



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 31, 2006

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

Dear Mr. Chairman:

Today, the Executive Committee of the Judicial Conference, acting on the Conference's behalf, voted to oppose the certificate of reviewability provision that was included as section 707 of the "Comprehensive Immigration Reform Act of 2006," that was considered by the Senate Judiciary Committee and is also included as section 507 of S. 2454, the "Securing America's Borders Act." That provision would require that petitions for review of decisions of the Board of Immigration Appeals (BIA) be assigned to a single circuit judge and, unless that judge issued a certificate of reviewability permitting the case to be heard by a three-judge panel, the petition for review would be denied. The judge would not be authorized to issue a certificate unless the petitioner established a prima facie case that the petition for review should be granted. The Executive Committee also reaffirmed the previously stated Judicial Conference opposition to a provision in these bills that would consolidate all immigration appeals in the United States Court of Appeals for the Federal Circuit. I respectfully request that a copy of this letter, as well as the March 23, 2006 letter from the Conference, be made part of the record of the hearing scheduled for Monday, April 3, 2006.

The certificate of reviewability process raises several issues of concern. First, it would create an additional layer of review by a single circuit judge. That judge would in many cases need to conduct a full review of the case to determine whether the petitioner's burden has been met. As referenced in recent opinions from some appellate courts, the record from the immigration judge often does not provide a full description of the issues or the litigant's claims. Compounding the problem is the high volume of decisions by a

single BIA member and the ability of the BIA to affirm a decision of the immigration judge without an opinion. The result is often an administrative record that may be inadequate for judicial review, complicating the task of the circuit judge. This problem would be further compounded by the provision that the United States “shall not be afforded an opportunity” to file a reply brief until a certificate of reviewability is issued. The bills would *permit* the court to request the government to file a reply brief before issuing a certificate; however, unless the exception were to become the rule, the provision could hinder the development of important legal issues that might have been omitted from or been inadequately addressed in the petitioner’s brief. The workload would be shifted from the Department of Justice to the circuit judges and court staff to conduct the research that would ordinarily be undertaken by government lawyers.

Sections 707 and 507 would also mandate how the courts of appeals are to manage their caseloads by requiring a judge to complete all action on a certificate of reviewability, including rendering judgment, not later than 60 days after the date on which the judge is assigned the petition (unless an extension is granted). As noted in our March 23rd letter, the courts of appeals have worked diligently to establish court management procedures to assist them in effectively and efficiently handling immigration cases. The provision removes flexibility and could negatively impact a judge’s management of his or her docket. It is longstanding policy of the Conference to oppose the statutory imposition of litigation priority, expediting requirements, or time limitation rules on specified classes of civil cases brought in federal court beyond those civil actions currently identified in 28 U.S.C. § 1657 as warranting expedited review.

Finally, beyond the practical concerns with the provision, it could raise issues of fairness by permitting a single judge to dismiss the appeal without further review by the courts of appeals. The appellate process is designed so that litigants ordinarily are given an opportunity for three judges to review their case after being fully briefed by both sides, with the possibility of oral argument. Streamlining both the administrative and appellate review of immigration cases raises concerns about whether the process would provide a meaningful review of these cases.

The legislation also includes a proposed increase in resources to the executive branch to litigate and review immigration cases and proposes changes in the current composition and procedures of the BIA to enhance the review provided at the administrative level. As reflected in Recommendation 9 of the *Long Range Plan for the Federal Courts* (December 1995), the judiciary has long supported efforts to strengthen the hearing and review process within administrative agencies. These proposed

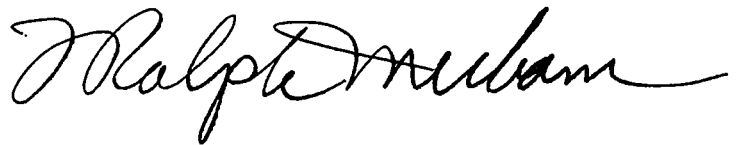
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administrative changes and increased resources may help address some of the problems identified by appellate judges with appeals from the BIA.

The proposed increases in resources to the executive branch and the substantive changes proposed in the pending legislation may also increase the caseload of the federal courts. Accordingly, the Executive Committee on behalf of the Judicial Conference urges Congress to include sufficient resources for the judicial branch to enable it to carry out its responsibilities in handling any increased caseload.

Thank you for your consideration of these views. We would be pleased to offer any assistance you deem appropriate. Please do not hesitate to contact me at (202) 273-3000, or if you prefer, you may have your staff contact Karen Kremer, Counsel in the Office of Legislative Affairs, at (202) 502-1700.

Sincerely,

A handwritten signature in black ink, appearing to read "Leonidas Ralph Mecham". The signature is fluid and cursive, with a long horizontal stroke at the end.

Leonidas Ralph Mecham
Secretary

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