Achieving America's Immigration Promise

ABA Recommendations to Advance Justice, Fairness and Efficiency

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The American Bar Association is the largest voluntary association of lawyers 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.

The ABA Commission on Immigration leads the Association's efforts to ensure fair treatment and full due process rights for immigrants, asylum seekers and refugees within the United States. The Commission acts in coordination with the ABA President, Governmental Affairs Office, and other Association entities, to advocate for modifications in immigration law and government practice based on approved ABA policies, provide continuing legal education and timely information about trends, court decisions and pertinent developments for members of the legal community, and assist in the operation of legal service programs that encourage volunteer lawyers to provide pro bono legal representation for individuals in immigration proceedings. The Commission thanks those members and staff who contributed to this paper.

For further information on the issues discussed in this paper, or other ABA legislative priorities, please contact:

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Introduction

The American Bar Association works to promote fair treatment and due process for immigrants, asylum seekers and refugees within the United States. Our volunteer members and staff have a wide range of expertise in immigration matters and serve as practitioners, educators, policymakers, business leaders, and analysts. Our common goal is to ensure that equal justice is a reality in America. However, laws and policies designed to protect noncitizens, particularly asylum seekers and other vulnerable groups, were systematically dismantled over the past four years, making fairness and due process difficult to attain.

There have been dramatic changes within the immigration system in the past four years, punctuated by numerous executive orders, regulations, policies, and Attorney General legal decisions that significantly altered the immigration legal framework, particularly within the asylum system. The new administration will have significant opportunities to reset and rebuild, and the ABA anticipates that, at a minimum, there will be an active effort to restore the 2016 status quo.

However, restoring the 2016 status quo is not enough. Systemic and structural issues pre-dated the outgoing administration, and those must be addressed. The challenge confronting the new administration is to not simply restore, but to improve the immigration system in ways that permanently enshrine basic rights and dignities into U.S. laws and policies.

Consequently, the ABA recommends that the incoming administration give immediate attention to our recommendations in five key areas of immigration policy that will have long-term impacts on the immigration system as a whole:

I. Reform the administrative adjudication process;
II. Ensure access to counsel;
III. Minimize reliance on immigration detention;
IV. Restore humanitarian protections; and
V. Preserve the rights of unaccompanied immigrant children.

Separately, each of these priority areas reflects long-standing ABA policy that offers concrete recommendations for short-term and long-term reforms. Taken together, however, they represent a vision of a more just system, one in which each section's key reforms and arguments build upon and complement the others.

The ABA Commission on Immigration's hands-on experience in the field also drives our recommendations. The Commission operates two immigration legal service programs near the Southern border in Texas and California and a legal resource center in Houston, Texas. The work of these projects provides the ABA with daily evidence of the many

failures—and the unique possibilities—of the current immigration system. The recommendations also derive from the Commission's many collaborations across the ABA with other programs and initiatives that increasingly recognize the intersection of immigration issues with other areas of the law, including criminal law, civil rights, children's rights, gender and racial justice, and court reform. The events of 2020 illuminate more than ever the significance of these important collaborations.

In this paper, the ABA ties its recommendations to specific immigration laws and policies, but we would be remiss if we failed to acknowledge that they must be considered against the broader backdrop of cultural, racial, and social issues forcing a re-examination of all aspects of American society. In short, the ABA seeks to provide the new administration with a non-exhaustive set of concrete suggestions for immediate immigration reforms that are acutely urgent, important to our nation, and grounded in adopted ABA policy positions. Immigration policy, however, is a dynamic issue that intersects with the most pressing issues of racial justice and true equality that the U.S. faces today.

Section I urges the new administration to implement systemic reforms to create a more just system of immigration adjudication, whether in court or before administrative agencies. It calls for the creation of an Article I court, as the ongoing politicization of the Executive Office for Immigration Review demonstrates how important it is to fully sever the judicial function of immigration decision-making from the Department of Justice. It also calls for greater use of prosecutorial discretion at the individual and group level to ensure appropriate prioritization of immigration enforcement efforts. At the legislative level, it calls for elimination of many criminal bars to immigration benefits, given the often-disproportionate severity of the immigration penalty compared to the underlying criminal violation. Section I also notes the worsening problem of access to fair adjudications before United States Citizenship and Immigration Services and recommends elimination of significant fee increases that make it virtually impossible for many eligible applicants to seek naturalization or other immigration benefits.

Building upon recommended improvements to system access, Section II focuses on the need for universal legal representation in immigration court and to ensure access to counsel at all stages of the immigration process. Counsel not only increases the likelihood of an individual's success, but it also improves the integrity and efficiency of the system. There is a significant need for more funding and more expansive use of existing authority to provide counsel on immigration matters. Section II also argues, however, that too many people are prevented from ever accessing even the most basic legal advice. For example, the Migrant Protection Protocols force people waiting for hearings to reside in Mexico enduring circumstances in which legal counsel is virtually unattainable.

Section III provides a succinct roadmap for a more compassionate, non-punitive detention system that limits detention in favor of case management and other non-restrictive oversight as much as possible. It calls for the end to family detention in favor of tested alternatives that have proven humane and effective. For those who must be detained, it urges detention standards that recognize the civil nature of immigration detention and provide greater access to legal and other services. Section III also calls for improved medical services, particularly in the wake of the COVID-19 pandemic.

Section IV calls for the repeal of numerous regulations and policies implemented to prevent refugee admissions or asylum access and makes specific recommendations for reversing course in our approach to humanitarian protection. It recommends a return to a robust refugee admissions program and urges the next administration to recommit to full and fair access for asylum seekers.

Section V focuses on the treatment of unaccompanied immigrant children. This section urges the new administration to rigorously follow the requirements of the Trafficking Victims Protection Reauthorization Act of 2008, which directed the government to recognize and adapt to the unique needs of unaccompanied children. It includes practical recommendations for improved treatment of unaccompanied children throughout the system—by Customs and Border Protection, during immigration court proceedings, and during the custody and release period managed by the Office of Refugee Resettlement. It calls for an end to family separation and to the Title 42 COVID-related expulsions of unaccompanied children. It also urges statutory and regulatory changes to the Special Immigrant Juvenile status (SIJ) program, including the critical need to increase the number of visas available to avoid the deportation of children with approved SIJ petitions who are waiting to be eligible to adjust their status. The section also calls on the government to preserve existing procedural protections for all children designated as unaccompanied upon their arrival to the United States, and to restore the Central American Minors Program.

There are many pressing issues confronting the new administration, from controlling the pandemic to restoring the economy to addressing climate change. Yet swift and decisive action on immigration policy is critically necessary and cannot be overlooked. This paper highlights key areas where smart action at the beginning of the President's term would reap numerous benefits for years to come. The ABA offers these recommendations in that spirit and urges a robust discussion among all government and nongovernment stakeholders working to restore and rebuild the immigration system.

I. Reforming Immigration Adjudication

Recommendations

- Congress should pass legislation to create an independent immigration court under Article I of the Constitution to promote the independence, impartiality, efficiency, and accountability of the removal adjudication system.
- The Executive Office for Immigration Review should repeal or withdraw administrative actions that limit adjudicatory discretion and restore longstanding judicial docket management tools.
- The Department of Homeland Security should restore meaningful use of prosecutorial discretion.
- The Department of Homeland Security and the Executive Office for Immigration Review should maintain fees for benefit applications at levels that do not deter eligible applicants from filing applications.
- Congress and the Executive Branch should take action to reduce the immigration consequences of certain criminal convictions.
- The Executive Office for Immigration Review should propose standards and procedures governing the process by which the Attorney General may certify cases to him or herself for adjudication.

The functioning of all our nation's court systems is of paramount importance to the American Bar Association (ABA). One of the distinctive hallmarks of our democracy is our insistence on an independent judiciary—the principle that all those present in our country are entitled to fair and impartial consideration in legal proceedings where important rights and privileges are at stake. The immigration courts issue life-altering decisions each day that may deprive individuals of their freedoms; separate families, including from U.S. citizen family members; and, in the case of those seeking asylum, may order a person removed to a country where he or she faces persecution or even death. Yet the immigration court system lacks the basic structural and procedural safeguards that other areas of the justice system take for granted. The ABA recommends implementation of incremental reforms within the current structure, but the best way to ultimately resolve the serious systemic issues within the removal adjudication system is to transfer the immigration court functions from the Department of Justice (DOJ) to a newly created independent Article I court.

A. The Executive Branch Should Work with Congress to Establish an Independent Immigration Court

Removal proceedings are federal administrative proceedings that determine whether an individual will be expelled from, admitted to, or granted permission to remain in the United States. These proceedings are held before immigration judges in immigration courts under the jurisdiction of the Executive Office for Immigration Review (EOIR), part of the DOJ. This structure is a fatal flaw for the perception and function of judicial independence, as it subjects the courts' personnel and operations to direct control by the Attorney General, who is also the chief law enforcement officer for the Federal government. Growing case backlogs and longer wait times adversely affect the fairness and effectiveness of the immigration system. Current policies and enforcement priorities that prioritize case completions over just outcomes further imperil due process and the viability of the immigration courts. For example, immigration judges face performance metrics that include requirements to rapidly adjudicate a certain number of cases annually, or risk losing their jobs.[1] Such quotas and timelines inhibit immigration judges' duty to fairly adjudicate cases and provide due process to the noncitizens appearing in immigration court. Moreover, adoption of policies that undermine immigration judges' ability to perform their role as neutral arbitrators of fact and law calls into question judicial independence.[2] These concerns go to the very essence of an impartial court.

The Executive Branch should work with Congress to establish, through legislation, an immigration court system independent of any federal agency, both at the trial and appellate level. In the ABA's view, any major court system restructure should have the following goals:

(1) Independence - Immigration judges at both the trial and appellate level must be sufficiently independent and adequately resourced to make high-quality, impartial decisions without improper influence, particularly influence that makes judges fear for their job security;

(2) Fairness and perception of fairness - The system must actually be fair, and it must appear fair to all participants;

(3) Professionalism of the immigration judiciary - Immigration judges should be talented and experienced lawyers representing diverse backgrounds; and

(4) Increased efficiency - An immigration system must process immigration cases efficiently without sacrificing quality, particularly in cases where noncitizens are detained.

With these goals in mind, the ABA Commission on Immigration examined potential models for an independent court system in its 2010 report *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* and its 2019 update to that report.[3] It determined that the Article I model was the best option to meet the goals and needs of the system. The Article I model would be a true judicial body and more likely to be viewed as independent than an administrative agency model. It is also likely to engender the greatest level of confidence in its results; use its greater prestige to attract the best candidates for judgeships; and offer the best balance between independence and accountability to the political branches of the federal government. Given these advantages, in our view, the Article I court model is preferred.

Because the Department of Justice primarily focuses on law enforcement and prosecution, the adjudicative function of EOIR under DOJ jurisdiction has always been an anomaly and subject to fairness concerns. History illustrates the potential within the current structure for the politicization of the hiring process and an inherent bias toward hiring current or former government prosecutors and other employees engaged in facilitating removals. An independent judiciary is more likely to attract a broader and more diverse pool of candidates and reduce the likelihood of favoritism in hiring. Judicial terms of sufficient length, along with protections against removal without cause, will similarly protect decisional independence and make Article I judgeships more attractive.

An Article I court is more likely to produce well-reasoned decisions because it will attract and select the highest quality lawyers as judges. Well-reasoned decisions and professionally-handled proceedings should improve perceptions of fairness and accuracy in results. Perceptions of fairness, in turn, should lead to greater acceptance of immigration judge decisions and fewer appeals to a higher tribunal. When appeals *are* filed, more clearly articulated immigration judge decisions should enable the reviewing body at each level to be more efficient in its review and decision-making, resulting in fewer remands for additional explanations or fact-finding.

B. Discretion Should Be Restored to the Immigration System

Until a new, independent court system can be created, the new administration and Congress should dismantle legislative, regulatory, and administrative barriers to the favorable exercise of discretion in individual immigration cases. Over time, Congress, DOJ, and the Department of Homeland Security (DHS) have drastically restricted the ability of immigration officials to determine when and how to handle a case. The ABA recommends the following actions to restore discretion to the system.

1. EOIR Should Restore Longstanding Judicial Docketing Tools

In 2017 and 2018, DOJ and EOIR sharply curtailed the use of continuances in immigration proceedings and all but eliminated the use of administrative closure and termination of proceedings as avenues to resolve cases through three separate Attorney General opinions: *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).[4] These decisions preclude the application of *sua sponte* decision making (in the interest of justice) and limit the Board of Immigration Appeals' (Board) ability to extend briefing deadlines. The rules resulting from the decisions hasten adjudications at the expense of ensuring noncitizens their fair day in court. Circuit courts have not readily applied the cases as precedent—the Fourth and Seventh Circuits outright rejected *Matter of Castro-Tum*—as they are viewed to be outside the bounds of the operation and intent of the statute and depart from longstanding judicial functioning in the immigration court system. In December 2020, EOIR issued a final rule that would codify *Castro-Tum* and end the practice of administrative closure. EOIR should restore the authority of immigration judges and the Board to manage their dockets by using tools such as administrative closure in appropriate cases.

2. DHS Should Restore Meaningful Use of Prosecutorial Discretion

Prosecutorial discretion allows DHS officers to decide whether, when, and how to pursue removal, and may be exercised at any stage of an immigration case. For example, officers may exercise discretion in decisions whether to arrest and detain a person, whether to initiate or terminate removal proceedings, whether to grant an application for an immigration benefit, or whether to stipulate to relief or join a motion. Prosecutorial discretion in the immigration context is an important tool that typically employs a priority system. In contrast to prior administrations' enforcement priorities and parameters, recent administration and DHS policies prioritize nearly all potentially deportable immigrants

for removal. This approach increased the overall case backlog and undermined fairness and efficiency in the adjudication system.

