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Concerning Immigration

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The Department of Justice appreciates the opportunity to address the provisions that were in Title VII of the Chairman's mark, which is the subject of today's hearing. Comprehensive immigration reform is unquestionably necessary, and the Department commends the entire Committee and particularly the Chairman for undertaking such a tremendous legislative effort.

The Department strongly supports the much needed reforms that were part of Title VII-A of the legislation. They are an appropriate and reasonable response to the overwhelming floodtide of immigration cases that has swamped the federal courts and the Executive Branch. We applaud their inclusion in your original Chairman's mark, and strongly urge that they be incorporated into the final bill that passes the Senate. None of these provisions deprives an alien of his day in federal court, and nothing will limit or affect the full three-stage agency review currently available to most aliens. Instead, the provisions simply provide a sensible mechanism for screening out the many meritless cases that aliens file to delay removal, and they would thus allow the courts to focus on the more complex cases that warrant closer scrutiny. Without these reforms, aliens deserving of relief are unjustly delayed.

However, with all due respect to the Chairman, the Department strenuously opposes central elements of Title VII-B. Though well-meaning, this provision would insulate adjudicators in the Executive Office for Immigration Review (EOIR) from Executive Branch oversight or supervision. Immigration is a quintessential sovereign function, inextricably intertwined with national security and foreign policy. For this reason, the power to decide immigration cases and to develop policy through adjudication should not be transferred to unaccountable agency officials. We hope that we can work with you to alleviate any concerns that you may have been seeking to address with this proposal without taking such an unwarranted step.

Finally, the Department respectfully proposes two additional reforms that would help stem the tide of immigration litigation. Both of these reforms seek to remedy court decisions that are inconsistent with the plain text of the Immigration and Nationality Act (INA).

I. THE DEPARTMENT SUPPORTS VIRTUALLY ALL OF TITLE VII-A.

The Department supports virtually all of the provisions in Title VII-A of the Chairman's Mark, which are measured responses to the exponential growth in immigration litigation. By way of background, there has been a 603% increase in the number of Board of Immigration Appeals (BIA) decisions appealed to the federal courts since fiscal year 2001 (according to the Administrative Office of the U.S. Courts). Whereas only 1,757 cases were appealed in 2001, 12,349 were challenged in 2005. In the Second Circuit alone, there has been a staggering 1400% increase in the number of BIA appeals, and in the Ninth Circuit, over 40% of all cases are now immigration appeals.

A. Consequences of the Floodtide of Immigration Cases

As a result of this increase of cases, which is due to stepped-up enforcement efforts by the Department of Homeland Security and the rapid rise in the rate at which aliens have appealed BIA decisions (from 6% in fiscal year 2001 to 29% in fiscal year 2005), there have been two predictable and equally undesirable consequences: first, a tremendous expenditure of resources and, second, delay in adjudicating immigration cases in the federal courts. On the issue of resources, the Department has been required to write opposition briefs in thousands of additional immigration appeals, many of which lack any merit and most of which are ultimately resolved in favor of the government. Unfortunately, under the current system, even cases that are devoid of merit often impose a significant burden on the Department because of the fact-specific nature of the typical claim and the time it takes to digest a several-hundred page record.

Moreover, to spread out this burden, the Department has been compelled to assign thousands of immigration cases to attorneys throughout the Department. Before 2002, the Civil Division's Office of Immigration Litigation and the U.S. Attorney's Office for the Southern District of New York handled nearly all of these matters. Since November 2004, however, the Department has had no choice but to seek assistance from lawyers in all of the litigating components, all of the United States Attorneys' Offices, and many non-litigating components as well.[1] Pursuant to a directive from the former Deputy Attorney General, virtually every office in the Department has been tasked with writing at least some immigration briefs.

