Testimony of

Hon. Paul R. Michel

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STATEMENT OF CHIEF JUDGE PAUL R. MICHEL
of the United States Court of Appeals for the Federal Circuit
to the Senate Judiciary Committee
Hearing on Immigration Reform
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The United States Court of Appeals for the Federal Circuit takes no position on the wisdom of enacting Sections 701 and 707 of the Chairman's Mark. In keeping with long-standing tradition, our Court has not previously sought, and does not now seek, expansion of its jurisdiction to include immigration appeals. However, neither do we seek to avoid any jurisdiction that the Congress wishes to confer. Our only goal is to adjudicate appeals fairly and efficiently in whatever areas of law the Congress assigns to the Federal Court.

As a court now receiving about 100 appeals a month, receiving 1,100 could overwhelm us within months. We lack adequate numbers of judges and also support staff and office space. We also lack the infrastructure to support greatly increasing our size, which would be required since the new jurisdiction would increase our filings by more than ten-fold. We are one of the smallest circuit courts, based on total number of staff and judges. As presently constituted, we simply cannot absorb 12,000 immigration filings per year; we keep current on our 1,500 annual filings only by very diligent efforts. Even assuming a massive increase in resources, a lengthy and difficult transition period would be required.
Of course, we would do our best to handle any new jurisdiction the Congress assigns. Certainly, our judges are very able and could quickly learn and accurately apply immigration law. The logistical challenges, however, would be immense.

I. Current Operations at the Court of Appeals for the Federal Circuit
Perhaps the most important information I can provide the Committee concerns the Federal Circuit itself -- how it is structured and how it handles its present caseload. The court has 12 active judgeship positions with one vacancy, and enjoys the part-time support of four colleagues who have taken senior status. All appeals with counsel are argued unless the parties waive oral argument. Preparation is done entirely by the judges, assisted by three "elbow" law clerks. No staff attorneys are involved. Opinions are written by the judges with assistance of law clerks, not by staff attorneys. Our 4 staff attorneys work solely on motions filed in those appeals not yet assigned to a 3-judge merits panel.
The oral arguments consist primarily of detailed questions by panel members of the parties' attorneys based on the judges' careful study of the briefs and the record on appeal. Our standard of expedition requires that we circulate opinions quickly enough that they may publicly issue not more than 90 days after argument. This goal is achieved in 90% of the appeals.

This model of appellate adjudication was the norm in an earlier era but is rare in many courts of appeals of today. Most of them now face caseloads that are massive, requiring huge staffs. Our judges feel that it is highly desirable to retain our present size and practices. Not surprisingly, our bar and their clients, including leading corporations, enthusiastically agree.

Contrary to popular assumption, we are not a narrowly specialized patent court. Rather, patent-related cases only constitute approximately one-third of our caseload. The other two-thirds include large numbers of appeals involving veterans' claims, government personnel cases, government contracts and a variety of money claims against the government, including tax refund cases and Fifth Amendment takings cases. The combined number of veterans and personnel appeals exceeds the number of patent appeals. In all, over 50% of our appeals come from administrative

courts, commissions, or boards, including the Merits System Protection Board, the Court of Appeals for Veterans Claims, the Court of Federal Claims, the departmental Boards of Contract Appeals, and the International Trade Commission. We also review all decisions of the Court of International Trade, an Article III trial court.

Our separate areas of jurisdictions share only one thing in common: the Congress determined that national uniformity was crucial. In addition, for areas such as patents and international trade, and perhaps some others, some limited expertise was thought desirable.
Reflecting the variety of our caseload, our 15 judges come from varied backgrounds. They include 2 former trial judges, several general litigators from major law firms, 4 former high officials from the Department of Justice, 3 patent lawyers and 2 former members of the staff of this distinguished Committee.

II. Innovations in the Chairman's Mark
Section 701 consolidates all immigration appeals in the Federal Circuit in place of the 12 regional circuits. While I am confident that our judges could rapidly learn the statutory law as well as the immigration caselaw of the regional circuits, as noted earlier we simply do not have the capacity for a ten-fold increase in filings. Within a few months or even sooner, we would suffer judicial breakdown. The result would be large and growing delays in all cases and the risk of inadequate attention to any individual case.

If vast increases in all our resources were promptly provided by the Congress, perhaps after a difficult transition period, which could well last more than a year or even two, we might be able to handle the combined workload. But, the increases would have to be truly vast. The number of judges might need to be increased from 12 to 18, rather than just 15 as presently provided, assuming single-judge review is retained; if not, it might have to be doubled to 24. The number of staff attorneys, presently 4, would have to be increased by more than 80, according to court staffing formulas used by the Administrative Office (AO). The number of deputy clerks, presently 20, would have to be increased by over 100, again according to the AO formulas.

