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March 16, 2006

Via email  
Senator Arlen Specter  
SH-711 Hart Senate Office Building  
Washington, DC 20510-3802

Re: Judicial Review Concerns in Chairman's Mark of Immigration Reform

Dear Senator Specter:

This letter represents the concerns of Lenni Benson, professor of law at New York Law School, and Stephen Yale-Loehr, adjunct professor of immigration law at Cornell Law School. We each have been teaching and/or practicing immigration law for more than 20 years. We each have written extensively about judicial review of removal orders and other related immigration decisions.

This letter addresses our concerns about certain provisions in your Chairman's Mark (EAS06090) that would change judicial review of immigration matters. In particular, we believe that:

- Judicial review of immigration decisions should not be moved to the U.S. Court of Appeals for the Federal Circuit until more careful thought has been given to this major proposed change.
- Judicial review should be preserved for motions to reopen and reconsideration.
- Allowing one judge on the Federal Circuit to decide whether a case should go forward raises serious problems.
- Judicial review should be preserved in naturalization cases.

### **Incremental Change May Be Wiser Than Broad Scale Reorganization**

Section 701 of the bill proposes moving judicial review of removal orders to the U.S. Court of Appeals for the Federal Circuit. Other provisions of the bill would preserve habeas corpus in the federal district courts for detention-related decisions. There may be cases where judicial review might involve both courts. Thus, these provisions need more careful consideration of the interaction between them.

We oppose the centralization of all petitions for review in the Federal Circuit for several reasons. First, Congress already has shortened the time period for filing a petition for review to 30 days. Thus, judicial review is not an important reason for delays in removing

noncitizens from the United States. Congress has authorized the removal of noncitizens even when a petition for review is pending. Rather, the Department of Homeland Security (DHS) simply lacks the resources to execute many final removal orders. Congress should not obscure this issue by suggesting that litigation delay frustrates the removal of noncitizens.

Second, the short time for filing a petition for review and for seeking a discretionary stay of removal with the Federal Circuit will cause problems for noncitizens. The extra time it will take to transmit those petitions from throughout the country disadvantages individuals and may make it difficult to find legal representation. It may make it particularly difficult for counsel to participate in settlement negotiations or to provide supporting documentation for motions seeking stays. Many attorneys unfamiliar with the Federal Circuit may decline to represent noncitizens seeking review there.

Third, centralization of judicial review should not occur yet because recent jurisdictional changes have not been fully integrated or understood. Last May, as part of the Real ID Act, Congress made a major shift in restoring the petition for review for certain classes of noncitizens, and transferred many pending matters from district courts to the circuit courts of appeals. There are ongoing questions about the scope of the transfer provisions and which matters should be included within a petition for review versus those that are appropriately considered in the district courts. This is a longstanding issue in immigration law because many government actions occur outside the scope of a removal hearing but could be and usually are ultimately going to affect the rights and benefits of an individual subject to removal. The federal courts have not had sufficient time to adjust to the changes brought by the Real ID Act.

Fourth, the Federal Circuit lacks expertise in immigration law. Nor are the judges on that court knowledgeable about criminal law, which applies to many immigration removal cases. Lacking such expertise, Federal Circuit judges may take longer to decide immigration appeals than their counterparts on the circuit courts of appeals.

### **Judicial Review Should Be Preserved for Motions to Reopen and Reconsideration**

Section 708 would commit decisions about whether to reopen or reconsider an immigration case to the Attorney General's discretion. This provision would trigger INA § 242(a)(2)(B)'s limitation of judicial review over discretionary decisions. By contrast, the current statute authorizes federal court review if the BIA denies a motion to reopen or reconsider. The current case law makes clear that courts defer to the immigration agency's action in the vast majority of cases. A court will generally order a remand only if the noncitizen proves that the agency made a statutory or constitutional error. Even if Congress tries to further restrict judicial review of these motions, it is likely that federal courts will continue to hear cases that are characterized as constitutional challenges.

We urge you to preserve judicial review of motions to reopen or reconsider. Such motions often arise because the individual has a claim for relief, incompetence of prior counsel, changed country conditions, or an error by the government inappropriately prevented the individual from relief.

If Congress believes that too many motions to reopen or reconsider are being filed, we urge you to first allow an empirical assessment of such motions before making any changes.

