

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

August 12-13, 2002

RESOLVED, That the American Bar Association opposes the incommunicado detention of foreign nationals in undisclosed locations by the Immigration and Naturalization Service (INS) and urges protection of the constitutional and statutory rights of immigration detainees by:

1. Disclosing the names, detention facilities and charges against detainees and ensuring their immediate access to attorneys and family members;
2. Promptly charging detainees and releasing detainees when charges are not brought or removal orders are not effectuated within a constitutionally permissible time period;
3. Providing prompt custody hearings before immigration judges with meaningful administrative review and judicial oversight;
4. Holding public removal hearings except when required to protect the individual's safety or welfare or when a judge finds that a portion of any such hearing must be closed because (a) information that would pose an imminent threat to national security is likely to be disclosed in that portion of the hearing and (b) there is no other reasonably available alternative to closure that would adequately protect the government's national security interest; and
5. Promulgating into regulation the four INS detention standards relating to access to counsel and legal information, and permitting independent organizations to visit the detention facilities and meet privately with detainees to monitor compliance.

REPORT

Introduction

The American Bar Association is deeply committed to ensuring that foreign nationals in the United States receive fair treatment under the nation's immigration laws in accordance with the Constitution. Among the Association's greatest concerns is the erosion of traditional due process safeguards and growing reliance on detention in the immigration context. In the wake of the September 11 attacks, the Department of Justice has questioned and detained hundreds of foreign nationals, nearly all of them on administrative immigration violations unrelated to those tragic events. Deprived of their liberty, the ability of detained individuals to secure and maintain working relationships with counsel and effectively exercise their rights in court is significantly diminished. Media coverage of their treatment has served to educate the public about Immigration and Naturalization Service (INS) practices and sparked a debate over the character of our justice system.

Several aspects of the INS's detention practices are constitutionally suspect, including the secret, incommunicado nature of the detention as well as closed hearings and lack of access to attorneys and family members. The Justice Department has refused to release information such as the names of those in detention, where they are being held, and what if any charges have been brought against them. Moreover, the INS has repeatedly changed the detention and bond rules to frustrate release and prolong detention. Reports from lawyers and media reveal that release bonds often are not being set, custody hearings are not scheduled or have been closed to family and the public, and the INS has refused to accept bonds for individuals who are eligible for release. Families cannot locate relatives and lawyers cannot find clients. Legal organizations have been prohibited from visiting with detainees and presenting legal rights orientations as permitted under the INS Detention Standards.

The Washington Post has reported that "[s]cores of immigrants detained after the Sept. 11 terror attacks were jailed for weeks before they were charged with immigration violations, according to documents released from the Justice Department."¹ The government has arrested over 1,200 people since the September 11 probe began. After many inquiries, the Department of Justice reported that about 750 of those arrested had been detained on immigration charges and 460 people from 39 countries were still being held. In late April 2002, 104 of these individuals remained in INS detention and 350 had been removed from the United States.² None of the detainees has been publicly charged with terrorism-related crimes. A significant number of the affected individuals are married to U. S. citizens and have lived in the United States for many years.³

¹ Dan Eggan, *Delays Cited in Charging Detainees*, WASH. POST, Jan. 15, 2002.

² Steve Fainaru and Amy Goldstein, *Judge Rejects Jailing of Material Witnesses*, WASH. POST, May 1, 2002, at A1.

³ See JAMES MADISON, REPORT TO THE GENERAL ASSEMBLY OF VIRGINIA, JAN. 7, 1800, reprinted in THE VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, THE KENTUCKY-VIRGINIA RESOLUTIONS AND MR. MADISON'S REPORT OF 1799, at 36 (1960). "If the banishment of an alien from a country into which he has been invited...

