

AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association supports the restoration of federal judicial
2 review of immigration decisions and urges Congress to enact legislation:

- 3
- 4 (a) To restore the U.S. Court of Appeals' authority to review discretionary decisions of the
5 Attorney General under the abuse of discretion standard in effect prior to 1996
6 legislation. Such legislation should provide that courts apply a presumption in favor of
7 judicial review and specifically reject attempts by the Attorney General to label
8 additional actions as discretionary and insulate them from review;
- 9
- 10 (b) To permit the courts of appeals to remand cases to the Board of Immigration Appeals
11 ("BIA" or "Board") for further fact finding under the standard provided in the Hobbs
12 Act for other agency actions where the additional evidence is material and there were
13 reasonable grounds for failure to adduce the evidence before the agency. See 28 U.S.C.
14 § 2347(c); and
- 15
- 16 (c) To amend the current 30-day deadline to file a petition for review with the court of
17 appeals to 60 days, with a provision for the petitioner to obtain an extension of an
18 additional 30 days for good cause or upon a showing of excusable neglect.
- 19

20 FURTHER RESOLVED, That the American Bar Association urges the promulgation of
21 regulations requiring that a final order of removal include notice of the right to appeal, the
22 applicable circuit court, and the deadline for filing an appeal.

REPORT

In 1996, Congress fundamentally altered judicial review of removal decisions, significantly restricting noncitizens' access to the federal courts. 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 and challenges to certain discretionary acts of the Attorney General. These amendments to the immigration laws directed all federal court review, to the extent still permitted, to the courts of appeals.

However, Congress's 1996 legislation did not sufficiently consider the constitutional limitations of precluding judicial review of removal orders. 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 court.¹ The Supreme Court noted that habeas corpus jurisdiction might be precluded if an adequate substitute was provided.² In 2005, with passage of the REAL ID Act,³ Congress decisively eliminated habeas jurisdiction for removal orders (except expedited removal) but provided for circuit court review of constitutional claims and questions of law that were previously available under habeas on the theory that the courts of appeals would then serve as an adequate substitute for habeas review.

Thus, today the principal vehicle for judicial review of a removal order is a petition for review, which must be filed with the court of appeals in the circuit in which the removal hearing was held. The petition must be filed within 30 days of the final order of removal, and this deadline cannot be extended even if good cause is shown. If these procedural requirements are met, the petitioner must then demonstrate that the appeal is not subject to one of the numerous jurisdictional bars.

Consequently, there is now a convoluted labyrinth of case law construing the exceptions (and constitutionally required carve-outs to these exceptions) to judicial review of removal orders. Petitioners and the courts of appeals spend valuable time wending their way through this jurisdictional thicket. As a result, judicial resources are not conserved, and it is questionable whether the objective of executing removal orders with dispatch has been achieved. Instead, the exceptional scope of the restrictions on judicial review undermines confidence in the entire adjudication system, as these restrictions are perceived as a mechanism to insulate dysfunctional administrative processes and questionable exercise of executive discretion.

The judicial review that has occurred illustrates its necessity. Circuit court decisions have been highly critical of the administrative review process, finding "manifest errors of fact and logic,"⁴

¹ *INS v. St. Cyr*, 533 U.S. 289, 304-5 (2001).

² *Id.* at 314 n.38 ("Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas corpus] through the courts of appeals.").

³ Pub. L. No. 109-13, 119 Stat. 231 (2005).

⁴ *Iao v. Gonzales*, 400 F.3d 530, 533-35 (7th Cir. 2005) (remanding to the Board of Immigration Appeals because Iao was entitled to a "rational analysis of the evidence" that had been denied to Iao).

