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American Bar Association

Ensuring Fairness And Due Process In IMMIGRATION PROCEEDINGS

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Immigration continues to shape and strengthen our country. Today, more than one in every five U.S. residents is either foreign-born or born to immigrant parents. Every day more immigrants seek to come to our country to reunite with close family members, fill jobs and find protection from persecution in their homelands. The development, implementation and enforcement of our immigration laws should seek to balance this influx with the necessity of controlling our borders through a fair and effective system of immigration. However, our immigration laws today are extremely complex, disjointed and often counterintuitive, particularly for people who often are just becoming familiar with our language, culture and legal system.

Moreover, despite that immigration matters routinely involve issues of life and liberty, the administrative system of justice that exists for immigration matters lacks some of the most basic due process protections and checks and balances that we take for granted in our American system of justice. As the national voice of the legal profession, the ABA has a unique interest in ensuring fairness and due process in the immigration enforcement and adjudication systems, and those topics comprise the primary focus of our recommendations here.

Even a cursory review of the immigration system today shows that it is plagued with problems at every level. Ultimately what is needed, and what the ABA supports, is comprehensive reform that fairly and realistically addresses the U.S. undocumented population, the need for immigrant labor, the value of family reunification and the importance of an effective and humane immigration enforcement strategy. However, political realities dictate that reform may be difficult to achieve in the immediate future. In the meantime, Congress and the Administration should implement these recommendations to strengthen fairness and due process for those persons caught up in the immigration enforcement and adjudication system.

Several of the ABA's recommendations for improving the nation's immigration system call for increasing federal funding of certain programs and activities. We recognize that our nation is experiencing a fiscal crisis and understand that difficult decisions will have to be made regarding the allocation of scarce resources. However, while some of the recommendations may result in initial additional outlays, part or all of that investment may ultimately be recouped as a result of the cost-savings provided through implementation of the recommended programs.

With this in mind, the ABA has proposed legislative and executive branch actions to improve our immigration system.

ACCESS TO LEGAL REPRESENTATION AND LEGAL INFORMATION

A hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. Meaningful access to legal representation for persons in immigration proceedings is particularly important. The consequences of removal can be severe, resulting in separation from family members and communities, or violence and even death for those fleeing persecution. Yet, immigrants have no right to appointed counsel and must either try to find lawyers or represent themselves. Legal assistance is critical for a variety of reasons, including a lack of understanding of our laws and procedures due to cultural, linguistic or educational barriers. Statistics show that asylum seekers and others who have legal representation are significantly more likely to succeed in their immigration cases. Representation is therefore crucial – the outcome of an immigration case should not be determined by a persons' income, but on the merits of his or her claim.

1. The ABA supports the due process right to counsel for all persons in removal proceedings. For indigent noncitizens who are not able to secure pro bono counsel, government-appointed counsel should be provided.

More than half of noncitizens in immigration proceedings lack legal counsel. The reasons vary, but for many the cost of retaining counsel presents an insurmountable obstacle, and free or low-cost legal services simply may not be available to them. Under U.S. law, noncitizens have a right to counsel in removal proceedings, but at "no expense to the government." This provision does not necessarily preclude government-funded counsel; it merely provides that counsel need not be provided as a matter of right. In fact, some courts have recognized in theory that due process might necessitate the appointment of counsel in particular cases.

The ABA supports establishing a system to identify indigent persons with potential relief from removal and refer them to legal counsel. To ensure due process and the effective administration of justice, all indigent noncitizens in removal proceedings should be screened by lawyers or other highly trained experts supervised by lawyers. While such a system is being developed, legal rights presentations (see 4. below) should be made available, including for those indigent noncitizens who are not detained. A legal rights presentation helps an immigrant make an educated judgment on the availability of relief from removal in his or her case. Once such a determination has been made in the affirmative, the person should be referred to legal counsel. While qualifying cases could be referred to charitable legal programs or pro bono attorneys where available, where these services are not, then government-paid counsel should be provided.

While establishing such a system would entail some additional cost to the government, the number of persons who are potentially eligible for relief from removal is limited. Department of Justice statistics show that roughly 10 percent of those who receive legal rights ("legal orientation") presentations have viable claims for relief. Of this figure, many secure pro bono counsel and others can afford to retain counsel. A very small percentage – those eligible for relief from removal who cannot otherwise obtain legal counsel – should be eligible for appointed counsel.

