March 30, 2006

The Honorable Harry Reid
Minority Leader
United States Senate
S-221 The Capitol
Washington, D.C. 20510

Dear Senator Reid:

On behalf of the American Bar Association Section of Intellectual Property Law ("the Section"), I write to express the opposition of the Section to provisions in immigration reform legislation under consideration in the Senate that would transfer jurisdiction over immigration appeals to the U.S. Court of Appeals for the Federal Circuit. These provisions are found in Subtitle A of Section VII of the Judiciary Committee Chairman's Mark, S. _____, the "Comprehensive Immigration Control Act of 2006," and in Title V of the bill introduced by Majority Leader Frist, S. 2454, the "Securing America's Borders Act."

The views expressed in this letter are those of the Section of Intellectual Property Law. They have not been submitted to nor approved by the ABA House of Delegates or Board of Governors and should not, therefore, be construed as representing policy of the American Bar Association.

The two bills would transfer exclusive jurisdiction to the United States Court of Appeals for the Federal Circuit of appeals from final administrative orders or district court decisions arising from any action taken, or proceeding brought, to remove or exclude an alien from the United States. This would include appeals from decisions of the Board of Immigration Appeals (BIA) and from district court decisions in habeas corpus proceedings challenging the detention of an alien. The bills would increase the number of authorized judgeships in the Federal Circuit from 12 to 15 and would also authorize unspecified additional appropriations for fiscal years 2007-2011 to meet the expanded responsibilities of the Federal Circuit, including the hiring of additional attorneys.

The Court of Appeals for the Federal Circuit is a court of special jurisdiction, including appeals in patent case. The Court was established in 1982, after a decade of public commission study and congressional consideration. A primary consideration in the creation of the Federal Circuit was a finding that the regional circuits were producing an unacceptable lack of uniformity in interpreting patent laws, and that there was a need to consolidate these appeals in a single national court of appeals. The record of the Court in the 24 years since its creation demonstrates that great progress has been made in providing the needed nationwide stability and consistency in patent law jurisprudence.

No such study, consideration, or record has been made for consolidating all immigration appeals in the Federal Circuit or in other single appellate court. Whether such a case could be made is a matter beyond our expertise and one on which we do and would not express views. We do, however, believe that we are competent to express views on the impact on patent laws and innovation of such a radical change in the jurisdiction and responsibilities of the Federal Circuit. Our view is that the impact would be extremely negative and damaging.

The numbers alone suggest that this is likely to be the case. Statistics for the fiscal year ending September 30, 2005 show that more than 12,000 appeals from the Board of Immigration Appeals were filed in all the regional circuit courts of appeals. In that same year, the Federal Circuit received 1,555 appeals within all of its existing areas of jurisdiction. The bills would authorize three additional judges for the Federal Circuit, for a total of 15. An increase in judgeships of 25% in the face of an 800% increase in caseload is obviously inadequate. Perhaps equally important, the bills do not provide adequately for the necessary increase in the staffing and other resources for the Court, even for the three additional judges. The bills attempt to address these needs by authorizing the appropriation of "such sums as may be necessary to carry out this subsection, including the hiring of additional attorneys for the Court." By way of contrast, we note that Chairman Specter's bill authorizes, for each of fiscal years 2007 through 2011, specific annual increases of 100 attorneys for the Department of Justice, 100 attorneys for the Department of Homeland Security, and 50 immigration judges for the Department of Justice.

It can be expected that the delays that are currently being experienced in the filling of judicial vacancies will continue, and that any new additional judges will not be available to hear cases for quite some time beyond the arrival of the flood of immigration appeals in the Court. Existing judges of the Court will initially be unfamiliar with immigration cases, and may require additional time to dispose of cases. Provisions in the bills restricting initial review to a single judge and making non-reviewable that judge's denial of a petition for review may reduce the burden on the Court, but it seems unlikely to provide adequate relief.

While it is not possible to predict the exact impact of the proposed legislation on patent cases and the patent system, it seems inevitable that it will be negative and will be substantial. Even with the addition of three additional judges, the average caseload of the Court's judges would increase from about 125 per year to over 900. Apart from the sheer magnitude of such an increase in caseload, the fact that almost 90% of that caseload will be new subject matter is certain to have a detrimental effect on the Court's attention to cases within its current subject matter jurisdiction. It can be expected that delays and uncertainty in the disposition of patent and other appeals will result. The requirement in the legislation that petitions for judicial review be acted on by the Federal Circuit within 60 days adds to this likelihood. Attention will likely be paid to the distribution of the subject matter of the Court's cases in making appointments to the Court. It therefore seems plausible to expect that priority may be given to nominees with background in expertise in immigration law, not only for the proposed three new judgeships, but for other future vacancies. The expertise and efficiency that the Federal Circuit has developed in the adjudication of complex patent cases will necessarily be diluted, to the detriment of the U.S. patent system and to American innovation and economic development.

For these reasons, we strongly urge you to remove from the immigration reform legislation the provisions that would transfer jurisdiction over immigration appeals to the U.S. Court of Appeals for the Federal Circuit.

Sincerely,

E. Anthony Figg
Chair