In addition, a new, huge and expensive computer system would probably have to be created, tested, and then put into use. Our present computer platform was designed for a court with less than 2,000 filings. The number of people needed to do this is unclear, but our Automation and Technology Office would have to at least double in size from 8 to 16. Additional personnel would also be needed in the Administrative Services Office, Circuit Executive's Office, Library and elsewhere. Including the Chambers staff of the new judges, the total number of additional personnel would have to be on the order of 250 to 300. Our present number is 140. We would need 400 or more. Therefore, roughly speaking, the size of our staff would have to triple.

In dollar terms, our budget, now at $24 Million annually, would have to increase at least two- to three-fold. We would also need to find, rent and secure commercial office space nearly the size of our present courthouse. Simply acquiring such space could take a year, even after funding was provided. It is not even clear that we could find sufficient space for all the new personnel at a location that would make an integrated operation feasible, particularly with paper filings in over 13,000 appeals.
In the current budget climate, it may be unclear whether the Congress would double or triple our budget to support the required tripling of our staff.

Even if all these logistical obstacles were addressed by massive new resources provided by the Congress, our method of adjudication would so change as to become unrecognizable. We would go from being the least bureaucratized court to the most heavily dominated by staff. The consequences for the quality of our work both in immigration and our present cases would surely be adverse. For one thing, oral argument would largely disappear and, it is estimated, would be available in less than 10% of the cases. For another, analysis and writing now done by judges would shift toward staff attorneys. Adequate supervision of their work might present another difficult challenge.

Some people predict the rate of filing of immigration appeals in the courts of appeals may soon decline. I do not know the reliability of this prediction. The number of cases going before judges of the Immigration Court may actually increase, if the government increases the resources devoted to locating illegal aliens and to adjudicating their cases. Consequently, the number of appeals to the Board of Immigration Appeals (BIA) may increase. If the number of judges in these two courts is increased, their annual output will also likely increase, even if more opinions are written at the appellate stage. Therefore, it appears likely that filings in the courts of appeals may go up, rather than down, at least for several years.

Section 707 of the Chairman's Mark contains another major innovation: one-judge review for "prima facie" merit. Some suggest that great efficiency would come from such one-judge review. I see little reason for confidence, however, that this review would be quick or easy. Although I do not have experience myself with immigration appeals, I have learned from those who do that a significant portion of these cases are factually complex and difficult to assess, taking much time for staff attorneys and also judges.

At one time, our court considered a similar procedure with respect to our hundreds of personnel cases. We quickly abandoned the idea, however, because it became clear that given the time needed to adequately assess whether the case had potential merit, the panel might as well decide the merits. Otherwise, the case is studied twice. If 99% of the appeals ended at the stage of one-judge review, the added burden on merits panels would be greatly reduced. But such an outcome is not likely, and in any event, would be greeted by an outcry that the review was inherently shallow and unfair. Such a complaint might have some validity. In addition, without an opinion to explain why merits adjudication by a three-judge panel was not warranted, the denials would look suspect to many. On the other hand, if an opinion was written for every denial by the single judge, the one-judge review process might suffer delays.

In sum, I see little ground for optimism that the nationwide immigration appeal caseload could become manageable either by rapid reduction in its size, or through the one-judge review procedure.

I agree with Judge Posner that the appeal rate from BIA decisions, which recently rose from less than 10% to more than 30%, would likely fall at least somewhat if the Immigration Court and the Board of Immigration Appeals were expanded and better equipped to do more thorough review. On the other hand, aliens awaiting deportation would still have considerable incentive to appeal the Board decision because of the likelihood of a stay of deportation. The alien could at least hope to delay his departure by a year or two and might also think he has some chance of prevailing at a court of appeals. Even those aliens without paid or pro bono representation could proceed pro se.

I am in no position to judge the current level of uniformity among the 12 regional circuits. Assuming that lack of uniformity is demonstrated as a problem, and assuming that delay is, too, I would be concerned that, while uniformity might increase with consolidation, the delays might well get worse, at least for several years of transition. If the concern is the reversal rate, I question whether, given the same BIA decisions reviewed last year, in the Federal Circuit would produce a lower reversal rate. If the concern is disparate interpretations of the immigration statutes, a reinvigorated BIA might prevent further disparities.
In conclusion, our court understands the substantial problems resulting from the flood of immigration cases now facing the regional circuits, and the difficult choices that confront this Committee and the Congress as a whole. I again wish to make clear that our court takes no position on the merits of the proposed jurisdictional provision. But if the proposal were enacted in this or some other form, our court would do its utmost to implement the wishes of the Congress and to shoulder whatever task we are asked to undertake. Although I have given the best estimates I could in one week on necessary resources, I also recognize that it is premature to delineate with precision the added resources that our court would require if given the new jurisdiction. If the jurisdictional provision is enacted, we will work with the Committee to better estimate the resource requirement, and to plan as smooth a transition as possible. Because the Committee has received much input from other circuits' Chief Judges, other judges, the Judicial Conference and other sources, I have limited my statement to information directly concerning or affecting the Federal Circuit.

I thank the Committee for the opportunity to submit this statement.