The decision to initiate removal proceedings through service of a Notice to Appear (NTA) on a noncitizen is an initial exercise of prosecutorial discretion. DHS officers have considerable discretion with respect to removal proceedings against noncitizens. In particular, they have discretion not to initiate proceedings at all; 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 or demonstrate compelling humanitarian factors (such as the serious illness of the respondent or a family member); to offer deferred action, administrative closure, or termination of proceedings early in the process; and not to file an appeal in certain types of cases. Because of limited agency resources, it is important for DHS to prioritize its enforcement efforts through documented national guidelines. DHS officers rely on agency memoranda to guide their exercise of discretion.

The ABA recommends that the new administration overturn Executive Order 13768 issued in early 2017. That Executive Order functionally abandoned any meaningful prosecutorial discretion policy, instead identifying vast swaths of immigrant communities as subject to immigration enforcement.[5] This led to substantial increases in immigration enforcement, plummeting use of discretion by immigration agencies, and contributed to growing immigration court backlogs.

The ABA also recommends that DHS increase the use of prosecutorial discretion by DHS officers and attorneys to reduce the number of NTAs served on noncitizens who are prima facie eligible for adjustment of status or other relief from removal.

In addition, DHS should reexamine the use of expedited removal proceedings. In October 2020, DHS began to implement expedited removal to the full extent of its statutory authority, meaning that noncitizens in the country who cannot show they have been present in the U.S. for at least two years could be summarily removed. The ABA has long opposed the use of expedited removal because it does not include standard due process safeguards such as review before an impartial adjudicator and access to counsel. DHS should scale back the number of individuals subject to expedited removal, rather than expanding its use.

3. Congress and the Executive Branch Should Take Action to Reduce the Immigration Consequences of Certain Criminal Convictions

The ABA has been concerned for some time about the already expansive immigration consequences of criminal convictions and the lack of due process protections governing these determinations. Legislation and administrative opinions issued by DOJ and the Attorney General have stripped immigration judges of discretion and mandated removal and detention in certain circumstances.[6] For this reason, the ABA has urged restoration of discretion to immigration adjudicators and judges considering claims for certain immigration benefits and relief from removal, such as asylum, adjustment of status, cancellation of

removal, naturalization, protection under the Violence Against Women Act, and termination of removal proceedings. The ABA urges Congress and the Executive Branch to take legislative and administrative action to restore eligibility for these immigration remedies, focusing on the following priorities.

First, federal immigration authorities should avoid immigration law interpretations that extend criminal deportation grounds to state dispositions that are not deemed convictions under state law, such as those that are set-aside or expunged. The federal government's current interpretation of a conviction[7] for immigration purposes—established through a series of Board and Attorney General administrative opinions that overturned decades of prior precedent[8]—includes state deferred adjudication dispositions that do not result in any final or formal finding of guilt. In addition, the Board has broadly interpreted this new definition to find that no effect is to be given in immigration proceedings to any state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. As federal immigration law previously recognized, a noncitizen should not be removed from the country for a minor offense, without the ability to consider the circumstances of the individual case, where a state has determined that the noncitizen should not be subject to criminal penalties or collateral sanctions.

Second, U.S. immigration authorities should interpret immigration laws in accordance with the categorical approach, whereby the adjudicator relies on the criminal statute and record of conviction only to determine the immigration consequences of criminal convictions. The ABA supports the categorical approach because of the "constitutional, statutory, and equitable" mandates it fulfills.[9] In dozens of immigration and federal sentencing cases in the past 20 years, the Supreme Court and Courts of Appeals reaffirmed application of a strict, elements-based categorical approach in determining subsequent consequences of a prior conviction.[10] However, the Board and the Attorney General have issued administrative opinions that erode the categorical approach and substantially reduce its efficacy.[11] Courts of Appeals across the country have disagreed with and struck down these opinions as contrary to congressional mandate.[12] The ABA recommends that immigration authorities adopt the approach of the federal courts to establish a uniform national standard for these adjudications that gives effect to congressional intent.

Third, the new administration should eliminate expansive barriers to asylum and withholding of removal based on criminal history. Earlier this year, the ABA participated in the notice and comment rulemaking process over recently finalized[13] proposals to expand these criminal bars to eligibility for humanitarian protection. The ABA pointed to numerous legal defects in the proposed rule, including incompatibility with international law and U.S. treaty obligations. For example, the Executive Branch's current determination of what constitutes a "particularly serious crime" for purposes of asylum and withholding of removal eligibility is inconsistent with the United Nations High Commissioner for Refugees, which interprets the term as an "offence" that is "a capital crime" or "a very grave punishable act."[14]

Fourth, Congress should pass legislation to reform immigration law provisions that attach severe, disproportionate penalties to past arrests. The ABA recommends substantial revision of the "aggravated felony" definition to require that any such conviction must

be of a felony offense and that a term of imprisonment of more than one year must be imposed (excluding any suspended sentence). In addition, federal immigration authorities should avoid interpretations of the immigration laws that extend the reach of the "aggravated felony" mandatory deportation ground to low-level state offenses that are misdemeanors under state law or would be misdemeanors under federal law, and state dispositions that are not considered convictions under state law. Congress also should also amend the deportation ground based on conviction of a single crime involving moral turpitude.[15]

Finally, Congress should restore authority to state and federal sentencing courts to recommend waiving a noncitizen's deportation or removal based upon conviction of a crime, by making a "judicial recommendation against deportation" upon a finding at sentencing that removal is unwarranted in the particular case; or, alternatively, to give such waiver authority to an administrative court or agency.

C. DHS and EOIR Should Maintain Filing Fees at Levels that Do Not Deter Eligible Applicants

It is crucial to the notion of fairness in immigration adjudication that noncitizens are able to seek benefits for which they are eligible, regardless of their ability to pay any application fees. However, U.S. Citizenship and Immigration Services (USCIS) and EOIR proposed to sharply increase fees and eliminate fee waivers for many applications. For example, USCIS would unbundle the interim benefits of adjustment applications, charging those who want to work or travel while their applications are pending. Each immigrant category must pay an estimated average 20% of increased application fees, and for the first time, asylum seekers would be required to pay a $50 filing fee. Such changes will price out countless immigrants and their families from applying for immigration benefits for which they are eligible. At the time of publication, enforcement of the USCIS rule was enjoined and the EOIR rule had just been finalized. DHS and EOIR should repeal these fee increases and should maintain fees at a level that enables all eligible noncitizens to apply for benefits for which they qualify, regardless of income. DHS and EOIR also should never charge a fee for seeking humanitarian protection, including asylum.

D. EOIR Should Establish Standards and Procedures for the Attorney General Certification Process

Current regulations empower the Attorney General to *sua sponte* refer Board decisions to him or herself and independently re-adjudicate them.[16] Traditionally, this referral power was used sparingly. However, Attorneys General in the current administration referred multiple Board decisions for review, and have even certified cases not yet decided by the Board, substantially rewriting immigration law in the process. These developments highlight the need for regulations delineating standards and procedures for such referrals.

As the Attorney General exercises his or her power to review immigration matters through the certification process, the ABA recommends that certain parameters be incorporated into a formal process to ensure greater transparency and consistency in the adjudication process. These parameters include providing notice when the Attorney General intends to review a matter through the certification process, identifying the specific legal questions that will be the subject of review, affording the opportunity for public comment and briefing, and releasing the underlying decisions in the case that are the subject of the review. Additionally, Attorney General certification should be used sparingly and only applied to Board-issued decisions. The review should also be narrowly tailored to address the issues on appeal before the Board.

Furthermore, currently there is no time limit for how far back an Attorney General can reach to select a case for review or to overturn settled law. This lack of finality of Board decisions is at odds with the mission of the Board to provide clear and uniform guidance across the country in the application and interpretation of immigration law. It invites 'cherry-picking' of cases to drive policy changes.

The ABA recommends that EOIR amend 8 C.F.R. §1003.1(h) and establish, through rulemaking, standards and procedures for the Attorney General certification process. The Attorney General's exercise of the certification authority without greater transparency and due process safeguards undermines the legitimacy of and confidence in the immigration adjudication process.

II. Ensuring Access to Counsel

Recommendations

- Government-funded counsel should be provided to all indigent individuals in removal proceedings before the immigration courts and before the Board of Immigration Appeals, no later than at the first Master Calendar hearing.
- Legal representation, including appointed counsel, should be provided to unaccompanied children and to mentally ill and disabled persons in *all* immigration processes and proceedings.
- The government should rescind policies and executive actions that impede meaningful access to counsel for noncitizens in removal proceedings.
- Congress should repeal the "at no expense to the government" restriction in 8 U.S.C. § 1362 (INA § 292).
- The Legal Orientation Program should be expanded to cover all detained individuals facing removal from the United States.
- Congress should repeal restrictions prohibiting civil legal service providers funded by the Legal Services Corporation from serving undocumented immigrants.

A universal right to counsel and broad access to legal information should be essential components of the U.S. immigration system. Government authorities should prioritize legislative and administrative actions to advance these goals. Counsel is particularly important for vulnerable populations who are not competent to represent themselves in immigration proceedings, such as children and the mentally ill or disabled. Recommendations for legal representation for unaccompanied children are discussed in greater detail in Section V.

A. Government-Funded Counsel for Indigent Immigrants in Removal Proceedings Is Essential to Due Process

The ABA is strongly committed to ensuring fair treatment and full due process rights for immigrants and asylum seekers under the nation's immigration laws and in accordance with the Constitution. ABA policy has consistently recognized the importance of access to counsel in removal proceedings where a lawyer's assistance is essential for a noncitizen to fully understand and effectively navigate the complexities of the U.S. immigration system. Government-appointed counsel for indigent persons who cannot afford a lawyer is a necessary step to achieving a more just, fair, and efficient immigration system.

The courts have long recognized that people placed in removal proceedings under section 240 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229a, are entitled to due process protections.[17] One of the most important elements of due process is the right to be represented by counsel, particularly in complex proceedings that have severe consequences. Nearly a century ago, Justice Brandeis stated that removal can result "in loss of both property and life, or of all that makes life worth living."[18] Removal proceedings present exceedingly high stakes: the potential loss of homes and livelihoods, permanent separation from U.S. citizen and lawful permanent resident (LPR) family members, banishment of a family's sole breadwinner, or even persecution, torture, or death.

The need for counsel cannot be overstated. Immigration law is often compared to the tax code in its degree of complexity, and it is often lawyers alone who are qualified to decipher the code and case precedents.[19] For those without counsel, it is exceptionally difficult to determine eligibility for waivers or defenses to removal, to comprehend complex statutes, and to navigate evolving case law. That difficulty is compounded for those with limited or no English proficiency. Unrepresented individuals in removal proceedings are inherently disadvantaged in an adversarial system in which the government is always represented by an experienced attorney.

Representation in removal proceedings is, arguably, at least as critical as it is in the criminal context,[20] yet to date minimal public funding is dedicated to representation of indigent immigrants. The momentum for public funding is growing, however, due to

increased immigration enforcement and a growing public awareness of the drastic impact of deportation on U.S. families and communities. In fact, recent polling found that an overwhelming majority of people in the United States (87%) support government-funded attorneys for people in immigration court.[21]

Individuals detained throughout the pendency of their removal proceedings face even more severe barriers to fairness and due process. Applications for relief from removal often require in-depth legal analysis, documentary evidence, sworn declarations and research on country conditions. Precisely prepared applications must be served on multiple parties and adhere to strict deadlines. These challenges are often insurmountable for detained immigrants without the resources to hire private counsel. Moreover, securing *pro bono* or lower-cost representation is more difficult for those in detention. Representation of detained individuals requires additional time and resources. Detained representation requires travel time to detention facilities, often located in remote areas hours away from major cities. Confidential communication with detained clients usually requires in-person visits, so even asking a simple question or obtaining a signature requires more time than for clients who are not detained. Representation of detained clients often also involves more complex issues, especially for those with criminal histories. It is thus no surprise that the rates of representation for detained individuals is significantly lower than for those not detained during their removal proceedings. In 2017, for example, only 30 percent of detained individuals were represented by counsel in removal proceedings, compared to 65 percent of non-detained individuals.[22]

Studies and individual examples consistently demonstrate the impact of representation on noncitizens' ability to exercise their legal rights under our immigration laws. For example, the ABA ProBAR project recently found *pro bono* counsel for an individual in Texas who was believed to be an LPR with a non-violent criminal history and had been detained for six months. Upon reviewing his case, the *pro bono* attorney realized that according to the Child Citizenship Act, her client actually qualified as a U.S. citizen. After providing the relevant documentation to Immigration and Customs Enforcement (ICE), this individual was quickly released from detention and his removal proceedings were terminated. Without counsel, this individual would likely have been unlawfully deported *even though he was a U.S. citizen.* A comprehensive national study in 2015 revealed that those who were represented in removal proceedings were between three-and-a-half and ten-and-a-half times more likely to succeed than those without counsel. The disparities in success rates were due to custody status, with representation having the most significant impact for those who were detained. *Those detained throughout their removal proceedings were more than 1,000 percent more likely to succeed with counsel than without.*[23] This study also demonstrated that detained individuals were much more likely to be released from detention once represented by counsel than unrepresented individuals.[24]

Universal representation of indigent immigrants in removal proceedings also maintains the integrity of the immigration system. Proceedings are more likely to comport with due process and basic notions of fairness and are often more efficient. Immigration judges prefer adjudicating cases of represented individuals.[25] Represented individuals with no defenses to removal are likely to accept removal orders more quickly than those who may

spend months trying unsuccessfully to find counsel and applying for waivers or defenses to removal for which they are ineligible. Moreover, those with attorneys are more likely to appear in immigration court throughout their proceedings. A recent study found that 85 percent of *in absentia* orders of removal, issued when individuals fail to appear in immigration court, were for unrepresented individuals. The same study found that only four percent of final *in absentia* removal orders, not including those that are rescinded, are for individuals represented by counsel.[26]

Universal representation also addresses racial inequities inherent in the U.S. immigration system. Decades of over-policing of communities of color, coupled with overly harsh immigration laws and increased enforcement efforts against those with criminal histories, have caused significantly disproportionate impacts on immigrants of color. Criminal convictions often result in mandatory detention of those in immigration proceedings, resulting in disproportionate numbers of people of color in detention with restricted access to counsel. Universal representation negates some of these racial inequities by providing counsel to all indigent individuals, regardless of the complexity of their cases or prior contacts with the criminal justice system.