Among the consequences of this brief-distribution program is that overworked attorneys throughout the Department have even less time to dedicate to their own pressing matters than they did before. Criminal prosecutors in the United States Attorneys' Offices have to focus on meritless removal cases in addition to their criminal prosecutions, diverting precious prosecutorial resources. Attorneys in the Civil Rights Division have had to juggle immigration cases along with all of their efforts to enforce

[1] Indeed, over the past year, the Department has also received help from another federal agency, the Federal Deposit Insurance Corporation, which has graciously agreed to detail several of its attorneys to the Department's Office of Immigration Litigation.

the Nation's civil rights laws. And lawyers in the Environmental and Natural Resources Division have had to split their time between protecting the environment and responding to time-consuming but ultimately unsuccessful claims of illegal aliens simply seeking to delay their removal.

Moreover, the wide distribution of cases also makes it more difficult for the Department to maintain a consistent litigating position on substantial issues, including eligibility for asylum and the scope of federal court jurisdiction.

In addition to the resource issue, another deleterious effect of the exponential growth in immigration litigation is delay – delay from the courts that are trying their best but struggling under the weight of thousands of new cases and delay from Department attorneys who understandably must request successive extensions to keep pace with the unprecedented growth of immigration litigation. Since 2001, all but two of the circuit courts have seen their case-processing times for BIA appeals increase significantly, with the Second Circuit experiencing the largest delays. In that court, according to the Administrative Office of the U.S. Courts, processing times for cases resolved on the merits have increased 171%, and it now takes almost 27 months to resolve a BIA appeal.

Without question, this is a problem that must be solved. An immigration system that survives only with delay is at odds with immigration enforcement. As the Supreme Court has recognized, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 321-325 (1992). Delay serves to reward illegal aliens and encourage additional illegal crossings. Even worse, it creates extra incentives for even more meritless appeals—thereby perpetuating a cycle of more litigation, more delay, and more reason to enter the country illegally.

Delay can also be harmful to aliens seeking and deserving legal status. Because they have to wait longer for an adjudication of their claims, they are without lawful status—and the benefits associated with that status—for a longer period of time. These aliens may be unable to work lawfully, travel abroad, or pursue an education. Finally, delay in the courts affects litigants in non-immigration cases as well, because courts have to divert resources from these cases to BIA appeals.

B. Title VII-A Would Help Reduce the Volume of Immigration Cases

The provisions in Title VII-A would serve to reduce the delay and alleviate the burden on Departmental and judicial resources. Perhaps the most critical provision is section 707, which would require aliens to obtain a certificate of reviewability (COR) from a federal judge in order to pursue his appeal. If the judge denies the COR, the government does not have to file a brief, and the alien may be removed without additional time-consuming and unnecessary proceedings.

Section 707 is modeled after a statute applicable in the criminal habeas context, 28 U.S.C. § 2253, which likewise requires a party to obtain a certificate before pursuing

an appeal. Section 2253 originated in a bill that Senators Specter and Hatch introduced, *see* S.623 (1995), and it has been invaluable in reducing the number of frivolous habeas appeals and allowing courts to focus on the cases that have substantial merit. To obtain a certificate in the habeas context, the petitioner must make a "substantial showing" of a denial of a constitutional right. By analogy, to obtain a COR, an alien should be required to make a "substantial showing" that his petition for review will be granted. In light of the fact that section 2253 applies to United States citizens (as well as aliens), and it applies to criminal cases in which the consequence of an erroneous determination might be life imprisonment or death, there is no reason not to adopt a similar requirement in the immigration context. Illegal aliens should not be given more access to our federal circuit courts than United States citizens on death row.

Unfortunately, section 707 in the Chairman's mark included a lower threshold for obtaining a COR – requiring an alien to set out only a prima facie case. This minimal standard would be inconsistent with the requirement in section 2253 and could be insufficient in screening out meritless cases and allowing courts to focus on the more complex matters. Accordingly, we recommend that the standard in section 707 require an alien to make a substantial showing that his petition for review will be granted.

