Testimony of

Hon. John M. Walker

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Statement of Chief Judge John M. Walker, Jr.
Of the United States Court of Appeals for the Second Circuit to the Senate Judiciary Committee
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Chairman Specter, Senator Leahy, and members of the Judiciary Committee, I thank you for the opportunity to appear before you today. The United States Court of Appeals for the Second Circuit, of which I am the Chief Judge, has federal appellate jurisdiction from district courts and administrative agencies in New York, Connecticut, and Vermont. I appear before the Committee today in my individual capacity; I do not speak for the court.

I appreciate the Committee's hard work on the very difficult issues related to immigration reform. I also appreciate that the Chairman and the Committee have turned to the impact of proposed legislation on the adjudication of immigration disputes both at the administrative level and in the courts of appeals. The Second Circuit is one of the two courts of appeals, the other is the Ninth Circuit, that is most affected by the increased volume of immigration appeals.

Beginning in 2002, my court began receiving immigration appeals in very large numbers, as the Bureau of Immigration Appeals ("BIA") in the Department of Justice undertook to clear its backlog. What we thought was a one-time bubble has turned into a steady flow of cases, in excess of 2,500 a year and about a 50% increase in our total annual filings. The great majority of these cases are asylum cases.

To deal with this backlog, in October 2005 my circuit instituted a Non-Argument Calendar ("NAC") for asylum cases. It runs parallel to our Regular Argument Calendar ("RAC"). We are adjudicating forty-eight cases a week on the NAC and are doing it with three judges on each case. In the six months it has been in effect, the NAC is reducing our backlog, and we expect to eliminate it in about four years. At the same time, we are assuring the parties that their case is receiving the court's full attention. In this regard, I would like to commend publicly all of the judges of the Second Circuit for their hard work in adjudicating these cases and particularly Circuit Judge Jon O. Newman, who was the principal architect of the NAC procedure.

I want to specifically address certain aspects of Title VII of the Chairman's proposed bill, which would alter the current mechanisms for judicial review by the courts of appeals from decisions of Immigration Judges and the BIA. As you know, at present the BIA in the Executive Office for Immigration Review ("EOIR") in the Department of Justice reviews the decisions of individual Immigration Judges located throughout the nation. If the alien is ordered deported by the Immigration Judge, and the BIA affirms the order, the alien may seek further review in the court of appeals within whose jurisdiction the Immigration Judge rendered the final decision in the case. The Second Circuit is second only to the Ninth Circuit in immigration petition filings. According to recent figures, the Second Circuit receives about 21% of the more than 12,000 petitions for review filed nationwide, second only to Ninth Circuit.

The Principal Reason for the Immigration Backlog is
the Lack of Resources at the Department of Justice

First, in my opinion, the principal reason for the current backlog in the courts of appeals and the reason that higher-than-expected numbers of cases are remanded are a severe lack of resources and manpower at the Immigration Judge and BIA levels in the Department of Justice. The 215 Immigration Judges are required to cope with filings of over 300,000 cases a year. With only 215 Judges, a single Judge has to dispose of 1,400 cases a year or nearly twenty-seven cases a week, or more than five each business day, simply to stay abreast of his docket. I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances. This is especially true given the unique nature of immigration hearings. Aliens frequently

do not speak English, so the Immigration Judge must work with a translator, and the Immigration Judge normally must go over particular testimony several times before he can be confident that he is getting an accurate answer from the alien. Hearings, particularly in asylum cases, are highly fact intensive and depend upon the presentation and consideration of numerous details and documents to determine issues of credibility and to reach factual conclusions. This can take no small amount of time depending on the nature of the alien's testimony.
The BIA faces similar substantial pressures. The BIA currently has eleven members and faces nearly 43,000 filings per year. For the BIA to keep current on its docket, even with streamlining so that the disposition is by a single judge, each judge must dispose of nearly 4,000 cases a year - or about 80 per week - a virtually impossible task. As a circuit judge, I have reviewed hundreds of these petitions for review, and I can say that the factual records on appeal are frequently substantial, with hundreds of pages of testimony and related material. In addition, the BIA is supposed to rule on questions of law raised by the petitions. One of my court's problems with the BIA is that it rarely seems to adjudicate the outstanding legal issues in a case, no doubt because the judges lack the time to do so. If the BIA were not so pressed, it could properly play its role of providing uniform national rules of law in these cases.

I therefore strongly support a substantial increase in the numbers of Immigration Judges and BIA members. The proposal to add four members to the eleven on the BIA to create a 15-member court is a step in the right direction, but it is too little. I think at least thirty BIA judges are needed. And this is a step that could be taken right away at modest cost. Also, I believe that it is necessary that the number of Immigration Judges be doubled. Adding resources at the Immigration Judge and BIA levels will also reduce the percentage of cases that are remanded by the courts of appeals for further work by the Immigration Judge or the BIA. Currently 20% of our cases are remanded; in the Seventh Circuit the percentage is 40%. As these administrative judges have more time to spend on each case, the quality of adjudication will improve, and the need for remands will drop.

Related to the matter of adequate resources for Immigration Judges and BIA functions within EOIR is the question whether EOIR itself should be transferred from the Department of Justice into a stand-alone agency to foster judicial independence. I see little to commend this proposal. Administrative adjudications are by definition administrative and not possessed of the independent character of Article III adjudication. Separating EOIR from the Department of Justice would not resolve its resource problems; it could be expected to increase them. And it would deprive the agency of the much-needed supervision it receives from the Attorney General who is working hard to improve the agency's standards of adjudication. The courts are currently cooperating with the Justice Department to improve agency adjudication by offering educational resources, and the Department has seen to it that EOIR is cooperating with the courts in promptly transmitting records electronically to the courts of appeals. This important relationship would, I believe, be disrupted by a transfer of EOIR from the Department of Justice.