Government-funded representation also produces economic benefits that should not be overlooked. For example, New York's publicly funded legal representation program resulted in an estimated $2.7 million annual tax revenue increase, due to the increased number of immigrants who won their immigration cases and were granted or maintained work authorization as a result. These immigrants were then able to work, pay taxes and contribute to their communities' economies.[27]

Critics of universal representation for indigent immigrants in removal proceedings have pointed to 8 U.S.C. § 1362 (INA § 292) as prohibiting government funding for representation.[28] The ABA has long called for, and continues to call for, the repeal of the "at no expense to the government" restriction in Section 292. It is widely held that Section 292 does not prohibit government-funded counsel, it merely relates to an individual's ability to claim an entitlement or right to appointed counsel.[29] A contrary interpretation would be inconsistent with the Executive Office for Immigration Review's (EOIR) National Qualified Representative Program (NQRP), which, as a result of the *Franco-Gonzalez v. Holder*[30] litigation, pays for legal representation. Through the program, noncitizens with serious mental incapacities are appointed counsel in their immigration cases so that they may "meaningfully participate" in their removal proceedings. The ABA's Immigration Justice Project in California is a NQRP provider. Although *Franco* class membership is particular to individuals deemed to have a serious mental disorder, the language of the holding notes that Section 292 does not prohibit outright the provision of counsel at government expense. Even without the repeal of the relevant language in Section 292, government funding of counsel for indigent individuals in immigration proceedings is not only permissible, but essential to an immigration adjudication system that comports with this nation's values of fairness and due process.

B. The Right to Counsel Requires Meaningful Access to Counsel

As discussed above, those seeking asylum and other immigration protection in the U.S. have a right to be represented by a lawyer at their own expense or though *pro bono* assistance. But repeated executive branch actions in the past few years have rendered that right meaningless for too many. For example, the practice of "metering," which restricts entry at border ports of entry, and the "Migrant Protection Protocols" (MPP) that force individuals to wait in Mexico for their U.S. removal hearings, both subject asylum seekers to conditions and locations which make it very difficult, if not impossible, for them to secure and consult with counsel. Virtual hearings for those subject to MPP are often held in "tent courts" in remote border areas. Limited attorney-client meeting areas in the tent courts and restrictive rules on pre-and post-hearing attorney-client meetings serve to prevent lawyers from consulting with their clients and to further impede meaningful exercise of the statutory right to counsel. Likewise, the effect of "expulsion" policies (immediately rejecting migrants—including, during the pandemic, unaccompanied children—at the border, with very limited or no screening or adjudication) has similar consequences. There are other problems that arise from such policies, discussed elsewhere in this paper, but given the difference legal representation can make in the outcome of any immigration case, the chilling effect on the right to assistance of counsel is among the most serious and disturbing consequences of these policies.

C. The Legal Orientation Program Is a Critical Safeguard and Should Be Expanded

Until universal representation is achieved, one important safeguard to advance justice, fairness and efficiency in the immigration system is the Legal Orientation Program (LOP), funded by EOIR and administered by the Vera Institute of Justice (Vera).

In 1998, EOIR initiated a "Legal Rights Presentation" pilot project in three locations. The ABA's South Texas Pro Bono Asylum Representation Project (ProBAR) was one of the legal service programs selected to implement this 90-day pilot at the Port Isabel Service Processing Center in Los Fresnos, Texas. The positive findings from that pilot program resulted in today's federally funded Legal Orientation Program. Today, LOP operates in 43 immigration detention facilities through a network of 18 legal service providers, and includes a national LOP telephonic Information Line.[31] The LOP program assists detained immigrants by providing them with information on their legal rights and responsibilities, the immigration court process, and options for release from detention. The four major elements of the LOP program are group legal rights presentations, individ-

ual orientations, self-help workshops, and referrals to *pro bono* attorneys where available. Today, the program reaches approximately 55,000 detained individuals annually[32] by providing them with critical, multilingual information. While LOP is not a substitute for legal representation, it is an effective way to provide legal information to unrepresented detained individuals, thereby improving fairness and making proceedings more efficient. Unfortunately, a series of actions in recent years threatens to drastically undermine the scope and efficacy of the LOP program.[33] It is critically important that EOIR ensure continued access to the full scope of existing services. EOIR also should expand LOP to reach all detained individuals facing removal from the United States.

Studies demonstrate that the LOP program facilitates faster case processing and saves taxpayer dollars. In a 2012 report to the U.S. Senate Appropriations Committee, EOIR analyzed data on detention costs and duration of detention for individuals who had received LOP services compared with those who had not. EOIR concluded that detained LOP participants completed their immigration court proceedings an average of 12 days faster than those who did not participate in the LOP.[34] EOIR reported that ICE data showed these same LOP participants spent an average of six fewer days in ICE detention than those who did not participate.[35] Furthermore, in a 2018 updated analysis of the LOP program, Vera found again that LOP is associated with faster case completions and more case closures at the initial master calendar hearing than comparable non-LOP cases.[36]

D. Civil Legal Services Providers Should Be Allowed to Provide Legal Representation to all Persons Who Otherwise Qualify for Their Services, Regardless of Immigration Status

Civil legal services programs funded by the Legal Services Corporation (LSC) are the primary source of legal assistance for indigent and low-income persons across the nation. In the absence of universal representation for those in the immigration system, immigrants might seek lawyers at LSC programs, but this critical resource is not available to many who seek immigration relief, including asylum seekers and unaccompanied children. With few exceptions, LSC funds may only be used to represent U.S. citizens, lawful permanent residents, and refugees.[37] In 1996, Congress extended the "alien restrictions" to all funds received by an LSC grantee, including those from nongovernmental sources.[38] Prior to that change, many legal services programs used foundation grants and other non-LSC funds to represent clients in need without regard to their citizenship or immigration status. This option is no longer available under current law.[39] Nonetheless, even with current restrictions, LSC-funded civil legal services programs can still represent lawful permanent residents, H2A agricultural workers, H2B forestry workers, and victims of battering, extreme cruelty, sexual assault or trafficking.[40] LSC-funded programs—as well as non-LSC-funded programs—should consider representing undocumented immigrants, where

resources permit and consistent with relevant legal restrictions, to expand representation critical to obtaining specialized forms of immigration relief available to such persons, such as VAWA, U and T visas for victims of domestic violence, trafficking and other criminal activity.

Pro bono lawyers, along with religious-based and other nonprofit organizations, have worked hard to fill the void but simply do not have sufficient resources to meet the needs generated by the current expansive enforcement regime. Congress should repeal the restrictions on LSC-funded grantees so that, at a minimum, legal services organizations are not restricted from using nongovernment funds when they have the time and resources available to represent immigrants regardless of their status.

III. Ending Reliance on Detention

Recommendations

- Detention should not be used except in extraordinary circumstances, generally limited to cases involving demonstrable danger to the community or national security, or where there is a substantial flight risk. Congress should pass legislation eliminating or severely limiting mandatory detention.
- Alternatives to detention programs should be utilized when a noncitizen presents a risk of flight that cannot be otherwise addressed. Both detention and alternatives to detention should use the least restrictive means available for the briefest amount of time possible and be subject to prompt and periodic review.
- Immigration and Customs Enforcement should develop a uniform set of detention standards that reflect the civil nature of immigration detention and promulgate them into enforceable regulations; increase its oversight of key detention operations and track performance and outcomes; and terminate its contracts with detention facilities that fail to operate in accordance with its detention standards.
- Immigration and Customs Enforcement should ensure that access to confidential legal services and visitation is preserved and expanded.
- Detained individuals should not be transferred, absent special justification, if it will impede an existing attorney-client relationship or interfere with access to family or

necessary healthcare. Further, immigration detention facilities should not be located in remote areas with limited access to legal services and emergency and specialized healthcare.

- Immigration and Customs Enforcement should establish a well-managed medical care system with a universal system of electronic medical records that ensures adequate availability of medical and mental health staff at detention facilities and access to external specialized care for those who need it.

Immigration and Customs Enforcement (ICE) holds more people in its custody annually than any other confinement system in the United States. Under the relevant statutes, immigration authorities may detain noncitizens in removal proceedings as they await a final decision on their ability to remain in the United States. Some, but not all, noncitizens in pending proceedings are entitled to immigration court review of an ICE decision to detain. Last year, former Attorney General Barr issued an opinion that overturned long-standing rules to end immigration court review of custody decisions in a wide swath of cases involving asylum seekers who have passed their initial screening interviews. Others in pending proceedings are subject to mandatory detention under the statute and are not entitled to immigration court review of detention, but ICE has discretion to release them with conditions. Immigration authorities may also detain individuals with a final removal order, after proceedings have concluded, during a short period of time necessary to execute the physical removal. Widespread use of immigration detention impacts liberty and due process rights. The ABA opposes the use of immigration detention during pending removal proceedings except in extraordinary circumstances, such as where the person presents a public safety or national security risk, or a substantial flight risk, and has urged other limits on detention.

ICE's use of immigration detention expanded significantly from the 1990s until early 2020, with a particularly dramatic increase in detention numbers starting in 2017. By early 2020, approximately 50,000 immigrants were detained each day. In 2019, ICE booked a record-breaking 500,000 individuals into detention.[41] In the later months of 2020, detention numbers declined, primarily because of the closure of the Southern border to asylum seekers and other migrants. ICE also released some noncitizens in response to judicial orders and considerable criticism for its failure to take necessary steps to prevent the spread of COVID-19 within detention facilities. Even with these developments, ICE detained approximately 170,000 people over the course of 2020.[42] The average length of time in detention has also increased. By the summer of 2020, the average time in detention was approximately three months, although there are many instances of much longer detention times.

Those in detention include asylum seekers, parents of U.S. citizen children who may have lived in this country for many years, and in some circumstances, lawful permanent residents. ICE relies upon state and local correctional systems and private for-profit prison providers for the majority of its bed space, and for the staffing and supervision of those in its custody.

The expansive use of detention for lengthy periods comes at great financial and human cost. In 2020 alone, ICE spent $3 billion on immigration detention.[43] As of October 2020, ICE has reported the deaths of 21 individuals in immigration detention facilities, eight of which were due to COVID-19.[44] Detention exacerbates existing trauma for detained individuals, including asylum seekers, and has serious negative effects on mental and physical health. Existing and new conditions often go untreated because of inadequate medical and mental health care in detention. The COVID-19 pandemic and resulting detainee deaths shed renewed light on long-standing problems with a lack of hygiene and adequate healthcare in detention. Detention also separates families and causes financial and emotional stress to family members left behind when a loved one is detained. It also is

more difficult for detained noncitizens to access legal counsel and, ultimately, to win relief from deportation in otherwise viable cases. The harm caused by detention and the lack of care for those in custody disproportionately impact vulnerable populations, including children held in custody with their parents, individuals with medical and mental health vulnerabilities, pregnant and nursing women, and transgender persons, among others.

The ABA urges the new administration to recognize that immigration detention is a form of civil detention, and to ensure that this deprivation of liberty is not punitive. Detention should be allowed only in extraordinary circumstances where necessary to address a likelihood of danger to the community or national security, or a substantial flight risk. Where there is a substantial risk that a noncitizen will fail to appear for hearings or refuse to comply with a final order of removal, such concerns should be addressed through formal alternatives to detention programs, negating the need to detain noncitizens over concerns of flight risk alone in most circumstances.

A. Noncitizens in Pending Removal Proceedings Should Not be Detained Except in Extraordinary Circumstances

No existing statutory scheme compels the current expansive system of immigration detention. Many noncitizens in ICE custody are awaiting final disposition of their immigration cases. They do not have an order of removal for ICE to execute and may never have one, as many noncitizens win the right to remain in the United States or otherwise have their immigration cases terminated or closed.[45] They are often swept into the detention system based on broad assertions of flight risk or danger. Studies show that noncitizens in removal proceedings appear for their hearings at rates above 90 percent when they have access to counsel or case management support.[46] Many noncitizens have relatives ready to receive them, so they have a stable residence and strong incentives to appear for their hearings to seek the right to remain in the United States. Specific and demonstrable flight risk concerns can be addressed through mechanisms other than detention, such as release on conditions or enrollment in a formal alternatives to detention program as described below. Furthermore, most noncitizens in detention do not appear to present a threat to the community or national security that would necessitate detention.[47] Many noncitizens in detention are asylum seekers fleeing violence. In addition, many detained noncitizens have no criminal history, and only a small number have convictions for violent crimes.[48] According to ICE's own threat assessments, more than half of those in detention present no risk of danger at all.[49]

The number of noncitizens in detention currently is at a five-year low, due to a variety of factors including the COVID-19 pandemic and the closure of the U.S. Southern border. This provides an important opportunity to shift away from excessive reliance on detention through development of a process for the safe release of current detainees and clear and appropriate criteria for determining the exceptional circumstances in which noncitizens

should be detained in the future. Such a change would be consistent with long-standing ABA policy opposing detention of noncitizens, other than in extraordinary circumstances, as well as developments in the criminal justice system.

