Testimony of

The Honorable John Roll

April 3, 2006

United States Senate
Committee on the Judiciary
Hearing on:
"Immigration Litigation Reduction"
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Senator Dirksen Office Building
Dirksen 226
Washington, D.C. 20510

Written Testimony of
John M. Roll
United States District Judge
District of Arizona
Tucson, Arizona 85701-5053

INTRODUCTION

I enthusiastically support the concept of all appeals from the Board of Immigration Appeals ("BIA") being consolidated in the Federal Circuit Court of Appeals. Consolidation of BIA appeals in the Federal Circuit would result in national standards being applied in these cases. It would also benefit the Ninth Circuit, which presently has over 6,500 BIA appeals on its docket.

HAVING BIA CASES HEARD BY A SINGLE CIRCUIT COURT IS SOUND POLICY

Currently, Board of Immigration Appeals (BIA) cases are heard by a number of federal circuit courts, with the largest proportion heard by the Ninth Circuit.

It has been proposed that BIA appeals be consolidated for review by the Federal Circuit Court of Appeals.

If these appeals were to be referred to the Federal Circuit for consideration, a more uniform national case law would likely develop in this area.

Consolidating all immigration appeals before the United States Court of Appeals for the Federal Circuit will produce a level of consistency and uniformity currently absent in the way federal appellate courts approach immigration appeals. Given the enormous volume of
immigration appeals currently pending before the circuit courts, we cannot continue to allow cases to be resolved under different standards of review, or different interpretations of the substantive law.

For example, depending on your geographic location, there are varying levels of deference given to an Immigration Judge's finding of fact and adverse credibility
determination. There are currently over 12,000 immigration appeals pending before the federal circuit courts; an immigration judge's finding of fact in one geographic location should not be reviewed with a different standard than an immigration judge's finding of fact in another geographic location. This problem was highlighted in the Ninth Circuit case, Kaur v. Ashcroft, 379 F.3d 876 (9th Cir. 2004) (Tallman, J., dissenting). Another more
substantive example would be to look at the law regarding the retroactive application of § 241(a)(5) of the Immigration

and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(5). Section 241(a)(5) is the reinstatement provision of the INA; it provides that a prior order of removal may be reinstated against an alien who has illegally re-entered the United States. It also bars such alien from applying for any form of relief under Chapter 12 of Title 8. Seven circuits, including the First, Third, Fourth, Fifth, Eighth, Tenth, and Eleventh, have all held that § 241(a)(5) applies retroactively, thereby allowing the government to reinstate a prior deportation and exclusion order of aliens who happened to unlawfully reenter the United
States before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In comparison, both the Ninth and the Sixth Circuits have held that § 241(a)(5) does not apply retroactively.

Finally, there is another important issue that has raised differing views among the circuits. This issue is whether an alien-parent, who does not personally have a well-founded fear of persecution, may derivatively seek asylum based on the possible persecution of the alien's United States-citizen child. The Seventh Circuit, in Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003), denied such a claim. Nevertheless, under Ninth Circuit case law, there is
support for such an argument. See Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005); Tchoukhrova v. Gonzales, 404 F.3d 1181 (9th Cir. 2005).

Adjudicating immigration appeals before one court will strengthen jurisprudence in this area of the law and produce consistent standards applied uniformly nationwide.

Furthermore, the Federal Circuit would unquestionably soon have an expertise in addressing these appeals, unmatched by any other circuit.

Depending upon whether all pending BIA appeals are transferred to the Federal Circuit or only future BIA appeals, the impact on the two circuits with the largest number of BIA appeals would be quite apparent. For example, the Ninth Circuit has over 6,500 BIA appeals currently pending before it. The Second Circuit Court of Appeals has another 2,000
BIA appeals on its docket.

Although some opposition to this proposal has been based on the argument that the Federal Circuit, in Washington, D.C., is inaccessible to litigants and attorneys, the Federal Circuit can sit at any location in the United States where any of the various circuit courts are authorized to sit. 28 U.S.C.§ 48. Federal Circuit panels could sit regularly in the busiest cities.

The Ninth Circuit Court of Appeals copes with the enormous number of BIA appeals through the use of staff attorneys. Certainly the Federal Circuit could utilize similar
resources.

Obviously, additional judgeships would be needed for the Federal Circuit. No referral of BIA cases should commence until such judgeships are provided for.

In addition to such consolidation serving sound public policy, another important benefit would be derived therefrom. The Ninth Circuit Court of Appeals, which is currently suffering from a staggering caseload, would benefit by the removal of BIA appeals from its
docket.

THE CONSOLIDATION OF BIA APPEALS IN THE FEDERAL CIRCUIT WOULD GIVE THE NINTH CIRCUIT MUCH RELIEF

It is undeniable that the Ninth Circuit's population and caseload are vastly disproportionate to those of all other circuits.