Beyond the obvious interest of affected noncitizens, legal representation also benefits the government and the administration of justice through improved appearance rates in court, fewer requests for continuances and shorter periods in detention at significant financial savings. It also deters frivolous claims. Above all, increased representation serves the government's interest in seeing that its decisions in these consequential cases turn on U.S. legal standards and merit and not on a litigant's income.

To facilitate the appointment of counsel in appropriate cases, Congress should repeal the "at no expense to the government" restriction in INA Section 292.

2. A system should be established to provide legal representation, including appointed counsel where necessary, for unaccompanied children and mentally ill and disabled persons in all immigration processes and procedures.

There are classes of vulnerable persons for whom it is particularly important to ensure appropriate legal representation for the duration of their cases: unaccompanied alien children and mentally ill and disabled persons. These persons may lack the capacity to make informed decisions on even the most basic matters impacting their cases and are not in a position to determine on their own whether they might qualify for relief. In fact, they may not be able even to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings. However, the particular vulnerabilities of these persons also make it difficult to impossible for them to obtain counsel on their own.

Current law calls for the government to ensure that unaccompanied children have legal representation in immigration proceedings and other matters, but only "to the extent practicable." Similarly, the law allows, but does not require, the appointment of a guardian or advocate for vulnerable unaccompanied children. For those who are mentally ill or disabled, the law allows an attorney or other representative to appear on behalf of the respondent, but does not require that legal representation be provided. Fundamental principles of fairness and due process demand that these vulnerable persons receive legal representation and guardians to represent their interests throughout the immigration process. While pro bono representation should be encouraged and utilized to the maximum extent possible, it cannot meet the need in all cases, particularly for those who are detained in remote border areas.

Congress and the Administration should act to ensure that legal representation is provided for unaccompanied children and the mentally ill and disabled in immigration proceedings, including by requiring government-appointed counsel where necessary.

3. Organizations that receive funding from the Legal Services Corporation should be allowed to provide legal representation to all persons who otherwise qualify for their services, regardless of immigration status.

Programs funded by the Legal Services Corporation (LSC) are the primary source of legal assistance for indigent and low-income persons across the nation, but this critical resource is not available to many people with potential immigration relief, including asylum seekers and unaccompanied children. The reason is that LSC funds only may be used to represent citizens, lawful permanent residents, refugees, and a few other specified groups of noncitizens. In 1996, Congress went one step further and extended the "alien restrictions" to *all* funds received by an LSC grantee, including those from nongovernmental sources. Prior to that change, many legal services programs had used foundation grants and other non-LSC money to represent clients in need without regard to their citizenship or immigration status. Under the current law, this option is no longer available. Pro bono lawyers, along with religious-based and other nonprofit organizations, have worked hard to fill the void but simply do not have sufficient resources to meet the needs created by continued increases in funding for enforcement, detention, and deportation.

Congress should repeal the restrictions on LSC-funded grantees so that, at a minimum, legal services organizations are not restricted from using nongovernment funds to represent immigrants regardless of their status.

4. The federal Legal Orientation Program should be expanded nationwide and be provided to all detained and nondetained persons in removal proceedings.

One of the ways that detained immigrants can be provided with appropriate legal information is through Legal Orientation Programs (LOP). The LOP program is administered by the Executive Office for Immigration Review, which contracts with nonprofit organizations to provide LOP services at 25 detention facilities around the country. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings to educate them on the law and to explain the removal process. Based on the orientation, the detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief – the overwhelming majority – typically submit to removal. Currently only detained persons are eligible for LOP services.

According to the Department of Justice, LOPs improve the administration of justice and save the government money by expediting case completions and leading detainees to spend less time in detention. Since the inception of the program, the ABA has provided LOPs at the Port Isabel Detention Center in South Texas and can unequivocally attest to the benefits that these presentations bring to detainees, the facility, and the immigration court system. Legal orientation

presentations facilitate noncitizens' access to justice, improve immigration court efficiency, and save government resources. Recognizing the value of LOPs, Congress in FY 2002 provided $1 million in funding for the program and increased that amount to $3.7 million for FY 2008.

Congress should provide increased funding to expand the Legal Orientation Program nationwide to all detained and nondetained persons in removal proceedings.

IMMIGRATION DETENTION

The Department of Homeland Security's Immigration and Customs Enforcement (ICE) is one of the nation's largest law enforcement agencies. ICE annually detains over 300,000 foreign nationals in facilities throughout the United States. Of the more than 30,000 daily detention beds available to ICE, over half are rented from private prisons and state and local jails. In recent years, immigration detainees have represented the fastest growing segment of the U.S. incarcerated population.