ICE should take steps to curtail immigration detention during removal proceedings to ensure that it is utilized only in extraordinary circumstances. In addition to ending the practice of family detention, ICE should immediately adopt a presumptive policy of non-detention or release for all noncitizens at the earliest possible juncture after initial apprehension. The detention of noncitizens should be limited to cases involving demonstrable danger for the community or national security, or substantial flight risk. All decisions to detain or otherwise curtail the liberties of noncitizens should be subject to prompt and periodic review. Where the Immigration and Nationality Act (INA) provides for mandatory detention during pending proceedings, legislative changes should be sought to eliminate mandatory detention or limit it to situations where a presumption of danger or substantial flight risk is objectively reasonable. In the meantime, ICE should ensure physical release from detention under appropriate conditions, consistent with the terms of the INA.

B. ICE Should Utilize the Least Restrictive Means in Any Custodial Situation

Although many noncitizens do not present any demonstrable risk and may reside in the community during pending proceedings without conditions, others may require some level of supervision. Formal alternatives to detention programs have proven effective at ensuring noncitizens' appearances at immigration court hearings and other immigration appointments at a significantly lower cost to the taxpayer than detention.[50] Studies also demonstrate the positive outcomes and effects of the now-discontinued Family Case Management Program, including a 99 percent attendance rate at ICE check-ins and appointments and 100 percent attendance at immigration court hearings.[51] Despite its success, the program was terminated in 2017.

However, some supervision programs can be costly and involve unnecessary restrictions on liberty. Some noncitizens are subjected to intrusive electronic monitoring for lengthy periods without effective mechanisms for determining ongoing need. For example, ICE statistics show that periods of electronic ankle bracelet monitoring exceeding one year are common.[52] Such over-supervision can create a stigma for those monitored, cause physical pain and discomfort, and present barriers to employment, education, and even legal representation. In turn, these barriers can have negative effects on a noncitizen's ability to participate fully in their immigration proceedings.

Supervision programs offer an important alternative to detention in appropriate cases, but there must be regular, individualized determinations of ongoing need. These programs should be utilized only in cases for noncitizens who present a risk level that cannot be addressed through means other than formal supervision. For those individu-

als, a full range of alternatives should be considered, and the least restrictive means of addressing the specific concerns involved should be applied. Alternatives could include release on parole without a requirement of a monetary bond, release on a low monetary bond that is based on the individual's economic means and level of risk, enrollment in community-based support programs, reporting requirements, or imposition of electronic monitoring as a last resort. Where supervision or monitoring is imposed, enrollment in these programs should be regularly reviewed. Finally, funding should be provided to expand and strengthen community-based case management and support programs. The new administration should restore the successful Family Case Management Program and develop additional programs serving non-detained noncitizens so that individuals receive the information and assistance needed to fully participate in their immigration proceedings.

C. Detention Must Be Non-Punitive with Adequate Access to Essential Services

Noncitizens in immigration detention often face dire conditions and limited access to services. The ABA receives reports from attorneys representing detained immigrants, national and local organizations serving noncitizens, and direct letters and phone calls from detained noncitizens that reflect serious, continuing problems with detention facility conditions. These reports often include the use of solitary confinement as a punitive measure of control and as a means of medical segregation and protective custody. The reports detail inadequate medical care, poor hygiene conditions, and inadequate access to legal resources. Reports of sexual abuse, assault, and harassment—perpetrated by both detained individuals and facility staff—are also prevalent.

Many detention facilities are located in remote rural areas, isolating detained noncitizens from family, legal services, and specialized healthcare. Detained individuals also are regularly transferred between facilities in ways that interrupt attorney-client relationships and further restrict access to other services.

As discussed in other sections of this paper, detained immigrants are much less likely to secure counsel than non-detained immigrants. The lack of access to counsel negatively impacts all aspects of a detained noncitizen's case, with unrepresented respondents less likely to gain release from detention and half as likely to secure protection from removal.[53] Barriers to securing or communicating with counsel include long travel and wait times for attorneys attempting to meet with their clients in detention, insufficient opportunities for confidential phone calls and meetings, delays in delivery of correspondence, and ever-changing requirements for visitation. The COVID-19 pandemic has exacerbated visitation challenges with the imposition of arbitrary requirements for visitation and a failure to offer meaningful alternatives to in-person visits.

Reform is needed to bring immigration detention in line with the civil nature of the system and to address problems of isolation and poor conditions. ICE should end the use

of detention facilities in areas where there is limited access to counsel and emergency and specialized healthcare services, and detained individuals should not be transferred, absent special justification, if it will impede an existing attorney-client relationship or interfere with access to family or necessary healthcare. As ICE reduces detention capacity, it should prioritize a reduction in its use of remote facilities.

Generally, ICE should provide services—including religious and recreation services—to detained noncitizens at a level that reflects the civil nature of immigration detention. At minimum, this should be offered to the same degree as provided to pre-trial detainees in the criminal justice system. ICE should expand access to legal materials, resources and visitation by counsel while ensuring ample opportunities for confidential communications in person and by phone, video, and mail. ICE also should ensure that adequate medical and mental health resources are available at all facilities and that individuals needing outside specialized care receive it. ICE can accomplish this by establishing a well-managed medical care system. Such a system should include electronic health care records encompassing a comprehensive initial assessment at admission and updates throughout the duration of detention, including any readmissions, to inform housing assignments, identify vulnerable individuals, and ensure continuous care management.

D. ICE Should Establish a Uniform Set of Detention Standards that Include Meaningful Oversight and Accountability Measures

ICE is comprised primarily of law enforcement personnel with extensive expertise performing removal functions but not in the design and delivery of detention facilities and community-based alternatives. The ICE-managed detention system is sprawling and lacks coordination. Currently, ICE maintains more than 100 agreements with public and private entities to house detained noncitizens in 232 facilities in 46 states, of which the federal government owns only seven and operates none.

ICE uses four different sets of detention standards—three for adult facilities and one for family residential centers—all of which are based on criminal, not civil, correctional standards. ICE allows immigration facilities to treat civil detainees as if they were pretrial or sentenced inmates, as well as to apply different standards governing their conditions of confinement based solely on the facility to which ICE has assigned them. The pandemic highlights the impact of assigning different detention standards to facilities in the same system for the same population. For example, ICE *required* the 44 dedicated (immigrant detainees only) facilities to comply with CDC guidelines and only *requested* the remaining, nondedicated (shared use) facilities to do so, a decision soundly criticized by members of Congress and the Department of Homeland Security's Office of the Inspector General.

Private for-profit entities own or operate most detention beds and also inspect and assess ICE detention activities. The intent of these annual assessments is to determine the extent to which each facility complies with the ICE detention standards. However, the inspections often are not conducted in a manner that reveals violations. When violations are discovered, there are often not clear consequences, such as cancellation or non-renewal of a contract, as detention is ICE's preferred population management strategy.

ICE should establish a national, uniform system of immigration detention with the requisite management tools, information systems and workforce to determine when detention is necessary, to make appropriate classification and placement decisions for those detained, and to release individuals wherever possible under the minimum conditions required. The ABA urges the development of plans for various contingencies going forward, and meaningful oversight and accountability measures should be deployed. ICE should also develop a new set of detention standards, incorporating the best components of its various standards and the ABA's Civil Immigration Detention Standards[54] into one uniform set of requirements applicable to all facilities. These standards should encompass provisions for ample federal oversight of key detention operations and to track performance and outcomes. ICE should discontinue use of any detention facility that fails to meet and maintain these conditions. ICE also should assign enough expert federal officials on-site to oversee detention operations, to intercede as necessary, and to ensure that there are appropriate grievance and disciplinary processes. Finally, ICE should develop a new set of risk and needs assessment and classification tools to inform care, custody restrictions, privileges, programs, and delivery of services consistent with risk level and medical needs of the population.

IV. Restoring Access to Humanitarian Protection

Recommendations

- The Executive Office for Immigration Review and the Department of Homeland Security should repeal or withdraw proposed rules, regulatory actions, and decisions that have narrowed the scope of substantive eligibility for asylum and other forms of humanitarian protection or erected significant procedural barriers to presenting protection claims.
- The Department of Homeland Security and Executive Office for Immigration Review should abandon policies that restrict or prevent access to the asylum system itself, including ending the Migrant Protection Protocols, terminating asylum cooperative agreements with Guatemala, Honduras, and El Salvador, and repudiating reliance on policies that tie asylum eligibility to manner of entry or applications of protection filed in other counties. The government also should revisit policies that have closed U.S. borders to asylum seekers during the COVID-19 pandemic.
- Congress should strengthen humanitarian protections to ensure that asylum seekers' access to counsel and due process is protected.
- The government should support a robust refugee program that includes the development of refugee visa and pre-clearance policies to assist refugees in coming to the United States.

The ABA has long supported a legal system that provides refugees, asylum seekers, and others seeking humanitarian protection optimal access to legal protections in the United States. In the last three years, the government took numerous actions and proposed others to severely restrict the ability of asylum seekers to access our nation's asylum system and the due process protections to which they are entitled. These policies violate fundamental notions of fairness and fail to comport with the United States' international treaty obligations or domestic statutory and regulatory requirements. The policies should be rescinded, and Congress should strengthen humanitarian protections to ensure that asylum seekers' access to counsel and due process is protected.

A change in focus is fundamental to restoration of the asylum system. The ABA encourages the government to recognize that many people are fleeing their countries out of genuine fear and desperation. Though the asylum process determines whether an individual meets the statutory definition of a refugee, a denial of asylum is not evidence of fraud, nor does it justify mistreatment or deprivation of rights. The numbers of individuals waiting months in squalid conditions at informal refugee camps on the Mexican side of the Southern border[55] and the continued arrivals of individuals to the United States during a global pandemic demonstrate that harsh policies do not deter vulnerable individuals seeking humanitarian protection. Rather, our government must focus on addressing the root causes of migration and improving the ability to effectively consider claims for asylum and other forms of humanitarian protection.

The United States should work with Central American governments on a regional response that will focus on protection as part of a broader effort to address situations that force individuals to flee. Coupled with robust use of refugee processing and other programs that consider protection claims while an individual is still in his or her country of origin, this approach has the potential to restore the United States to its position as a model for humanitarian protection while easing the burden on domestic institutions, such as the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR).

A. Undoing Threats to Due Process and Access to Counsel

Although the government has implemented many policy and regulatory changes since 2017 that restrict access to the U.S. asylum system, this paper focuses on those that pose the greatest threat to the right to a full and fair adjudication of an asylum seeker's claim.

International and domestic law prevent the United States from returning an individual to a place where she would be persecuted or tortured.[56] The ABA called on prior administrations to enhance and improve existing asylum procedures within a shared understanding of U.S. domestic and international obligations. Recent governmental changes appear to have abandoned that shared understanding and threaten the very framework of the U.S. commitment to refugees and asylum seekers. These threats fall into two general categories:

(1) proposed rules, regulatory actions, and decisions that narrow the scope of substantive eligibility for asylum and other forms of humanitarian protection and/or erect significant procedural barriers to presenting protection claims before DHS and EOIR; and (2) policies that restrict or prevent access to the asylum system itself.

1. DOJ and DHS Should Repeal, Withdraw, or Abandon Policies and Regulations that Improperly Narrow Asylum Eligibility

The Department of Justice (DOJ) has narrowed the scope of asylum eligibility through a series of precedent decisions issued by the Attorney General that overturned longstanding legal doctrine regarding persecution based on family affiliation, domestic violence, and criminal or gang violence.[57] Consequently, many individuals fleeing from these types of persecution, particularly from Central America, find it more difficult to meet even the threshold standard in an initial asylum screening interview. Those who clear the initial threshold screening face greater difficulty establishing eligibility for protection in court. In December, EOIR and DHS finalized a rule that not only would codify these decisions but would fundamentally alter asylum law with respect to substance and procedure by defining terms to significantly circumscribe who can demonstrate eligibility for asylum; limiting access to full and fair hearings; changing the applicable standards of proof; shifting burdens of proof; and denying access to legal counsel and information.[58] In October 2020, EOIR and DHS finalized a rule that significantly expands barriers to asylum eligibility based on criminal history. A court recently enjoined the rule,[59] which would exclude individuals from asylum protection based on relatively minor criminal convictions, as well as allegations of certain types of criminal misconduct, in contravention of due process principles and international law.

Actions that purport to narrow substantive eligibility for protection have been coupled with recent procedural changes that eliminate existing due process protections and restrict access to counsel, making it more difficult for asylum seekers to qualify for protection. These actions include a rule that significantly changes procedures before the Board of Immigration Appeals (Board) by imposing strict time lines on briefing and appeal processing; referring untimely appeals to the EOIR Director, a political appointee, for adjudication; allowing immigration judges to bypass the process of full agency review where they allege that the Board made an error; and further limiting avenues for the consideration of new evidence or changes in the law that would benefit noncitizens. EOIR also recently issued a final rule that accelerates the deadline for the submission of asylum applications for individuals placed in expedited removal proceedings; imposes an unduly restrictive and inflexible standard for accepting an application as complete; defines which sources immigration judges can rely on when deciding protection claims and how they can be relied on; permits immigration judges to submit their own evidence into the record; and strictly enforces the statutory deadline for adjudication of asylum applications at a time when EOIR is facing a historic backlog of cases.

Restoring substantive eligibility and ensuring that the asylum process is fair and has procedural integrity is a critical step for rebuilding the nation's humanitarian protection system.

