Statement of Judge Carlos T. Bea, Circuit Judge, Ninth Circuit Court of Appeals.

Thank you for the opportunity to appear before you today. My name is Carlos Bea. I was appointed to the Ninth Circuit Court of Appeals by President George W. Bush in 2003. My chambers are in San Francisco, California. In addition, to my knowledge, I am the only circuit judge to have been ordered deported by the Immigration and Naturalization Service, appealed that order to the Board of Immigration Appeals, and prevailed on appeal. Also, before becoming a judge I occasionally represented alien clients before Immigration Judges and the Ninth Circuit.

I am here today to offer a few comments on the immigration reforms included in Title VII of the proposed "Comprehensive Immigration Reform Act of 2006."

First, Section 701 provides for the consolidation of appeals of immigration orders in the Federal Circuit.

Immigration law has developed somewhat like our federal tax laws: new legislation has been adopted many times over the years and added to the previous law. As in the tax code, this layering of rules, exceptions and remedies has complicated the law, requiring aliens, executive personnel and judges alike to determine which set of rules applies based on the facts of each case. To this one should add administrative rules and regulations, and even transitional provisions which apply to cases arising during some time periods but not others.

As if not sufficiently daunting, the distribution of appeals from lower court and agency actions throughout the 12 federal circuit courts has increased the complexity of our immigration laws. As is to be expected, there is variation among the regional circuit courts on how to view the facts and apply the law in similar cases. These variations are especially significant in the immigration field because relatively few immigration cases are taken up by the Supreme Court.

This diversity of views crops up in several fields. What is sufficient evidence upon which to credit an Immigration Judge's adverse finding of credibility can vary from circuit to circuit. What constitutes "persecution" for purposes of Asylum can require more stringent actions in one circuit than in another. Whether a prior state conviction qualifies as an "aggravated felony"

rendering the alien ineligible for discretionary relief such as asylum and withholding of removal varies amongst the circuits.[1]

One current issue, which is specifically dealt with in Section 705 of the proposed bill, is whether a Department agency may reinstate a previous order of removal when a previously removed alien reenters the country illegally, or whether that alien must be accorded a full hearing before an Immigration Judge. Recently, a panel of our circuit held a hearing was required;[2] another circuit has held a Department agency can act without a hearing.[3] A circuit split on this issue results in the imposition of different administrative requirements on the government, and the provision of different procedural rights to aliens, in different sections of the country. This is unfair to both the government and the aliens.

Our Immigration law is, and should be, a national pronouncement of policy. Efforts to make that policy uniform throughout the country should be encouraged. The provisions of Title VII constitute an important step in that direction.

Another reason for unification of the appeals process in the Federal Circuit is to reduce forum-shopping among the circuits, as aliens' counsel quite understandably seek those circuit courts which they perceive most friendly to their clients. Venue for appeal can be established by the location at which the alien applies for relief. A glance at the statistics is illuminating. Since 2000, the

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[1] *Compare Gonzales-Gomez v. Achim*, No.05-2728, 2006 WL 708678 (7th Cir. March 22, 2006) (holding a felony offense under state law does not constitute an "aggravated felony"under 8 U.S.C. § 1101(a)(43) rendering the alien ineligible for cancellation of removal and asylum if the same conduct constitutes only a misdemeanor offense under federal law), *and Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004) (same), *and Gerbier v. Holmes*, 280 F.3d 297 (3rd Cir. 2002) (same), *and Aguirre v. INS*, 79 F.3d 315 (2nd Cir. 1996) (same), *with United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001) (holding a state felony conviction for conduct punishable only as a misdemeanor under federal law constitutes an "aggravated felony" under § 1101(a)(43) rendering the alien ineligible for discretionary relief from removal).

[2] *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) *rehearing en banc granted by* 423 F.3d 1112 (9th Cir. Jan. 5, 2005).

[3] *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004).

number of appeals from the BIA to the Fifth Circuit which, like the Ninth Circuit, shares a border with Mexico, has increased from 225 to 593, 125%. The number of similar appeals in the Ninth Circuit, however, has risen from 910 to 6,583, or 590%. Interestingly, in 2005 the Fifth Circuit reversed the denial of asylum in only 9% of the cases presenting the issue (4 of 46), while the Ninth Circuit did so in 33% of the cases (193 of 591).

Another feature of Title VII worthy of comment is the increased attention given to improving and increasing the administrative process, with an eye to reducing the number of appeals to the circuit courts.

It is undeniable that since the Board of Immigration Appeals (BIA) instituted its one-judge review and adoption of Immigration Judge rulings, without the former more detailed review, the number of appeals from BIA rulings has dramatically increased. In 2000, prior to the changes in the BIA, there were 1,723 appeals of BIA rulings in all the circuits. In 2005, there were 12,349, a rise of 602%.

There are two clear reasons for this increase in appeals. First, petitioners and their attorneys do not think the one-judge BIA review and adoption procedure has adequately dealt with the claimed errors on appeal. They think they have received "rubber-stamp" treatment. Second, as petitioners and attorney see appeals piling up in the circuit courts, they realize that their appeals will be delayed. During that period of delay, events may change the alien's chances of staying in the country. Those changes may be personal, such as a marriage to a United States citizen or the birth of children or any number of other conditions affecting removability. Or those changes may be political, such as changed country conditions in the alien's home country, or legislative and administrative, such as immigration reform in this country, giving the alien new hopes to remain here. Even if the appeal lacks all merit, the backlog of cases in the circuit courts provides an incentive to appeal by almost guaranteeing a significant delay in deportation.

The provisions of Sections 711 et seq. which enlarge the number of BIA judges, their staff and make three-judge hearings a matter of course are welcome additions. The recognition of the importance of BIA decisions in forming Immigration jurisprudence by providing for en banc hearings by the BIA is also a step forward for uniformity of immigration law.

There are many other provisions of Title VII which are needed improvements, not the least of which is the provision for more Immigration judges, trial attorneys and Federal public defenders in Section 702.

Now a word about some of the objections that have been raised by conscientious voices. The most often heard is that judges should be generalists because they bring greater experience into judging and are not likely to become captives of the interests who frequently appear in specialized courts. This is not a new complaint and it is something to be kept in mind in making judicial appointments.

But I am not aware that the Federal Circuit has fallen into the hands of either applicants for patents or their opponents who seek to avoid the application of the claimed patent. Neither has the National Relations Labor Board become captive to special interests, nor has the Court of Veteran Appeals.

Fears have been voiced that petitioners will not likely receive representation if they have to lodge and argue appeals in far-away Washington, D.C. Two things should be kept in mind: (1) the Federal Circuit has explicit authority to hold hearings in any circuit,[4] in the very same cities where the circuit courts sit today; (2) the overwhelming number of appeals from BIA rulings are determined without hearing by the courts of appeal. For example, in 2005, the Ninth Circuit decided a total of 4,777 cases. Of those, only 472 (9.9%) proceeded to merits panels of three judges, and many of those were submitted on the briefs. The remaining cases were decided by motions panels or by screening panels of three judges which the issues raised were appropriate for summary adjudication.

Last, there is the expressed fear that only circuit court judges from around the country can give the detailed and meaningful consideration necessary to the important, often life-determining, issues involved in Immigration matters. This ignores the care with which national courts such as those mentioned routinely act. The systems for selection of judges to specialized courts and the regional circuit courts is similar. There is no reason to think only regional circuit court judges are sufficiently sensitive to administer justice.

In conclusion, I endorse the proposals of Title VII as long-needed

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[4] *See* 28 U.S.C. § 48(a).

improvements to the administration of our national Immigration policy.

Thank you for letting me voice my views.