U.S. Department of Justice, EOIR Adds Twelve New Legal Orientation Sites 1 (Oct. 15, 2008), available at <http://www.usdoj.gov/eoir/press/08/LegalOrientationProgramExpands101508.htm>.

73 See IMMIGRATION ENFORCEMENT ACTIONS: 2008, *supra* note 34; IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, *supra* note 35.

74 *In re Lozada*, 19 I. & N. Dec. 637, 638 (BIA 1988).

75 *In re Compean*, 24 I. & N. Dec. 710, 714 (AG 2009).

76 *In re Compean*, 25 I. & N. Dec. 1 (AG 2009).

77 *Id.*

78 See Press Release, Executive Office for Immigration Review, U.S. Dep't of Justice, EOIR to Expand and Improve Pro Bono Programs (Nov. 15, 2007), *available at*

<http://www.usdoj.gov/eoir/press/07/ProBonoEOIRExpandsImprove.pdf>; see also Fact Sheet, Executive Office for Immigration Review, U.S. Dep't of Justice, EOIR's Improvement Measures — Progress Overview (Sept. 8, 2008), *available at*

<http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf> (noting EOIR “[b]egan developing regulations to strengthen both the recognition/accreditation process for immigration practitioners and the requirements for private attorneys and organizations to appear on EOIR’s List of Free Legal Services Providers”).

79 See Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 3 (2004) (citing Edwin Garcia, *Activists Help Those Who Fall Through the Cracks*, SAN JOSE MERCURY NEWS, Aug. 25, 2003, at 1A).

80 ENSURING FAIRNESS, *supra* note 29, at 6.

81 *Id.*

82 APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA’S IMMIGRATION COURTS 35 (2009), *available at*

<http://www.appleseeds.net/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf>.

83 See Peter Levinson, *A Specialized Court of Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 651 n.52 (1981) (“On various occasions Congress has recognized that a judicial forum provides a more appropriate structure for resolving controversies that had been left to executive decision-making [through agency boards] in the past”); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 351 (1991) (comparing Legislative (Article I) Judges and Administrative Judges).

84 Bruff, *supra* note 83, at 344.

85 *Id.*

86 *Id.*

87 APPLESEED, *supra* note 82, at 35-36.

88 *Id.* at 35.

89 The appellate and trial judges would be selected from among persons screened and recommended by a Standing Referral Committee. Details about this Committee are set forth in the Summary of Recommendation for System Restructuring in this Executive Summary.

90 See Summary of Recommendation for System Restructuring in this Executive Summary regarding the composition of the Committee.

Table ES-1 Summary of Recommendations

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
Increase use of prosecutorial discretion by DHS officers and attorneys to reduce the number of Notices to Appear served on noncitizens and to reduce the number of issues litigated.	1-IV.A.1 ES-20	Regulation	Short Term	Both	Low
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.	1-IV.A.2 ES-20	Regulation	Short Term	Both	Moderate
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.	1-IV.A.3 ES-20	Existing	Long Term	Both	Moderate
Authorize USCIS asylum officers to review asylum claims that are raised in expedited removal proceedings. The asylum officer would be authorized either to grant asylum if warranted or refer the claim to the immigration court.	1-IV.A.4 ES-20	Regulation	Long Term	Both	Moderate
It may be possible to divert to the Asylum Division defensive asylum claims made in removal proceedings in the immigration courts and thereby further reduce the burden on immigration courts and trial attorneys.	1-IV.A.4 ES-20	Legislation, Regulation	Long Term	Both	Moderate

¹ Indicates whether the recommendation is an incremental reform, applies only in conjunction with the system restructuring proposal, or applies in both cases.

Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
Cease issuing Notices to Appear to noncitizens who are prima facie eligible to adjust to lawful permanent resident status.	1-IV.A.5 ES-20	Existing	Short Term	Both	Low
Create a position within DHS to oversee and coordinate all aspects of DHS immigration policies and procedures, including asylum matters.	1-IV.B ES-21	Existing	Long Term	Both	Low
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.	1-IV.C.1 ES-21	Legislation	Short Term	Both	Low
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). Eliminate the retroactive application of the aggravated felony provisions.	1-IV.C.2 ES-22	Legislation	Short Term	Both	Low
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.	1-IV.C.3 ES-22	Legislation	Short Term	Both	Low

¹ Indicates whether the recommendation is an incremental reform, applies only in conjunction with the system restructuring proposal, or applies in both cases.

Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
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Part 1: Department of Homeland Security (continued)

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.	1-IV.C.3.b ES-23	Existing	Short Term	Both	Low
Curtail the use of expedited removal for noncitizens apprehended at the border or within the United States by: (1) eliminating expedited removal for individuals who are already in the United States, unaccompanied minors, and the mentally ill; (2) permitting DHS officers to issue expedited removal orders only if they determine that individuals lack facially valid travel documentation; and (3) expanding judicial review (through habeas proceedings) 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.	1-IV.D.2 ES-23	Legislation	Short Term	Both	Low

¹ Indicates whether the recommendation is an incremental reform, applies only in conjunction with the system restructuring proposal, or applies in both cases.

Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
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Part 1: Department of Homeland Security (continued)

<p>Ensure proper treatment during expedited removal proceedings of noncitizens who fear persecution or torture upon return to their countries of origin by improving supervision of the inspection process at ports of entry and border patrol stations, including by expanding the use of videotaping systems to all major ports of entry and border patrol stations. In addition, make a copy of any videotape or other recording of the interview of a noncitizen during expedited removal proceedings available to such noncitizen and his or her representative for use in his or her defense from removal.</p>	<p>1-IV.D.4 ES-24</p>	<p>Existing, Regulation</p>	<p>Short Term</p>	<p>Both</p>	<p>Low</p>
<p>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. 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.</p>	<p>1-IV.D.1 ES-23</p>	<p>Existing, Regulation, Legislation</p>	<p>Short Term</p>	<p>Both</p>	<p>Low</p>
<p>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.</p>	<p>1-IV.E.1 ES-25</p>	<p>Legislation</p>	<p>Short Term</p>	<p>Both</p>	<p>Low</p>

¹ Indicates whether the recommendation is an incremental reform, applies only in conjunction with the system restructuring proposal, or applies in both cases.

**Table ES-1
Summary of Recommendations (continued)**

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
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.	1-IV.E.1 ES-25	Existing	Long Term	Both	Low
Improve and expand Alternatives to Detention, and use them only for persons who would otherwise be detained. Review current Alternatives to Detention programs to determine whether they constitute custody for purposes of the INA; if so, DHS could extend these programs to mandatory detainees who do not pose a danger to the community or a national security risk and for whom the risk of flight, within the parameters of the programs, is minimal.	1-IV.E.2 ES-25	Existing	Long Term	Both	Low
Grant parole where asylum seekers have established their identities, community ties, lack of flight risk, and the absence of any threat to national security, public safety, or other persons. In addition, conduct parole determinations as a matter of course for asylum seekers who have completed the credible fear screening.	1-IV.E.3 ES-25	Existing	Short Term	Both	Low
Adopt policies to avoid detaining noncitizens in remote facilities located far from family members, counsel, and other necessary resources.	1-IV.E.4 ES-25	Existing, Regulation	Long Term	Both	Moderate

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**Table ES-1
Summary of Recommendations (continued)**

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
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Part 1: Department of Homeland Security (continued)

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.	1-IV.E.4 ES-25	Existing	Long Term	Both	Moderate
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Part 2: Immigration Judges/Courts

Request additional immigration judges (approximately 100), increase number of law clerks to increase ratio to one clerk per judge, and increase number of support personnel.	2-IV.C.1 ES-28	Legislation	Short Term	Both	High
Require more formal, reasoned written decisions that are clear enough to allow noncitizens and their counsel to understand the bases of the decision and to permit meaningful BIA and appellate review.	2-IV.C.2 ES-30	Existing	Short Term	Both	Low
Give immigration judges statutory protection against being removed or disciplined without good cause, in order to protect them from retribution for engaging in ethical and independent decision making.	2-IV.A.2 ES-30	Legislation	Short Term	Both	Low
Adopt a new, single, consolidated code of conduct for immigration judges based on the ABA Code of Judicial Conduct, tailored to the immigration adjudication system.	2-IV.B.2 ES-29	Existing	Short Term	Both	Low