The requirements of due process have long been applied to individuals in immigration proceedings.⁴ Just last term, the Supreme Court reaffirmed that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678 (2001). For both citizens and noncitizens, freedom from physical detention lies at the core of the liberty interest protected by the Due Process Clause. *Foucha v. Louisiana*, 504 U.S. 71 (1992). See also *Zadvydas, supra*, (“the Due Process Clause applies to all ‘persons’ within the United States”). Detention practices need to be carefully calibrated to ensure that they respect fundamental principles.

Due Process and INS Practices

The INS is one of the nation’s largest law enforcement agencies, with more armed agents than the FBI. Its presence is not limited to border areas but extends everywhere within the United States. The INS annually detains over 200,000 foreign nationals with pending administrative proceedings in facilities throughout the United States. Today, there are about 20,000 detention beds available to the INS; 55 percent are rented from private prisons and state and local jails. Immigration detainees represent the fastest growing segment of the U.S. incarcerated population.⁵

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.⁶ Unfortunately, even immigrants who may be eligible for release often remain detained because they cannot afford to post the high bonds.⁷

where he may have formed the most tender of connections, where he may have vested his entire property and acquired property... and where he may have nearly completed his probationary title to citizenship...if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the norms can be applied.”

⁴ See *Yamataya v. Fisher*, 189 U.S. 86 (1903) (holding that it is not permissible for the government “arbitrarily to cause an alien who has entered the country. . . although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.”)

⁵ Letter from Robert D. Evans, Director, Governmental Affairs Office, American Bar Association, to Sen. Carl Levin, Chairman, Permanent Subcommittee on Investigations (Nov. 13, 2001).

⁶ Detention arises primarily in four contexts: (1) arriving individuals who are seeking admission to the United States may be detained without bond; (2) people charged with being deportable may be detained pending the conclusion of deportation hearings, but people who are charged with certain criminal and national security grounds are held without bond; (3) aliens with final deportation orders are taken into custody and those whom the INS cannot deport may be detained indefinitely; and (4) children under 18 years of age may be detained when there is no suitable adult relative, legal guardian or foster care placement to which to release them. See Immigration & Nationality Act (INA) § 236(a); 8 U.S.C. § 1226(a) (2000).

⁷ Minimum bond is \$1,500. See INA § 236(a)(2); 8 U.S.C. § 1226(a)(2) (2000).

The loss of liberty has punitive effects and works to undercut rights on many levels, beginning with the right to counsel. The complex and dynamic nature of immigration laws coupled with the vulnerability of the population affected by them renders counsel essential. The consequences of removal from the United States can be grave, even life threatening. However, asylum seekers and others in removal⁸ proceedings are not entitled to appointed counsel under the Sixth Amendment as are criminal defendants.⁹ They have a “privilege” of representation by counsel “at no expense to the Government.”¹⁰ Immigrants and refugees who are indigent must find lawyers or legal service programs to represent them for free or at a reduced cost, or they must represent themselves.¹¹

Even if they succeed in hiring an attorney or obtaining pro bono representation, detained people often cannot access vital information and experience numerous difficulties preparing their cases and communicating with counsel. INS detention practices exacerbate this situation. Although there is nearly universal agreement that criminal and non-criminal detainees should not be commingled, the INS relies heavily on penal facilities for asylum seekers and other administrative detainees. The lack of access to phones, family, counsel and legal information in these places is well documented. The INS frequently transfers detainees to distant locations, often without notifying the person’s lawyer of record and without regard for the need to prepare for a hearing or to be close to one’s family and support system. Many detention facilities are in rural locations, far from private and pro bono lawyers and nonprofit legal programs, which makes access to lawyers, family and legal materials even more difficult. INS practices since Sept. 11 have compounded these problems.

There are no effective procedural safeguards in place to ensure that detention is non-punitive in nature, and judicial review is severely limited if available at all. In recent months, moreover, the INS has broadened its own rules to allow for the incarceration of foreign nationals. Taken together, these provisions can result in long-term and sometimes indefinite detention of administrative detainees and significantly impacts their ability to secure and maintain working relationships with counsel.