2. DOJ and DHS Should Eliminate Bars to the Asylum Process

In addition to substantive eligibility and procedural rules affecting eligibility in individual cases, the government implemented sweeping policies to prevent people from applying for asylum by creating categorical bars on asylum eligibility or by cutting off access to the asylum system entirely. Though courts have invalidated some of these actions, and some remain subject to litigation, a firm repudiation of the actions described below is necessary to restore balance to the system.

a. DHS and DOJ Should Not Tie Asylum Eligibility to Manner of Entry

The first action involved an interim final rule and Presidential Proclamation that operated together to ban migrants from receiving asylum if they entered the United States at the Southern border other than at a designated port of entry. This action was enjoined by one court and vacated by another[60] because the Immigration and Nationality Act (INA)[61] clearly states that any noncitizen who is physically present in the United States or arrives in the United States (whether or not at a designated port of arrival) may apply for asylum, irrespective of such person's status. The rule is also unduly punitive given that, prior to the COVID-19 pandemic, DHS was employing a "metering" policy at the Southern border, whereby Customs and Border Protection (CBP) limited the number of individuals who could seek to be inspected and apply for asylum at a port of entry during a given time period. Through metering, CBP turned away many asylum seekers from the Southern border and forced thousands of individuals to wait months in Mexico for their opportunity to present claims for protection. DHS' own Office of Inspector General found that metering likely led more noncitizens who would otherwise seek to enter the Southern border legally to cross unlawfully between ports of entry.[62] DHS should end the practice of metering and develop orderly procedures for processing asylum seekers who present themselves at ports of entry. It should also withdraw or overturn any restrictions on eligibility for asylum based on the place or manner of arrival at the U.S. border.

b. DOJ and DHS Should Not Restrict Asylum Eligibility for Individuals Who Fail to Apply for Protection in Transit Countries

In July 2019, DOJ and DHS issued an interim final rule that barred asylum seekers, including unaccompanied children, who entered or attempted to enter the United States at the Southern border from asylum eligibility unless they had applied for and were denied

asylum in at least one country of transit on the journey to the United States (with some narrow exceptions). Other than Mexican nationals, every person fleeing over land to the Southern U.S. border necessarily transits at least one third country. Although individuals impacted by the rule were still eligible to apply for withholding of removal and protection under the Convention Against Torture (CAT), they had to meet a heightened standard in an initial screening interview before being able to present their claim to an immigration judge. Barring affected migrants from asylum eligibility also contributed to family separations, because unlike in asylum claims, family members cannot be included as dependents in withholding and CAT claims. This meant that if an entire family fled due to political persecution suffered by both parents and they did not apply for asylum in a country of transit before reaching the United States, the parents might win withholding or CAT protection, and their minor children might be ordered removed.

The interim final rule was vacated by one court and enjoined by another over the summer, with good reason.[63] It was inconsistent with existing exemptions in the asylum statute and created a categorical bar to asylum eligibility based on protections available in a third country that left no room for an individualized assessment of the specific circumstances of the case. The rule also ignored that, in many cases, seeking asylum is either impracticable or impossible in the countries through which asylum seekers may transit on the way to the United States. Nevertheless, EOIR and DHS recently issued a final rule, and it is scheduled to go into effect on January 19, 2021. The new administration should repeal the rule.

c. The United States Should Terminate "Asylum Cooperative Agreements" with Northern Triangle Countries

In late 2019, DHS and DOJ issued an interim final rule that set forth implementation procedures for "asylum cooperative agreements" signed with the governments of Guatemala, Honduras, and El Salvador. The interim final rule purported to implement the safe third country exception in the INA, which provides that a person may be ineligible for asylum if he or she transited through a country that has signed a "safe third country" agreement with the United States.[64] However, in doing so, the agencies ignored ample evidence that the Northern Triangle countries are not safe and do not provide access to a full and fair procedure for determining protection claims. During the COVID-19 pandemic, DHS has not removed individuals pursuant to these agreements; however, when the agreement with Guatemala was operational, hundreds of Honduran and Salvadoran nationals received removal orders and were deported without the opportunity to apply for any type of humanitarian protection in the United States. Reports indicated that individuals subjected to the agreement with Guatemala were not adequately screened for protection concerns in their home country or in Guatemala, were held for days or weeks in CBP custody without access to counsel and were removed to Guatemala without an informed understanding of the process, their legal options, or even where they were going.[65] The "asylum cooperative agreements" with the Northern Triangle countries should be terminated. These agreements do not protect asylum seekers or create genuine regional solutions to address migration. They simply allow the United States to shift its responsibility

to protect vulnerable asylum seekers onto countries that are ill-equipped and unable to ensure protection. Instead, the United States should work with these countries to address the root causes of migration.

d. DHS Should Not Force Asylum Seekers to Remain in Mexico While Pursuing Their Claims

In January 2019, DHS again shifted its responsibility to protect asylum seekers to a regional neighbor by implementing the Migrant Protection Protocols (Remain in Mexico policy (MPP)). This policy purportedly allows asylum seekers to apply for protection in the United States, but, in reality, cuts off any meaningful access by forcing them to remain in Mexico while their claims are pending. There are numerous due process concerns inherent in the MPP program. It is impossible for the vast majority of MPP asylum seekers to exercise their statutory right to counsel in removal proceedings because counsel either must travel to dangerous border cities in Mexico or meet with their clients virtually, or in immigration court immediately before a scheduled hearing. The hearing process for MPP asylum seekers also fails to comport with fundamental notions of due process because of inadequate notice of changed or cancelled hearings, and the use of "tent courts" to conduct hearings in Brownsville and Laredo, Texas. In "tent court" hearings, the judge and government counsel often appear by videoconference, and there is no simultaneous interpretation provided for MPP asylum seekers who are not fluent in English. Moreover, MPP places asylum seekers in grave personal danger by forcing them to fend for themselves in dangerous Mexican border cities where many have been subjected to extortion, kidnapping, trafficking, and other forms of violence.[66] All MPP hearings have been postponed since the beginning of the COVID-19 pandemic, leaving thousands of asylum seekers to wait indefinitely in Mexico for their chance at protection in the United States. While the Supreme Court has agreed to review the legality of MPP, regardless of the outcome of that case, DHS should end MPP and develop a comprehensive plan to screen all MPP participants for admission into the United States at designated ports of entry for purposes of continuing their immigration proceedings.

e. The United States Should Revisit COVID-19 Related Restrictions

The COVID-19 pandemic presents many challenges for the United States and other countries. The ABA therefore is mindful of the government's legitimate public health and safety concerns surrounding the pandemic. Nevertheless, these concerns must be balanced with U.S. obligations under international and domestic law.

Since the COVID-19 pandemic began, the administration has closed the Southern and Northern borders to nearly all asylum seekers by allowing CBP officials to expel individuals, including unaccompanied children, encountered at or between ports of entry without proper entry documentation, with limited exceptions. The restrictions were issued based on the Centers for Disease Control's (CDC) authority under the public health laws to prohibit the introduction of individuals into the United States to avert the danger of the

introduction of a quarantinable communicable disease.[67] This policy has resulted in more than 300,000 expulsions since March.[68] A recent court order prevents the government from using the CDC order to expel unaccompanied children, but it remains in effect for families and single adults.[69] The new administration should revisit these restrictions and develop a process that balances legitimate public health and safety concerns with the rights of those seeking humanitarian protection.

In addition to the CDC order, the administration also finalized a rule that redefines the statutory bar to eligibility for asylum and withholding of removal for noncitizens who present a danger to the security of the United States to include noncitizens whose entry to the U.S. would pose a risk of spreading infectious or highly contagious diseases. The rule is overbroad and lacking appropriate procedural safeguards. It should be repealed.

B. A Return to Humanitarian Protection

After four years of immigration measures designed to deter asylum seekers from coming to the United States, particularly from the northern countries of Central America, it is time for a new page in the government's approach to reducing unauthorized migration flows. One important component of this work is U.S. engagement in refugee protection. The government should support a robust refugee program so that those who need protection can be identified before they leave their home countries. As discussed elsewhere in this paper, the government should reinstate the Central American Minor refugee program, which provided a vital lifeline for certain at-risk children whose parents resided in the U.S. Other creative refugee programs could reduce migration flows without resorting to abridged asylum criteria in the United States. They also could alleviate pressure on existing systems, such as the immigration courts and the affirmative asylum case backlog.

V. Protecting Unaccompanied Children

Recommendations

- Counsel should be provided to unaccompanied children in all stages of their immigration processes and proceedings, including initial interviews before U.S. Citizenship and Immigration Services asylum offices, and at all proceedings necessary to obtain Special Immigrant Juvenile status, asylum, and other remedies.
- The government should ensure that an unaccompanied child has had a meaningful opportunity to consult with counsel about the child's specific legal options before immigration courts conduct any hearings, including final hearings, that involve the taking of pleadings or admission of evidence.
- The Department of Justice should establish an independent office with child welfare expertise to ensure that children's interests are recognized and respected at all stages of the immigration process.
- The government should ensure more consistent application and further development of child-friendly practices for children engaging with the immigration system, consistent with the ABA *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States* (2018).
- Live, in-person hearings for unaccompanied children should be ensured in most instances. Absent exigent circumstances where the child and any counsel of record

have consented, video teleconference should not be used in immigration proceedings involving children.

- Special protections should be implemented for unaccompanied children when they are initially apprehended and screened at the border and revised guidance should be issued for the screening of unaccompanied children.
- A minor who is designated as an unaccompanied child upon initial entry to the United States should maintain that designation until her case is completed and she should be afforded all attendant protections of the Trafficking Victims Protection Reauthorization Act, including initial U.S. Citizenship and Immigration Services jurisdiction over her asylum application.
- The Department of Homeland Security should issue a final rule regarding adjudications of Special Immigrant Juvenile status that does not impose requirements beyond those mandated by Congress or exclude children who are otherwise eligible for SIJ status.
- The Executive Office for Immigration Review should issue guidance allowing immigration judges to continue, administratively close, or terminate cases to allow Special Immigrant Juvenile recipients to wait for an available visa permitting adjustment of status.
- Congress should increase the number of visas available for Special Immigrant Juveniles.
- The Central American Minor refugee program should be reinstated.
- The Department of Homeland Security should not separate a child from a parent unless there has been a determination of child endangerment.
- Unaccompanied children should be processed at the border according to the protections outlined in the Trafficking Victims Protection Reauthorization Act. The Department of Homeland Security should not turn unaccompanied children away at the border or expel them during the COVID-19 pandemic.

The ABA's Commission on Immigration operates two projects in Texas that give the ABA direct experience regarding how government policies affect unaccompanied children who arrive to the United States. These projects are the South Texas Pro Bono Asylum Representation (ProBAR) project in Harlingen, Texas, which serves detained (and some non-detained) adult and unaccompanied minor immigrants and asylum seekers, and the Children's Immigration Law Academy (CILA) a legal resource center in Houston that serves children's immigration legal services programs throughout Texas. Our direct experience demonstrates that crucial protections provided to unaccompanied children must be restored, additional child-friendly practices should be implemented at all phases of the immigration system, and due process rights should be expanded for this vulnerable population.

A. The Government Should Appoint Counsel for Unaccompanied Children

The ABA supports the appointment of counsel at government expense for unaccompanied immigrant children. Children who assert their legal rights and seek to remain in the United States have a long and difficult road ahead of them. Immigration court is an adversarial setting, presided over by a Department of Justice (DOJ) immigration judge and prosecuted by experienced Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) counsel. Even in cases where a child may pursue asylum initially before the asylum office, the process is complicated and requires the child to prove her claim and recount the most difficult details of her life to a complete stranger, often through an interpreter. Defenses to deportation are limited and applications for deportation relief require the timely completion of lengthy forms, in English, supplemented by extensive evidentiary support and documentation. This is a difficult process for anyone who is unfamiliar with the English language and the American legal system. It is unrealistic and unreasonable to expect children to represent themselves in these proceedings.

Accordingly, appointed counsel should be available to unaccompanied children in all stages of their immigration processes and proceedings, including initial interviews before U.S. Citizenship and Immigration Services (USCIS) asylum offices, and at all proceedings necessary to obtain Special Immigrant Juvenile (SIJ) status, asylum, and other remedies. Furthermore, immigration courts should not conduct any hearings, including final hearings, involving the taking of pleadings or presentation of evidence before an unaccompanied child has had a meaningful opportunity to consult with counsel about the child's specific legal options.

Access to counsel makes all the difference for children, who are six times more likely to be granted relief if represented.[70] Data from fiscal year 2005 through March 2016 demonstrates that 95 percent of children who are represented appeared for their hearings in immigration court.[71] Unfortunately, the current network of non-profit legal service providers and private bar *pro bono* volunteers cannot meet the overwhelming need for

representation. Based on data through August 2020, more than half—or 52 percent—of children facing deportation are unrepresented.[72]

The immigration system is overwhelmed and suffers from huge backlogs,[73] inefficiencies in case processing, and insufficient resources to adequately protect the rights of unaccompanied children. Ensuring that every unaccompanied child has representation would benefit all stakeholders, including the government, by increasing efficiencies in case processing and thus reducing costs associated with the adjudication of some children's claims. It is unreasonable to expect an immigration judge to adequately develop the record and competently adjudicate an unaccompanied child's removal proceedings without counsel to ensure the child's protection needs are understood and fairly presented.

B. The Government Should Ensure More Consistent Application of Child-Friendly Practices in the Immigration System

The ABA supports more consistent application and further development of child-friendly practices by all federal agencies engaging with children in our immigration system. The ABA also supports the establishment within DOJ of an independent office with child welfare expertise to ensure that children's interests are recognized and respected at all stages of the immigration process.

Collaborative efforts among ABA staff and experts on unaccompanied children nationwide produced the ABA *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States* (ABA Standards).[74] The ABA Standards address the comprehensive psychological, legal, medical, mental health, educational, and other basic needs of unaccompanied immigrant children in federal custody. These standards were updated in August 2018 and replace the original standards promulgated in August 2004. The ABA urges their application and use in the training of all stakeholders involved with unaccompanied children.

