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The Honorable Secretary Jeh Johnson
U.S. Department of Homeland Security
Nebraska Avenue Complex
3801 Nebraska Avenue, N.W.
Washington, DC 20528

RE: ABA Concerns about Expansion of Immigration Detention, Including Detention of Women and Children Seeking Protection as Refugees

Dear Secretary Johnson:

As President of the American Bar Association, I write to express the Association's concerns about recent policies and practices that have significantly expanded immigration detention, particularly impacting women and children arriving in family units at our borders seeking refugee protection. Widespread detention of migrants is inconsistent with fundamental principles of liberty and due process and is particularly problematic when it impacts asylum seekers and children.

The ABA has a long history of working to ensure fair treatment and due process rights for noncitizens, including those placed in immigration detention in the United States. For more than two decades, the ABA has opposed the use of detention except in extraordinary circumstances, such as when an individual poses a threat to national security or public safety, or a substantial flight risk.¹ The ABA has adopted a comprehensive set of Civil Immigration Detention Standards,² intended to provide a blueprint for the Department of Homeland Security (DHS) as the agency has worked to reform the detention system to a truly civil model. Guiding principles for the standards include that: (1) any restrictions or conditions placed on noncitizens should be the least restrictive, nonpunitive means necessary to ensure their appearance in immigration court or for removal; (2) detention is only permissible based upon an objective determination that an individual presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision; and (3) noncitizens should not be presumed to be dangerous or prone to flight in the absence of credible information establishing objective risk factors.

DHS's current detention policies fail to meet these standards and instead presume detention as the default position for many migrants, particularly for Central American women and children seeking asylum. Specifically, since June of 2014, DHS has expanded the capacity for detention

¹ The ABA has reaffirmed this position several times, most recently in February of 2006. *See*: http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107e.authcheckdam.pdf.

² Available at http://www.americanbar.org/groups/public_services/immigration/civilimmDETstandards.html.

of families by approximately 1,000 detention spaces and has concrete plans to create an additional 2,500 beds in the coming months. This rapid and significant expansion of detention for families runs counter to a presumption against detention and is also a marked departure from the government's 2009 decision to end the detention of families except in truly exceptional circumstances, which resulted in an appreciable reduction of detention space for families. In 2009, the government reached the decision to eliminate the detention of families after recognizing that families present little to no risk to the nation's safety and that detention causes severe harm to asylum-seeking children and families because of their unique developmental vulnerabilities and the likelihood that they have already suffered serious trauma. These same considerations continue to weigh against detention of mothers and children currently seeking asylum. For these reasons, DHS general policy still favors release of asylum seekers, finding that detention is generally not "in the public interest."³

However, DHS has chosen to emphasize detention in addressing the humanitarian challenges presented last summer when larger numbers of women and children arrived at the U.S. border seeking protection. DHS has placed these Central American women and children into expedited removal proceedings, which requires their detention at least until they pass a credible fear interview allowing them to pursue an asylum claim. This practice is a departure from previous DHS practice and also from our nation's basic principles that favor liberty, due process, and access to justice.

The ABA also finds problematic DHS' process for determining custody after families pass a credible fear interview. DHS initially insisted on the continued detention of families even after a favorable credible fear determination, based on a deterrence rationale. Detention is neither effective nor justifiable as deterrence to migration of families and individuals fleeing violence. Such detention violates basic principles requiring that any deprivation of liberty be justified based on individual circumstances and instead serves an impermissible punitive function that should be reserved for those convicted of crimes. Indeed, on February 20, 2015 a federal district court issued a preliminary order enjoining DHS from "detaining class members for the purpose of deterring future immigration to the United States and from considering deterrence of such immigration as a factor in such custody determinations."⁴

Recently, DHS has begun to allow for release of some families upon payment of a bond after a favorable credible fear interview. However, ICE has set prohibitively high bond amounts in many cases, such that release is impossible as a practical matter, and the bond amounts do not appear to reflect any individualized assessment. These practices do not align with the principled approach, supported by ABA policy, of requiring individualized consideration of the necessity of detention based on objective criteria.

An additional concern regarding the widespread use of detention is that it significantly impedes access to legal representation. Statistics show that about 50 percent of noncitizens in immigration proceedings lack legal counsel; the percentage rises to more than 80 percent for

³ U.S. Immigration and Customs Enforcement, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, December 8, 2009, available at: http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.

⁴ RILR v. Johnson, No. 1:2015cv00011 (D.D.C. Feb. 20, 2015)

those in detention. Multiple studies have confirmed that detention of an immigrant makes it more difficult to obtain counsel, which makes success in removal proceedings less likely.⁵ Family detention facilities are located in remote and concentrated areas, far from major urban centers where legal services organizations and *pro bono* attorneys can be found. Detention thus makes it challenging for families to obtain representation and places a serious burden on the resources of *pro bono* legal service providers seeking to serve this uniquely vulnerable population. Legal representation not only enhances due process protections but also increases rates of appearances and improves the efficiency of the immigration court process, a critical need given the historically high case backlog. Thus, policies should be adopted that facilitate, rather than impede or obstruct, representation.