Caseload.

The Ninth Circuit currently has pending nearly 17,000 appeals. Although the Ninth Circuit is but 1 of 12 geographical federal circuit courts, it has 28% of all pending federal appeals. (See Attachment A).

Consolidation of BIA appeals in the Federal Circuit, including pending cases, would reduce the Ninth Circuit's caseload by over 6,500 cases.

At the end of September 2005, there were 6,583 filed appeals from the Board of Immigration Appeals in the Ninth Circuit out of a total of over 16,000 filed appeals. (See
Attachment B). If the Ninth Circuit were to schedule oral argument for these appeals as they are filed, it would overwhelm the circuit and cause needless delay in other important pending appeals. Direct criminal and habeas corpus claims in which the petitioner is imprisoned are
time sensitive matters that also require efficient resolution. Appeals of preliminary injunctions also must be handled in an expedited manner. The Ninth Circuit is running out of resources to effectively handle over half the immigration appeals of this nation while still
providing prompt and just adjudication of the cases which make up the rest of its docket. Transferring BIA appeals to the Federal Circuit would not only allow these immigration appeals to be more effectively and efficiently resolved, but it would free the Ninth Circuit to concentrate on appeals in other matters where delay also jeopardizes the rights and freedom of parties to those appeals.

Decisional Time.

According to the latest statistics from the Administrative Office of the U.S. Courts, unquestionably as a result of the enormous caseload, the Ninth Circuit is now dead last in decisional time, when measured from the time of filing of notice of appeal to disposition. This is, of course, the only time period of importance to litigants. The Ninth Circuit is 2 months slower than the next slowest circuit in decisional time using this measurement. (See Attachment C).

Population.

The Ninth Circuit presently contains over 58 million people. This represents onefifth of the population of the United States. The Ninth Circuit has 27 million more people
than the next largest circuit. (See Attachment D). This vast population unquestionably contributes to the Ninth Circuit's disproportionate caseload.

Judgeships.

Because of the confluence of an enormous circuit population and circuit caseload, the current Ninth Circuit has 28 authorized active circuit judgeships and is in need of at least 7 more. The next largest circuit has 17 active circuit judgeships; the average circuit has less than 13 active circuit judgeships.

With 7 more authorized active circuit judgeships, the Ninth Circuit would have twice as many judgeships as the next largest circuit and nearly three times as many judgeships as most other circuits.

Limited en banc.

Because the Ninth Circuit has so many judges, it, alone of all federal circuits, must sit en banc with fewer than all active circuit judges. Until this year, 11 active circuit judges participated in "limited" or "mini-" en banc hearings. When the Commission on Structural Alternatives for the Federal Courts of Appeals ("White Report") was issued on December 18, 1998, it commented that few en banc cases were closely decided. (White Report, at 35). However, that is certainly no longer the case. Since the White Report was issued, more than 1/3 of all Ninth Circuit en banc decisions have been by 6-5 or 7-4 margins.

The recent change in Ninth Circuit rule, resulting in 15 active circuit judges now sitting "en banc," is still 13 less than the number of authorized active circuit judges for the Ninth Circuit. Former U.S. Supreme Court Justice Sandra Day

O'Connor wrote to the White Commission in 1998 that an en banc hearing with less than all active circuit judges participating could not serve the purpose of a full en banc hearing. (See Attachment E).

Reversals by Supreme Court.

In 1998, U.S. Supreme Court Justice Antonin Scalia wrote to the White Commission, pointing out that the Ninth Circuit is the most reversed circuit and the most unanimously reversed circuit. (See Attachment F).

Since the White Report was issued, the Ninth Circuit has continued to be the most reversed circuit. Perhaps even more strikingly, since the White Report was issued, the Ninth Circuit has been unanimously reversed nearly 60 times. (See Attachment G). Most of these cases were never heard en banc by the Ninth Circuit.

Post-White Report increase in population and caseload.

While the Ninth Circuit now has nearly 17,000 pending appeals and decides the law for a population of 58 million people, when the White Report was issued in 1998, the Ninth
Circuit's caseload was about 8,600 appeals and the population in the Ninth Circuit was 51,453,880. (White Report, at 27, 32).

CONCLUSION

At the present time, public policy commends a consolidation of BIA appeals in the Federal Circuit. Thank you for the opportunity to present my comments to you regarding these very important measures.