It is important to note that section 707 would not close the courthouse doors to any alien. Every single alien would still have his day in court in front of an Article III judge, in addition to the multiple layers of agency review that are currently available. Indeed, the typical alien has three layers of agency review – an initial determination by the Department of Homeland Security, another determination by an immigration judge, and then a third determination by the BIA. As a result of these multiple layers of agency review, over 131,000 aliens were granted asylum from the agencies in Fiscal Years 2001 through 2005 without any court involvement whatsoever. Section 707 nonetheless provided for the courts as an additional forum for pursuing relief.

It has been said that section 707 is ill advised because the adjudicators in the Department of Justice are doing an inadequate job of deciding cases and a full three-judge panel in the federal courts is needed to make up for the Department's deficiencies. But the only evidence supporting this argument is the reversal rate in a single circuit court that hears no more than 2% of the total number of appeals from BIA decisions. In that court, the BIA was reversed (or had its decisions remanded) last year in 39% of the cases in which the court reached the merits of the case. The nationwide average, however, was only *14%*, as calculated by the Administrative Office for the U.S. Courts. That means that the BIA was reversed in only one of every seven cases in which the court reached the merits. Indeed, no court (other than the Seventh Circuit) reversed the BIA in one of five cases, and the Second, Fourth, Tenth, and Eleventh Circuits reversed the BIA in roughly one of twenty cases in which the court reached the merits. Even the Ninth Circuit, which is often viewed as being more receptive to aliens' claims than the average court,[2] reversed the BIA in only 17% of the cases decided on the merits.

[2] According to Judge Posner, the Ninth Circuit's "hostility to the Board of Immigration Appeals is well known . . . and doubtless explains the large number of Ninth Circuit immigration cases reversed by the Supreme Court." *Stroe v. IN*S, 256 F.3d 498, 503 (7th Cir. 2001).

Moreover, to say that the court reversed the BIA 14% of the time overstates the reversal rate for two reasons. First, the 14% figure reflects only those cases that were terminated on the merits. It does not account for all of the aliens' appeals that were dismissed on procedural grounds before the case even reached a three-judge panel. According to the Administrative Office for the U.S. Courts, last year, 60% of all BIA appeals were dismissed on procedural grounds. Because most of these cases were resolved against the alien—for instance, because he filed in the wrong court or filed out of time or failed to pay the filing fee—the BIA's actual reversal rate was substantially lower than 14%. The Administrative Office for the U.S. Courts does not calculate this figure, but according to statistics tracked by the Civil Division of the Department of Justice, the Government prevailed in 91.5% of its immigration cases last year (and thus incurred reversals or remands in only 8.5% of the cases), which is consistent with its percentage in 2004 (92.9%), 2003 (91.2%), and 2002 (89.7%), and noticeably higher than its percentage in 2000 (83.1%).[3] From 1983 to 2005, the Government prevailed in 89.9% of its cases. Because of this consistent success rate—which confirms the lack of merit of most aliens' appeals—there is no reason to reject sensible jurisdictional provisions that are consistent with steps taken in the habeas context.

Second, most BIA decisions, about 70%, are not appealed to the federal courts. And an even larger percentage of the roughly 265,000 decisions by immigration judges are never challenged in the federal courts. By way of comparison, the federal courts reversed or remanded to the Department's adjudicators in only 556 cases in 2005. Accordingly, there is no support for the proposition that the Department's adjudicators are doing an inadequate job of deciding cases or that a full three-judge panel in the federal courts is needed to make up for any Departmental deficiency.

Finally, another provision in Title VII-A that is worth noting is section 708, which would limit review of discretionary denials of motions to reopen. The Supreme Court has long recognized that motions to reopen are disfavored and that the government should have broad discretion to deny such motions. *Doherty*, 502 U.S. at 323; *INS v. Abudu*, 485 U.S. 94, 107-08 (1988); *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985). Nevertheless, while current law makes discretionary determinations unreviewable, a loophole in the statute provides for judicial review of motions to reopen when the BIA denies them as a matter of discretion. By eliminating this loophole, for which there is no justification, section 708 would free up scarce judicial resources and allow courts to focus on serious legal and constitutional claims.