Regulatory changes in INS detention in the wake of September 11

Shortly after September 11, the Department of Justice made several rule changes permitting prolonged detention of immigration detainees *before* charges are initiated, continuing mandatory detention without bond or a custody hearing *after* charges have been filed (even when charges

⁸ The term “removal” refers to the expulsion of an alien from the United States. This expulsion may be based on grounds of inadmissibility or deportability.

⁹ See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation proceedings are purely civil and various protections that apply in the context of a criminal hearing do not apply in deportation proceedings). See also *United States v. Campos-Ascencio*, 822 F.2d 506, 509 (5th Cir. 1987); *Ramirez v. INS*, 550 F.2d 560, 563 (9th Cir. 1977).

¹⁰ INA § 240(b)(4)(A); 8 U.S.C. § 1229a(b)(4)(A) (2000).

¹¹ Legal programs funded by the Legal Services Corporation are subject to “alien restrictions” imposed by Congress that prevent them from representing most immigration detainees.

are *not* based on security grounds), and providing for an automatic stay of release when an immigration judge or the Board of Immigration Appeals makes a custody determination that is favorable to the alien. These significant changes went into effect immediately upon publication in the Federal Register, without the advance notice and comment period usually required under the Administrative Procedures Act. Three new regulations in particular far fall short of the procedural safeguards necessary to ensure the protection of due process rights.

1. Pre-charge detention.

The first rule allows the INS to hold someone in custody for up to 48 hours without bringing charges.¹² In the event of an emergency or other extraordinary circumstance, however, the Service has an unspecified amount of “reasonable” additional time to bring charges. Previously, the INS had been required to issue formal charges within 24 hours of apprehension¹³ and many, if not most, decisions were made within a few hours. Since the new rule went into effect on September 17, several hundred individuals have been held under this interim regulation. Many individuals were not charged within the 48 hours, and it appears that a very large number have been held considerably longer than 48 hours.¹⁴

In one example, two Pakistani immigrants were arrested on Oct. 2, but were not charged with overstaying their visas until 49 days later, the records show. In another case, an Israeli national of unidentified ethnicity was held for 66 days before being charged with illegally entering the country.¹⁵

The INS claims these changes were needed to “establish an alien's true identity; to check domestic, foreign, or international databases and records systems for relevant information

¹² Disposition of cases of aliens arrested without warrant, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (to be codified at 8 C.F.R. pt. 287).

¹³ 8 C.F.R. § 287.3(d).

¹⁴ The new 48-hour time frame appears to be adopted from the criminal context. There the government normally has 48 hours in which to present a defendant for a probable cause hearing. The time derives from *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), where the Supreme Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to extended detention following a warrantless arrest. Subsequently, in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), the Supreme Court clarified *Gerstein* by defining “prompt.” In *McLaughlin*, the Court stated that “judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.” The 48-hour rule is not absolute; even shorter periods have been held to violate the Fourth Amendment. As the *McLaughlin* Court explained: “This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delays are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.” *Id.* If the probable cause determination does not occur within 48 hours, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. *Id.* The Court cautioned that neither intervening weekends nor time to consolidate pretrial proceedings rose to that level.

¹⁵ Dan Eggan, *Delays Cited in Charging Detainees*, WASH. POST, Jan. 15, 2002.

regarding the alien; and to liaise with appropriate law enforcement agencies within the United States and abroad.”¹⁶ The INS also claims the need to “process cases, to arrange for additional personnel or resources, and to coordinate with other law enforcement agencies” in the event of an “emergency or other extraordinary circumstance.”¹⁷ The interim regulation does not define what types of circumstances may constitute an emergency, but there is no limit on how long an individual may be held prior to being charged in the event of an emergency. There also is no requirement that detained individuals receive hearings promptly to review their custody and terms of release.

