



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 6, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed the Department of Justice's responses to questions directed to Jonathan Cohn, Deputy Assistant Attorney General for the Civil Division, following Mr. Cohn's testimony at the April 3, 2006 hearing entitled "Immigration Litigation Reduction."

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this proposal. Please do not hesitate to call upon us if we may be of additional assistance.

Sincerely,

A handwritten signature in black ink that reads "William E. Moschella".

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

**Questions of Senator Patrick Leahy
Ranking Member, Judiciary Committee
Hearing on Immigration Reform
April 3, 2006**

Questions for Mr. Jonathan Cohn

1. **Statistics on the BIA's rejections of appeals from Immigration Judge decisions are conspicuously absent in the EOIR's recent annual report. Media accounts and preliminary studies indicate that since the 2002 BIA streamlining measures took effect, the Board has ruled against non-citizens significantly more often than the years before 2002. Please provide a breakdown of the disposition of IJ appeals to the BIA for the past five years, year by year, including a breakdown by the grounds for rejections and by the party appealing the decision.**

Answer: Attached is a chart showing the results of appeals filed by the parties in immigration proceedings and the decision by the BIA. The BIA does not track the reasons for upholding or dismissing appeals.

2. **In your testimony, you contend that the rapid rise in immigration appeals to the circuit courts is due only to increased enforcement efforts and increased appeals to the BIA. Have you considered the effects of the broad expansion of summary affirmances and one-judge review following the BIA streamlining in 2002? If the BIA were to reinstate full written opinions for more categories of cases, would that likely result in a lower rate of appeals to the federal circuits?**

Answer: The Department has considered the effects of "streamlining," a process that began under Attorney General Reno in 1999 and was expanded under Attorney General Ashcroft in 2002. It is difficult to conclude that streamlining is to blame for the increase in the number of immigration appeals in the federal courts. First, streamlining applies to the entire country, but the floodtide of appeals is primarily concentrated in two circuits, the Second and the Ninth. In those courts, the appeal rate from the Board to the federal court is roughly 38 percent. By contrast, in the Eleventh Circuit, the appeal rate is only 8 percent. This suggests that a number of other factors are also at work, including the fact that the Second and Ninth Circuits are the most generous in terms of stays of removal.

Second, the BIA has actually reduced the number of affirmances without opinion (AWOs) since fiscal year 2002, but the rate of appeal to the federal courts has increased over the same time period. In fiscal year 2002 (which pre-dates Attorney General Ashcroft's streamlining regulation), 31% of all Board decisions were AWOs; now, only 20 percent of board decisions are AWOs. Over the same time period, the rate of appeal nationwide has increased from 10% to 29%

(largely because of the increases in the Second and Ninth Circuits, which account for roughly 75% of the caseload).

Third, one cannot reasonably conclude that streamlining has caused the increase in appeals (or that longer Board opinions would reduce the rate of appeal). Opponents of streamlining have claimed that aliens appeal to the federal courts because they are dissatisfied with the AWO or the short single-judge opinion and they are seeking a better explanation from the federal courts. Under this logic, however, an alien would not appeal – but would instead accept the Board’s judgment and return home – if he simply got a longer opinion from the Board. In light of the economic incentive that many aliens have to stay in the United States, this seems implausible.

Instead, much of the increase in the rate of appeals is likely due to the interest that illegal aliens have in delaying their removal. Before streamlining, aliens did not have to appeal to the federal courts to obtain years of delay, because it often took the Board several years to decide a case. Now, however, the Board takes only months to decide the average case, so the aliens have to turn to the federal courts for delay. It is thus unsurprising that the federal courts with the most generous stay policies have also suffered from the largest appeal rates.

3. **The committee was presented with contradictory testimony regarding the extent of forum shopping in immigration cases. The INA provides that judicial review of removal orders is available only in “the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.” 8 U.S.C. 1252(b)(2). Is venue in immigration court not determined in the first instance by ICE, depending where it chooses to file the Notice to Appear and detain the respondent? And is it not also correct that respondents have no right to transfer venue in removal proceedings, after ICE’s initial choice of venue, but may only request transfer in the discretion of the Immigration Judge?**

Answer: The Department did not present testimony regarding forum shopping. In any event, there is a potential for forum shopping even though judicial review of removal orders is available only in "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," 8 U.S.C. § 1252(b)(2), venue in immigration court is determined in the first instance by ICE, and aliens have no right to transfer venue. Under the regulations, immigration judges have the discretion to transfer venue for good cause, 8 C.F.R. § 1003.20(b), and thus they can accommodate aliens for whom it would be a hardship to travel to the initial venue for removal proceedings. Aliens can take advantage of EOIR's accommodation and move to the most advantageous forum. A rule or practice limiting changes of venue might make forum shopping more difficult, but it could also impose a burden on aliens.

Board of Immigration Appeals Outcomes of Case Appeals by Appealing Parties FY 2001 – FY 2005

Appealing Party	Year Appeal Decided	BIA Decision					
		Sustain	Dismiss	Remand	Other	Total	
Alien	Decided						
	FY 2001	1,110	10,484	3,293	3,598	18,485	
	FY 2002	890	26,193	3,648	1,297	32,028	
	FY 2003	1,194	25,010	3,055	489	29,748	
	FY 2004	1,035	25,684	2,433	299	29,451	
Government	FY 2005	676	21,944	2,452	146	25,218	
	FY 2001	113	1,413	165	153	1,844	
	FY 2002	262	1,096	424	72	1,854	
	FY 2003	409	1,183	514	46	2,152	
	FY 2004	345	776	545	14	1,680	
Both	FY 2005	224	874	531	14	1,643	
	FY 2001	12	37	30	22	101	
	FY 2002	15	61	28	18	122	
	FY 2003	24	105	38	25	192	
	FY 2004	22	74	30	16	142	
Other	FY 2005	15	54	71	12	152	
	FY 2001	10	62	42	17	131	
	FY 2002	17	144	53	34	248	
	FY 2003	5	139	57	17	218	
	FY 2004	11	192	70	33	306	
TOTAL		6,400	115,729	17,585	6,351	146,065	

Note: The above table shows decisions on case appeals decided at the Board of Immigration Appeals. While we can discern which party appealed an immigration judge decision, we are unable to track the precise reasons for each appeal or the outcome of each issue that was on appeal. Please note that appeals are often sustained in part and dismissed in part and that cases may have had one or more appeals filed during this time frame. An "Other" BIA decision usually refers to administrative closure of a case, the granting of Temporary Protected Status, or the continuation of a case. Where the appealing party is "Other," this refers to cases where an immigration judge certifies a case to the BIA.