

American Bar Association: News Release

Release: Immediate

Contact: Tina Lanier
Phone: 202/662-1792
E-Mail: lanierc@staff.abanet.org

Or: Patricia Gaul
Phone: 202/662-1094
E-Mail: gaulp@staff.abanet.org

Online: <http://www.abanews.org>

NEW REPORT TO ABA ADDRESSES CRISIS WITHIN IMMIGRATION REMOVAL SYSTEM *Scores of Reforms Recommended to Improve Adjudication, Lower “Exploding Caseload”*

WASHINGTON, D.C., Feb. 2, 2010 — Painting a picture of an overwhelmed immigration court system choked by an “exploding” caseload and an “exponential” increase in outside pressures, a report submitted to the American Bar Association has the ABA considering a host of policy reforms affecting the adjudication system for determining whether to remove noncitizens from the United States.

The new report, “Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases” was prepared pro bono by the law firm of Arnold & Porter LLP. The report represents the opinions of the authors and editors and should not be construed to be those of either the American Bar Association or the ABA’s Commission on Immigration unless and until adopted pursuant to the bylaws of the association. They are set to come to a vote next week.

The nearly 500-page report examines each stage of the immigration removal adjudication system and makes some 60 recommendations for incremental and systemic reform. Designed as a tool for policymakers considering legislative and administrative changes to the immigration system, the study identifies concerns ranging from internal Department of Homeland Security practices to systemic weaknesses within the court’s current structure. Key findings cover six areas of concern and include:

Department of Homeland Security

- DHS policies and procedures, along with some substantive provisions of immigration law, have contributed to a marked rise in caseload that has immigration courts handling more than 280,000 proceedings each year.
- Law enforcement and other officers, rather than government attorneys, initiate immigration court proceedings.
- Prosecutorial discretion is not sufficiently used.
- Grounds for removal of noncitizens based on “aggravated felony” convictions have been dramatically expanded, and many cases are handled without court oversight.
- Removal proceedings are initiated against noncitizens who are eligible to adjust to lawful permanent resident status.

Immigration Courts

- Significant disparities in rates of favorable decisions indicate that respondents’ chances of success are highly dependent upon the judges before whom they appear rather than the merits of their case.

- Courts face public skepticism and a low level of respect for the process due in part to their lack of independence from the Department of Justice.
- Shortages of judges, law clerks and staff abound, as do systemic problems with how immigration judges are hired, retained or removed.
- Each Immigration Judge handles an average of more than 1200 proceedings a year, far more than other federal adjudicators; due to time pressures, judges issue predominantly oral decisions that sometimes are not fully researched or based in law or fact.
- Immigration courtroom technology, such as inadequate audio recordings and the increasing use of videoconferencing, may undermine the fairness of proceedings.

Board of Immigration Appeals

- “Streamlining” changes led to a seven-fold increase in the number of circuit court appeals over five years (from 2001 to 2006).
- The reputation of the Board remains poor, and several circuit judges have leveled scathing critiques against the Board and immigration courts
- The Board has been unable to eliminate unsupportable disparities among immigration judges’ decisions.
- Remand of cases to immigration judges has declined so considerably that it may be that the Board is not exercising adequate oversight.

Circuit Court Judicial Review

- The federal circuit courts of appeals have been faced with an explosion of immigration cases.
- The increasing complexity of immigration laws and greater limits on judicial review have led courts of appeals to spend inordinate amounts of time determining the scope of their jurisdiction.
- Judicial review of removal orders has not become more efficient or just; instead it is producing more difficulties for unwary and unrepresented noncitizens.

Representation

- More than half of respondents in removal proceedings and 84 percent of detained respondents do not have representation.
- Lack of adequate representation has a host of negative repercussions, including delays, questionable fairness, increased cost of removal proceedings, and risk of abuse and exploitation by “immigration consultants” and “notarios.”

System Restructuring

- Immigration courts and the Board of Immigration Appeals lack independence due to their placement within the Department of Justice.
- An independent body responsible for adjudicating immigration removal issues is needed.

The need for restructuring of the immigration court system is at the centerpiece of the study. The report also highlights enormous problems generated by lack of representation for immigrants at every level of the immigration adjudication system, and a very serious lack of staff, technology and other resources.