In contrast to the vagueness of the regulation, section 412 of the USA PATRIOT Act¹⁸ establishes one narrow exception to the usual custody rules under section 236 of the Immigration and Nationality Act – certification by the Attorney General that he has “reasonable grounds to believe” the individual is a terrorist, will engage in terrorist activities, is a representative of terrorist organization, has violated U.S. espionage laws, or endangers national security.¹⁹ The law also limits the detention of a certified alien to a maximum of seven days before charges are initiated and provides for judicial review through habeas corpus. It is unclear under what authority the INS has created new non-statutory exceptions.

2. Expanded grounds for automatic stays of custody determinations

The INS has also promulgated regulations expanding the grounds for which the INS can obtain an automatic stay of an immigration judge’s custody decision in any case in which INS initially set bond at \$10,000 or more.²⁰ In effect, the regulations permit the INS prosecuting attorney to override the decision of an independent immigration judge. If the INS dislikes the immigration judge’s ruling, the prosecutor need only file a notice that the INS intends to appeal the decision in order to obtain a stay (and continue detention) while the bond decision is appealed to the Board of Immigration Appeals – a process that often takes at least six months. If the BIA authorizes release, its decision is automatically stayed for five days, during which time the INS Commissioner may decide to certify the decision to the Attorney General. The BIA custody order will continue to be stayed until the Attorney General makes a final decision. The obvious result is prolonged, possibly indefinite, detention despite the decision of an impartial adjudicator that detention is not warranted.

Prior to these regulations, the INS could obtain stays of bond decisions for immigrants charged with being inadmissible or deportable due to many types of criminal convictions, including aggravated felonies, terrorist activity, controlled substance violations, prostitution, firearms

¹⁶ Disposition of cases of aliens arrested without warrant, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (to be codified at 8 C.F.R. pt. 287).

¹⁷ *Id.*

¹⁸ Pub. L. No. 107-65, 115 Stat. 272 (2001).

¹⁹ *Id.*

²⁰ Custody/bond, 66 Fed. Reg. 54,909 (Oct. 31, 2001) (to be codified at 8 C.F.R. pt. 3).

offenses, and any crime in which the sentence imposed was for one year or longer.²¹ The law and regulations provided that such immigrants were subject to mandatory detention.²² The INS can now prolong detention for individuals who are statutorily eligible for release. This permits virtually endless detention of anyone whom a low-level deportation officer deems deserving of a \$10,000 bond. A \$10,000 bond, it is important to note, is not in the least extraordinary for immigration detainees; the minimum bond usually imposed is \$5,000.

3. Indefinite detention

The third regulatory change instituted by the INS concerns indefinite detention.²³ The Immigration and Nationality Act (INA) allows the INS 90 days in which to remove an alien who is ordered deported. In many cases, however, the INS cannot deport an individual with a final removal order. This could be for any number of reasons, including lack of a deportation treaty with the country of citizenship, inability to obtain travel documents, or an order issued under the Convention Against Torture prohibiting execution of the removal order. The INA allows for suspension of the 90-day removal period and detention beyond the 90-day removal period in certain limited circumstances. The INS, however, had interpreted the law to mean that it had the authority to detain non-removable aliens indefinitely.

The Supreme Court addressed this issue in *Zadvydas v. Davis, supra*, and held that indefinite detention of individuals with final orders of removal is constitutionally suspect. The Court further held that six months is a reasonable time in which to attempt removal, and that if removal could not be effected within that time frame, the individual must be released. The INS promulgated interim regulations that claim to comport with the *Zadvydas* decision but in reality undermine its basic prohibition of indefinite detention. The interim regulations in effect enable the INS to detain an alien for years upon concluding every six months that the individual can potentially be removed in another six months. These decisions are made by deportation officers without formal evidentiary hearings or the involvement of immigration judges; there is no administrative appeal. The interim regulations thus completely contradict the *Zadvydas* decision and create an unending cycle of detention interrupted only by a nominal internal review every six months.

²¹ 8 C.F.R. § 3.19(i)(2).