For assistance with the below tables please contact the U.S. Senate Judiciary Committee and/or see:
http://library.lb9.circ9.dcn/sct/sctframes.htm

Attachment A
Pending Cases by Circuit* - December 2005

Attachment B

Attachment C
Dispositional Time in Months - Circuit Courts, Dec. 2005*

TABLE B4. U.S. COURTS OF APPEALS
MEDIAN TIME INTERVALS IN MONTHS FOR CASES TERMINATED AFTER HEARING OR SUBMISSION, BY CIRCUIT DURING THE TWELVE MONTH PERIOD ENDED DEC. 31, 2005

Attachment D
Circuit Populations (in millons)*
http://library.lb9.circ9.dcn/sct/sctframes.htm

LIST OF NINTH CIRCUIT CASES UNANIMOUSLY REVERSED BY THE SUPREME COURT, 1998-1999 TERM THROUGH 2005-2006 TERM
Term: 2005-2006 (9)
*U. S. v. Grubbs, 377 F.3d 1072 (9th Cir. 2004), rev'd, 2006 WL 693453 (2006) (Justice Alito did not participate).
Dagher v. Saudi Refining, Inc., 369 F.3d 1108 (9th Cir. 2004), rev'd, Texaco Inc. v. Dagher, 126 S.Ct. 1276 (2006) (Justice Alito did not participate).
McDonald v. Domino's Pizza, Inc., 107 Fed. Appx. 18 (9th Cir. 2004), rev'd, 126 S.Ct. 1246 (2006) (Justice Alito did not participate).

Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran, 385 F.3d 1206 (9th Cir. 2004), vacated per curiam by 126 S.Ct. 1193 (2006).
*Collins v. Rice, 365 F.3d 667 (9th Cir. 2004), rev'd, 126 S.Ct. 969 (2006).
*Chavis v. LeMarque, 382 F.3d 921 (9th Cir. 2004), rev'd, Evans v. Chavis, 126 S.Ct. 846 (2006).
Olson v. U.S., 362 F.3d 1236 (9th Cir. 2004), vacated by 126 S.Ct. 510 (2005).
Espitia v. Ortiz, 113 Fed. Appx. 802, (9th Cir. 2004) rev'd per curiam, 126 S.Ct. 407 (2005).
Smith v. Stewart, 241 F.3d 1191 (9th Cir. 2001), vacated per curiam by Schriro v. Smith, 126 S.Ct. 7 (2005).

Term: 2004-2005 (10)
Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004), vacated by 125 S.Ct. 2764 (2005).
*Mena v. City of Simi Valley, 332 F.3d 1255 (9th Cir. 2003), vacated by 125 S.Ct. 1465 (2005).
*Chevron USA v. Bronster, 363 F.3d 846 (9th Cir. 2004), rev'd, 125 S.Ct. 2074 (2005).
Broudo v. Dura Pharmaceuticals, Inc., 339 F.3d 933 (9th Cir. 2003), rev'd, 125 S.Ct. 1627 (2005).
*Abrams v. City of Rancho Palos Verdes, Cal., 354 F.3d 1094 (9th Cir. 2004), rev'd, 125 S.Ct. 1453 (2005).
*Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003), rev'd, 125 S.Ct. 1230 (2005).
Banaitis v. Commissioner, 340 F.3d 1074 (9th Cir. 2003), rev=d sub nom. Commissioner v. Banks, 543 U.S. 426 (2005).
Alford v. Haner, 333 F.3d 972 (9th Cir. 2003), rev=d sub nom. Devenpeck v. Alford, 125 S. Ct. 588 (2004) (Chief Justice Rehnquist took no part in the decision).
*KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 328 F.3d 1061 (9th Cir. 2003), vacated by 125 S. Ct. 542 (2004).
Roe v. City of San Diego, 356 F.3d 1108 (9th Cir.), rev=d per curiam, 125 S. Ct. 521 (2004).
Term: 2003-2004 (10)
*Newdow v. U. S. Congress, 292 F.3d 597 (9th Cir. 2002), amended by 321 F.3d 772 (2003), rev=d, 124 S. Ct. 2301 (2004) (Justice Scalia took no part in the decision).
*United States v. Dominguez Benitez, 310 F.3d 1221 (9th Cir. 2002), rev=d, 124 S. Ct. 2333 (2004).
Public Citizen v. Dep=t of Transp., 316 F.3d 1002 (9th Cir. 2003), rev=d, 541 U.S. 752 (2004).
McNeil v. Middleton, 344 F.3d 988 (9th Cir. 2003), rev=d per curiam, 541 U.S. 433 (2004).
*United States v. Flores-Montano, 282 F.3d 699 (9th Cir. 2003), rev=d, 541 U.S. 149 (2004).
United States v. Galletti, 314 F.3d 336 (9th Cir. 2002), rev=d, 541 U.S. 114 (2004).
United States Postal Serv. v. Flamingo Indus., 302 F.3d 985 (9th Cir. 2002), rev=d, 540 U.S. 736 (2004).
United States v. Banks, 282 F.3d 699 (9th Cir. 2002), rev=d, 540 U.S. 31 (2003).
Yarborough v. Gentry, 320 F.3d 891 (9th Cir. 2003), rev=d per curiam, 540 U.S. 1 (2003).
Raytheon Co. v. Hernandez, 292 F.3d 1030 (9th Cir. 2002), vacated by 540 U.S. 44 (2003) (Justice Souter and Justice Breyer took no part in the decision).
Term: 2002-2003 (7)
Dastar Corp. v. Twentieth Century Fox Film Corp., 34 Fed. Appx. 312 (9th Cir. 2002), rev=d, 539 U.S. 23 (2003) (Justice Breyer took no part in the decision).