II. THE DEPARTMENT OPPOSES CENTRAL FEATURES OF TITLE VII-B.

With all due respect to the Chairman, the Department of Justice strongly opposes central features of the draft legislation that previously constituted subtitle VII-B of the Chairman's Mark.

[3] The Civil Division's numbers do not track cases delegated to elsewhere in the Department, and they do include the relatively small number of cases that are appealed from district court decisions. Neither factor is material.

The relevant provisions of the legislation would largely insulate EOIR's adjudicators from any supervision or oversight. The Director of EOIR (the office that contains the BIA and immigration judges), rather than the Attorney General, would have the ultimate authority to appoint the immigration judges and the immigration appeals judges on the BIA. Moreover, although the Director would have the authority to select and supervise the BIA chair, he would be unable to discipline or remove immigration judges or immigration appeals judges for exercising "independent judgment and discretion." In addition, neither the Director nor any other officer subject to the President's supervision would be able to review or revise the BIA's final decisions. Instead, those decisions would be binding on the Executive Branch and reviewable only by the Court of Appeals for the Federal Circuit.

As should be evident from the foregoing, the draft legislation would transfer authority to determine which aliens will be allowed to stay in the United States to government officials insulated from direction, supervision or control by any politically accountable officer. This situation would be fundamentally at odds with the relationship between immigration decisions and the national security and foreign policy of the United States—a relationship that the courts have long recognized. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 104 (1976); *Knauff*, 338 U.S. at 542; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). Moreover allowing the government to seek judicial review from these decisions is no substitute for this kind of supervision, given the nature of the decisions involved.

Indeed, in the INA, Congress itself has acknowledged the inextricable connection between immigration policy, national security, and foreign policy. The INA confers broad discretion on the Attorney General and the Secretary of Homeland Security to base determinations of aliens' admissibility or removability on numerous considerations of foreign affairs and national security. For example, in deciding whether to grant asylum, the INA calls for consideration of, among other things, whether there are reasonable grounds for regarding an alien as a danger to the security of the United States, INA § 208(b)(2)(A)(iv); whether an alien convicted of a particularly serious crime constitutes a danger to the community of the United States, INA § 208(b)(2)(A)(ii); and whether there are serious reasons to believe the alien has committed a serious nonpolitical crime outside the United States prior to arrival, INA § 208(b)(2)(A)(iii).

The debates surrounding the immigration reform bills now pending in the Senate reflect the fundamental importance of controlling the nation's borders and enforcing our Nation's immigration laws. The draft legislation in subtitle VII-B of the Chairman's Mark would give unelected and unaccountable officials the final discretionary authority over these efforts in any given case. That would be a grave mistake, and thus the Department of Justice strongly opposes this proposal.

In addition, the Department opposes this section of the legislation for at least two additional reasons as well. First, it would erode the Executive's constitutional responsibility to manage and implement immigration policy and would run afoul of the

Appointments Clause. Second, it is premature. At the Attorney General's direction, the Deputy Attorney General and Associate Attorney General are in the process of conducting a comprehensive review of EOIR. The draft legislation would overhaul EOIR without the benefit of this review.

A. Background

Before going into these reasons in further detail, it is important to clarify the role of the immigration judges and the BIA under current law. For over fifty years, the authority to determine the admissibility and removability of aliens has been statutorily committed to the Attorney General and, since enactment of the Homeland Security Act of 2002, the Secretary of Homeland Security as well. The Attorney General's discretion under the INA has long been delegated to subordinate officers—immigration judges and members of the BIA—but he has always retained the authority to supervise, appoint, and remove any of these officers and to revise their decisions. That makes sense, because these officials are exercising Executive authority ultimately vested in the Attorney General. It should also be noted that the Supreme Court concluded, in *Marcello v. Bonds*, 349 U.S. 302 (1955), that there was no due process violation in entrusting a deportation hearing involving a lawful permanent resident (who had lived in the United States for 44 years) to a special inquiry officer subject to the supervision, direction, and control of the Attorney General and the INS.

