BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

March 1, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
United States Senate
Hart Building, 711
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
United States Senate
Russell Building, 433
Washington, D.C. 20510

Dear Mr. Chairman and Senator Leahy:

On behalf of the Brennan Center for Justice at New York University School of Law, a nonpartisan organization that promotes equality and human dignity, I write regarding the recently released Chairman's Mark of the "Comprehensive Immigration Reform Act of 2006." The Brennan Center recognizes the pressing need for comprehensive immigration reform but urges reconsideration of several provisions in the Chairman's Mark that, if adopted as law, would impede the fair adjudication of claims in our federal court system and raise core due process concerns.

In particular, the Brennan Center urges reconsideration of:

- Section 701, which would consolidate all immigration appeals in the Federal Circuit because doing so would decrease the reliability of immigration decisions and make it more difficult for immigrants with meritorious claims to access our court system;

- Section 707, which would establish a certificate of reviewability process for immigration appeals in federal court, because doing so will inevitably result in claims going unheard regardless of their merit;

- All measures, such as Sections 204, 704 and 705, that would strip our federal courts of their longstanding jurisdiction over immigration related matters because doing so will further limit the historical function of the courts to provide a safeguard against miscarriages of justice; and

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- All measures, such as Sections 202 and 204, that would permit the use of secret evidence in immigration-related proceedings because doing so would violate our core notions of fairness and due process.

Our more detailed comments on each of these measures follow below.

I. Consolidation of Immigration Appeals in the Federal Circuit

First, recent statements by a range of federal judges and Attorney General Alberto Gonzales have underscored the need for U.S. Immigration and Customs Enforcement ("ICE") to conduct a serious internal review of its policies and procedures. The Attorney General, for example, has ordered a comprehensive review of the immigration courts because of his belief that "there are some [judges] whose conduct can aptly be described as intemperate or even abusive and whose work must improve." (Jan. 9, 2006 Memorandum from the Attorney General to Immigration Judges.)

The strong criticisms by immigrants and their attorneys of the decisions issued by immigration judges and the Board of Immigration Appeals can no longer be discounted as complaints of the disgruntled. Unless and until ICE restores meaningful administrative review, merely consolidating appeals in the Federal Circuit will not address the substantial problems with immigration review and may actually serve only to mask the true extent of those problems.

Second, shunting all appeals of removal orders into what will functionally be a separate court system is objectionable for several reasons. Those who adjudicate immigration-related issues benefit not from ultra-specialization but rather an immersion in many different bodies of the law: removing immigration related claims to what will be a highly specialized court will do little, if anything, to serve the increased accuracy or efficiency of adjudicating such claims.

In any given immigration appeal, a broad variety of issues may arise, involving equal protection principles, constitutional due process and issues of limits on Congressional authority raised in Constitutional law; selective prosecution and the reading of criminal statutes central to criminal law; questions of agency powers and jurisdiction that arise in administrative law; and the scope of international treaties implicated by international law. The judges (and the decisions they make) benefit from exposure to all of these overlapping areas of the law. Moreover, it makes little sense from a systemic point of view to have one circuit decide the meaning of the term "aggravated felony" in the immigration context while all the other circuits decide the meaning of the term in the criminal sentencing context.

Immigration law is different from patent law and other areas of the law that lend themselves to treatment by highly specialized experts — although the Federal Circuit is an efficient and effective adjudicator of claims over intellectual property, there is ample reason to believe that the expertise those judges have developed is not transferable to immigration law.

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Third, the consolidation of all removal claims in the District of Columbia will, as a practical matter, make it impossible for many individuals and their families ever to get their day in court. Even if claims are eventually distributed to other circuit courts, any such court network will of necessity be more limited in number and geographical reach than the existing one of federal courts, and will therefore be that much more difficult for those with claims — and those who represent them — to access. A failure to confront the questions of how to get to an immigration court to have one's claim heard, or who will be admitted to practice before such a court, will result in a court that is dangerously disengaged from the wider community and claimants who cannot get a fair hearing because they literally cannot get to court.

