

March 14, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

We are law school deans and legal scholars whose areas of scholarship include federal courts, administrative law, immigration law, and constitutional law. We write to express our profound reservations regarding the legislative proposal found in Section 701 of your draft bill entitled February 24, 2006, Chairman's Mark. This provision would place exclusive jurisdiction over all future immigration appeals in the U.S. Court of Appeals for the Federal Circuit and eliminate the role of the regional courts of appeals in such appeals. We urge that this proposal be withdrawn immediately, so that it can be subjected to the careful study that such a fundamental change in our legal order warrants.

Our concerns are based on: the strong, historically grounded presumption favoring the use of Article III appellate courts of general jurisdiction in our judicial system; the important values underlying that tradition; and the often unforeseen negative consequences that arise when specialized courts are established (and especially when they are established hastily, as this bill would do).

We are, unsurprisingly, not of one view regarding the costs and benefits of specialized courts. But we strongly share the view that transferring categories of cases involving claims of personal liberty that are currently heard in the regional circuits to a single, narrowly focused, specialized, commercially oriented court should not be done precipitously, or without hearings in which experts on immigration, federal jurisdiction, constitutional law, and administrative procedure can be heard. We are fully mindful of the caseload pressures that some circuits are presently facing, due in no small part to the upsurge in immigration appeals. Nonetheless, we do not believe that the current situation warrants the radical step of relegating all immigration appeals to the Federal Circuit, a court of specialized jurisdiction that currently hears cases involving areas quite distant from immigration law, such as patents and trademarks, veterans' claims, and other miscellaneous matters.

Legal scholars have in the past raised reservations about specialized courts on numerous grounds. Generalist judges have the benefit of applying their broad judgment and experience drawn from deciding cases across many and varied fields of law, while specialist judges are exposed solely or mostly to a single narrow field of law. This can generate not only tunnel vision but also an ossification of views in such judges. Moreover, specialized courts are considerably more prone than generalist courts to being "captured" by opposing interest groups or the agency they review. These are dangers that should not be lightly undertaken when liberty is at stake.

In immigration cases, for example, judges are typically asked to interpret the federal immigration statute, as well as complex and interrelated questions of constitutional law, criminal law, habeas corpus, state criminal statutes, family law and individual liberty. The specialized judges of the Federal Circuit rarely, if ever, now confront any of these types of claims. Thus, their consideration of these multifaceted and important issues would arise overwhelmingly, if not exclusively, in the immigration context. The Federal Circuit judges would not benefit from the broader experience of considering similar questions in a wide variety of contexts and cases that has been one of the hallmarks and strengths of the generalist tradition of Article III judging.

In addition, as a practical matter, the Federal Circuit would face an initial caseload crisis and many novel transitional practical and legal issues, as it confronts the large number of new immigration appeals from throughout the country. This caseload increase could dilute the quality of the Federal Circuit's decision-making not only in the immigration cases that would be added to its docket, but also in the areas of its existing jurisdiction. Some of those transitional issues may diminish over time. Specialized courts are, however, far more vulnerable to fluctuations in caseload because of their limited jurisdiction. These kinds of fluctuations can be even more extreme with immigration cases, due to such factors as changes in patterns of immigration enforcement and the impact of federal legislation.

Significant issues of fairness and the perception of access to the courts would also be raised if henceforth, all immigration cases were heard exclusively in the Federal Circuit. Immigrant petitioners, unlike commercial litigants, are often not represented by legal counsel and may be incarcerated during the pendency of any appeal.

We believe, therefore, that altering the appellate jurisdiction of the regional federal courts to centralize claims in a single specialized court ought to be, if anything, a response of last resort. This option should be pursued only after the Judiciary Committees of Congress hold hearings at which experts are called and thorough study is made. Such a hearing would permit a thorough consideration of the costs and benefits of the specific proposal, as well as consideration of the experience with previous or current specialized courts.

For all the foregoing reasons, we urge you to delete 701 from the Chairman's Mark of the immigration legislation, and to consider that proposal, if at all, at a time and in legislation where the broader implications and various considerations raised by this proposal can be fully expressed and evaluated before enactment.

We note that the proposal in section 707 of the Chairman's Mark to create a new certificate-of-reviewability gatekeeper system for immigration appeals is also untested in relation to executive detention, and it raises constitutionally-sensitive questions of access to judicial review that would benefit from further study by your Committee. By expressing our opposition to 701 we do not mean to suggest any endorsement of section

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707 or any other provision of the proposed bill, about which we express no collective view.

If further information regarding our views would be helpful, Harold Hongju Koh would be pleased to speak or meet with you.

Respectfully,

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cc: Members of the Committee on the Judiciary