To be sure, the Attorney General has needed to directly involve himself in adjudicating immigration cases only rarely. When he has done so, it has been to ensure that the INA is being properly applied and that the discretion that the law provides is being wisely exercised—often at the request of the BIA or the Secretary of Homeland Security.[4] Indeed, over the last fifteen years, the Attorney General has personally reviewed only 25 out of the 422,000 cases that have been decided. Of those 25 cases, the Attorney General himself initiated certification in only eight, with the rest being certified by the Secretary of Homeland Security (or by the INS Commissioner before 2002) or the BIA itself.[5] Although the Attorney General rarely needs to involve himself directly in

[4] When the Attorney General involves himself in an immigration decision, he does so (pursuant to longstanding regulation) only after the decision has been rendered by an immigration judge and reviewed by the Board of Immigration Appeals. At that point, the Attorney General certifies the Board's decision to himself.

[5] Attorney General Gonzales has certified only one case. He certified the case in February and has not decided it yet. The case involves an alien who is mentally ill and was convicted of repeatedly raping a 55-year-old woman. The Board of Immigration Appeals upheld the decision of an immigration judge finding the alien entitled to protection from removal to the Dominican Republic under the Convention against Torture. The immigration judge concluded that, if the alien were removed, he probably would not take his medication, come to the attention of the police, and would therefore probably be arrested and incarcerated in a Dominican prison, where abuse of the mentally ill is reportedly common. The Board's affirmance of the grant of protection prevents the United States from removing this individual to the Dominican Republic. Given that there is no other country likely to take him, if the decision stands, the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), will require DHS to release him into the American public regardless of how dangerous he may be. The Attorney General took this case to determine whether the Board acted properly in barring removal.

adjudications of removal orders, his ability to do so in specific, highly sensitive cases is critical, and his authority to do so generally is essential to maintaining a consistent interpretation of the INA at the administrative level.

With this legislation, the nature of immigration judges and BIA members would be radically redefined. Rather than acting for the Attorney General and under his guidance, review, and supervision, these individuals would now be exercising their discretion without any politically accountable supervision or review whatsoever.

B. Constitutional Constraints

By insulating immigration judges and the BIA from the direction and control of the President and other Executive Branch officials, the draft legislation would transfer core executive powers to unelected and unaccountable officials. This is of doubtful constitutionality under basic principles of separation of powers. The Supreme Court has stated that the "exclusion of aliens" stems "not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Giving the BIA the power to issue decisions that bind the President on issues of foreign policy or national security would raise serious separation-of-powers concerns. The President's position at the head of the Executive Branch demands that he have the ability to oversee decisions of subordinate officers that implicate such core Article II functions. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982).

The discretionary character of many decisions under the immigration laws, as noted above, further underscores the constitutional importance of vesting responsibility for their implementation in the Executive. *See supra* at 6; *see, e.g.*, INA § 208(b)(2)(A)(iv) (discretion to determine whether there are reasonable grounds for regarding the alien as a danger to the security of the United States). The Supreme Court has upheld broad legislative grants of discretionary authority to admit and exclude aliens against non-delegation challenges exactly because of the political accountability of the Executive. *See Mahler v. Eby*, 264 U.S. 32 (1924). The broad grants of discretion in the INA would be much more vulnerable to attack, however, if the delegation were to unaccountable adjudicators.

Specific provisions of the draft legislation would also violate the Appointments Clause of the Constitution. The legislation would require the President's appointment and the Senate's confirmation of the director of EOIR and would provide that the current director serve as acting director until he or a successor is so appointed. Congress lacks the authority, however, to remove officers of the Executive Branch except through either the bona fide abolition of their office or their impeachment and conviction. *See Myers v.*

Additionally, the BIA itself recently certified a case to the Attorney General involving an individual suspected of terrorist activities but to whom the immigration judge granted asylum. The Attorney General has not made a final decision yet on whether to accept this case for review.