“[a] disturbing pattern of [immigration judge (“IJ”)] misconduct,”⁵ and bias and abusive conduct.⁶ In *Galina v. INS*, the Seventh Circuit found that the “[Board of Immigration Appeals (“BIA”)] analysis was woefully inadequate” and that “elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the [BIA] in this as in other cases.”⁷ Five years later in *Benslimane v. Gonzales*, Judge Posner noted that “different panels of this court reversed the [BIA] in whole or part in a staggering 40% of the 136 petitions to review the Board that were resolved on the merits.”⁸ While these numbers only reflect reversals by the Seventh Circuit, many judges have criticized the administrative adjudication process.⁹

These scathing decisions not only prevented manifest injustice in individual cases, but they also illuminated certain problems in the immigration adjudication process. Meaningful judicial review plays an indispensable role in implementing the rule of law and checking administrative caprice. For many noncitizens, it is the right to go before a judge that differentiates the United States from other countries that lack the same commitment to the rule of law.

The need for reform that would ensure efficacy, restore public confidence, and safeguard due process in immigration adjudication has been apparent for many years. Given the judiciary’s critical oversight of, and dialogue with, the administrative adjudication process, the role of judicial review warrants serious consideration. These recommendations urge the restoration of judicial review over discretionary decisions and the implementation of procedural rules that will help ensure access to meaningful review by the circuit courts.

⁵ *Wang v. Attorney Gen.*, 423 F.3d 260, 268 (3d Cir. 2005).

⁶ *See, e.g.,* *Fiadjoe v. Attorney Gen.*, 411 F.3d 135, 155 (3d Cir. 2005) (“The conduct of the IJ by itself would require a rejection of his credibility finding.”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (IJ’s determination was “skewed by prejudgment, personal speculation, bias, and conjecture”); *Zhang v. Gonzales*, 405 F.3d 150, 158 (3d Cir. 2005) (IJ sought to “undermine and belittle” the petitioner’s testimony); *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003) (IJ’s opinion “consist[ed] not of the normal drawing of intuitive inferences from a set of facts, but, rather, of a progression of flawed sound bites that [gave] the impression that she was looking for ways to find fault with Dia’s testimony”); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007 (9th Cir. 2003) (IJ abandoned role as neutral fact finder by her “sarcastic commentary and moral attacks”).

⁷ *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000).

⁸ *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). *See also* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 364 (2007) (regarding rates of reversal in asylum cases). 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).

⁹ *See Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., Second Session at 5-6 (April 3, 2006), available at <http://www.access.gpo.gov/congress/senate/pdf/109hrg/28339.pdf> (last visited April 5, 2009) (noting that the “performance and productivity of the IJs and the BIA” is the “core problem in immigration adjudications”). *See also* notes 4-8, *supra*, and accompanying text.

I. Recommendations

The ABA previously has noted that the 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.”¹⁰ Legislation should be enacted that would restore 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. These recommendations for reform are in accordance with that principle, and apply even if administrative adjudication by the immigration courts and the BIA is moved into an independent agency or restructured as an Article I court.

Congress Should Repeal the 1996 Amendments Precluding Judicial Review of Certain Discretionary Decisions

The 1996 amendments to the INA restricted judicial review of discretionary decisions. Prior to the 1996 legislative changes, the courts reviewed discretionary decisions under a deferential “abuse of discretion” standard. 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.”

While administrative discretion is unquestionably necessary in the application of immigration laws to millions of noncitizens each year, it does not follow that the courts of appeals 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, whether someone will be returned to a country suffering from violence, political instability, and economic disaster. Such decisions have an enormous impact on millions 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 that Congress enact legislation restoring such review in order to strike a more appropriate balance between the exercise of agency discretion and judicial review. . Moreover, such legislation should provide that the courts apply a presumption in favor of judicial review and specifically reject attempts by the Attorney General to insulate more and more actions from review by labeling them as discretionary. We advocate a model of review along the lines of the APA. The APA recognizes the value and necessity of administrative discretion, but reflects a presumption in favor of review. Under the APA, discretionary decisions will not be disrupted by courts as long as they are not arbitrary, capricious, or an abuse of discretion. Review under this

¹⁰ AMERICAN BAR ASSOCIATION, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 8 (2008), *available at*: http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

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standard would balance the need for agency flexibility and provide a judicial check on executive power in an area of law such as immigration where personal and civil liberties are at stake.