Black & Decker Disability Plan v. Nord, 296 F.3d 823 (9th Cir. 2001), rev=d, 538 U.S. 822 (2003).
*Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of Bishop Colony, 291 F.3d 549 (9th Cir. 2002), vacated by 538 U.S. 701 (2003).
City of Los Angeles v. David, 307 F.3d 1143 (9th Cir. 2002), rev=d per curiam, 538 U.S. 715 (2003).
Holley v. Crank, 258 F.3d 1127 (9th Cir. 2001), vacated sub nom. Meyer v. Holley, 537 U.S. 280 (2003).
Visciotti v. Woodford, 288 F.3d 1097 (9th Cir.), rev=d per curiam, 537 U.S. 19 (2002).
Packer v. Hill, 291 F.3d 569 (9th Cir.), rev=d per curiam, Early v. Packer, 537 U.S. 3 (2002).
Term: 2001-2002 (6)
*United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001), rev=d, 536 U.S. 622 (2002).
Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000), rev=d, 536 U.S. 73 (2002).
Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001), rev=d sub nom. Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002) (Justice Breyer took no part in the decision).
*United States v. Arvizu, 232 F.3d 1241 (9th Cir. 2000), rev=d, 534 U.S. 266 (2002).
*United States v. Knights, 219 F.3d 1138 (9th Cir. 2000), rev=d, 534 U.S. 112 (2001).
*Andrews v. TRW, Inc., 225 F.3d 1063 (9th Cir. 2000), rev=d, 534 U.S. 19 (2001).
Term: 2000-2001 (6)
*Nevada v. Hicks, 196 F.3d 1020 (9th Cir. 2000), rev'd, 533 U.S. 353 (2001).
*United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109 (9th Cir. 1999), rev'd, 532 U.S. 483 (2001) (Justice Breyer took no part in the decision).
*Shaw v. Murphy, 195 F.3d 1121 (9th Cir. 1999), rev'd, 532 U.S. 223 (2001).
Bradshaw v. G & G Fire Sprinklers, 204 F.3d 941 (9th Cir. 1998), rev'd sub nom. Lujan v. G & G Fire Sprinklers, 532 U.S. 189 (2001).
Clark County Sch. Dist. v. Breeden, 232 F.3d 893 (9th Cir. 2000), rev'd per curiam, 532 U.S. 268 (2001).
Central Green Co. v. United States, 177 F.3d 384 (9th Cir. 1999), rev'd, 531 U.S. 425 (2001).
Term: 1999-2000 (3)
Ada v. Government of Guam, 179 F.3d 672 (9th Cir. 1999), rev'd, 528 U.S. 250 (2000).
International Ass's of Independent Tank Owners v. Locke, 148 F.3d 1053 (9th Cir. 1998), rev'd, 529 U.S. 89 (2000).
*U.S. v. Martinez-Salazar, 146 F.3d 653 (9th Cir. 1998), rev'd, 528 U.S. 304 (2000).

Term: 1998-1999 (8)
*Kirkingburg v. Albertson's, Inc., 143 F.3d 1228 (9th Cir. 1998), rev'd, 527 U.S. 555 (1999).
El Paso Natural Gas Co. v. Neztsosie, 136 F.3d 610 (9th Cir. 1998), rev'd, 526 U.S. 473 (1999).
Aquirre-Aquirre v. I.N.S., 121 F.3d 521(9th Cir. 1997), rev'd, 526 U.S. 415 (1999).
Ward v. Management Analysis Co. Employee, 135 F.3d 1276 (9th Cir. 1998), rev'd, 526 U.S. 358 (1999).
*Gabbert v. Conn, 156 F.3d 893 (9th Cir. 1998), rev'd, 526 U.S. 286 (1999).
Jacobson v. Hughes Aircraft Co., 105 F.3d 1288 (9th Cir.), amended by 128 F.3d 1305 (1997), rev'd, 525 U.S. 432 (1999).
Blue Fox Inc. v. Small Business Admin., 121 F.3d, 1357 (9th Cir. 1997), rev'd, 525

U.S. 255 (1999).
*Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997), rev'd, 525 U.S. 234 (1999).
* Decision includes one or more concurrences but no dissents.