



2019 Update¹ – Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

In 2010, the American Bar Association Commission on Immigration published a 300-page report on the immigration adjudication system, [Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases](#). The [2019 Update Report](#) reaffirms and updates the 2010 recommendations, but in some instances, rejects prior recommendations in favor of more drastic reforms.²

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

Unfortunately, most of the reform efforts never came to fruition. As explained in the Update Report, which chronicles changes to the system from 2010 through 2018, there have been virtually no new immigration laws addressing issues covered by the 2010 Report. At the same time, certain policies that were in place at the time of the 2010 Report and that promoted the fairness, efficiency and due process in the immigration system have been undermined during intervening years.

This 2019 Update Report reviews and updates the 2010 recommendations and adds some new recommendations. As with the original report, this Update and its recommendations build upon the Commission’s focus to ensure fair and unbiased treatment and full due process rights for immigrants, asylum seekers, and refugees within the United States.

The report focuses on the issues relating to the four major government entities involved in immigration adjudication —DHS, immigration judges and the immigration courts, the Board of Immigration Appeals (“BIA”) and the federal circuit courts that review BIA decisions— as well as matters of representation in removal proceedings and system restructuring.

¹ The American Bar Association Commission on Immigration is extremely grateful once again to the law firm of Arnold & Porter for its tremendous commitment to drafting this 2019 Update Report, following its expansive work on the original 2010 Report.

² 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.

The development of the Update Report explored three primary questions. First, what has changed since 2010 and what are the problems with the current removal adjudication system. Second, which recommendations in the 2010 Report, that including steps that could be taken within the existing structure to improve the removal adjudication system, have been implemented; which of those recommendations should be renewed or modified; and what new recommendations should be made. And third, whether the recommendations in the 2010 Report relating to restructuring of the removal adjudication system should be renewed or modified.

The primary question of what changed since 2010 also includes the following inquiries: 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? And 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?

Additionally, four main goals have driven the development of the Update Report:

- 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.
- Goal 4: Increase the professionalism of the immigration judiciary.

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

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

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

Part 3 addresses reforms made over the last eight years at the Board of Immigration Appeals. While the Board has implemented several of the quality and process improvements recommended in our 2010 Report, while avoiding significant growth in its case backlog and wait times, we ultimately warn that new proposals affecting immigration judges and the Board could reduce these improvements. We also express concern that the Attorney General's frequent exercise of the certification authority, without

more transparency and due process safeguards, could undermine the legitimacy and credibility of the immigration adjudication process.

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

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

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

The 225-page 2019 Update Report, like the 2010 Report, appears in two volumes. The first volume includes a 26-page Executive Summary and a 25-page chart that provides a summary of the 70 recommendations in the 2010 Report and the 100 recommendations in the 2019 Update Report. The second volume of about 165 pages contains full analysis and explanation of the recommendations. Both volumes of the 2019 Update Report (and the two volumes of the 2010 Report) are available on the website of the ABA Commission on Immigration: www.americanbar.org/immigration.