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Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
Implement judicial model performance reviews for immigration judges based on the ABA's Guidelines for the Evaluation of Judicial Performance and the Institute for Advancement of the American Legal System's proposed model for judicial performance.	2-IV.B.3 ES-29	Regulation	Short Term	Both	Low
Establish a new, more independent and transparent system to manage complaints and the disciplinary process by establishing a new office in EOIR that would segregate the disciplinary function from other supervisory functions, creating and following publicly available procedures and guidelines for complaints and discipline, fully implementing a formal right of appeal/review for adverse disciplinary decisions, and allowing public access to statistical or summary reporting of disciplinary actions (individual disciplinary records themselves would not be made public).	2-IV.B.4 ES-29	Legislation	Short Term	Incremental	Moderate
Provide additional opportunities for training of immigration judges, including training in assessing credibility, identifying fraud, changes to U.S. asylum and immigration law, and cultural sensitivity and awareness; provide sufficient funding to permit all judges to participate in regular, in-person trainings on a wide range of topics in immigration law; and designate an administrator to facilitate communication among immigration judges.	2-IV.C.4 ES-28	Existing	Short Term	Both	Moderate
Limit use of video conferencing to procedural matters in which the noncitizen has given consent.	2-IV.C.6.b ES-30	Existing	Short Term	Both	Low/Moderate

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**Table ES-1
Summary of Recommendations (continued)**

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
In hiring immigration judges, add questions on applications, interviews and reference checks designed to evaluate a candidate’s background, judicial temperament, and ability to demonstrate cultural sensitivity and treat all persons with respect; allow more public input in the hiring process by permitting professional organizations to participate in screening candidates who reach final levels of consideration.	2-IV.A.1 ES-29	Legislation or Regulation	Short Term	Incremental	Low
Increase administrative time available to immigration judges to allow increased participation in live training and opportunities to interact with other immigration judges on their courts.	2-IV.C.3 ES-28	Existing	Short Term	Both	Low
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.	2-IV.C.7 ES-30	Existing	Short Term	Both	Low
Significantly increase the number of Assistant Chief Immigration Judges to permit a more appropriate ratio of judges to supervisors, and expand their deployment to regional courts.	2-IV.B.1 ES-29	Existing	Short Term	Incremental	Moderate
Implement GAO recommendations that EOIR develop and maintain appropriate procedures to accurately measure case completion, identify and examine cost-effective options for acquiring the data, and acquire the necessary expertise to perform useful and reliable analyses of immigration judges’ decisions.	2-IV.C.5 ES-29	Existing	Short Term	Incremental	Low/Moderate
Give priority to completing the rollout of digital audio recording systems to facilitate fair and efficient proceedings.	2-IV.C.6.a ES-30	Existing	Short Term	Both	Low/Moderate

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Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
Part 3: Board of Immigration Appeals					
Increase resources available to the Board, including additional staff attorneys and additional Board members.	3-IV.G ES-34	Legislation	Short Term	Incremental	High
Require three-member panel review in all non-frivolous merits cases that lack obvious controlling precedent. Allow single-member review for purely procedural motions and motions unopposed by DHS.	3-IV.A ES-32	Regulation	Short Term	Incremental	Included Above
Extend deadline for issuance of single-member decisions from 90 to 180 days from receipt of appeal (i.e., the same deadline as for panel review).	3-IV.D ES-33	Regulation	Short Term	Incremental	Included Above
Restore the Board’s ability to conduct a de novo review of immigration judge factual findings and credibility determinations.	3-IV.C ES-32	Regulation	Short Term	Incremental	Low
Issue more precedential decisions, expanding the body of law to guide immigration courts and practitioners. Continue to require the full Board to authorize designation of an opinion as precedential. Make non-precedential opinions available to noncitizens and their representatives.	3-IV.E ES-32	Existing	Short Term	Incremental	Low

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Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
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Part 3: Board of Immigration Appeals (continued)

Finalize 2008 proposed rule that would make Affirmance Without Opinion discretionary rather than mandatory. Written decisions should address all non-frivolous arguments raised by the parties, thus providing sufficient information to facilitate review by federal appeals courts, to allow participants to understand the Board’s decision, and to promote their confidence in the fairness of the decision.	3-IV.B ES-32	Regulation	Short Term	Incremental	Moderate
Apply new code of conduct proposed for immigration judges, based on the ABA Code of Judicial Conduct, to Board members as well.	3-IV.F ES-34	Existing	Short Term	Both	Low