Congress Should Allow Courts of Appeals to Remand to the BIA for Further Fact Finding in Sufficiently Compelling Circumstances

Prior to IIRIRA, a noncitizen challenging an order of removal in federal court could choose between two avenues of review. She could file directly in a court of appeals, or if she was “in custody,” she could file a habeas petition in district court. Both of these options preserved the petitioner’s ability, in compelling circumstances, to have new evidence presented before an Article III court. Neither of these options for presenting new evidence exists today. The elimination of habeas corpus review for final removal orders and § 1252(a)(1), which precludes the court of appeals from remanding to the BIA for further fact finding, have significantly curtailed the petitioner’s ability to present new evidence.

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 court of appeals, a district court reviewing a habeas petition from a non-citizen prior to 2005 was empowered to “hear and determine facts, and dispose of the matter as law and justice require.”¹¹ The district court could thus hold evidentiary hearings to supplement the record as necessary.

Moreover, before IIRIRA a court of appeals could, under the Hobbs Act, remand the case to the agency for further inquiry and findings. The then-controlling section of the INA specified that when a noncitizen sought review directly in the court of appeals, “the petition shall be determined solely upon the administrative record upon which the deportation order is based” and that the Attorney General’s findings of fact “shall be conclusive.”¹² Courts, however, were not unnecessarily shackled by the record. “A court of appeals . . . reviews the administrative record only and will not conduct a de novo hearing on matters which could have been considered in the administrative proceedings, but were not. Where, however, alleged unfairness is extrinsic to the record, a court of appeals may remand the case to the agency for further inquiry and findings.”¹³

The ability of the courts of appeals to remand for additional fact finding in cases challenging agency orders is covered by the Hobbs Act:

If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that —

- (1) the additional evidence is material; and
- (2) there were reasonable grounds for failure to adduce the evidence before the agency;

¹¹ 28 U.S.C. § 2243 (1994).

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.¹⁴

Thus, a court of appeals could order the agency to find facts when new evidence was material to the adjudication of the case¹⁵ and there were reasonable grounds for not having brought forth the evidence at the administrative level.¹⁶ Prior to IIRIRA, courts held that remand under § 2347(c) was not precluded by 8 U.S.C. § 1105a, which requires that the court of appeals base its decision solely on the administrative record.¹⁷ However, IIRIRA expressly stated that the court of appeals may not remand for the taking of additional facts under § 2347(c) of the Hobbs Act.¹⁸

Some courts have sidestepped the issue by taking judicial notice of new facts.¹⁹ Other courts decline to take this route.²⁰ Relying on a judicial solution is problematic. Judicial notice-taking is restricted by the Federal Rules of Evidence, and such notice-taking does not apply to matters not “generally known within the territorial jurisdiction of the trial court” or matters “[in]capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

¹⁴ 28 U.S.C. § 2347(c) (1994).

¹⁵ To be material, the evidence must be relevant and not cumulative. *See, e.g.*, *Bernal-Garcia v. INS*, 852 F.2d 144, 147 (5th Cir. 1998) (letter from petitioner’s brother detailing physical threats made by Salvadorian soldiers against petitioner was “probative on the issue of likelihood of Bernal being subject to persecution in the event of deportation”); *Feleke v. INS*, 118 F.3d 594, 599 (8th Cir. 1997) (remand for information regarding abuses by the Ethiopian government toward organization of which petitioner was a member was material); *Refahiyat v. INS*, 29 F.3d 553 (10th Cir. 1994) (remand denied where evidence of petitioner’s conversion to Mormonism as ground for fear of persecution by the Iranian government had been considered by the BIA); *Fleurinor v. INS*, 585 F.2d 129, 133 (5th Cir. 1978) (Amnesty International report found material in another case “does not establish the universal materiality of this report. In order for evidence to be ‘material’ within the meaning of § 2347(c), the evidence must be probative on the issue of the likelihood of *this alien* being subject to persecution in the event of deportation”) (emphasis added).