Fourth, the consolidation of claims in the Federal Circuit in particular will raise particularly challenging logistical issues that require serious consideration. The Federal Circuit already hears thousands of cases each year and adding all removal appeals would amount to several thousand additional claims for review — not counting new claims appealing denials issued under the new legislation itself. The resulting court would be the busiest circuit court in the nation by far, with a crushing caseload little alleviated by the addition of just three new judges. The caseload problem would be compounded by the fact that the twelve judges now sitting on the Federal Circuit not only are unlikely to have immigration related expertise but have also chosen to sit and were selected to sit on that court because of their expertise in a completely unrelated area of the law.

There is widespread acknowledgment that the current system of reviewing immigration appeals in the federal court system is in need of improvement. The problems that would result from the enactment of Section 701 show us that there can be no quick and easy solutions. As appealing as it would be to include such a proposal in a comprehensive immigration reform package, we urge you to consider instead a careful and thorough study of the range of options.

II. Creation of a Certificate of Reviewability Process

We also urge you to reconsider Section 707, which would establish a screening process for appeals of removal orders in the newly reconfigured Federal Circuit.

First, Section 707's "certificate of reviewability" requirement creates an excessively discretionary standard for court review that is likely to block numerous meritorious cases from receiving the scrutiny they deserve. The bill requires that a certificate *may* not issue unless the petitioner establishes a prima facie case that the petition should be granted but provides no standards for when a certificate *must* issue. As a result, even the most compelling cases may be shut out from judicial review based on an exercise of discretion by a single judge. That discretion, moreover, is completely unfettered and unreviewable, as Section 707 provides no opportunity for petitioners to appeal the denial of a certificate.

Each judge on the Federal Circuit will have final authority to determine whether to grant certificates in literally thousands of claims over the course of a year, on top of the court's existing caseload and those cases that are granted a certificate. The combination of a crushing docket with unchecked discretion over whether each additional case warrants a

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certificate that would stretch already limited judicial resources even further should be avoided.

Second, the elimination of a government response to thousands of immigrants' petitions will deter settlement of meritorious cases and degrade the quality of justice provided. The immigration agency's current obligation to respond to all petitions before the federal courts often brings to light claims that inarticulate and/or *pro se* plaintiffs have not identified and prompts settlement offers without need for court intervention. Section 707 eliminates this incentive for settlement and increases the chances that meritorious claims will escape the court's notice because no one other than a single, overburdened, judge will be obligated to review the relevant documents.

Third, Section 707's provision that denies a petition 60 days after its filing — even if a judge has never laid eyes on it — will inevitably lead to miscarriages of justice. Given the heavy caseload that each Federal Circuit judge will bear, it is simply impractical to assume that each will be able to examine every petition within 60 days of its filing. The bill mandates automatic denial and removal once the 60 days have passed, without even so much as an exception for petitions that have merely been misplaced. It is fundamentally unfair, in every sense of the word, for a removal order to issue as a direct result of clerical error or judicial oversight and yet Section 707 creates a system in which such a situation will all but surely arise with no accompanying procedural protections whatsoever.

Finally, to the extent the Senate does wish to institute a certificate of reviewability process, we urge it to do so only after further study of the various options and under a longer timeframe than is currently contemplated. The current proposal, which would result in thousands of claims being reviewed under no ascertainable standard, with perhaps only a lucky few cherry-picked petitions surviving, runs counter to our core values and should at a minimum warrant closer scrutiny.

III. Elimination of Judicial Review in the Federal Courts

We urge the Senate to refrain from tinkering further with the judicial review currently exercised by the federal courts. Even if one disagrees with our premise that meaningful access to the courts is an essential part of our unique American justice system, it simply makes good common sense to wait until the revisions that took effect last May with the REAL ID Act play themselves out before making additional changes. The Chairman's Mark contains numerous sections that would further limit or eliminate federal court review. This letter will focus on just one of those provisions in the naturalization context, contained in Section 204, as an example of the types of harm that can arise when court jurisdiction is unnecessarily and unwisely limited.

First, Section 204(g) would effectively eliminate federal district court jurisdiction over claims brought by applicants for naturalization whose cases have lingered for months on end in the immigration agency without resolution. Under 8 U.S.C. § 1447(b), such applicants are currently entitled to seek an answer as to their naturalization status with a district court after not having heard from the agency within 120 days; and the district court

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may either determine the matter itself, bringing closure for the applicant, or remand the matter to the agency.