Recently, even prior to the pandemic,[75] DOJ began relying on video teleconference hearings (VTC) in processing the cases of some detained unaccompanied children, which raises serious due process concerns among advocates.[76] As set forth in the ABA's Standards, the ABA strongly opposes the use of video teleconferencing in immigration proceedings involving children.[77] At best, these hearings are difficult to comprehend for children; at worst, they are terrifying for children. At a VTC hearing, a child may be in a different physical location than the judge, opposing counsel, and the child's own counsel. As a result, a child's right to communicate with counsel, and communicate with the judge and any interpreter can be adversely affected.[78] The ABA encourages live, in-person hearings for unaccompanied children absent exigent circumstances.

C. CBP Should Provide Special Protections for Unaccompanied Children in Its Custody

The ABA supports special protections for unaccompanied children upon initial apprehension and screening at the border.[79] Apprehension, detention, and screening by Customs and Border Protection (CBP) is the first government point of contact for unaccompanied immigrant children who cross the U.S. border or seek admission at a U.S. port of entry.[80] Children who are separated from a parent or from another adult caregiver at the border may also be identified as unaccompanied children.[81] In 2008, Congress provided special protections for the screening of children at the border as part of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), [82] which created a 72-hour deadline for transferring certain children out of CBP facilities.[83]

Unfortunately, an exception to the 72-hour rule is available,[84] and in May 2019 the entire country learned of the deplorable conditions for children in CBP facilities near the border subject to the "extraordinary circumstances" exception. [85] These conditions, which involved the deaths of six children in CBP custody,[86] were reminiscent of the conditions in which children like Jenny Flores were detained by legacy Immigration and Naturalization Services (INS) in the 1980s.[87] Those circumstances and subsequent litigation resulted in the *Flores* Settlement Agreement (FSA), which still governs CBP conditions because the federal judge overseeing the FSA enjoined DHS from implementing final published regulations in September 2019.[88] The Young Center for Immigrant Children's Rights also issued a 2019 report documenting failures in the TVPRA screening process that resulted in the repatriation of "an extraordinarily high percentage of unaccompanied Mexican children" to "particularly dangerous communities in Mexico."[89]

Several organizations have proposed alternatives to the current framework for apprehending, detaining, and screening unaccompanied children in CBP facilities.[90] In particular, revised guidance is needed for the screening process of unaccompanied children. The ABA Standards urge CBP to ensure children are interviewed in their best language, including any indigenous language they may speak.[91] The Standards also urge that immigration enforcement personnel receive training in child-sensitive and culturally appropriate interviewing techniques.

D. ORR Should Center the Best Interest of the Child in the Detention and Release of Unaccompanied Children

The Department of Health and Human Services' Office of Refugee Resettlement (ORR) should center the best interest of the child in the detention, care, and release of unaccompanied children. Congress charged ORR to oversee the care and custody of unaccompanied children including detention in the least restrictive setting, centering on

the best interest of the child.[92] The standards for the detention, release, and treatment of minors in immigration custody set forth in the FSA still govern ORR today. Many lawsuits have been filed in federal court in the past few years challenging ORR policies and seeking enforcement of the FSA.[93] ORR publishes its own policy guide which it can change without prior notice.[94] Several government reports have made recommendations for improved ORR oversight.[95]

The National Center for Youth Law's December 2019 report detailed the experiences of youth in ORR facilities collected as part of their role as *Flores* counsel.[96] That report highlights the disparity in lengths of stay at different facilities around the United States, the number of large facilities housing children, and the absence of a policy to challenge placement decisions.[97] The ABA Standards recommend release of children expeditiously after being detained in small, non-secure, community based programs.[98] Children without reasonable prospects of placement with potential sponsors should be transferred to ORR or state long-term foster programs without requiring demonstration of their potential eligibility for legal relief.[99]

E. DHS Should Ensure TVPRA Protections for Unaccompanied Children Who Were Subjected to the Migration Protection Protocols

Unaccompanied children, along with certain other vulnerable groups, should not be included in the Migrant Protection Protocols, or Remain in Mexico policy (MPP).[100] Yet many families with children are in the program, and unaccompanied children have been affected by MPP in a variety of ways. Despite the plain language of the TVPRA that requires DHS to place all unaccompanied children in removal proceedings under section 240 of the INA,[101] DHS instead has removed unaccompanied children with prior orders from the MPP program without affording them the full rights conferred by Congress in the TVPRA. MPP should end; however, as long as MPP remains in place, to ensure compliance with the TVPRA, all unaccompanied children upon entry, including those affected by the MPP policy, should be issued a new NTA and full removal proceedings should be initiated.

F. USCIS Should Maintain Initial Jurisdiction Over the Cases of all Unaccompanied Children

The ABA supports the initial jurisdiction of the USCIS asylum office for all children who are designated as unaccompanied in the United States. The TVPRA provides multiple protections for unaccompanied children. Among the most significant protections is the ability for unaccompanied children to apply for asylum in the first instance in a non-adversarial setting at the USCIS asylum office rather than applying before the immigration court, even while they are in removal proceedings.[102] This protection affords children better access to the asylum system and a more child-friendly adjudication that considers their age and any trauma they have endured in their home countries or in their journeys to the United States.

The term "unaccompanied alien child" is defined in 6 U.S.C. § 279(g)(2). Although there is a legal definition for unaccompanied child, interpretations differ as to whether a child maintains that determination or whether it should be reassessed as the case progresses.[103] The ABA believes that all those who are determined to be unaccompanied children in the United States, or who have ever been so determined, should be afforded the protections of the TVPRA, and therefore, the USCIS asylum office should have initial jurisdiction over their asylum applications. The unaccompanied child determination should remain valid until the case is completed.[104] This would improve fairness, uniformity, and accessibility to the asylum system for children and ensure their cases are heard in a more child-friendly setting.

G. Special Immigrant Juveniles Should Be Protected from Removal

SIJ status is a form of relief for noncitizen children who have suffered abuse, abandonment, and/or neglect by one or both of their parents. To seek SIJ status, a state juvenile court must make certain determinations, including a finding that it would not be in the child's best interest to be removed to their country of origin.[105] Proposed regulations were reopened in October 2019 on the adjudication of SIJ petitions.[106] The ABA submitted comments and urges DHS to adopt final regulations in line with those recommendations.[107] The ABA does not support regulations that create requirements beyond those mandated by Congress or that seek to exclude children who are otherwise eligible for SIJ status, such as those that essentially direct DHS adjudicators to redetermine those matters expressly delegated to state courts for decision and resolution.

SIJ recipients can adjust their status to that of Lawful Permanent Resident (LPR) when a visa is available under the employment-based fourth preference category.[108] A limited number of visas are available each year and the number includes a country-based

cap. In recent years, there has been an increasing backlog for children from certain countries and some children must wait years before they can adjust to LPR status. While they wait for the opportunity to seek permanency in the United States, SIJ recipients are not protected from removal. To protect these children from deportation and provide meaningful relief, EOIR should issue guidance allowing immigration judges to continue, administratively close, or terminate removal cases to allow SIJ recipients to wait until a visa is available for them to adjust their status. The ABA also supports congressional action to increase the number of visas available for Special Immigrant Juveniles.

H. The Central American Minor Refugee Program Should Be Reinstated

The ABA supports reinstatement of the Central American Minor (CAM) refugee program. Thousands of children make the dangerous journey to the United States without a parent or legal guardian each year.[109] Instead of endangering the lives of children by forcing them to seek asylum at the Southern border of the United States, the government should institute refugee processing for children in Central America by restoring and improving the CAM program.[110] Before its 2017 termination, the CAM program provided a way for children from Honduras, El Salvador, and Guatemala to reunite with a parent lawfully residing in the United States through refugee status or parole. More than 13,000 children applied for the program while it was active, and more than 1,500 children received refugee status while more than 1,400 children received parole status.[111] An additional 2,700 children resumed case processing under the program after a lawsuit was filed in federal court.[112] The program should be reinstated.[113]

I. Children Should Not Be Separated from Family Members Unless There Is a History of Child Endangerment

The ABA urges the implementation of immigration practices that avoid the separation of children from their families. In the summer of 2018, there was national outcry after reports of children being separated from their families at the Southern border.[114] The administration had implemented a "Zero Tolerance" policy they openly acknowledged was employed for its deterrent effect.[115]

Despite the public attention and ensuing court battles, family separation is not a new concept in immigration in the United States, nor has it stopped occurring.[116] In theory, children are only to be separated from their parent(s) at the border if the parent poses a danger to the child.[117] However, it is the interpretation of what constitutes a "danger" that allows many family separations to continue—children are separated when their parents

have low-level criminal backgrounds (in the United States or home country) and their offenses have nothing to do with endangering their children or violence.[118] Other children caught up in the policy have been raised by a family member or an adopted parent, not their biological parents. CBP will separate the child from their caretaker if their DNA does not establish a biological parent-child relationship.[119] This has occurred even where the caretaker is a grandparent or adult sibling.[120]

Separated children are then declared unaccompanied and placed in ORR custody.[121] These children are not unaccompanied, or were not until the government made them so, and treating them as such places a further burden on the system and diverts resources from those children who are truly unaccompanied. This also potentially creates a dangerous situation for the child and is likely harmful to the child's well-being. Any separation of a child and a parent should occur only upon a determination of child endangerment, applying well-defined criteria with due process protections for parent and child.

J. DHS Should Never Expel Unaccompanied Children

The ABA supports processing unaccompanied children at the border according to the protections outlined in the TVPRA. On March 20, 2020, in response to the COVID-19 pandemic in the United States, the Centers for Disease Control (CDC) released a sweeping order under Title 42 of the U.S. Code applying to persons at the Southern or Northern land borders.[122] In effect, the order prohibited the entry of any person who was not a U.S. Citizen, LPR or visa holding non-immigrant, including those asking for asylum. The CDC reasoned that those who had travelled through Mexico, Canada, or other countries could introduce COVID-19 into CBP holding facilities and other locations, but disregarded the fact that COVID-19 was already spreading in the United States and that most asylum seekers were already being forced to stay in Mexico due to the MPP program.

According to DHS and HHS official declarations filed in support of the government's Ninth Circuit stay request in the *Flores* case, between March 20 and September 9, 2020, CBP expelled more than 8,800 "single minors."[123] The government also stated that, while CBP immediately expelled more than 6,500 of those single minors to Mexico, CBP transferred more than 2,200 single minors to ICE custody, where many were subsequently held in hotels.[124]

Per the Homeland Security Act of 2002 and the TVPRA, unaccompanied children who present themselves at the border are required to be placed in ORR custody, and under the FSA, unaccompanied children should only be held by CBP for a maximum of 72-hours before being transferred to ORR. A federal court recently enjoined the government from expelling unaccompanied children under the CDC order.[125] The practice of turning unaccompanied children away at the border, or placing them in hotels to await their expulsion, should never be repeated.

Conclusion

The recommendations contained in this paper draw upon many decades of collective reflection on the state of our immigration system. In 2010, the ABA published *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*,[126] a report that surveyed the challenges faced by noncitizens seeking immigration relief or benefits, particularly within in the context of immigration enforcement actions and the immigration court system. In 2019, the ABA published an update to the report,[127] tracing the successes and failures of the Obama administration's efforts to address immigration enforcement issues, as well as the increasingly disturbing trends heralded by the first two years of the Trump administration.

The past four years have been particularly challenging, but they were possible, in part, because the laws and systems in place to protect noncitizens seeking to pursue immigration benefits have always been insufficient. A focus on the fundamental principles of justice—ensuring a fair, unbiased adjudication process, providing access to counsel, limiting deprivations of liberty, providing refuge to those fleeing harm, and protecting our most vulnerable populations—must be at the core of the new structure.

The ABA urges the new administration to take up this challenge, to engage in discussion with stakeholders to further refine these ideas, to support and promote legislation embodying these protections, and to lead the country to a better future.

Endnotes

1. *The Immigration Court - In Crisis and in Need of Reform*, Nat'l Ass'n Immigr. Judges (Aug. 2019), https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf.

2. *Id.*

3. *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, Am. B. Ass'n Commission on Immigr. (Feb. 2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf; *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, Am. B. Ass'n, Commission on Immigr. (Mar. 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

4. *See* Memorandum from MaryBeth Keller, Chief Immigration Judge on Operating Policies and Procedures Memorandum 17-01: *Continuances* (July 31, 2017), https://www.justice.gov/eoir/file/oppm17-01/download; *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

5. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

6. *See Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (Stevens, J.) ("The 'drastic measure' of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.").

7. 8 U.S.C. § 1101(a)(48)(A) (INA's statutory definition of term "conviction"); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693 (2013) ("This is the third time in seven years that we have considered whether the Government has properly characterized a low-level . . . offense [in immigration proceedings] . . . . Once again we hold that the Government's approach defies . . . commonsense[.]").

8. *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute); *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018) (declining to recognize Cal. P.C. § 18.5(a), California's retroactive misdemeanor sentencing reform law); *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674 (A.G. 2019) (overturning *Matter of Song*, 23 I&N Dec. 173 (BIA 2011), and *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), thereby refusing to honor state court resentencing and sentencing modification decisions absent particular legal defects). These decisions upended decades of administrative precedent in which DOJ construed the immigration laws to recognize state post-conviction relief measures in virtually all circumstances. *See Matter of G-*, 9 I&N Dec. 159 (BIA 1960, A.G. 1961).

9. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016).

10. *See id.* at 2256; *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Gomez-Perez v. Lynch*, 829 F.3d 323 (5th Cir. 2016).

11. *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019); *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014); *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016); *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009).

12. *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc) (categorical approach in context of burden of proving relief eligibility); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008) (same); *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017) (rejecting BIA's application of the realistic probability standard, the methodology for identifying the full range of conduct the state legislature intended to cover under a criminal statute); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018) (same); *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015) (same); and *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017) (same).

