Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Ranking Member, Judiciary Committee

Hearing on Immigration Reform

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The Chairman's mark on comprehensive immigration reform contained provisions that would radically restructure our system of immigration appeals. Most significant among these was a proposal in section 701 to consolidate all Federal immigration appeals in the Court of Appeals for the Federal Circuit, a highly specialized court that hears appeals on cases involving patents, personnel, and veterans' benefits. Another provision, section 707, would create a one-judge review certification process. This provision could potentially deprive an alien of a review of his case on the merits by the traditional three-judge panel we use in our Federal appellate courts.

The Title VII provisions of the Chairman's mark that the Committee is considering today have generated a great deal of controversy. Several Federal judges, including the Chief Judges on the circuits most affected by immigration appeals, the Ninth and Second Circuits, wrote in opposition these sections. Judge Posner of the Seventh Circuit expressed serious concerns. Even the Chief Judge of the Federal Circuit, while not taking a position on the consolidation proposal, described the sweeping overhaul of his court that would be required to take on the immigration appeals cases, including vast increases in staff, resources, and space.

Last week, as the Committee was finishing its markup of the immigration bill, the Chairman said that he would set aside Title VII in order to study its proposals more carefully. The bill was reported to the full Senate without this title, and the Chairman scheduled today's hearing to examine the issues. I commend the Chairman for adopting this more sensible approach.

There is a significant backlog of pending immigration appeals, with the largest number of cases waiting review in the Ninth and Second Circuits. I agree that this problem must be addressed. It is clear that the backlog has the potential to impair the quality of justice that appellants deserve, and that the United States is obligated to afford. This deficiency has been noted in published judicial decisions and every judge that wrote to the Committee on Title VII discussed this pressing concern.

Before we consider a radical restructuring of the appeals system, however, we must investigate how this problem arose. The Department of Justice claims that the rise in appeals can be traced directly to stepped up enforcement efforts. A more realistic explanation in my view is that these appeals can be traced to administrative policies put into place by former Attorney General John Ashcroft and the Bush-Cheney Administration.

In 2002, in a purported attempt to "streamline" procedures, Attorney General Ashcroft significantly modified the structure and review processes of the Board of Immigration Appeals (BIA). First and foremost, Attorney General Ashcroft cut the number of judges on the Board from 21 to 11. He disposed of more cases at the BIA with fewer

judges by increasing the number of cases referred for single-member summary review, eliminating de novo review of the immigration judge's factual findings, and broadening the grounds by which a case could be dismissed.

Attorney General Ashcroft's recipe was to use fewer judges to afford petitioners even less meaningful review. So, while the backlog was reduced at the BIA, the changes had serious consequences throughout the system, resulting in an increased burden on the Federal judiciary and potential harm to immigrant petitioners. The BIA backlog reduction was illusory in that the costs were shifted to the Federal circuit courts of appeals. Between 2001 and 2003 immigration appeals rose from 3 percent to 15 percent of the total caseload of the various circuit courts of appeals.

Before any serious consideration is given to the proposed consolidation of appeals in the Federal Circuit, we must consider what was recommended by each of the judges that wrote to us about this problem. We must reform and improve the system, beginning at the first level of review before immigration judges. We must increase the resources to allow the immigration judges and the BIA to provide meaningful hearings and review. We must address the root of the problem, and not just the symptoms leading to an overburdened system. Attorney General Gonzales announced a review of the immigration court system in January. His study will encompass the quality of work as well as the manner in which it is performed, encompassing the immigration courts and the BIA. We should not revamp our immigration appeals system without first considering the results of that study.

In addition, we must take note of the efforts already under way by the circuit courts of appeals. As Judge Newman describes in his written testimony, the Second Circuit has already taken steps to address its backlog and is making progress. He believes the backlog in that circuit can be curtailed in two to three years. We must contrast that prediction with the forecast of Chief Judge Michel of the Federal Circuit, who writes in his own testimony that it would take up to two years and significant resources to consolidate immigration appeals in the court he leads.

In addition to the concerns raised by the proposed consolidation of appeals in section 701 of the mark, section 707 generated equally strong opposition by the Federal judges, legal scholars, and others that wrote to us. These experts expressed skepticism about the proposed procedure by which one judge, acting as a gatekeeper, can accept or deny, a petition seeking review of a decision. Many of these petitions are, of course, appeals from one-line "affirmance without opinion" from the BIA. The Chairman's mark contemplates that a single judge, rather than a three-judge panel, should determine the petitioner's fate. In a system where this appeal is likely the last stop for an immigrant who may face danger upon deportation to her home country, a single judge gatekeeper does not amount to meaningful review.

Our witnesses will address these concerns in detail. I welcome each of them, and want to add a personal note of thanks to Judge Walker and Judge Newman of the Second Circuit for appearing today. Judge Mary Schroeder, the Chief Judge of the Ninth Circuit, regrets that she is unable to appear because of court duties this morning. Judge John T. Noonan of the Ninth Circuit was unable to be here in person, but offered to appear by video conference prior to attending to his court responsibilities this morning in California. Regrettably, he was denied this opportunity, although this Committee has seen a number of witnesses invited by the majority testify by video conference. Judge Noonan wrote to the Committee in opposition to sections 701 and 707, and I believe his testimony would have added significantly to this debate. I ask unanimous consent that his letter, Judge Schroeder's letter, and the letters submitted by a number of judges, the Judicial Conference, law school deans, and others be placed in the record.

As we consider any proposed changes to judicial review, we must not lose sight of the profound impact that final immigration decisions have on real people, many of whom have come to the United States seeking sanctuary from persecution, the liberty our Constitution provides, and the opportunity offered by our democratic system. Our judicial treatment of immigrants is a direct reflection of our collective capacity for compassion and humanity in the administration of justice and fulfillment of our laws. Our procedures should respect our history as a nation of immigrants, founded by immigrants who sought to bring to life the designs of true liberty and freedom. To permit our judicial treatment of immigrants to become antithetical to our basic constitutional foundation of due process is to forget our history and disregard American values.

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