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SIDEBAR

## ABA commission had warned of immigration-court backlog

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*Illustration by Sam Ward*

Seven years ago, an ABA commission issued a series of recommendations to address the immense backlog in immigration cases, yet few of those proposals have come to pass.

A 2010 report from the ABA Commission on Immigration cited many of the same concerns that exist today about a system incapable of handling increased enforcement of immigration laws.

The report, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases*

([http://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.pdf](http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf))

(PDF), also noted a sevenfold increase over five years in cases going to the U.S. Court of Appeals, in part because the Board of Immigration Appeals directly below had stopped supporting its decisions with extensive written opinions.

“In 2010, there was hope that comprehensive immigration reform would be a possibility in coming years,” explains Karen Grisez, who chaired the commission at the time and now serves as a special adviser to it. “So it was intended to give recommendations for improving the system across the board.”

Just as modern observers have noted, the report’s authors (all pro bono attorneys from Arnold & Porter) found that the backlog was largely created by increases in immigration enforcement not matched by increases in resources for the immigration courts. It also found too much enforcement against immigrants convicted of minor offenses; delays and insufficient time to make decisions in immigration courts and actual or perceived politicization of the courts.

**Read more: Legal logjam in immigration courts grows to more than 540,000 cases** ([legal\\_logjam\\_immigration\\_court](#))

The commission proposed restructuring immigration courts by removing the court system from the Department of Justice to obviate concerns about their independence from political interference. The immigration courts and the BIA would instead be Article I (congressionally created) courts, with a leadership appointed by the president and confirmed by the Senate. Judges would have fixed terms, set qualifications and obligations to a code of conduct.

That’s long been on the wish list of the National Association of Immigration Judges. Dana Leigh Marks, speaking as president of the union and a sitting judge in San Francisco’s immigration court, believes this would help the system secure adequate funding, rather than having to compete with much larger units of the Department of Justice. It would also insulate the immigration courts from perceived or actual political interference.

The report also recommends smaller steps, including narrowing the definitions of “crime” in certain statutes to lessen eligibility for deportation; increasing the use of prosecutorial discretion to end minor cases; establishing a right to legal representation in removal cases, particularly for vulnerable populations like unaccompanied minors; and decreasing the use of detention. Many of these recommendations clash with President Donald Trump’s early executive orders. For example, one order construes “crime” broadly, to include actions that an immigration officer believes would “constitute a chargeable criminal offense.”

Grisez, who also works on immigration issues in her role as public service counsel for the Washington, D.C., office of Fried, Frank, Harris, Shriver & Jacobson, says advocates are concerned about how Trump's moves will affect immigrants across the system.

Nonetheless, Grisez notes, there's been movement on some of the report's priorities, including improvements in the length and clarity of the BIA's opinions, which has reduced appeals to the federal appeals courts and given more guidance to immigration courts. There are also several new programs providing counsel to unaccompanied minors, another recommendation.

One key recommendation was to hire more immigration judges, which came to pass near the end of the Obama administration. As of March, the Executive Office for Immigration Review said it had 301 judges and was authorized to hire up to 374. Recent reports state that the Trump hiring freeze will not include immigration judges. Still, Grisez says advocates are concerned that Attorney General Jeff Sessions might slow the process by rejecting new hires.

But with more enforcement coming, Grisez says, continuing the hiring will be essential: "Unless there are a large number of judges added, it's obvious that more new cases in the system without more judges is going to lead to increased backlogs."

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