13. The final rule was published on October 21, 2020 and was supposed to take effect on November 20, 2020. Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020) (to be codified at 8 C.F.R. pt. 1208). However, implementation of the rule was enjoined by a federal judge. *See* Order Converting TRO to Preliminary Injunction; Setting Status Conference, ECF No. 74, *Pangea Legal Services v. DHS*, Case No. 20-cv-07721-SI (N.D. Cal. Nov. 24, 2020).

14. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1, ¶ 155 (1979, re-edited Jan. 1992), https://www.unhcr.org/4d93528a9.pdf (interpreting Article 1(F) of the Convention). Note that the proposed rule relied on an expansion of the definition of "particularly serious crime;" however, the final rule as published relied instead on the authority in 8 U.S.C. § 1158(b)(2)(C) for the Attorney General and the DHS Secretary to establish additional limitations and conditions on asylum eligibility. 85 Fed. Reg. at 67207.

15. *See Barbosa v. Barr*, 926 F.3d 1053, 1060 (9th Cir. 2019) (Berzon, J., concurring) (citing *Arias v. Lynch*, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring)).

16. 8 C.F.R. § 1003.1(h)(1) (2019).

17. *See Bridges v. Wixon*, 326 U.S. 135, 161-62 (1945).

18. *Ho v. White*, 259 U.S. 276, 284 (1922).

19. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987).

20. *See Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

21. *Public Support in the United States for Government-Funded Attorneys in Immigration Court*, Vera Inst. of Just. (May 2020), https://www.vera.org/downloads/publications/taking-the-pulse-national-polling.pdf.

22. *See Who is Represented in Immigration Court?* Transactional Recs. Access Clearinghouse (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485 (TRAC report based on EOIR data).

23. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1 (2015) (hereinafter "Eagly and Shafer 2015 Study"); *See also* Jennifer Stave et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, Vera Inst. of Just. (Nov. 2017), https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf (hereinafter "Stave et al. Evaluation").

24. Eagly and Shafer 2015 Study.

25. *See* Peter Markowitz, et al., *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 Cardozo L. Rev. 357, 388-89 (Dec. 2011), https://ils.ny.gov/files/Accessing%20Justice.pdf.

26. Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. Pa. L. Rev. 817, 859 (2020).

27. *See* Stave et al. Evaluation, at 54.

28. 8 U.S.C. § 1362 (INA § 292) states: "In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

29. *See* Kate M. Manuel, *Aliens' Right to Counsel in Removal Proceedings: In Brief*, Cong. Res. Serv. R43613 1, 7-8 n.53 (March 17, 2016), https://fas.org/sgp/crs/homesec/R43613.pdf; *Escobar Ruiz v. INS*, 838 F.2d 1020, 1028 (9th Cir. 1988), *abrogated on other grounds by Ardestani v. INS*, 502 U.S. 129 (1991) (Section 292 permits government funded counsel for indigent immigrants while prohibiting the creation of a right to such funding); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975) (noting the same).

30. No. CV 10-02211 DMG (DTBx) (C.D. Cal.) (The *Franco* lawsuit alleged that individuals in immigration detention in Arizona, Washington, and California who are incompetent to represent themselves because of a serious mental disorder are entitled to legal representation in their immigration cases. The court held that such individuals are entitled to legal representation).

31. *See* Bettina Rodriguez Schlegel, *Legal Orientation Program*, Vera Inst. of Just, https://www.vera.org/projects/legal-orientation-program (last visited Oct. 5, 2020). The ABA sponsors two onsite LOP programs through the Immigration Justice Project in San Diego, California and at ProBAR in Harlingen, Texas. The ABA Commission on Immigration also operates the national telephonic LOP Information Line.

32. E-mail from Bettina Rodriguez Schlegel, Program Director, Center for Immigration Justice, Vera Institute of Justice, to Meredith Linsky, Director, ABA Commission on Immigration (Oct. 5, 2020) (on file with author).

33. Letter from Legal Orientation Program subcontracting organizations to Members of Congress, (Nov. 19, 2020), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-11/NGO-Letter-to-CJS_EOIR-Legal-Access-Programming_Nov2020.pdf.

34. Cost Savings Analysis – The EOIR Legal Orientation Program (updated April 4, 2012), provided to Hon. Kay Bailey Hutchinson by Lee J. Lofthus, Assistant Attorney General for Administration, U.S. Department of Justice, (July 2, 2012), https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

35. *Id*.

36. Memorandum from Nina Siulc, Vera Institute of Justice to Steven Lang, EOIR, Update on Performance Indicators: LOP Case Time Analysis (April 1, 2018), https://www.tahirih.org/wp-content/uploads/2018/09/Vera-LOP-2018-Reports-combined-8-pgs_FINAL.pdf. While EOIR analyses in 2018 and 2019 found that LOP participants had longer detention stays and that LOP respondents had longer proceedings and cases, these findings were refuted by Vera. *See* LOP Cohort Analysis Phase I, Executive Off. for Immigr. Rev. (Sept. 5, 2018), https://www.justice.gov/eoir/file/1091801/download; LOP Cohort Analysis Phase II, Executive Off. for Immigr. Rev. (Jan. 29, 2019), https://www.justice.gov/eoir/file/1125621/download; *Myths and Facts About EOIR's LOP Phase I and Phase II Cohort Analysis*, Vera Inst. of Just. (on file with ABA Commission on Immigration).

37. *See* Omnibus Consolidated Rescissions and Appropriations Act, Apr. 26, 1996, Pub. L. No. 104-134, Title V, 110 Stat. 1321-50–59. There are also related regulations promulgated to effectuate the restriction against representation of non-US citizens. *See* 45 C.F.R. § 1626.1 et seq. ("This part is designed to ensure that recipients provide legal assistance only to citizens of the United States and eligible aliens.").

38. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Apr. 26, 1996, Pub. Law No. 104–134, 110 Stat 1321-59 ("[N]o recipient shall accept funds from any source other than the Corporation, unless the Corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act . . . ."); 45 C.F.R. § 1610 (implementing "restrictions on the use of non-LSC funds by LSC recipients"). *See also* 45 C.F.R. § 1627.5 ("The prohibitions and requirements set forth in 45 CFR part 1610 apply both to the subgrant and to the subrecipient's non–LSC funds.").

39. However, as a result of litigation, organizations affiliated with LSC-funded civil legal services providers are not subject to the restriction on the use of non-LSC funds. *See Legal Aid Soc. of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1421 (D. Haw. 1997) (enjoining enforcement of the non-LSC fund restriction of affiliates as originally drafted). LSC's "program integrity" rule allows an affiliate of an LSC grantee to engage in the restricted activity so long as the grantee can show that the affiliate is a sufficiently separate entity. 45 C.F.R. § 1610.8 (setting criteria to determine program integrity); *Legal Aid Servs. of Oregon v. Legal Servs. Corp.*, 608 F.3d 1084, 1089 (9th Cir. 2010) (rejecting grantees' challenge that the program integrity rule is unconstitutional as applied).

40. For the complete list, see 3C Am. Jur. 2d *Aliens and Citizens* § 2182 (2020).

41. *FY19 Detention Statistics*, Immigr. and Customs Enforcement, https://www.ice.gov/detention-management.

42. FY20 YTD Detention Statistics are available at https://www.ice.gov/detention-management.

43. *U.S. Immigration and Customs Enforcement Budget Overview*, Dep't of Homeland Security (2020), https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.

44. *ICE Guidance on COVID-19*, Immigr. and Customs Enforcement, https://www.ice.gov/coronavirus.

45. TRAC Immigration shows that in fiscal year 2020, around 10% of individuals with closed cases were granted relief, around 8.6% had their cases terminated and around 5% had their cases administratively closed. *See Immigration Court Processing Time by Outcome*, Transactional Recs. Access Clearinghouse (2020), https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

46. *Immigrants and Families Appear in Court: Setting the Record Straight*, American Immigr. Council (July 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf; *Evidence Shows that Most Immigrants Appear for Immigration Court Hearings*, Vera Inst. of Just. (Oct. 2020), https://www.vera.org/publications/immigrant-court-appearance-fact-sheet.

47. In its FY19 Detention Statistics, ICE data shows that of the 510,854 adults booked into ICE custody, only 155,891 had criminal convictions and 38,635 had pending criminal convictions. *See Detention Management*, Immigr. and Customs Enforcement, https://www.ice.gov/detention-management. The rest, 316,328 (almost 62%) were booked into custody as "Other Immigration Violators." *Id*.

48. *Id*. ICE detained almost 50,000 noncitizens on a given day in 2019, of whom 36 percent, or over 17,000 detainees, had criminal convictions. *See Growth in ICE Detention Fueled by Immigrants With No Criminal Conviction*, Transactional Recs. Access Clearinghouse (Nov. 2019), https://trac.syr.edu/immigration/reports/583/.

49. *See Detention Management*, Immigr. and Customs Enforcement, https://www.ice.gov/detention-management ("FY 19 Detention Statistics" at "Facilities FY19" tab shows the number of individuals categorized as "No ICE threat level").

50. U.S. Gov't Accountability Off., GAO-15-26, Alternatives to Detention Improved Data Collection and Analysis Needed to Better Assess Program Effectiveness (2014), https://www.gao.gov/assets/670/666911.pdf.

51. Dep't of Homeland Security Off. of the Inspector General, OIG-18-22, U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program Contract (2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf.

52. In fiscal year 2019, the average length of time individuals were enrolled in ATD programs was 352.2 days. *See FY19 Detention Statistics*, Immigr. and Customs Enforcement, https://www.ice.gov/detention-management.

53. *See* Section IIA, *infra*.

54. *Civil Immigration Detention Standards*, Am. B. Ass'n Commission on Immigr. (2012), https://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf.

55. Dianne Solis, *Asylum seekers in Matamoros Fear They'll Be Forgotten*, Dallas Morning News (Sept. 7, 2020), https://www.dallasnews.com/news/immigration/2020/09/07/s-in-matamoros-fear-they-ll-be-forgotten/ (discussing the daily anxiety consuming the 650-1,000 migrants who remain at the tent camp in Matamoros, Mexico, due to stalled immigration cases, the pandemic, Hurricane Hanna and resulting flooding, and vulnerability to growing crime from cartels).

56. Protocol Relating to the Status of Refugees, art. 5, Oct. 4, 1967, 606 U.N.T.S. 267; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, (1988); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (noting that one of the primary purposes in enacting the Refugee Act of 1980 was to implement the principles agreed to in the 1967 Protocol); Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) § 2242(a), Pub. L. No. 105-277, 112 Stat. 2681 (codified at 8 U.S.C. § 1231).

57. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), *abrogated by Grace v. Barr*, 965 F.3d 883, 897 (D.C. Cir. 2020) (limiting grounds for asylum claims based on persecution by private actors, overruling prior precedent that clarified eligibility for asylum based on domestic violence, and potentially affecting claims related to gang violence); *Matter of L-E-A*, 27 I&N Dec. 581 (A.G. 2019) (limiting which families can qualify as "particular social groups" for purposes of demonstrating asylum eligibility).

58. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (Dec. 11, 2020).

59. Order Converting TRO to Preliminary Injunction; Setting Status Conference, ECF No. 74, *Pangea Legal Services v. DHS*, Case No. 20-cv-07721-SI (N.D. Cal. Nov. 24, 2020).

60. *East Bay Sanctuary Covenant v. Trump*, 354 F.Supp.3d 1094 (N.D. Cal. 2018). On December 21, 2018, the Supreme Court denied the government's request for a stay pending appeal of the district court's earlier November 19, 2018 order granting a temporary restraining order in the same case. *See Trump v. East Bay Sanctuary Covenant*, 139 S.Ct. 782 (2018). *See also O.A. v. Trump*, 404 F.Supp.3d 109, 152 (D.D.C. 2019) (vacating interim final rule).

61. 8 U.S.C. § 1158(a)(1).

62. *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, DHS Off. of Inspector General, OIG-18-84 at 7 (Sept. 27, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.

63. *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020); *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020).

64. 8 U.S.C. § 1158(a)(2)(A).

65. *Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement*, Human Rts. Watch (May 19, 2020), https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative#.

66. *Delivered to Danger: Trump Administration sending U.S. asylum seekers and migrants to danger*, Human Rts. First, https://deliveredtodanger.org/ (last visited Sept. 30, 2020) (documenting at least 1,114 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults as of May 23, 2020 for individuals subjected to MPP).

67. Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559 (Mar. 24, 2020) (to be codified at 42 C.F.R. pt. 71).

68. *FY20 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, Customs and Border Protection, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020 (last visited Dec. 14, 2020) (showing nearly 200,000 expulsion encounters from March-September 2020); *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, Customs and Border Protection, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited Dec. 14, 2020) (showing nearly 120,000 expulsion encounters in October-November 2020).

69. *P.J.E.S. v Wolf*, Civ. Action No. 20-2245 (EGS), 2020 WL 6770508 (D.D.C. Nov. 18, 2020).

70. *Children's Immigration Law Academy (CILA) Pro Bono Guide: Working with Children and Youth in Immigration Cases* at 8-9, Vera Inst. of Just. (2020), http://www.cilacademy.org/wp-content/uploads/2020/08/CILA-Rept-Final-Web.pdf (based on data then captured from TRAC Immigration Data, Juveniles – Immigration Court Deportation Proceedings (through February 2020), reflecting that only .55% of unrepresented children were granted relief in the period reviewed, while some 3.78% represented children were granted relief).

71. *Children in Immigration Court: Over 95 Percent Represented by an Attorney Appear in Court*, American Immigr. Council, https://www.americanimmigrationcouncil.org/sites/default/files/research/children_in_immigration_court.pdf.