²² INA § 236(c).

²³ See *Apprehension and Detention of Aliens Ordered Removed*, 66 Fed. Reg. 56,967 (Nov. 14, 2001) (to be codified at 8 C.F.R. pt. 241). It is important to recall that the INS arrests and detains individuals who are charged with committing administrative, not criminal, violations. The Supreme Court has held that non-punitive civil confinement must conform to strict procedural safeguards, including a disavowal by the detaining party of any punitive intent; limited confinement to a small segment of particularly dangerous individuals; the assistance of counsel in the case of indigence; the right of the detainee to examine evidence, present witnesses, and cross examine witnesses; the availability of several levels of review of custody decisions; and segregation from the criminal population. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Changes to long-respected standards of due process

Since September 11, the procedural rights of immigrants have been subject to sweeping changes that deviate from recent past practice as well as from fundamental principles that have been the mainstay of our judicial process since the inception of the country. One principle threatened by recent changes is that of the full, fair and open hearing. As the Federal Court of Appeals for the District of Columbia stated, “That we regard an ‘open or public hearing’ to be a fundamental principle of fair play inherent in our judicial process cannot be seriously challenged.”²⁴ The Sixth Amendment requires a public trial in all criminal cases. Civil cases as well are required to be conducted in open court.²⁵ Even in administrative proceedings, “the rule of the ‘open’ forum is prevailing – if not by statutory mandate, then by regulation or practice.”²⁶ Nevertheless, the Department of Justice issued instructions to immigration courts in September 2001 specifying that in certain cases “[t]he courtroom must be closed for these cases – no visitors, no family, and no press.”²⁷

A second fundamental change appears in the Justice Department’s newly released administrative rules permitting the government to listen in on conversations between lawyers and clients in federal custody, including people who have been detained for immigration reasons but not charged with any criminal offense, if there is “reasonable suspicion” that an exchange of information may occur “for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.”²⁸

As ABA President Robert E. Hirshon has forcefully maintained, no privilege is more “indelibly ensconced” in the American legal system than the attorney-client privilege. These new rules

²⁴ *Fitzgerald v. Hampton*, 467 F.2d 755, 764 (C.A.D.C. 1972).

²⁵ FED. R. CIV. P. 77(b).

²⁶ *Fitzgerald v. Hampton*, *supra* note 22, (citing THE REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941)). Open hearings have been the general rule in the immigration removal context; however, there are narrowly-crafted exceptions to protect the welfare and confidentiality of applicants for asylum, withholding of removal, protection under the Convention Against Torture, and other relief available in removal proceedings including under the Violence Against Women Act.

²⁷ Memorandum from Chief Immigration Judge Michael Creppy, to All Immigration Judges (Sept. 21, 2001) (forwarding written instructions issued by the Attorney General). A Michigan federal court has ordered that the public be permitted access to the removal proceedings of Lebanese national Rabih Haddad, whose proceedings had been closed pursuant to Judge Creppy’s directive. Relying on *Fitzgerald*, *supra* note 22, Judge Nancy Edmunds held that “[o]penness is necessary for the public to maintain confidence in the value and soundness of the Government’s actions, as secrecy only breeds suspicion as to why the Government is proceeding against Haddad and aliens like him.” *Detroit Free Press et al. v. Ashcroft*, 30 Media L. Rep. 1598 (E.D. Mich. 2002). On April 18, 2002, the Sixth Circuit Court of Appeals denied the government’s request to prevent the release of the hearing transcripts in that case and to prevent the press and public from attending future hearings. The appeals court said there was a “slim likelihood” that the government would prevail in an appeal of the ruling and that it was “unlikely” that the government would suffer “irreparable harm” by complying with the order pending an appeal. *Appeals judges insist U.S. open immigration hearings*, CHI. TRIB., Apr. 19, 2002.