Part 4: Judicial Review

Enact legislation to restore courts’ authority to review discretionary decisions under the abuse of discretion standard in effect prior to 1996 legislation. Require that courts apply a presumption in favor of judicial review and specifically reject attempts to insulate more and more actions by labeling them as discretionary.	4-IV.A ES-36	Legislation	Short Term	Both	Moderate
Amend the INA to permit the courts of appeals to remand cases for further fact finding under the standard provided in the Hobbs Act for review of other agency actions — i.e., where “the additional evidence is material” and “there were reasonable grounds for failure to adduce the evidence before the agency.” See 28 U.S.C. § 2347(c).	4-IV.B ES-36	Legislation	Long Term	Both	Moderate

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Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
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Part 4: Judicial Review (continued)

Require each final order in which the government prevails to include notice of right to appeal, the applicable circuit court, and the deadline for filing an appeal.	4-IV.C ES-37	Regulation	Short Term	Both	Low
Extend the current 30-day deadline to file a petition for review with the court of appeals to 60 days, with the possibility of a 30-day extension where the petitioner is able to show good cause or excusable neglect.	4-IV.C ES-37	Legislation	Short Term	Both	Moderate

Part 5: Representation

Establish a right to government-funded counsel in removal proceedings for indigent noncitizens who are potentially eligible for relief from removal and cannot otherwise obtain representation. Apply this right at all levels of the adjudication process, including immigration court adjudications, appeals at the BIA and federal appellate courts, and habeas petitions challenging expedited removal. Provide representation at government expense for unaccompanied minors and noncitizens with mental disabilities and illnesses, at all stages of the adjudication process, whether or not the proceeding may necessarily lead to removal. Eliminate the “no expense to the Government” limitation of section 292 of the INA in order to limit controversy over whether the provision of government-funded representation is permitted under current law.	5-IV.A.1 ES-40	Legislation	Long Term	Both	High
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Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
Part 5: Representation (continued)					
Where representation at government expense is required (as proposed above), require it to be provided by an attorney in proceedings raising substantial questions of law, such as appeals to the BIA where a significant legal issue is presented, all appeals to the federal appellate courts, and in the preparation of habeas petitions challenging expedited removal orders. In other matters, in addition to attorneys, second-level accredited representatives would continue to be able to represent the noncitizen.	5-IV.A.1 ES-40	Regulation	Long Term	Both	High
Expand the Legal Orientation Program (“LOP”) to provide services for all detainees and at immigration courts for non-detained noncitizens in removal proceedings.	5-IV.A.2 ES-41	Legislation	Long Term	Both	High
Modify the LOP’s current screening system so that it screens all indigent persons (not only detainees) in removal proceedings and refers them to individuals or groups who can represent them in adversarial proceedings, using a set of standards developed by EOIR. The system would also screen noncitizens to determine whether they belong to one of the groups entitled to representation. Qualifying cases could be referred to charitable legal programs or pro bono counsel. Where these services were unavailable, government-paid counsel would be appointed. Establish an administrative structure for the enhanced LOP to enable it to provide counsel at government expense for noncitizens in some cases.	5-IV.A.3 ES-41	Legislation or Regulation	Long Term	Both	High

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Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
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Part 5: Representation (continued)

Permit recognized nonprofit agencies to charge “reasonable and appropriate fees,” as opposed to “nominal charges,” for their services.	5-IV.B.2.a ES-41	Existing	Short Term	Incremental	Low
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.	5-IV.B.2.b ES-41	Regulation	Short Term	Incremental	Low
Require immigration judges to consult with local bar associations and other local stakeholders in determining the criteria for inclusion on EOIR’s pro bono service providers list.	5-IV.B.2.d ES-42	Regulation	Short Term	Incremental	Low
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. 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.	5-IV.B.1.b ES-42	Existing	Short Term	Both	Low

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Table ES-1
Summary of Recommendations (continued)