If Section 204(g) were signed into law, applicants who had not heard from the agency within 180 days, or more than 6 months, would only be able to appeal to a district court to remand the matter to the same immigration agency that failed to process their application in a timely manner in the first place. With no other body available to settle the matter, the agency will have little incentive to move expeditiously, opening the door to widespread delays and backlogs at great human cost to those seeking citizenship.

Second, Section 204(d) would eliminate federal court jurisdiction over a wide swath of previously reviewable claims, foreclosing review for those applicants most likely to be affected by the introduction of "secret evidence" made permissible in Section 204(e). Under 8 U.S.C. § 1421(c), applicants for naturalization may appeal a denial of their petition before a federal court, which is authorized to make findings of fact and conclusions of law and to conduct hearings on the claims before it.

If Section 204(d) were signed into law, applicants who were denied citizenship on the basis of good moral character, understanding and attachment to the principles of the Constitution, or being well disposed to the good order and happiness of the United States, would have no recourse whatsoever. Decisions made by the agency to deny citizenship on those grounds would be completely unappealable, regardless of the basis — or lack thereof — for the findings.

The harms of denying court access are compounded by the vagueness of the grounds for denial of citizenship. "Good moral character," understanding and attachment "to the principles of the Constitution of the United States," and being "well disposed to the good order and happiness of the United States" are all amorphous concepts. Making appeals of denials on those grounds unreviewable by any court of law opens the door to abuses of discretion and unlawful denials masked by a finding of bad moral character, perhaps based upon secret evidence the applicant has never even seen.

IV. Use of "Secret Evidence"

Finally, we urge you to reconsider the increasing use of "secret evidence" in immigration decisions. The Chairman's Mark contains several provisions that would allow for the use of "any relevant information or evidence, including classified, sensitive, or national security information" — *i.e.*, secret evidence. Section 204(a), for example, automatically deems a person "described in" the security-related grounds for inadmissibility under section 212(a)(3) or deportability under section 237(a)(4) not of good moral character, and expressly allows that determination to be based on secret evidence. Similarly, Section 204(e) prohibits a person from naturalizing if the agency determines based on secret evidence that he or she was *ever* a person "described in" Sections 212(a) and 237(a)(4). Additionally, Section 202(a)(8)(E) authorizes the continued detention of individuals subject to final orders of removal beyond the statutory maximum based upon secret evidence. All of these

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provisions will have severe repercussions for the fundamental rights of the affected individuals and for the integrity of the system as a whole.

Allowing individuals to be denied U.S. citizenship, removed from the United States, or detained based on allegations they have never seen — let alone had an opportunity to dispute — is contrary to the most basic values of our legal system. It runs counter to both due process and the principle that government officials must be held accountable for their actions.

It is also suspect from a purely practical standpoint as, all too often, evidence the government claims is too "sensitive" to disclose turns out to be false. The New York Times, for example, described a case in which a thirteen year United States resident who had overstayed his student visa was detained for more than three years because the INS claimed he was "connected to terrorism" based on secret evidence. When a judge finally ordered the government to present this evidence, it turned out there was no connection to terrorism at all. (Anthony Lewis, "The Uses of Secrecy," N.Y. Times, Nov. 4, 2000, at A21.) It is not difficult to imagine many similar cases whose facts have never come to light because of the very secrecy shrouding the evidence at issue.

The problems created by the use of secret evidence are compounded by the bill's other provisions restricting judicial review and meaningful access to the courts. Eliminating the check that meaningful federal court review would provide encourages the use of unreliable information and reduces government accountability. The potent combination of secret evidence with court stripping will also have very real consequences for those who seek citizenship in this country; if Section 204 were signed into law, individuals could be denied American citizenship on the basis of secret evidence and then have no recourse for appeal whatsoever. Such a possibility is inconsistent with the principles of fairness underpinning our justice system.

V. Conclusion

We understand and support the need for comprehensive immigration reform and we recognize the urgency of that need. We urge the Senate, however, not to act hastily when it comes to overhauling those parts of the system charged with guaranteeing access to justice for those who seek it. The best solution may not be one that can be arrived at quickly, but it will be one that remains true to our values as a nation — and will therefore be worth the wait.

Respectfully,

Emily Chiang
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cc: Members of the Senate Judiciary Committee

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