Statement of Jon O. Newman, United States Circuit Judge,
Second Circuit Court of Appeals,
before the Senate Committee on the Judiciary
April 3, 2006

Mr. Chairman, Senator Leahy, and members of the Committee: My name is Jon O. Newman. I am a United States Circuit Judge, serving on the United States Court of Appeals for the Second Circuit. I have served on that Court for 27 years and previously served as a United States District Judge in the District of Connecticut for seven and one-half years.

First, I want to thank you for the opportunity to appear before you today to discuss the pending proposals concerning the adjudication of immigration cases. There are several specific points to be made, but my basic contention is that it would be a serious mistake to remove the existing jurisdiction of the regional courts of appeals to review decisions of the Board of Immigration Appeals ("BIA") and place that jurisdiction in the Court of Appeals for the Federal Circuit.

1. The Issues Raised by Moving Immigration Cases to the Federal Circuit.

The pending provisions to move such jurisdiction to the Federal Circuit raise two distinct issues, which deserve separate consideration. The first issue is whether appeals from the BIA should be centralized in one court. If centralization is thought desirable, the second issue is which court should be used to adjudicate such appeals.

2. Centralization Is Not Required to Achieve Uniformity.

The traditional arguments for centralizing a class of appeals in one court do not apply to immigration cases. One argument for centralizing appeals in one court is to

secure increased uniformity of decisions. It was the disparity of results among the regional courts of appeals in patent cases that led to the creation of the Court of Appeals for the Federal Circuit. Congress sought to end the rampant forum-shopping by litigants trying to bring their cases in circuits perceived as either pro patent or anti patent. Patent lawyers had easy opportunities to choose virtually any forum in the country for their cases. Appeals from BIA decisions arise in an entirely different context. In the first place, there is not rampant forum-shopping in immigration cases; these case may be brought generally only in the jurisdiction where the alien entered or resides. Furthermore, the circuits are not perceived as either pro alien or anti alien. The few issues on which the circuits have divided concerning interpretation of immigration statutes provide the Supreme Court with a useful airing of close questions of law, and also afford Congress an opportunity to respond to statutory conflicts as they arise.

But the more important difference between the immigration and the patent context is that the typical issue in an immigration case is whether the testimony of an applicant for asylum is to be believed, and for a reviewing court, the issue is whether a finding by an individual Immigration Judge ("IJ") that the witness lacks credibility is supported by substantial evidence. On that recurring issue, it is not surprising that there is not uniformity, but it is illusory to think that centralization of immigration appeals will achieve uniformity with respect to credibility decisions on such fact-intensive matters. It would be equally illusory to suggest that review of all findings of fact by district judges should be centralized in one specialized court to achieve uniformity of outcomes.

3. Centralization is not Required Because of Caseload Volume.

Another argument for centralizing immigration appeals in one court is that the

regional courts of appeals are currently overburdened with BIA appeals. We surely are overburdened, especially the Second and Ninth Circuits, which have experienced the major share of the increase in filings. I have little doubt that many judges of the regional courts of appeal would tell you that they would be delighted to be rid of these cases. But the personal preference of judges is not a legitimate basis for formulating public policy concerning the structure of appellate jurisdiction. We serve to adjudicate the cases that are appropriately placed within our jurisdiction, not just the cases we would prefer to hear.

In fact, the courts of appeals, especially the Second and Ninth Circuits, are making substantial progress in disposing of the enormous flood of cases that started coming to us two years ago. They came, as you know, because of a decision within the Department of Justice to have the BIA substantially clear its backlog. The BIA responded by deciding thousands of cases within a matter of months, often by one-line orders of affirmance. The Courts of Appeals had no choice but to handle that sudden influx as best they could. Both the Second and Ninth Circuits are making significant progress in reducing the backlogs that were thrust upon them. In the Second Circuit, we have adopted special new procedures to expedite the decision of cases involving denial of asylum claims. In addition to our regular court calendar, we are assigning 48 appeals of asylum cases each week to four panels of three judges. If our current rate of progress continues, we expect to eliminate our backlog in less than three years. The flood of immigration appeals will be handled far more expeditiously by leaving them distributed among the regional courts of appeals, rather than centralizing these thousands of cases in just one appellate court.