RECOMMENDATION (Description)	DISCUSSION (Part-Section In Report and Starting Page In Executive Summary)	AUTHORITY NEEDED Existing Regulation Legislation	RELATIVE TIME FRAME Short Term Long Term	SCOPE OF REFORM ¹ Incremental Restructuring Both	RELATIVE COST Low Moderate High
Part 5: Representation (continued)					
Amend EOIR’s Rules of Conduct to allow for civil monetary penalties to be imposed by immigration judges against both private and government attorneys.	5-IV.B.1.a ES-42	Regulation	Short Term	Incremental	Low
Expand and improve the EOIR pro bono program to facilitate and encourage attorney participation.	5-IV.B.2.c ES-42	Existing	Short Term	Incremental	Moderate
Part 6: System Restructuring					
Create Article I court with trial and appellate divisions, headed by Chief Trial Judge and Chief Appellate Judge, respectively. President appoints Chief Appellate Judge, other appellate judges, Chief Trial Judge, and possibly Assistant Chief Trial Judges, with advice and consent of Senate, from among persons screened and recommended by a Standing Referral Committee. Other trial judges appointed by Chief Trial Judge or Assistant Chief Trial Judges, also using Standing Referral Committee. Fixed terms of 12-15 years for appellate judges, 8-10 years for trial judges. Judges removable by appointing authority only for incompetency, misconduct, neglect of duty, malfeasance, or disability. Existing judges can serve out the remainder of the new fixed terms (which are deemed to have begun at the time of their prior appointment to current positions) and are eligible for reappointment thereafter.	6-III.A.1 ES-9, 43	Legislation	Long Term	Restructuring	High
In the alternative, if Article I court is not established, create independent agency for both trial and appellate functions.	6-III.A.2 ES-43	Legislation	Long Term	Restructuring	High

¹ Indicates whether the recommendation is an incremental reform, applies only in conjunction with the system restructuring proposal, or applies in both cases.

Table ES-2 Features of Major Restructuring Systems

FEATURE	CURRENT SYSTEM	ARTICLE I COURT	INDEPENDENT AGENCY	HYBRID APPROACH
Appointment of Trial Judges	Appointed by Attorney General. Chief Immigration Judge (CIJ) reviews applications and refers candidates to EOIR panels for review. EOIR Director and CIJ select at least 3 candidates to recommend for final consideration. Second panel interviews finalists and recommends one to the AG, who approves or denies. If denied, either AG or Deputy AG can request additional candidates.	President appoints Chief Trial Judge (CTJ) and possibly Assistant Chief Trial Judges (ACTJs) with Senate confirmation. CTJ appoints trial judges; or ACTJ for each region appoints trial judges in that region, with approval of CTJ. Trial judges selected from among persons recommended by Standing Referral Committee.	President appoints Chief Immigration Judge (CIJ) and possibly Assistant Chief Immigration Judges (ACIJ), with Senate confirmation. Alternatively, ACIJs selected by CIJ from among current IJs based on recommendations from Standing Referral Committee. Other trial judges appointed based on merit selection system (including testing) similar to the one now used to hire Administrative Law Judges, but administered by the new agency rather than OPM.	Same as in independent agency model.
Appointment of Appellate Judges	AG has authority to appoint, but it is sometimes delegated.	President appoints Chief Appellate Judge and other appellate judges, with Senate confirmation. Selected from among persons recommended by Standing Referral Committee.	President appoints Chairperson and members of Board of Immigration Review, with Senate confirmation. Selected from among persons recommended by Standing Referral Committee.	Same as in Article I court model.

Table ES-2
Features of Major Restructuring Systems (continued)

FEATURE	CURRENT SYSTEM	ARTICLE I COURT	INDEPENDENT AGENCY	HYBRID APPROACH
Qualifications of Trial Judges	Licensed to practice law in a state, territory or DC; US citizen; at least 7 years of relevant legal experience; at least one year equivalent to GS-15; and either (1) knowledge of immigration law and procedure, (2) substantial litigation experience, (3) experience handling complex legal issues, (4) experience conducting admin. hearings, or (5) knowledge of judicial practices/procedures.	Licensed to practice law in a state, territory, Puerto Rico or DC; US citizen; 5 years of experience as licensed attorney or judge involved in litigation or admin. law matters at federal, state or local level. Strong consideration to candidates with at least 5 years of experience in immigration law.	Licensed to practice in a state, territory, Puerto Rico or DC; US citizen; at least 7 years of experience as licensed attorney preparing for, participating in and/or reviewing formal hearings or trials involving litigation and/or admin. law. Strong consideration to at least 5 years of experience in immigration law.	Same as in independent agency model.
Tenure of Trial Judges	No fixed term.	Fixed renewable terms of moderate length (e.g., 8-10 years).	CIJ appointed for relatively short term (e.g., 5-7 years). All other judges have unlimited tenure (like ALJs).	Same as in independent agency model.
Tenure of Appellate Judges	No fixed term.	Fixed, relatively long renewable terms (e.g., 12-15 years).	Fixed, relatively short renewable terms (e.g., 5-7 years).	Same as in Article I court model.
Removal of Judges	Removable by AG at any time without cause.	Only for incompetency, misconduct, neglect of duty, malfeasance or disability. Appellate judges, CTJ and possibly ACTJs are removable only by the President. Other trial judges are removable by CTJ on recommendation of the ACTJ for the applicable region and with concurrence of other ACTJs.	Board members and CIJ can be removed by President only for inefficiency, neglect of duty or malfeasance. ACIJs can be removed as ACIJs by the CIJ under same standard. Immigration judges (like ALJs) can be removed only for good cause after hearing before Merit Systems Protection Board (MSPB), subject to judicial review.	Same as Article I model for appellate judges. Same as independent agency model for trial judges.

