JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 23, 2006

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman:

As the Senate Judiciary Committee continues its consideration of the "Comprehensive Immigration Reform Act of 2006," I write to share the opposition of the Judicial Conference to section 701 of that proposed bill, which would consolidate all immigration appeals in the United States Court of Appeals for the Federal Circuit. I note that a similar provision has also been included in S. 2454, the "Securing America's Borders Act," introduced by Majority Leader Frist on March 16, 2006. While the judiciary is still assessing these bills, I thought it important to make the Senate Judiciary Committee and members of the Senate aware of the views of the Conference with respect to this section of the pending legislation.

Section 701 of the bill would grant the United States Court of Appeals for the Federal Circuit exclusive jurisdiction of appeals to review a final administrative order or a district court decision arising from any action taken, or proceeding brought, to remove or exclude an alien from the United States. These cases would include appeals from decisions of the Board of Immigration Appeals (BIA) and from district court decisions such as orders granting or denying petitions for a writ of habeas corpus challenging the detention of an alien. This section would increase the number of authorized judgeships in the Federal Circuit from 12 to 15 and would also authorize appropriations for fiscal years 2007-2011 for the Federal Circuit to meet its new responsibilities, including the hiring of additional attorneys.

As reflected in Recommendation 20 of the *Long Range Plan for the Federal Courts* (*Long Range Plan*) (December 1995) and in various positions adopted by the Conference over the past several years, the Judicial Conference has generally been opposed to concentrating appellate review of actions of administrative agencies and decisions of Article I courts in a single Article III court, and has preferred dispersed review in the courts of appeals for the respective geographic circuits. Recommendation 20 provides in part that "[i]n general, the actions of administrative agencies should be reviewable directly in the regional courts of appeals." While Recommendation 20 expresses a preference for review of administrative decisions in the courts of appeals instead of the district courts, it also reinforces the preference of the Conference for dispersed review of administrative decisions rather than consolidated review. This preference reflects both a concern regarding the docket pressure that consolidation would place on a single court and a recognition that individual litigants may be unfairly burdened by a system of exclusive review in a distant tribunal.

Recommendation 16 of the *Long Range Plan* also relates to the courts of appeals and provides that "[t]he federal appellate function should be performed primarily in: (a) a generalist court of appeals established in each regional judicial circuit; and (b) a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas." Although the drafters of the *Long Range Plan* perceived benefits in centralized review in limited contexts, the commentary to Recommendation 16 (which explains and supplements the recommendations of the *Long Range Plan* but does not necessarily reflect the views of the Conference) makes it clear that the *Plan* did not generally endorse proposals to create new specialized or subject-matter courts in the judicial branch. Centralized review is seen as appropriate only in particular areas of the law in which national uniformity is crucial and the courts of appeals have taken significantly different approaches in applying the law, and where the subject matter is so technical that specialized expertise is necessary to render high-quality decisions. For example, the Judicial Conference was supportive of the establishment of the United States Court of Appeals for the Federal Circuit to hear appeals involving patent laws, copyright, and trademark, appeals from the Merit Systems Protection Board, cases decided by the Court of International Trade, and cases decided by the Court of Federal Claims.

While there has been a dramatic increase in the number of immigration appeals filed in the courts of appeals over the past several years, judges on the regional courts of appeals report that the problems with immigration appeals stem, not from differences among the circuits in the interpretation of the immigration statutes, but from the need to conduct a thorough review of the factual basis for the decision, a situation created when

an agency record fails to fully develop all of the issues for appellate review. Centralized review of cases in a single Article III court will not correct this problem.

No sufficient justification to support changing the status quo and shifting these cases from the regional courts to the Federal Circuit has been provided. The regional courts of appeals have developed expertise in resolving immigration cases, which may often involve substantial issues of constitutional law. These courts have worked diligently to establish court management procedures to assist them in effectively and efficiently handling these cases. These measures are enabling the courts to process significantly larger numbers of cases than in prior years.

Before consolidating immigration appeals in the Federal Circuit or in another Article III appellate court, it would also be necessary to conduct a careful analysis to determine that consolidation would not likely overwhelm the court's docket. Section 701 would significantly increase the caseload of the Federal Circuit. Although as noted earlier, the bill would authorize additional resources, such resources may be insufficient to address the significant increase in the court's docket. Inadequate resources could jeopardize the ability of that court to hear and decide those distinctive cases the court was originally created to decide. To put the situation in context, recent statistics reflect that more than 12,000 appeals from the BIA were filed in all circuit courts of appeals in the fiscal year ending September 30, 2005. In that same year, the United States Court of Appeals for the Federal Circuit received 1,555 appeals of *all types* within its existing jurisdiction.[1]

The Conference is continuing to look at other sections of the legislation that may have implications for the federal courts and the administration of justice. One section that is being closely examined is section 707 of the bill that would add a requirement of a certificate of reviewability by a single judge as a prerequisite to review of an immigration appeal by an appellate panel. (A similar provision is included as section 507 of S. 2454 and section 805 of H.R. 4437.) Although the Judicial Conference policy does not address this proposal, such a significant change calls for careful analysis to ensure that it would not interfere with the ability of the courts of appeals to manage their caseload and provide meaningful review of such cases, and would not impose an unwarranted burden on the judiciary or litigants.

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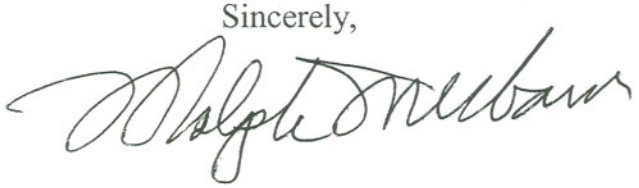
[1]The judiciary recognizes that the Comprehensive Immigration Reform Act of 2006 also includes changes to the procedures of the Board of Immigration Appeals, which may affect the quality and quantity of appeals filed in the courts of appeals from decisions of the Board of Immigration Appeals.

Thank you for your consideration of these views. The Judicial Conference is mindful that the Senate Judiciary Committee intends to complete action on this bill next week as the full Senate begins its debate on immigration legislation. Should the Conference take further action with respect to this legislation, we will provide those views to the members of the Senate Judiciary Committee expeditiously. We would be pleased to offer any assistance you deem appropriate as you consider this important issue. Please feel free to contact me at (202) 273-3000, or, if you prefer, you may have your staff contact Karen Kremer or Ralph Watkins, Counsel in the Office of Legislative Affairs, at 202-502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy,
Ranking Democrat, Committee on the Judiciary
Members of the Committee on the Judiciary