¹⁶ The petitioner must provide “reasonable grounds” for not producing the evidence during the administrative proceeding. *See, e.g.*, *Mackonnen v. INS*, 44 F.3d 1378, 1386 (8th Cir. 1995) (remand ordered where the letter describing incarceration was not available until after conclusion of administrative process); *Osaghae v. INS*, 942 F.2d 1160 (7th Cir. 1991) (remand ordered where petitioner had sought additional information but delivery of documents was delayed because INS moved petitioner to different jails); *Dolores v. INS*, 772 F.2d 223, 227 (6th Cir. 1985) (“Even if the Amnesty International report were material, Dolores’ failure to articulate reasonable grounds for not earlier bringing the information it contains to the attention of the BIA raises an inference of dilatory tactics”); *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977) (remand ordered where Amnesty International report had not been available for public use during prior administrative hearings).

¹⁷ *See, e.g.*, *Mackonnen*, 44 F.3d at 1385; *Coriolan*, 559 F.2d at 1003.

¹⁸ IIRIRA § 306(a)(2) (amending 8 U.S.C. § 1252(a)(1) to subject judicial review of removal orders to the Hobbs Act “except that the court may not order the taking of additional evidence under section 2347(c) of such title”).

¹⁹ *See, e.g.*, *Namo v. Gonzales*, 401 F.3d 453, 458 (6th Cir. 2005) (taking judicial notice of the collapse of the Saddam Hussein regime); *Singh v. Ashcroft*, 393 F.3d 903, 905-07 (9th Cir. 2004) (taking judicial notice of the existence of an Indian counterterrorism organization, which was doubted by the IJ).

²⁰ *See, e.g.*, *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1278-82 (11th Cir. 2001).

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questioned.”²¹ Therefore, the use of judicial notice to supplement the factual record is not only an incomplete solution to the problem but also subject to variable application depending on the specific court of appeals. A legislative solution that restores the authority of a court of appeals to remand for further fact finding is preferable.

We recommend that Congress repeal the provisions in § 1252(a)(1) that prevent the courts of appeals from remanding cases to the BIA for further fact finding and return to the standard provided in the Hobbs Act, and permit remand where “the additional evidence is material” and “there were reasonable grounds for failure to adduce the evidence before the agency.”

Deadline for Filing A Petition for Review and Notice of Right to Appeal

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 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.

We recommend that the INA be amended to 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 excusable neglect or good cause. In other situations where the United States is a party, the petitioner is provided with 60 days to file an appeal.²² There is no apparent reason why petitioners in immigration cases should be subject to a shorter time in which to appeal a case than any other case in which the United States is a party. Moreover, the final removal order should provide the petitioner with adequate notice of the right to appeal. We recommend that regulations be amended to require that each final removal order state that an appeal from a final order of removal may be filed with the U.S. Court of Appeals, identify the specific circuit court in which the petition for appeal must be filed, and state the deadline for filing the appeal.

Respectfully Submitted,

Karen Grisez, Chair
Commission on Immigration
February 2010

²¹ Fed. R. Evid. 201(b).

²² Under the Federal Rules of Civil Procedure, when the United States, or an officer or agency of the United States, is a party in the case, all parties have 60 days to file a notice of appeal of the final judgment. Fed. R. App. P. 4(a)(1)(B). The Hobbs Act also provides for a 60-day period to file a petition for review of certain agency decisions with the court of appeals. 28 U.S.C. §§ 2342, 2344.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Karen T. Grisez, Chair, Commission on Immigration