4. If Centralization Is Desired, the Federal Circuit Is Not the Appropriate Forum.

If, despite the arguments just made, it is thought desirable to centralize immigration

appeals in one appellate court, the Federal Circuit is not the appropriate court. The Federal Circuit is a specialized court hearing primarily appeals involving patents, claims against the government, and government employee personnel issues. The issue of using a specialized court for certain classes of appeals has been a controversial matter for decades. In general, the Nation has been well served by leaving the vast majority of appeals within the jurisdiction of the regional courts of appeals, on which serve a talented cadre of men and women selected in large part for the broad range of their experience. There may be a good argument for placing some categories of appeals in a specialized court, as is currently done with all patent appeals going to the Court of Appeals for the Federal Circuit. But never in our Nation's history have we segregated in a specialized court cases involving personal liberties and human rights.

I do not question in any way the competence of the distinguished judges who serve on the Federal Circuit. But the fact is that most of them were selected, quite appropriately, for their expertise in patent law or other technical fields. As a group, these judges do not have the broad range of experiences that characterizes the judges of the regional courts of appeals. Moreover, although the Immigration and Nationality Act is a highly technical statute, most of the appeals from decisions of the BIA do not involve interpretations of that statute. Instead, the vast majority of cases now coming to the regional courts of appeals involve the issue of whether the decision of the BIA or that of an IJ is supported by substantial evidence, and in most of those cases, that issue turns on whether substantial evidence supports the IJ's finding that an asylum applicant's testimony is not credible. The regional courts of appeals have regularly been reviewing administrative agency decisions to determine if the rulings are supported by substantial evidence, and they have regularly

been reviewing the findings of district judges to make the similar decision as to whether those findings are clearly erroneous. By contrast, patent cases rarely turn on issues of credibility. Thus, although the Federal Circuit no doubt could adjudicate BIA appeals if assigned that role, such jurisdiction would be substantially foreign to the tasks they now perform, whereas it is within the mainstream of what the regional courts of appeals regularly do.

5. Centralizing Immigration Appeals in the Federal Circuit Would Overburden that Court.

Placing all of these cases in the Federal Circuit would place an intolerable burden on that Court. Judge Richard Posner has provided you with the statistics concerning the burden each judge of the Federal Circuit would have to bear. Even if the argument for placement of these cases in a centralized court were substantial, it would not be sound judicial administration policy to place such a massive volume of cases into a court of 12 members or even the 15 members called for under the pending proposal.

6. Centralization Can Better Be Achieved by Creating a -Specialized Court Manned by Currently Serving Circuit Judges.

If Congress is determined to remove these cases from the regional courts of appeals and centralize them somewhere, I urge you not to place them in the Federal Circuit, but instead to consider creating a new specialized court manned by currently sitting judges selected from the regional courts of appeals.

This approach would follow the model previously used in at least two other contexts--the so-called FISA Court and what was formerly known as the TECA Court. At the present time, Congress has authorized the Chief Justice to name eleven district judges for

temporary assignment to the special court authorized to issue warrants for electronic surveillance involving foreign intelligence, 50 U.S.C. § 1803(a), plus three district or circuit judges for temporary assignment to the special court authorized to review denials of surveillance warrants, id. § 1803(b). Some years ago, Congress authorized the Chief Justice to appoint district and circuit judges to the Temporary Emergency Court of Appeals to hear appeals from district court decisions arising under the Economic Stabilization Act. The model of a temporary court composed of sitting federal judges was also proposed in 1983 by former Chief Justice Warren Burger in his State of the Judiciary address as a device to resolve intercircuit conflicts among the courts of appeals.

Following these models, Congress could implement a system of centralized review of BIA decisions by creating a special court, manned by currently sitting circuit judges. These judges could be selected from all the circuits either at random or by appointment of the Chief Justice.