“Protecting rule of law and due process are values we all share as Americans and they are at the core of ABA advocacy,” said ABA President Carolyn Lamm. “This report focuses on the many ways in which our current immigration adjudication system is failing to meet our national expectations of fairness and effectiveness. We welcome its comprehensive analysis and look forward to considering adoption of its suggestions for reform.”

“The study’s recommendations identify priorities to ensure that our immigration adjudication system is far more modern, transparent, functional and fair,” noted Commission on Immigration

Chair Karen Grisez. “Restructuring, Representation, Resourcing, and Professionalism are the priorities to ensuring that our immigration adjudication system accomplishes these central goals.”

Among the report’s key recommendations:

System Restructuring

- Three basic options for restructuring were examined: an Article I court, independent agency, or hybrid of the two. The report concludes that an Article I court or an independent agency would be excellent alternatives that offer vast improvements over the current system. Both offer greater independence, fairness and perceptions of fairness, professionalism and efficiency than the current system.
- The report recommends the establishment of an Article I court as the preferred option because it is likely to be viewed as more independent, engender the greatest amount of confidence, carry greater prestige in recruiting the highest quality judges, and offer the best balance between independence and accountability.
- The new Article I court would have a trial and appellate division, headed by a Chief Trial Judge and Chief Appellate Judge, respectively. The President of the United States would appoint these two officials and all of the appellate judges, with the advice and consent of the Senate, from among persons screened and recommended by a standing referral committee. Other trial judges would be appointed by or with the approval of the Chief Trial Judge.
- All judges of the Article I court would serve for fixed terms: in the range of 12 to 15 years for appellate judges and 8 to 10 years for trial judges. They could be removed by the appointing authority only for incompetency, misconduct, neglect of duty, malfeasance, or disability.
- The report also offers recommendations on the qualifications of the judges, their supervision and discipline, and ethical standards to be required of such judges.
- Finally, the report suggests transitional measures for retaining existing immigration judges and BIA members who are currently employed by the Department of Justice.

Further, for each of the following areas, the study calls for:

Representation

- Establishing a right to representation for indigent noncitizens in adversarial removal proceedings and for individuals in groups with special needs. Congress should establish 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. For individuals in groups with special needs, including unaccompanied minors and noncitizens with mental disabilities and illnesses, access to government-funded counsel should extend to all immigration proceedings.
- Expanding the Legal Orientation Program beyond its current availability to detainees in a limited number of facilities, so that it is established at all detention sites and expanded to immigration courts to reach non-detained persons in removal proceedings.
- Modifying the Legal Orientation Program to incorporate screening of all indigent persons in removal proceedings and referring them to individuals or groups who can represent them in adversarial proceedings, using standards developed by the Executive Office for Immigration Review. The recommendations also call for the system to screen all noncitizens to determine whether they belong to one of several vulnerable groups. Further, it calls for an administrative structure to enable the Legal Orientation Program to provide counsel at government expense to noncitizens in some cases.

Circuit Court Judicial Review

- Restoring judicial review of discretionary decisions under an abuse-of-discretion standard.

- Amending the Immigration and Nationality Act to permit the courts of appeals to remand cases for further fact finding.
- Extending the current 30-day deadline for filing petitions for review with the courts of appeals 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.
- Amending regulations to require 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 appeal.

Board of Immigration Appeals

- Requiring three-member panel BIA review (rather than review by a single member) for all non-frivolous merits appeals that lack obvious controlling precedent, as well as for motions that are not purely procedural or unopposed by DHS.
- Expanding the Board's resources.
- Amending the Board's existing regulations to encourage more developed written decisions, and requiring that Board opinions respond to all non-frivolous arguments properly raised by the parties in all cases.
- Restoring de novo review of immigration judge factual findings and credibility determinations, which the Board had exercised until 2002. 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.

Immigration Courts

- Hiring approximately 100 additional immigration judges as soon as possible, but at least within the next three to four years. Increasing the number of law clerks and adding support personnel.
- Requiring 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. Immigration judges should, at a minimum, produce written decisions that are clear enough to allow all parties to understand the basis of the decision and to permit meaningful BIA and judicial review.
- Increasing training opportunities for immigration judges, including training in assessing credibility and identifying fraud, knowledge about changes to United States asylum and immigration law, and training in cultural sensitivity and awareness.
- Limiting 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.