The expanded emphasis on detention is especially troubling when it is not necessary to accomplish the primary goal of ensuring appearances in court. Asylum seekers are highly motivated to comply with court orders, as they have a strong interest in securing protection. Most of the detained mothers and children present no flight risk because they can be released to family members, with valid U.S. immigration status, who can support them and help to ensure that they appear for their asylum hearings. Children and families released in this manner are likely to appear in court, particularly when represented by counsel.⁶ For cases that present a flight risk that cannot be addressed adequately through requirement of payment of a nominal financial bond, there is a range of alternatives to detention that cost a fraction of the amount of detention. Community-based support models have shown appearance rates of well over 90%, and ICE's existing full-service model reports an appearance rate of 99.6%.⁷ Lutheran Immigration and Refugee Service and the U.S. Conference of Catholic Bishops have piloted community support programs in cooperation with ICE, and these have been highly effective. Utilizing alternatives to detention also enhances access to legal representation and ensures that individuals and families are able to access needed services and support to address the trauma that many have experienced.

For the reasons expressed above, we urge that DHS:

1. Revise its detention policies and practices to end the detention of families except in truly exceptional circumstances.
2. Cease the expansion of family detention spaces at the Karnes and Dilley detention centers.

⁵ See The Honorable Robert A. Katzmann, Bench, Bar and Immigrant Representation, 15 Legislation and Public Policy 585, 593 (2012).

⁶ See Wall Street Journal, Most Migrants Make their Court Date (Oct. 7, 2014), available at <http://www.wsj.com/articles/most-migrants-make-their-court-date-1412715818>; American Immigration Council's Immigration Policy Center, "Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court," July 29, 2014, available at <http://immigrationpolicy.org/just-facts/taking-attendance-new-data-finds-majority-children-appear-immigration-court>; Migration Policy Institute, U.S. Detention of Asylum Seekers and Human Rights (March 1, 2005), available at <http://www.migrationpolicy.org/article/us-detention-asylum-seekers-and-human-rights>.

⁷ DHS, U.S. Immigration and Customs Enforcement, Salaries and Expenses, Fy2014 Congressional Budget Justification, pg. 925, available at <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>; *Intensive Supervision Appearance Program II: Contract Year 2013 Annual Report* (BI Incorp. 2013); *Lutheran Immigration & Refugee Serv.*, Alternatives to Detention: History and Recommendations 2 (2013) available at <http://lirs.org/wpcontent/uploads/2013/04/LIRS-Backgrounder-on-Alternatives-to-Detention-3-12-13.pdf> (between 93% – 97% appearance rate for individuals in supervision programs).

3. Honor the preliminary injunction issued in *RILR v. Johnson*.
4. Abandon deterrence-based detention policies and adopt a presumption against detention, particularly in the case of vulnerable individuals such as asylum-seekers and children.
5. Provide an individualized custody assessment for families placed in expedited removal after they pass the credible fear interview, taking into account their individual circumstances and particular vulnerabilities as well as the specific likelihood that they pose a flight risk or danger to the community.
6. Prioritize release of eligible families on parole (without the requirement of a parole bond) or on recognizance in all possible cases.
7. Utilize alternatives to detention in cases in which some appearance support is determined to be necessary for those who would otherwise be detained.
8. In those limited cases where a specific flight risk or danger has been established and payment of a financial bond is the least restrictive means of addressing these risks, set the bond amount at an attainable level based on individual circumstances.
9. Facilitate access to legal representation and legal information for all individuals and families subjected to detention.

There is no question that the rapid increase in families and unaccompanied children entering our country over the past year has presented challenges. However, in the rush to address those challenges, the United States cannot abandon the principles of liberty, fairness, and due process that make this country a beacon of hope for those suffering persecution around the world. The current policies that have resulted in unprecedented levels of detention, most disturbingly a return to the failed practice of family detention, should be abandoned immediately in favor of policies that ensure a humane and effective system that reflects the core values of our legal and justice systems.

ABA representatives, along with representatives of other national stakeholders, have been meeting regularly with officials and staff from relevant government agencies, including DHS, to discuss the many serious issues that have arisen as a result of the children and family surge cases beginning last year and the ongoing expanded detention policies. We appreciate being included in that group and the efforts of those involved to ameliorate some of the problems, but we firmly believe that a fundamental changes in policy are necessary. We stand ready to work with you and your Department to accomplish the objectives that we propose in this letter.

Sincerely,



William C. Hubbard

cc: Eric Holder, Attorney General, DOJ