UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604-1805

CHAMBERS OF
RICHARD A. POSNER
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March 15, 2006

VIA FACSIMILE (202/228-0400)

Honorable Richard J. Durbin
United States Senate
332 Dirksen Senate Building
Washington, D.C. 20510

Dear Senator Durbin:

I am writing in response to your inquiry concerning my views of the judicial-review provisions of Senator Specter's proposed "Comprehensive Immigration Reform Act of 1006." Senator Specter's bill is hundreds of pages long and covers a wide variety of issues relating to the regulation of immigration. My comments are limited to two provisions of the bill, sections 701 and 707, which deal with judicial review of removal (deportation) orders, and to two other sections that deal with the Immigration Court and the Board of Immigration Appeals (sections 702 and 712).

At present, after a removal order by a judge of the Immigration Court is affirmed by the Board of Immigration Appeals in the Department of Justice, the alien can petition for judicial review in the federal court of appeals for the circuit in which the hearing before the immigration judge was held. As a result of recent increases in the number of these petitions, the Second and Ninth Circuits have been swamped with petitions. Other circuits have also experienced increasing filings, but of lesser magnitude.

Senator Specter's bill proposes to alleviate the burden on the courts of appeals in two ways. First (section 701), all petitions for review would have to be filed in the U.S. Court of Appeals for the Federal Circuit, in Washington, D.C.; that court would have exclusive jurisdiction over petitions to review removal orders, and the number of judgeships on the Federal Circuit would be increased from the present 12 to 15 to

enable the court to dispose of the petitions (at present, the Federal Circuit has no jurisdiction over such petitions). Second (section 707 of the bill), all petitions for removal would initially be referred to just one judge of the Federal Circuit, who would decide whether the petition had any merit. Only if he decided that it appeared to have merit would he issue a certificate of reviewability authorizing the court to review the petition. If he denied the certificate, that would be the end; there would be no further review of the petition.

Speaking with the greatest respect for Senator Specter's effort to alleviate what has become a significant burden on particular courts of appeals, I believe that the proposal in his bill is not a sound solution to the problem. The transfer of jurisdiction over petitions for review from the twelve regional courts of appeals to the Federal Circuit would disserve the judiciary and the immigrant community. The Federal Circuit is a specialized court, focusing particularly on patent cases; I cannot think of an area of law that is more remote from immigration than patents. No doubt the judges of the Federal Circuit can become knowledgeable about immigration law; but they will be overwhelmed by the new caseload. At present, about 1,500 cases are filed each year in the Federal Circuit, divided among 12 judges, which translates into a caseload of 125 cases per judge. The annual number of petitions to review removal orders is more than 12,000, which under Senator Specter's proposal will be divided among 15 judges, or approximately 820 per judge. The total number of cases (1,500 + 12,000 = 13,500) per judge would be about 900. That would be an unsupportable load.

The provision for certificates of reviewability will reduce the burden somewhat, as one judge rather than three judges will be reviewing most cases. But the provision is independently undesirable, because workload pressure will prevent the judges from giving more than cursory attention to the petitions. Certificates of reviewability will be denied in many cases in which the petition has merit.

It is tempting to suppose that most petitions for review are frivolous, designed only to postpone the inevitable day of removal. The experience of my court has been different. In a recent opinion that I wrote for a unanimous panel, I noted that in the preceding year my court (the Seventh Circuit) had reversed 40 percent of the petitions for review that we had decided on the merits. *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).

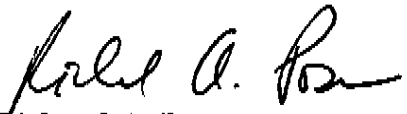
The higher the reversal rate, the more petitions for review are filed. Only by bringing down the reversal rate can the flood of petitions be staunched. The reversal rate can be brought down only by more effective filtering by the Board of Immigration Appeals, to which appeals from removal orders go in the first instance. If the Board was consistent in reversing erroneous orders, many fewer petitions for review would be filed in the courts. The number would be less because many of the meritorious cases would already have been resolved in the immigrant's favor by the

Board, because the reasons for affirming the immigration judge in those cases that were affirmed would be explained in full, and because the immigration bar would know that since the Board was filtering out the meritorious cases and giving good explanations when it affirmed a removal order, there was little chance that the Board would be reversed by the court when the Board decided that a case was not meritorious. The Board's problem is that it is overwhelmed by appeals and thus cannot do an effective filtering job. Its 11 judges receive almost 43,000 appeals a year, or almost 4,000 per member—a crushing workload.

In another provision of Senator Specter's bill (section 712), the number of members of the BIA is set at 15. This is a step in the right direction, but it does not go far enough. Fifteen board members cannot handle the appeal load; 43,000 appeals divided by 15 equals almost 3,000 appeals per member. For that matter, the immigration judges, whom the Board reviews, are overwhelmed too (215 judges handle some 300,000 removal cases a year), which is a principal reason why so many of their decisions are erroneous, and the bill would increase the number of immigration judges by less than 10 percent (section 702(b)(3)(A).

The only just and effective way of alleviating the burden of immigration appeals on the federal courts of appeals is by greatly augmenting the decisional capacity of the Immigration Court and the Board of Immigration Appeals. That should be the focus of reform focused on judicial review of removal orders. Funneling all petitions for judicial review of such orders to the Federal Circuit and authorizing single judges of that court to deny petitions without further review are neither just nor effective solutions.

Very truly yours,



Richard A. Posner