1. Noncitizens in removal proceedings should not be detained, except in extraordinary circumstances, such as when national security or public safety is threatened or when a noncitizen presents a substantial flight risk.

Although immigration is a civil, not a criminal, matter, various provisions of the Immigration and Nationality Act provide for detention of foreign nationals. The primary reasons for permitting detention in the immigration context are to ensure that people appear for all scheduled immigration hearings and comply with the final order of the immigration judge. Unfortunately, even immigrants who may be eligible for release often remain detained because they cannot afford to post the high bonds. These persons often are detained for months or even years while their immigration cases work their way through the courts.

The loss of liberty has punitive effects and works to undercut rights on many levels, including the right to counsel. Furthermore, the impact of detention is particularly negative for certain vulnerable groups, such as families enduring indefinite separation, asylum-seekers and victims of crime suffering from trauma and fearful of government authority, and those with physical or mental conditions that may be exacerbated by the lack of adequate medical care.

Detention also imposes a significant financial burden on the public; the federal government spent $1.7 billion on immigration detention in 2007. Efficient and effective use of scarce public resources should be directed toward detaining only those who pose a threat to public safety, national security, or present a substantial flight risk. Persons who do not meet those criteria should be released under appropriate conditions to ensure compliance with their immigration proceedings.

Where ICE has discretion to consider release of eligible noncitizens in immigration proceedings, it should adopt and consistently enforce a policy favoring release under appropriate conditions. In addition, Congress should enact legislation to revise current laws that require mandatory detention or set such strict requirements as to practically remove discretion to release on the part of ICE.

2. The use of alternatives to detention should be enhanced and implemented appropriately.

ICE detains over 300,000 persons annually, including long-time permanent residents, sole care providers, survivors of torture and abuse, and people with serious medical conditions who need specialized care. Humanitarian concerns and limited detention capacity have sparked national efforts over the past several years to integrate into ICE's general practices the use of various alternatives to detention. Detention alternatives used by ICE include release on orders of recognizance, release on bond, supervised release, and electronic monitoring.

Alternatives to detention offer the prospect of a considerable cost savings. The cost of detention is approximately $95 per day per person, while alternative programs can cost as little as $12 per day. Experience has shown that alternatives programs, designed and implemented appropriately, can be extremely effective. A pilot alternatives program coordinated by the Vera Institute of Justice between 1997 and 2000 resulted in a 93% appearance rate for asylum seekers in the program, at about half the cost of detention. Aside from the issue of the cost-effectiveness, utilizing alternatives in appropriate cases also serves to increase access to legal representation and may allow noncitizens to fulfill their family, work, or community responsibilities while awaiting determination of their case.

Congress should continue to provide increased funding for alternatives to detention and direct ICE to implement true alternatives to detention that apply to only those who would otherwise be detained and that use the least restrictive options necessary to ensure that an immigrant appears in court.

3. The ICE National Detention Standards should be strengthened and adopted as a regulation; the Standards should be implemented and enforced at all facilities where noncitizens are detained for immigration purposes.

For those persons who are detained, it is essential to provide uniform and consistent standards to ensure that facilities housing federal detainees are safe and humane. During the late 1990s, the ABA and several other organizations worked with the government to develop standards to govern the conditions for those in immigration detention. The ICE National Detention Standards encompass a diverse range of issues, including access to legal services. While the development of the Detention Standards was a positive step, it has become apparent that ICE's inspection process alone is not adequate to ensure facilities' full compliance.

The ABA regularly receives reports from attorneys representing detained immigrants, national and local immigrant advocacy groups, and direct letters and phone calls from detained immigrants around the country that indicate serious, continuing problems with detention facility conditions including: inadequate or prohibitively expensive access to telephones, including for calls to pro bono or retained counsel; inadequate access to legal materials; delayed or denied medical treatment; and unsanitary conditions. The concerns identified by the ABA are consistent with issues raised in the 2006 report of the DHS Office of the Inspector General: "Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities."

In addition, there are many noncitizens held for long periods in immigration detention to whom the Standards do not apply at all. ICE does not apply or enforce the Detention Standards at Bureau of Prisons facilities or facilities designed to hold people on a short-term basis, though hundreds of immigration detainees are held in these facilities every day. While some of these facilities may be accredited by the American Correctional Association (ACA), the ACA standards were not designed for immigration detention and do not include the detailed provisions for access to legal counsel and legal materials that are essential for noncitizens in detention.