Department of Homeland Security

- Increasing the control that DHS lawyers have over the initiation of removal proceedings by DHS officers. DHS could implement a pilot program requiring the prior approval by a DHS lawyer for the issuance of all discretionary Notices to Appear on a case-by-case basis. Finally, to the extent possible, each removal case in immigration court should be assigned to an individual DHS trial attorney to increase efficiency and facilitate exercise of prosecutorial discretion.
- Increasing the use of prosecutorial discretion by DHS officers and attorneys. 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).
- Permitting all eligible noncitizens to adjust to lawful permanent resident status while remaining in the United States. Alternatively, the bars on reentry should be eliminated so such noncitizens who have accrued unlawful presence in the United States can become lawful permanent residents by consular processing while outside of the United States.
 - Amending the definition of “aggravated felony” and eliminating the retroactive application of aggravated felony provisions in immigration law. The definition of “aggravated felony” has progressively expanded and currently is so broad that it is being applied to persons convicted of misdemeanors and other minor crimes. Retroactive application of the aggravated felony provisions also has burdened the system, is unfair and results in removal of noncitizens with longstanding U.S. ties.
 - Curtailing 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.
 - Eliminating expedited removal for individuals who are already in the United States, unaccompanied minors and the mentally ill; permitting DHS officers to issue expedited removal orders only if they determine that an individual lacks proper travel documentation; and expanding judicial review of expedited removal orders. 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.
 - Requiring that defensive asylum claims arising in expedited removal proceedings be adjudicated by asylum officers so as to reduce the caseload burden on immigration courts and DHS attorneys.
 - Reducing the use of detention by avoiding detention of persons who are not flight risks and do not pose a threat to national security, public safety or other persons; expanding the use of alternatives to detention; and expanding the use of parole for asylum seekers.

Arnold & Porter LLP conducted the project at the request of the ABA Commission on Immigration. More than 50 lawyers and legal assistants researched, investigated, and prepared the study of the United States adjudication system for the removal of noncitizens. The effort took more than a year and was led by Arnold & Porter partner Lawrence Schneider, with leadership on various parts of the Report by Michael Lee, Lily Lu, William Cook, Wilson Sweitzer, Christopher Flack, Scott Morrow and Asim Varma.

Lawrence Schneider, in addition to leading Arnold & Porter’s international trade practice, has developed expertise in pro bono immigration work over the past twenty years and heads Arnold & Porter’s award-winning pro bono immigration practice. Michael Lee also has done pro bono immigration work and focused here on reviewing other administrative and judicial systems for adjudication and developing proposals for restructuring the adjudication system for removal of noncitizens.

“We began this project with no preconceived notions about reforms to the immigration adjudication system,” said Schneider. “Our goal was delivering a timely, wide-ranging and objective guidebook for policymakers.”

“No other study offers such a comprehensive comparison of federal adjudication systems,” he continued. “We’re especially proud of the level of detail and research our team contributed to this project. It is a body of work we hope will prove useful immediately, and serve as a reference for years to come.”

“The ABA commissioned this study as our country considers how to overhaul our broken immigration system,” said ABA President Lamm. “This thoughtful analysis of the adjudication system’s problems will help frame the debate as our nation’s leaders move forward. The ABA is

especially hopeful that the report's findings regarding representation and system restructuring will lead to reforms for which all Americans can be proud."

Arnold & Porter LLP is an international law firm of about 700 lawyers with eight offices in the United States and Europe. The firm maintains more than 25 practice areas spanning a broad spectrum of the law, with a primary focus on litigation, transactional matters, and regulatory issues. Arnold & Porter has been widely recognized for its longstanding and steadfast commitment to pro bono in the legal profession.

With nearly 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

- 30 -

This distribution list is a service to the news media from the American Bar Association Division for Media Relations and Communication Services. Your e-mail address will only be used within the ABA and its entities. We do not sell or rent e-mail addresses to anyone outside the ABA. To change your e-mail listing or be removed from our distribution lists, please contact the Media Relations Department at 312/988-6171 or abanews@abanet.org.

To review our privacy statement, [click here](#).