Transfer of Judicial Review to the Federal Circuit
Section 701 of the Chairman's original bill would transfer petitions for review out of the regional courts of appeals and send them to the United States Court of Appeals for the Federal Circuit, located in Washington, D.C. With all due respect, I believe that consolidating court of appeals review in the Federal Circuit is undesirable for the following reasons:
? It will do nothing to improve the performance and productivity of Immigration Judges and the BIA, which is the core problem in immigration adjudications and which can only be addressed by additional resources.
? It will swamp the Federal Circuit with petitioners, reducing the time for careful consideration, delaying dispositions, and exacerbating the backlog.
? It will run counter to the firmly accepted idea of relying on generalist judges to adjudicate disputes and the policy of the Judicial Conference disfavoring specialized courts.
? It runs the risk of politicizing the review of a group of cases by an Article III court, affecting the reputations not only of the Federal Circuit but of the judiciary as a whole.
? The benefits of having appeals heard in the community where the parties are located will be lost.
Consolidating Article III review in the Federal Circuit will do nothing to improve the performance of the BIA or Immigration Judges, which is the core problem in immigration adjudications and the principal reason for the backlog. Rather, it seems to me that consolidating all review in the Federal Circuit would slow the process of review even further.
At present, every circuit judge in the country, with the exception of those on the Federal Circuit, is available to review immigration petitions. Considering only the judges of the Second and Ninth Circuits, which are responsible for 74% of all petitions for review, there are seventy federal judges available to dispose of these cases. Even with the proposed expansion of the membership of the Federal Circuit under section 701, fifteen judges would be responsible for the more than 12,000 petitions for review.

The Federal Circuit's total docket is presently only about 1,500 cases per year. Even with the gatekeeping provisions in the Chairman's bill, the judges of the Federal Circuit would be overwhelmed, especially when not enough is being done to improve the quality of the decisions of the Immigration Judges or the BIA. While I cannot speak for others, I have little doubt that members of the specialized bar of the Federal Circuit - for instance, the patent bar - are intensely concerned that their highly specific, specialized cases will take a back seat to immigration review as the fifteen judges of the Federal Circuit cope with the massive addition of 12,000 immigration cases each year to their 1,500 case docket.

The Judicial Conference on numerous occasions has opposed the specialization of the Article III judiciary in favor of using generalist judges to decide cases - a system that has served our nation well throughout its history. Just last Friday, the Executive Committee of the Conference confirmed that position and opposed consolidating immigration appeals in the Federal Circuit. The use of a specialized court for immigration matters raises the possibility that members of that court would be selected on the basis of their tendency to rule in certain ways in immigration cases. At present, with the exception of the Federal Circuit, the members of the federal judiciary are generalists. We rule on the cases that happen to reach us. For the most part, judges are not appointed to decide a specific class of cases. This fact ensures that the judiciary's members are selected on the basis of overall merit and learning in the law and not based on any specific prediction concerning the outcome they would reach in a particular kind of case. However, under the proposal, the overwhelming majority - 90% - of the docket of the Federal Circuit would be immigration appeals. Even if done with the best of motives, the appointment and confirmation of judges to the Federal Circuit would tend to focus on outcomes: how the nominee would be inclined to rule in immigration matters. Should this occur, the prestige of the Federal Circuit would be impaired, as would the perception of impartiality that is so critical to the public's favorable view of the judiciary as a whole.
There is also a benefit to having the circuit courts deciding these petitions in the court closest to the petitioner and the community. There is a level of trust in the outcome, even if it is unfavorable to the alien petitioner, that such proximity engenders. And it is also more convenient to litigants.

The Single-Judge Gatekeeping Provisions

I am also troubled by the provisions of the proposed bill that provide that one judge decide whether the petitioner is entitled to court of appeals review. Currently, even under the more efficient NAC procedure of the Second Circuit, each alien's petition receives the attention of three judges. But with the hastily assembled administrative records that we are seeing, single-judge gatekeeping review would diminish the quality of review these cases receive, and it would not appreciably speed the process because these cases are so fact intensive that the same staff attorney support would be required as today. Moreover, the provision requires that the gatekeeping judge act only upon the petitioner's brief. Even when the appeal lacks merit, as most do, that fact often does not become obvious until the government files its brief. In sum, my opinion is that any seeming efficiencies based on single-judge review are not worth the sacrifice in judicial scrutiny by three judges.
Conclusion

I thank the Chairman and the members of the Committee again for the opportunity to discuss this important issue. I thank Chairman Specter especially for proposing his bill and bringing to light the issues faced by the federal courts in dealing with the immigration docket. In my view, the single most effective way to improve the functioning of judicial review of immigration proceedings is to give the Department of Justice adequate resources to handle its caseload. It is not reasonable to expect the BIA and Immigration Judges to perform their jobs effectively in their present situation. Until a sufficient number of Immigration Judges and BIA members are in place, the backlog is likely to continue and to grow, no matter which court is responsible for deciding petitions for review. The present structure of immigration review is not at fault, and the solution does not lie in changing it. Rather, those responsible for its implementation need to be given sufficient resources to do their job.

I thank the Chairman and the Committee again for their time.