DHS should revise and strengthen the detention standards to ensure appropriate oversight and include additional protections related to access to counsel and legal materials, and prompt and effective medical care. DHS should adopt the Standards as regulations that apply to all facilities that hold immigration detainees.

4. Detention space should not be contracted for or constructed in, and detainees should not be transferred to, remote locations where legal assistance is generally not accessible; the Detainee Transfer Standard should be revised to expressly prohibit the transfer of a detainee if it will impede an existing attorney-client relationship.

Meaningful access to legal representation must be a primary consideration in determining the location of immigration detention facilities. Currently, many immigration detention facilities are located in remote areas of the country. While this creates serious barriers to detainees who have retained counsel because of travel costs and other logistical difficulties, it is an even more serious problem for detainees who are unrepresented and need access to pro bono immigration services, which often are not available in these remote locations. While the government must understandably give consideration to the cost of detention bed-space, this interest should not trump the detainees' due process right to counsel.

In many cases, persons are initially detained in one area, but then transferred to another facility. The current Detainee Transfer Standard requires ICE to take into account whether a detainee is represented when deciding whether to transfer him or her. However, the ABA has observed that this has not prevented transfers of represented detainees or those with imminent hearing dates, such that access to counsel is severely impaired, court dates are missed, cases are delayed, and detention is prolonged. When cases are prolonged, cost savings from housing detainees in remote areas is consumed by the increased length of the stay. It is clear that stronger provisions and regulations are required to ensure that detainees are not transferred to the detriment of their legal rights, depriving them of ready access to counsel or access to family members, material witnesses, or evidence that would assist with case preparation or defense.

DHS should adopt a policy or Congress should enact legislation to require that detention facilities, to the extent practicable, are located near areas where free or low-cost legal representation with expertise in asylum and immigration law is available. DHS/ICE should revise the Detainee Transfer standard explicitly to prohibit transfer when it would impede an existing attorney-client relationship.

IMMIGRATION ADJUDICATION

The Executive Office for Immigration Review, an office within the Department of Justice, is responsible for administrative adjudication functions within the United States and oversees more than 200 immigration judges in over 50 immigration courts around the country. Immigration judge decisions are administratively final unless the case is appealed to the Board of Immigration Appeals (BIA). BIA decisions are binding unless modified or overruled by the Attorney General or a federal court.

Several changes in recent years have undermined the quality of due process received by noncitizens in the immigration adjudication system. First, there have been vast increases in the resources devoted to immigration enforcement efforts that have resulted in an ever-burgeoning caseload in the immigration courts -- in 2007, immigration judges handled approximately 350,000 cases. Yet there has not been a commensurate increase in resources available to the courts. Second, a series of procedural reforms has been adopted that significantly revised the manner in which appeals from the immigration courts were considered by the BIA. These procedural reforms resulted in a loss of confidence in the fairness of review at the BIA and generated a massive number of appeals to the federal courts.

The American Bar Association believes that these problems can best be addressed by moving toward a system in which immigration judges are independent of any executive branch cabinet officer. Indeed, we are currently considering how such a system might best be implemented. In the meantime, the Administration and Congress should immediately take the following steps to restore confidence in the immigration adjudication system and ensure that noncitizens are afforded appropriate due process in all proceedings.

1. Removal decisions should be made only by impartial adjudicators, preferably immigration judges, following a formal hearing that conforms to accepted norms of due process, and should be subject to administrative and judicial review.

Low-level immigration officers have been granted unprecedented authority to determine admission and removal cases. This occurs in the context of "expedited removal" applying to noncitizens who arrive at a port of entry or who have been unlawfully present in the United States for up to two years. During expedited removal a person does not have the right to legal counsel, an interpreter, or review by an immigration judge. It may also apply in cases of "expedited administrative removal," a system used for certain persons with criminal convictions, and "reinstatement of removal," which is the application of previous removal orders to those who return to the United States without permission.

All of these systems, although they address serious problems in the immigration enforcement system, implicate due process concerns. They expressly exclude the oversight of an impartial adjudicator; they are radically accelerated; they are largely insulated from public scrutiny and judicial review. The continuation and expansion of such hidden systems of administrative procedure violate many of the most fundamental norms of due process.