Table ES-2
Features of Major Restructuring Systems (continued)

FEATURE	CURRENT SYSTEM	ARTICLE I COURT	INDEPENDENT AGENCY	HYBRID APPROACH
Supervision and Evaluation	CIJ is responsible for supervision of immigration judges, with assistance of ACIJs. IJs are exempt from performance appraisals applicable to other civil service employees, but subject to caseload review. EOIR and NAIJ are negotiating performance review system.	Trial judges supervised by their local ACTJ. Appellate judges supervised by Chief Appellate Judge. Performance reviews based on ABA Guidelines for Evaluation of Judicial Performance and model for judicial performance evaluation proposed by Institute for Advancement of the American Legal System. System stresses improvement and cannot be used for discipline.	Similar to Article I court model. Performance reviews are used to promote improvement and cannot be used as basis for rewarding, reassigning, promoting, reducing in grade, retaining or removing an Immigration Judge.	Same as Article I court model for appellate judges. Same as independent agency model for trial judges.
Discipline	Immigration judges subject to multiple codes of conduct and ethics. Complaints filed with ACIJ and forwarded to Office of CIJ. Assistant Chief Judge for Conduct and Professionalism reviews all complaints and allegations of misconduct. EOIR may refer complaints to DOJ Office of Professional Responsibility or Office of Inspector General.	Judges subject to code of ethics and conduct based on ABA Model Code of Judicial Conduct and complaint procedure similar to what is used for other federal judges.	Agency would have separate office responsible for receiving, reviewing and investigating complaints against Board members and IJs. Discipline subject to review by MSPB and subsequent judicial review.	Same as Article I court model for appellate judges. Same as independent agency model for trial judges.

Table ES-3 Comparison of Major Restructuring Options

CRITERIA	ARTICLE I COURT	INDEPENDENT AGENCY	HYBRID APPROACH
Independence	Viewed as more independent because it is a wholly judicial body.	Method of selection, unlimited tenure and protection against removal for trial judges gives them greater independence than judges on a court.	Combines independence of trial judges with more judicial features at the appellate level.
Perceptions of Fairness	Likely to engender greatest level of confidence, as a wholly judicial body.	Professionalization of the immigration judiciary at trial judge level should increase public confidence.	Combines confidence derived from professionalization at trial level with confidence in judicial body at appellate level.
Quality of Judges and Professionalism	Greater prestige of Article I court judgeship may attract more qualified candidates.	Method of selection, unlimited tenure and protection against removal offers greater job security to trial judges.	Combines greater job security at trial judge level with greater prestige of a court at appellate level.
Efficiency, Cost and Ease of Administration	Ability to fill and maintain several hundred judgeships at trial court level could be significant challenge.	Can fill and maintain trial judge positions through proven civil service type of process.	Most costly option, requires creation and operation of two new distinct institutions.
Accountability	Trial judges with fixed terms will be more accountable to the President and Congress.	Trial judges chosen by merit system with unlimited tenure will have little or no accountability to the political branches.	Combines little or no accountability to the political branches at trial judge level with greater accountability at appellate level.
Impact on Article III Courts	Greater independence and perceptions of fairness could result in fewest appeals to circuit courts.	Should reduce the number of appeals to circuit courts, but possibly not as much as Article I court.	Impact should be somewhere between independent agency and Article I court.



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