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# Amid “nightmarish” case backlog, experts call for independent immigration courts

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The U.S. immigration court system is broken and “action is needed now to create an Article I Immigration Court so that immigration judges can have the independence that we need because every person is entitled to due process regardless of legal status,” Judge Dana Marks of the Immigration Court in San Francisco said during a spirited panel discussion on Thursday, Aug. 8, at the American Bar Association Annual Meeting in San Francisco.

## Annual Meeting 2019

*Due Process Issues Facing the U.S. Immigration Courts*

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Marks, a past president of the National Association of Immigration Judges, was one of four panelists on the CLE program, “[Due Process Issues Facing the U.S. Immigration Courts](#).” She was

joined by moderator retired judge Joan Churchill and speakers Richard Pierce, professor at George Washington University Law School; Elizabeth Stevens, chair of the Immigration Law Section of the Federal Bar Association; and Karen T. Grisez, public service counsel with Fried, Frank, Harris, Shriver and Jacobson LLP and a member of the ABA [Commission on Immigration](#).

Marks provided an inside view of the immigration courts, which she called "nightmarish," facing an overwhelming backlog of more than 900,000 immigration cases nationwide.

"My pending caseload is about 4,000 cases," Marks said. "I have about half a judicial law clerk and less than one full-time legal assistant to help me. And most importantly, you have to look at the people who come to our court. They are an incredibly vulnerable population who are often unfamiliar with U.S. laws, and they do not have a guaranteed right to counsel unless they can afford it or if they can get pro bono help."

[New guidelines](#) for immigration judges recently issued from the Department of Justice on how to deal with these cases, Marks says, have stripped immigration judges of their independence in managing their dockets.

"There have been management officers who now tell us how many cases to docket and how many cases to hear," she said. "They put production quotas on us in terms of the time frame that we have to decide an individual case. And we now have performance evaluations based on a requirement that immigration judges complete 700 cases a year, which translates to about four cases a day."

"Immigration court judges are very much like a true judicial court in what we do, and we conduct ourselves in a quasi-judicial fashion but we are not being treated like courts. The administrative structure for what we do is so outdated."

If Congress established an Article I Immigration Court, she and other panelists argued, it would give immigration judges the independence and protections governed by the Administrative Procedures Act. "That means we don't have contempt authority. That means we don't have protection from being disciplined or fired from our jobs if our supervisors are dissatisfied with our decisions," she explained. "That means that we can't manage our court dockets in a way that provides due process to the people who come before us."

The Federal Bar Association and the American Bar Association have advocated for the restructuring of the adjudication process to move the immigration court system out of the Department of Justice and into an independent Article 1 agency. Last month, the ABA, FBA, American Immigration Lawyers Association and the National Association of Immigration Judges jointly sent a [letter](#) to Congress urging the establishment of an independent immigration court because "our current immigration court system cannot meet the standards which justice demands."

Grisez talked about the due process of the immigration courts from the perspective of the ABA Commission on Immigration, which in March released a [2019 update](#) on reforming the immigration system. The original 2010 report looked at all aspects of the immigration adjudication system. There were six areas to the 2019 report:

- 1 Department of Homeland
- 2 Immigration Courts
- 3 Board of Immigration Appeals (BIA)
- 4 Circuit Court Review
- 5 Representation
- 6 Structure of Adjudication Process

"There were some things that got better from the 2010 report, but a lot of things got worse," Grisez said. "Almost every day there is some new assault on due process in the immigration adjudication system that, from my perspective, is aimed at decreasing the number of people that make it into immigration court at all and then taking away procedural protections that the judges previously had available to offer to try and lean toward due process."

One of the most glaring changes since the 2010 report, Grisez said, is a practice by the attorney general of assigning cases to himself.

"He is taking cases away from the BIA sometimes before the board has adjudicated them and frequently ruling on issues that were not a part of the adjudication," she explained. "So, basically, he's taking cases on appeal and using them to establish or articulate policy rather than simply review the quality of the decision-making. The attorney general self-certification process is

allowed under the regulations, but the use of it in recent years is about four-fold over what it has been in previous administrations.”

Grisez said the 2019 report put forth several solutions that will be offered up as [resolutions](#) before the ABA House of Delegates to become formal ABA policy if adopted.

Stevens said the Federal Bar Association since 2013 has urged Congress to establish an Article I “United States Immigration Court” to replace the Executive Office for Immigration Review in the U.S. Department of Justice as the principal adjudicatory forum under Title II of the Immigration and Nationality Act.

“In 2017, we [drafted legislation for a model bill](#),” she said. “The immigration court is already an Article I Immigration Court, so we’re not just creating an Article I Court but an independent Article I Court.”

The program was sponsored by the ABA [Judicial Division’s National Conference of the Administrative Law Judiciary](#) and cosponsored by the ABA [Center for Public Interest Law](#).

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