I remain opposed to routing all immigration cases to any centralized court, but a centralized court drawn from the personnel of the existing courts of appeals would be far preferable to sending all such cases to the Federal Circuit. It would use the experience of generalist judges. It would also permit flexibility in the number of judges assigned to the task, with the number fluctuating to correspond to the ebb and flow of the caseload, rather than fixed at an arbitrary number, such as the three new judges proposed for the Federal Circuit.

7. The Proposed Certificate of Reviewability Requirement is Ill-Advised.

Apart from the issue of ending all immigration appeals to the Federal Circuit, one seriously flawed aspect of the pending proposal is the use of a certificate of reviewability,

issued by just one judge, as a condition of obtaining review on the merits of any appeal. Perhaps this idea was borrowed from the use of a certificate of appealability ("COA"), which is now required by 28 U.S.C. § 2253(c), for appeal from the denial of a writ of habeas corpus to challenge a state court conviction. However, there is a fundamental difference between the gate-keeping function of a COA in habeas corpus cases and immigration cases. Habeas cases have already been considered by the state court counterparts of Article Three judges through all levels of a state's judicial system and then by an Article Three federal district judge. By contrast, immigration cases, prior to review in the courts of appeals, have been considered only by immigration judges and members of the Board of Immigration Appeals. It would be an extraordinary step to authorize one federal circuit judge to cut off all appellate review of a case involving individual liberty that has not been given the consideration to be expected from the two- and usually three-tiered system of a state judicial system, followed by the decision of a federal district judge.

Furthermore, although Congress has authorized one federal circuit judge to perform the gate-keeping role for review of a district court's denial of a petition for habeas corpus, nearly all the federal courts of appeals have required three judges to consider applications for a COA. See, e.g., 2d Cir. R. 27(b).

8. The Provisions for Additional BIA Members and Immigration Judges Are Urgently Needed.

One component of the pending proposal deserves your wholehearted support. This is the proposal to expand the number of judges of the Board of Immigration Appeals and the number of Immigration Judges. As you know, the BIA, laboring under an enormous caseload and with a reduction of its membership, has adopted a so-called streamlined

procedure whereby hundreds of appeals from decisions of IJs are decided by one judge of the BIA, usually in a one-line ruling that merely says "Affirmed." The result has been a serious flaw in the normal working of the administrative process. When overburdened IJs decide their high volume of cases hurriedly with oral findings dictated into the record and then their decisions are affirmed in a one-word ruling, the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process.

Providing an adequate number of IJs and BIA members would go a long way toward improving the quality of the BIA's decisional process, thereby facilitating appellate court review. It might even reduce the number of court appeals, once lawyers see that a carefully reasoned decision of a three-member BIA panel stands little, if any, chance of being reversed on a further appeal.

I do not share the view of some that the IJs as a group are doing an inadequate job. Having reviewed a large number of their decisions, I am impressed that most of them are doing extremely conscientious and competent work. However, I have also noticed that in a few instances, the hearing conducted by an IJ falls significantly below the standards expected of a federal hearing officer, and in some of those instances, the result has nonetheless been summarily affirmed by a one-member, one-word BIA ruling. A full complement of BIA members, sufficient to provide three-member panels for all appeals, would enable the BIA to resume its place as a professional administrative agency, comparable to the other agencies of the federal government.

Of course, it will cost money to provide the necessary complement of IJs and BIA members. But Congress has properly created a review procedure for important immigration cases such as asylum claims, and justice for those availing themselves of that

procedure cannot be rationed for lack of adequate funding.

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Conclusion

In conclusion, I emphasize that many of these cases involve serious claims by victims of persecution throughout the world, who have come here at great risk to themselves and their families, seeking the protection of our law as refugees. Whether their claims are meritorious or not, they deserve consideration in a properly functioning judicial system. A fully staffed administrative procedure, subject to the current system of review in the regional courts of appeals, will assure that the standards for freedom from persecution, mandated by the Congress, are fully and fairly implemented. I implore you not to remove these cases from the regional courts of appeals, an unprecedented move that would be antithetical to our Nation's traditional insistence on full judicial consideration of claims involving denial of liberty in appellate courts of general jurisdiction.