72. *Juveniles – Immigration Court Deportation Proceedings*, Transactional Recs. Access Clearinghouse (Aug. 2020), https://trac.syr.edu/phptools/immigration/juvenile/ (reflecting 344,897 juveniles without representation, out of a total of 663,330 pending cases).

73. *See Backlog of Pending Cases in Immigration Courts*, Transactional Recs. Access Clearinghouse (Aug. 2020), https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php. The data indicates that for FY2020, a total of 1,246,164 cases are currently pending. More than half, or 663,330, of currently pending cases are juvenile cases.

74. *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, Am. B. Ass'n Commission on Immigr. (Aug. 2018), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/standards_for_children_2018.pdf (hereinafter "ABA Standards for Unaccompanied Alien Children").

75. Lomi Kriel, *New Trump Administration Policies Fast-Track Some Children's Immigration Court Hearings, Including Video Pilot in Houston*, Houston Chronicle (Mar. 3, 2020), https://www.houstonchronicle.com/news/houston-texas/houston/article/New-Trump-administration-policies-fast-track-some-15105573.php.

76. Amanda Robert, *Video Teleconference Program for Immigrant Children 'Is Contrary to the American Pursuit of Justice,' ABA Says*, ABA J. (Mar. 5, 2020), https://www.abajournal.com/news/article/aba-president-calls-for-end-to-new-video-teleconference-program-for-unaccompanied-children; Jennifer Podkul, Opinion, *Remote Hearings for Unaccompanied Children Proves a Disaster*, The Hill (Mar. 16 2020), https://thehill.com/opinion/immigration/487440-remote-hearings-for-unaccompanied-children-proves-a-disaster; *New Video Hearings Prevent Fair Hearings for Immigrant Children*, Young Ctr. for Immigrant Child. Rts. (Mar. 9, 2020), https://www.theyoungcenter.org/stories/2020/3/9/new-video-hearings-prevent-fair-hearings-for-immigrant-children.

77. *See* ABA Standards for Unaccompanied Alien Children, *supra* note 74, cmt. X.A.3.

78. *See* Robert, *supra* note 76.

79. *See* ABA Standards for Unaccompanied Alien Children, *supra* note 74, VII.C.

80. An "unaccompanied alien child" is defined as an individual who 1) is under the age of 18, 2) lacks lawful immigration status in the United States, and 3) does not have a parent or legal guardian living in the United States who is available to provide care and physical custody. 6 U.S.C. § 279(g)(2).

81. Off. Of Inspector General, OEI-BL-18-00511, Rep. on Separated Children Placed in Office of Refugee Resettlement Care (2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf; *see also* Joel Rose, *Migrant Caregivers Separated From Children at Border, Sent Back to Mexico*, NPR (July 5, 2019), https://www.npr.org/2019/07/05/738860155/family-separations-under-remain-in-mexico-policy.

82. 8 U.S.C. § 1232(a).

83. CBP must evaluate children from Mexico and Canada within 48 hours for their ability to make independent decisions, fear of returning home, and risk of trafficking. *See id.* § 1232(a)(2)(A). CBP must contact the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) within 48 hours to report the apprehension of an unaccompanied child from a non-contiguous country or a child who passes the aforementioned screening. *See id.* § 1232(b)(2). CBP must transfer the unaccompanied child to the custody of ORR within 72 hours. *Id.*

84. *See id.* § 1232(b)(3).

85. Maria Sacchetti & Abigail Hauslohhner, *Hundreds of Minors Held at U.S. Border Facilities Are There Beyond Legal Time Limits*, Wash. Post (May 30, 2019), https://www.washingtonpost.com/immigration/hundreds-of-minors-held-at-us-border-facilities-are-there-beyond-legal-time-limits/2019/05/30/381cf-6da-8235-11e9-bce7-40b4105f7ca0_story.html.

86. Robert Moore, *Zero Tolerance: Six Children Died in Border Patrol Care. Democrats in Congress Want to Know Why*, ProPublica (Jan. 13, 2020), https://www.propublica.org/article/six-children-died-in-border-patrol-care-democrats-in-congress-want-to-know-why.

87. Lorelei Laird, *Meet the Father of the Landmark Lawsuit that Secured Basic Rights for Immigrant Minors*, ABA J. (Feb. 1, 2016), https://www.abajournal.com/magazine/article/meet_the_father_of_the_landmark_lawsuit_that_secured_basic_rights_for_immig.

88. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Oct. 22, 2019) (to be codified at 45 C.F.R. pt. 410); Amy Taxin, *Judge Blocks Trump Rules for Detained Migrant Kids*, Assoc. Press (Sept. 27, 2019), https://apnews.com/article/e69ba2785cce42bfa1c81efce8175120.

89. *Border Screening for Children Has Failed*, Young Ctr. for Immigrant Child. Rts. (Aug. 5, 2019), https://www.theyoungcenter.org/stories/2019/8/5/current-border-screening-of-unaccompanied-children-from-mexico-has-failed-and-should-not-be-a-model-for-reform.

90. *See e.g. Framework for Considering the Best Interests of Unaccompanied Children*, Young Ctr. for Immigrant Child. Rts. (May 2016), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf (hereinafter "Young Center Best Interests Framework"); ABA Standards for Unaccompanied Alien Children, *supra* note 74, VII.C.1.; *In the Best Interest of the Child*, U.S. Cmte. for Refugees & Immigrs. (Oct. 2019), https://refugees.org/wp-content/uploads/2020/09/USCRI-Best-Interest-Oct2019.pdf.

91. *See* ABA Standards for Unaccompanied Alien Children, *supra* note 74, VII.C.1. The Young Center has recommended that CBP collaborate with child welfare experts to develop revised screening tools, create safe, child-friendly spaces for the screening interviews, and "contract with child welfare professionals who are trained in trauma-informed interviewing skills to conduct TVPRA screenings." Young Center Best Interests Framework, *supra* note 90.

92. 8 U.S.C. § 1232(c).

93. *See e.g.*, *Litigation Strategies*, Nat'l Ctr. for Youth L., https://youthlaw.org/strategies/litigation-strategies/?_sft_issues=immigration.

94. *ORR Guide: Children Entering the United States Unaccompanied*, Off. of Refugee Resettlement (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied.

95. U.S. Gov't Accountability Off., GAO-16-180, UNACCOMPANIED CHILDREN: HHS Can Take Further Actions to Monitor Their Care (2016), https://www.gao.gov/assets/680/675001.pdf; U.S. Gov't Accountability Off., GAO-18-506T, UNACCOMPANIED CHILDREN: DHS and HHS Have Taken Steps to Improve Transfers and Monitoring of Care, but Actions Still Needed (2018), https://www.gao.gov/products/GAO-18-506T; Off. Of Inspector General, OEI-09-18-00431, Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody (2019), https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf.

96. Neha Desai, et. al, *Child Welfare & Unaccompanied Children in Federal Immigration Custody: A Data and Research Based Guide for Federal Policymakers*, Nat'l Ctr. for Youth L. (Dec. 2019), https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf.

97. *Id*. at 6.

98. *See* ABA Standards for Unaccompanied Alien Children, *supra* note 74, VII.B.7.

99. *Recommendations for Improving Services and Supports for Children in Category 4 Cases*, Migration Policy Inst. (MPI), Lutheran Immigr. and Refugee Serv. (LIRS) & Am. B. Ass'n, Ctr. on Children and the Law (the ABA Center) (submitted to ORR, on file with the ABA Commission on Immigration).

100. *Migrant Protection Protocols*, Dep't of Homeland Security (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols ("Unaccompanied alien children and aliens in expedited removal proceedings will not be subject to MPP.").

101. 8 U.S.C. § 1232(a)(5)(D)(i).

102. *Id*. § 1158(b)(3)(C).

103. USCIS issued a Memorandum in 2013, commonly known as the "Kim Memo," which outlines its procedure for handling initial jurisdiction over asylum for unaccompanied children. *See* Memorandum from Ted Kim, Chief of the Asylum Division, U.S. Citizenship & Immigration Services to Asylum Office Staff (May 28, 2013), https://www.uscis.gov/sites/default/files/document/memos/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf. Then in 2019, USCIS updated their procedures and changed the process in the "Lafferty Memo." *See* Memorandum from John Lafferty, Chief of the Asylum Division, U.S. Citizenship & Immigration Services to Asylum Office Staff (May 31, 2019), https://www.uscis.gov/sites/default/files/document/memos/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf. As a result of litigation in the *J.O.P. v. DHS* case, there is currently a preliminary injunction in place and USCIS is enjoined from applying the "Lafferty Memo"; therefore, USCIS is currently following the procedures outlined in the "Kim Memo." *See J.O.P. v. DHS: Class-Action Lawsuit Seeks Protection for Asylum Seekers Who Arrived as Unaccompanied Children*, Catholic Legal Immigration Network (July 8, 2019), https://cliniclegal.org/resources/litigation/jop-v-dhs-class-action-lawsuit-seeks-protection-asylum-seekers-who-arrived. However, the Executive Office for Immigration Review issued guidelines in 2017, and then in 2018, the Board of Immigration Appeals issued *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018). As a result, agencies are currently interpreting issues of unaccompanied children determinations and initial jurisdiction differently. Additionally, DHS issued new regulations regarding the unaccompanied children determination process in 2019 (*see* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44392 (to be codified at 8 C.F.R. 212, 236, 45 C.F.R. 410)), but Judge Dolly M. Gee, who oversees the *Flores* Settlement Agreement, enjoined DHS from applying, implementing, or enforcing the new regulations. *See Flores v. Barr*, 407 F. Supp. 3d 909, 921 (C.D. Cal. 2019).

104. *See* ABA Standards for Unaccompanied Alien Children, *supra* note 74, III.

105. 8 U.S.C. § 1101(a)(27)(J).

106. Special Immigrant Juvenile Petitions, 84 Fed. Reg. 55250 (to be codified at 8 C.F.R. pts. 204, 205, 245) (Oct. 16, 2019), https://www.federalregister.gov/documents/2019/10/16/2019-22570/special-immigrant-juvenile-petitions.

107. Letter from Judy Perry Martinez, ABA President, to Samantha Deshommes, Chief of the Regulatory Coordination Division of the Office of Policy and Strategy, Department of Homeland Security (Nov. 15, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-comments-dhs-docket-no-uscis-2009-000411-15-19.pdf?logActivity=true.

108. *Special Immigrant Juveniles, Green Card Based on SIJ Classification (Form I-485)*, U.S. Citizenship and Immigr. Serv., https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4/special-immigrant-juveniles.

109. *CBP Southwest Border Migration Statistics*, U.S. Customs and Border Protection, https://www.cbp.gov/newsroom/stats/sw-border-migration (last visited December 14, 2020) (showing number of encounters with various demographic groups along Southwest border, including unaccompanied children).

110. *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)*, U.S. Citizenship and Immigr. Serv. (Nov. 15, 2017), https://www.uscis.gov/CAM.

111. Mica Rosenberg, *U.S. Ends Program for Central American Minors Fleeing Violence*, Reuters (Aug. 16, 2017), https://www.reuters.com/article/us-usa-immigration-minors/u-s-ends-program-for-central-american-minors-fleeing-violence-idUSKCN1AW2OZ.

112. *Central American Minors (CAM): Information for Parole Applicants*, U.S. Citizenship and Immigr. Serv. (Jun. 18, 2019), https://www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-information-for-parole-applicants.

113. The USCIS Ombudsman issued a report with recommendations regarding the CAM program. *Citizenship and Immigration Services Ombudsman Recommendation on the Central American Minors (CAM) Refugee/Parole Program*, Dep't of Homeland Security (Dec. 21, 2016), https://www.dhs.gov/sites/default/files/publications/Citizenship%20and%20Immigration%20Service%20Ombudsman.pdf.

114. *Background on Separation of Families and Prosecution of Migrants at the Southwest Border*, Am. B. Ass'n Commission on Immigr. (July 31, 2018), https://www.americanbar.org/groups/public_interest/immigration/resources/memo-on-family-separation/ (hereinafter "ABA, Background on Separation of Families").

115. *Id*.

116. Michelle Wiley & Tyche Hendricks, *Zero Tolerance: An Ongoing History of Family Separations at the US-Mexico Border*, KQED (Jan. 30, 2020), https://www.kqed.org/news/11797878/zero-tolerance-an-ongoing-history-of-family-separations-at-the-u-s-mexico-border.

117. *Ms. L. v. U.S. Immigration & Customs Enforcement*, 415 F. Supp. 3d 980, 983 (S.D. Cal. 2020).

118. *Id*. at 991-93.

119. Roxana Kopetman, *For Immigrant Families Without Biological Parents, Separation Might be Permanent*, Orange County Register (Sept. 7, 2018), https://www.ocregister.com/2018/09/07/for-immigrant-families-without-biological-parents-separation-might-be-permanent/; Valeria Fernández & Jude Joffe-Block, *She Raised Her Niece Like a Daughter. Then the US Government Separated Them at the Border*, Guardian (Oct. 25, 2019), https://www.theguardian.com/us-news/2019/oct/25/family-separation-trump-immigration-nonparents.

120. *Id*.

121. *See* ABA, Background on Separation of Families, *supra* note 114.

122. Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559 (Mar. 24, 2020) (to be codified at 42 C.F.R. pt. 71).

123. Decl. of Raul L. Ortiz in Supp. of Defs.' Emergency Mot. to Stay ¶ 6, *Flores v. Barr*, Dkt. Entry 2-4, No. 20-55951 (9th Cir. Sept. 11, 2020).

124. *Id*.

125. *P.J.E.S. v Wolf*, Civ. Action No. 20-2245 (EGS), 2020 WL 6770508 (D.D.C. Nov. 18, 2020).

126. *See* note 3, *supra*.

127. *Id*.