United States, 272 U.S. 52, 122 (1926). Congress may not accomplish the removal of an officer by ostensibly abolishing an office while simultaneously recreating it and requiring a new appointment. *See Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term*, 11 Op. O.L.C. 25, 26 (1987). Such "ripper" legislation impermissibly forces a duly appointed official to seek Senate consent in order to stay in office.

In addition, the legislation would require that current members of the BIA and current immigration judges be appointed to their newly created statutory positions and serve for limited, staggered terms. Congress may not direct the appointment of an executive official; the Constitution grants that power to the President and other officers alone. *See Civil Service Commission*, 13 Op. Att'y Gen. 516, 520-21 (1871). Nor may Congress impose fixed terms on officers currently serving without limitation, for that would "amount[] to an attempt on Congress's part 'to gain a role in the removal of executive officials other than its established powers of impeachment and conviction.'" *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 170-71 (1996) (quoting *Morrison v. Olson*, 487 U.S. 654, 686 (1988)).

C. The Attorney General's Comprehensive Review

Finally, the Attorney General's authority over EOIR is not only important for reasons of national security and separation of powers principles; it is also valuable to the management and quality control of EOIR's output. On January 9, the Attorney General launched a comprehensive review of EOIR's operations and work product. The review is still underway and should be completed shortly.

The draft legislation would prematurely restructure EOIR and even modify the streamlining procedures before the review is complete. This approach is problematic for two reasons. First and foremost, it would be a profound waste. Lawyers from the offices of the Deputy Attorney General and the Associate Attorney General have expended substantial time, effort, and resources over the last three months gathering information from the BIA and immigration judges around the country. This information will be compiled and used to formulate recommendations to the Attorney General on proposed reforms of EOIR's operations. The draft legislation would proceed without the benefit of either the information that has been gathered or the recommendations based thereon. Second, to the extent that the review indicates that changes are warranted, the statutory modification to streamlining contemplated in the draft legislation would be more rigid than regulatory changes, and could not be readily amended in light of new developments and information. As a result, such statutory modifications should be opposed.

III. THE DEPARTMENT SUPPORTS TWO ADDITIONAL PROPOSALS THAT WOULD HELP STEM THE TIDE OF IMMIGRATION LITIGATION.

Finally, there are two additional ways to alleviate the crushing immigration litigation burden on the Department and the Courts, both of which have been adopted by the House of Representatives. First, the Department supports modifying section

242(a)(2)(B) of the INA. Most notably, that provision eliminates judicial review of discretionary questions. Despite the plain terms of the statute, the Ninth Circuit has nonetheless held that it has jurisdiction over discretionary questions, except when the discretion is "pure" and unguided by legal standards or guidelines. *See Oropeza-Wong v. Gonzales*, 406 F.3d 1135 (9th Cir. 2005). Accordingly, when the Department acts responsibly and adopts guidelines for its adjudicators in order to promote uniformity, the Ninth Circuit asserts jurisdiction, further burdening Department litigators. Understandably, two other courts have rejected the Ninth Circuit's interpretation. *See Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir.2004); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 161 (3d Cir.2004).

Second, the Department endorses clarifying the scope of section 242(a)(2)(C) of the INA, which limits judicial review over factual determinations regarding criminal aliens. Attempting to expedite the removal of such aliens, Congress adopted this provision in 1996. The Ninth Circuit, however, has carved out an exception for certain criminal aliens seeking relief from removal—in plain contradiction to the terms of the statute. *See Unuakhaulu v. Ashcroft*, 398 F.3d 1085, 1089 (9th Cir. 2004). The amendments proposed by the Administration would fix both of these problems.

IV. CONCLUSION.

The Department of Justice thanks the Committee once again for the opportunity to express its views on the proposed legislation and stands ready to gather and provide further information on these issues at the Committee's request.