1. Summary of Recommendation(s).

The Recommendation supports the restoration of federal judicial review of immigration decisions to ensure that noncitizens are treated fairly in the adjudication process. In addition, it is made to provide oversight by encouraging legislation to restore the U.S. Court of Appeals' authority to review discretionary decisions of the Attorney General under the abuse of discretion standard. Such legislation should provide that courts apply a presumption in favor of judicial review and specifically reject attempts by the Attorney General insulate specific actions from review. The recommendation promotes legislation to permit the courts of appeals to remand cases to the Board of Immigration Appeals ("BIA") for further fact finding under the standard provided in the Hobbs Act for other agency actions 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); and legislation to change the current 30-day deadline to file a petition for review with the court of appeals to 60 days, with a provision for the petitioner to obtain an extension of an additional 30 days for good cause or upon a showing of excusable neglect. Finally, the recommendation supports a regulation requiring that a final order of removal include notice of the right to appeal, the applicable circuit court, and the deadline for filing an appeal

2. Approval by Submitting Entity.

On November 17, 2009, the Commission approved this recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The ABA has called for legislation restoring judicial review of immigration decisions to ensure that noncitizens are treated fairly in the adjudication process. However, the suggested recommendations go further. Judicial review should be provided at a minimum to the same extent provided for review of other agency actions and administrative adjudication. These recommendations urge the restoration of appellate review over discretionary decisions and the implementation of procedural rules that will help ensure access to meaningful review by the circuit courts. These elements are a core concern of the ABA, promoting these goals through system-wide improvement to our overburdened immigration adjudication system will only serve to advance the rule of law (Goal IV) by providing for a fair legal process.

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The ABA has previously addressed similar issues in a series of reports addressing immigration procedures, immigration detention and fairness in the administrative immigration process:

In 1974, the House of Delegates adopted a policy on the enactment of legislation to amend Section 106(b) of the Immigration and Nationality Act, as amended, 8 U.S.C.1105a(b), by authorizing judicial review of a final order excluding a person seeking to enter the United States either by habeas corpus or declaratory judgment in the district in which the final exclusion order was entered. (8/74)

In 1983, the House of Delegates adopted a policy to recommend that the United States reform its immigration laws and practices in accord with the following principles, that those federal agencies charged with administering the immigration and refugee laws and the pertinent laws governing fair labor standards and practices be provided sufficient resources and organization to enforce and administer the laws effectively and fairly. This policy also opposed legislative proposals relating to immigration and naturalization that would limit the availability and scope of judicial review of administrative decisions under the Immigration and Nationality Act to less than what is provided for in applicable provisions of the relevant section of the Administrative Procedure Act, 5 U.S.C. 706: in particular judicial review of decisions regarding the reopening and reconsideration of exclusion or deportation proceedings, asylum determinations outside of such proceedings, the reopening of applications for asylum because of changed circumstances, denials of stays of execution of exclusion or deportation orders, administrative decisions to exclude aliens from entering the United States and constitutional and statutory writs of habeas corpus. In addition, the policy opposed legislative proposals relating to immigration and naturalization that would require the filing of actions for judicial review of administrative decisions, including deportation orders, rendered under the Immigration and Nationality Act within less than 60 days of such decisions. (2/83)

In 2006, the House of Delegates adopted a policy urging an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include proceedings like those governed by the Administrative Procedure Act, in person and on the record, with notice and opportunity to be heard, and a decision that includes findings of facts and conclusions of law; availability of full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake; and the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal. This policy also supported the neutrality and independence of immigration judges, both at the trial and appellate levels, and of any federal agency by which they are employed, so that such judges and agencies are not subject to the control of any executive branch cabinet officer. (06M107C)

In 2006, the House adopted a policy on the administration of U.S. immigration laws, calling for “a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient, and that has sufficient resources to carry out its functions in a timely manner.” As well as supporting the free availability of user-friendly legal resources for participants in

immigration matters, and the development of self-help assistance centers in all facilities where immigration matters are processed or adjudicated. (06M107D)

In 2006, the House of Delegates adopted a policy supporting the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. (06107F)

These policies recognize the importance of immigration judges in ensuring due process for immigrants facing removal proceedings. However, they do not fully address the steps necessary to improve adjudications by immigration judges and foster systematic reform of the immigration removal adjudication system to promote fairness, efficiency and professionalism in the adjudication of all removal cases.