### **Judicial Review Requires Parity for Both Parties**

Section 707 provides that once a petitioner's brief is filed, it would be assigned to a single Federal Circuit judge. Unless that judge issues a "certificate of reviewability," the petition would be denied and the

government would not need to file a brief supporting the removal order. No certificate of reviewability could be issued unless the petition provided a "prima facie" case that the petition should be granted.

This proposed process raises several concerns. First, this provision would not provide for any internal system of reconsideration or review. This interference with judicial independence will undoubtedly create litigation concerning the separation of powers. Second, it does not provide an equal opportunity for the government to participate in the court's deliberations. Many judges may be uncomfortable acting without participation of both parties. Third, Federal Circuit judges have no prior immigration experience and are not well prepared to assess the prima facie validity of a petition for review without the benefit of briefing from the government.

If the goal of this provision is to allow a single judge to reach a decision about the likelihood of success on appeal, Congress might consider adopting a pre-screening mechanism. Alternatively, the federal courts of appeals could develop internal processing and efficiency procedures. Individual judges facing the strict time deadlines set forth in section 707 might certify more cases than they otherwise would under a different procedure. Alternatively, the government may find that after a judge has devoted significant energy to certifying an appeal, they have a uphill battle and that the government would be better served by stipulating to a remand to the Board of Immigration Appeals (BIA). We believe many unintended and unpredictable consequences may result from such a dramatic alteration in appellate practice and procedure.

### **Judicial Review Corrects Wrongs**

We know that Congress appreciates how important removal proceedings are to individuals facing removal. We are sure your office also receives many calls from U.S. relatives and employers of noncitizens facing removal, many of whom may have been permanent residents for many years. The American people believe our nation is governed by the rule of law and that important life changing decisions are not made by nameless and faceless bureaucrats. Judicial review helps to foster respect for the immigration system.

Judicial review can also help to protect the many noncitizens who are not represented. The BIA recently reported that unrepresented individuals constituted nearly 13,000 of their total case load of approximately 42,000 matters. There has also been an increase in the number of children in immigration proceedings. The agencies have special duties of care in the consideration of juvenile cases, and the courts are essential guardians of the rights of these children.

We have not had an opportunity to study the overall rate of remands. However, we do have one snapshot about the rate of reversal. Recently the U.S. Court of Appeals for the Second Circuit instituted a new procedure that bypasses oral argument for most asylum appeals. The Second Circuit adopted these procedures to allow it to more efficiently handle the increased volume of immigration appeals. These new procedures started in October 2005. The cases are considered by panels of three judges, with assistance from specialized court staff. In a review of 589 asylum decisions decided under these non-argument rules, more than 17% resulted in a remand to the BIA. While this rate of reversal indicates that many cases do not need a remand, a 17% reversal rate still indicates that many people had legal claims that were not properly addressed by the agency.

Moreover, we are sure that you appreciate the type of cases where the courts do reverse the agency. For example, courts have recently held that the DHS did not adequately consider claims of religious persecution in asylum cases. These opinions echo the findings of an independent commission Congress created to review the expedited removal system, a system that lacks judicial review for most of its determinations. If there is no watchdog, mistakes occur. These mistakes may also frustrate the intent of Congress.

### **Judicial Review is Essential in Naturalization Cases**

Section 204 of your Chairman's mark would limit judicial review of naturalization decisions. To put the naturalization process solely into the hands of the executive branch would make it more likely to be attacked by whichever political party is not currently in office. The watchdog role of the courts to ensure equal and fair treatment of individuals is one of the greatest strengths of our democracy. If we eliminate judicial review in these important cases, we invite cynicism and political grandstanding in an area that should be immune from partisan politics.

Moreover, there has been a low rate of judicial review in naturalization cases. There is no compelling reason to justify such a radical departure from the centuries-old tradition of openness in our society's most important rite of passage--the full incorporation of newcomers into our society.

Even if Congress believed more limits were necessary on the jurisdiction of the federal courts to review aspects of the naturalization process, the current bill simply invites federal courts to preserve their constitutional role by characterizing challenges to agency decisions as challenges that present constitutional issues. The constitutionalization of such litigation raises the stakes for the government and can result in courts imposing new procedures onto agency adjudication in an effort to preserve fairness and accuracy in decisionmaking.

### **Conclusion**

We are happy to provide more detail to you or your staff on any of these issues. We understand the challenges you face in implementing our immigration laws. We appreciate the opportunity to present these comments.

Sincerely,

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This letter expresses our own personal opinions and does not necessarily reflect the views of our law schools.

pc: Other Judiciary Committee members