Congress should enact legislation to restore the authority to conduct removal proceedings solely to immigration judges. All removal hearings, however named, should conform to accepted norms of due process, including the right to be notified of charges, to examine and rebut evidence, to be present, to defend oneself with legal assistance, and to have a decision that is based on a record and subject to meaningful administrative and judicial review.

2. Discretion to grant certain forms of relief should be restored to immigration judges.

Several laws enacted in 1996 removed certain long-standing discretionary waivers of removal and substantially limited the discretion of immigration judges to recognize compelling circumstances in particular cases. As a result, a person who has lived in the United States since early childhood as a lawful permanent resident, whose entire family is here, whose spouse and children are U.S. citizens, who speaks only English and knows no other culture but ours may be deported and permanently barred from re-entering the United States. All this may be due to a minor criminal offense committed years ago, which may not even have been a ground for deportation when it was committed and may not have been considered a conviction under the law of the state where it occurred.

Current laws severely limit discretion by an immigration judge to provide humanitarian relief in such a situation. Additionally, the deportee may have no right to have an independent federal judge review the case. Restoration of discretion to immigration judges is necessary in the interest of fairness, proportionality, and justice.

Congress should enact legislation to restore the authority of immigration judges to grant discretionary relief on a case by case basis.

3. The Board of Immigration Appeals "Streamlining Procedures" adopted in 2002 should be repealed.

The Board of Immigration Appeals (BIA) has a unique role and mission. The purposes of the Board's administrative review are to provide guidance to immigration judges below through the interpretation of the law, to achieve uniformity and consistency of decisions rendered by the 200- plus immigration judge corps, and to ensure fair and correct results in individual cases. In an overwhelming majority of appeals, the Board is the court of last resort. In this context, the quality of the administrative appeal is crucial.

With the expressed intent to eliminate a backlog of cases at the BIA, the Department of Justice implemented a series of procedural reforms in 2002. These procedural reforms limit the use of the Board's traditional three-member panel review and allow in most cases a single Board member to decide the merits of an appeal with only a brief order and no written opinion. These changes not only resulted in a significantly lower number of appeals being granted by the BIA, but also greatly increased the number of BIA decisions being appealed to the federal courts -- from 5 percent (about 125 cases per month) to 25 percent (1000 to 1200 cases per month). Rather than eliminating the backlog of cases, the reforms appear to have instead shifted the burden to the federal courts. Having an efficient system is important, but simply shifting the burden is not efficient. In addition, efficiency must not be at the cost of transparent, meaningful review.

The Department of Justice should repeal the "Streamlining Procedures," or at a minimum, revise them to revert to the Board's historic practice of adjudicating its cases, with very limited exceptions, in three-member panels that issue full written decisions in each case.

4. Federal judicial review of immigration decisions should be restored and made meaningful.

Access to the courts is an essential feature of our system of government, and the implementation and execution of the immigration laws have often been corrected by such judicial oversight. Judicial review also has been important historically in protecting immigrants' rights and civil liberties.

In 1996, Congress sought to tighten the access of immigrants to the federal courts while at the same time narrowing the ability of the courts to protect immigrant rights. The 1996 laws contained provisions to restrict the review of deportation orders by federal courts; eliminate the review of discretionary denials of relief; eliminate the review of custody decisions; bar habeas review of orders denying admission, except in rare cases; and limit the power of federal courts to review implementation of the laws and issue injunctions. The Supreme Court limited the reach of some of these jurisdictional preclusions and confirmed that the writ of habeas corpus remained available to challenge a range of immigration law questions. However, in 2005 the Real ID Act incorporated aspects of these rulings and established a system of judicial review that seeks to insulate discretionary determinations from all judicial oversight.

These restrictions on federal judicial review are exceptional in scope and establish a dangerous precedent for unreviewable government actions. As such, they are incompatible with the basic principles on which this nation's legal system was founded. The ABA is cognizant of the impact that the increased number of immigration appeals has had on our federal courts in recent years and the concerns of some that restoring federal review in a number of areas would further exacerbate this problem. However, we believe that incorporating the changes outlined above to improve the administrative system of adjudication and review will ensure that only those cases that necessitate further review will reach the federal courts.

Congress should enact legislation to restore federal judicial review of immigration agencies' decisions, including deportation orders, discretionary decisions, detention, and expedited removal.

The recommendations discussed above are among a wide range of issues endorsed by the ABA and are by no means exhaustive. We emphasize these issues because of their timeliness and importance to our nation.

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