5. What urgency exists which requires action at this meeting of the House?

Given the overburdened and inefficient nature of the current system, there is a strong likelihood that Congress will address the need for comprehensive immigration reform in the next few months, between the Annual Meeting and the next meeting of the House.

The current removal adjudication system handles several hundred thousand matters annually, overwhelming the resources that have been dedicated to the task of determining whether noncitizens in immigration proceedings should be removed from the United States and sent back to their home countries or elsewhere. Due to this overwhelming burden, and the known inefficiencies in the current system, there is intense political pressure for immediate and immigration reform.

6. Status of Legislation. (If applicable.)

Several bills have been introduced addressing various aspects of immigration system; however, as of this time, none have received legislative action.

7. Cost to the Association. (Both direct and indirect costs.)

None. Existing Commission and Governmental Affairs staff will undertake the Association's advocacy on behalf of these recommendations, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest with this resolution.

9. Referrals.

This recommendation is being circulated to Association entities and Affiliated Organizations including:

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Section of Administrative Law and Regulatory Practice
Criminal Justice Section
Commission on Domestic Violence
Section of Family Law
Government and Public Sector Lawyers Division
Section of Individual Rights and Responsibilities
Section of International Law
Judicial Division
Legal Services Division/Center for Pro Bono
Legal Services Division/Standing Committee on Pro Bono and Public
Council on Racial and Ethnic Justice
Commission on Law and Aging
Commission on Law and National Security
Section of Litigation
Standing Committee on Legal Aid and Indigent Defendants (SCLAID)
Young Lawyers Division
American Immigration Lawyers Association (AILA)
National Legal Aid and Defender Association (NLADA)

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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EXECUTIVE SUMMARY

1. Summary of the Recommendation

The Recommendation supports the restoration of federal judicial review of immigration decisions to ensure that noncitizens are treated fairly in the adjudication process. In addition, it is made to provide oversight by encouraging legislation to restore the U.S. Court of Appeals' authority to review discretionary decisions of the Attorney General under the abuse of discretion standard. Such legislation should provide that courts apply a presumption in favor of judicial review and specifically reject attempts by the Attorney General insulate specific actions from review. The recommendation promotes legislation to permit the courts of appeals to remand cases to the Board of Immigration Appeals ("BIA") for further fact finding under the standard provided in the Hobbs Act for other agency actions 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); and legislation to change the current 30-day deadline to file a petition for review with the court of appeals to 60 days, with a provision for the petitioner to obtain an extension of an additional 30 days for good cause or upon a showing of excusable neglect. Finally, the recommendation supports a regulation requiring that a final order of removal include notice of the right to appeal, the applicable circuit court, and the deadline for filing an appeal

2. Summary of the Issue that the Resolution Addresses

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. Consequently, there is now a convoluted labyrinth of case law construing the exceptions (and constitutionally required carve-outs to these exceptions) to judicial review of removal orders. Petitioners and the courts of appeals spend valuable time wending their way through this jurisdictional thicket. As a result, judicial resources are not conserved, and it is questionable whether the objective of executing removal orders with dispatch has been achieved. Notwithstanding the statutory limitations on their jurisdiction, the courts of appeals have been faced with an explosion of immigration appeals on their dockets, in 2008, more than 10,000 BIA decisions were appealed, comprising 16.8% of the civil appeals docket of the courts of appeals.

3. Please Explain How the Proposed Policy Position will Address the Issue

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. However, reform must go further. Judicial review should be provided at a minimum to the same extent provided for review of other agency actions and administrative adjudication. These recommendations urge the restoration of appellate review over discretionary decisions and the implementation of procedural rules that will help ensure access to meaningful review by the circuit courts.

4. Summary of Minority Views

None to date.