²⁸ National Security Cases, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (to be codified at 28 C.F.R. § 501.3(d)).

clearly violate that privilege, and therefore seriously impinge on the right to counsel – a right that extends to foreign nationals in immigration proceedings. If the government has probable cause to believe criminal activity is occurring or is about to occur, it can ask a judge to approve the type of monitoring proposed by these regulations. But prior judicial approval and the establishment of probable cause - not “reasonable suspicion” – are required if the government’s surveillance is to be consistent with the Constitution and to avoid abrogating the rights of innocent people.

Effects of the erosion of due process rights

The cumulative effect of these changes, combined with the Justice Department’s vast Middle Eastern and Muslim-focused terrorist investigation, has been the extended detention of individuals without charges or charged with minor immigration violations, such as visa overstay and working without authorization, that prior to September 11 rarely resulted in pre-hearing detentions. Members of Congress have held hearings into the DOJ activities and repeatedly asked the INS for information about the individuals being detained and their locations, and ultimately received only a list of anonymous individuals. In response to the Department of Justice’s actions, the American Civil Liberties Union brought a successful lawsuit compelling the release of the identities and locations of detainees in New Jersey prisons.²⁹ The Department of Justice appealed and also attempted to circumvent the ruling by issuing an interim regulation, effective immediately upon its publication, prohibiting state and local governments from releasing information pertaining to any INS detainee. The interim rule specifies that it applies to requests for disclosure that are the subject of pending proceedings.³⁰

The situation of the detainees has not improved even though no information has been made available to the public to suggest that the Department of Justice’s tactics appear to have produced few, if any, leads in the terrorism investigation. Moreover, such tactics are generating mistrust of and discontent with law enforcement in immigrant communities, as demonstrated by the following:

- Ali Maqtari, a Yemeni French teacher married to a U.S. citizen, was detained on September 15, 2001, while dropping off his wife Tiffany at basic training. Mr. Maqtari testified at a Senate Judiciary Committee hearing that officers descended upon him and his wife (who was wearing an Islamic head scarf) “wild and full of anger.” Charged with a minor visa violation that normally would have been resolved with some paperwork, the INS detained Mr. Maqtari for almost two months, during which time he was allowed only one phone call per week not to exceed fifteen minutes. He was interrogated and threatened with evidence that he was a terrorist. He was threatened with beatings and taunted by a guard. He passed a lie detector test three days after being detained but was held for the next seven weeks with hardened

²⁹ ACLU of New Jersey et al. v. County of Hudson et al., Docket No. HUD-L-463-02 (N.J. Super. Ct. Law Div. Apr. 12, 2002). *See also* Steve Fainaru, *U.S. Bans the Release of Detainees’ Names; INS Order Issued to Counter N.J. Ruling*, WASH. POST, Apr. 19, 2002 at A10.

³⁰ Information regarding detainees, 67 Fed. Reg. 19,508 (Apr. 17, 2002) (to be codified at 8 C.F.R. pt. 236 and pt. 241).

criminals. His wife, fearing for her husband's and her own safety, resigned from the Army.³¹

- The FBI took into custody more than 40 immigrants from Mauritania, a country in North Africa, during a September 21 sweep through three Boone County, Kentucky apartment complexes. The FBI was following up on a “tip” that some of the September 11 hijackers had been living in Northern Kentucky. All of the Mauritians were cleared of any connection to terrorism and all but four were released the next day.³²
- The Israeli government believes that as many as 100 young Israeli adults have been detained nationwide. At least one Israeli national spent almost a month in immigration service custody before lawyers were able to gain her release. Most of the time she sat in a county jail, having been denied bond, finding it difficult to get access to an attorney, and being encouraged to sign papers that waived her right to a hearing. “At first we were told that we would be back in Israel in about 10 to 14 days and that all we needed to do was not to ask for a bond hearing and sign some papers to go,” she said. “I had no idea what my rights were.” The FBI and the INS declined to comment about her case.³³
- Post-September 11 detainees who were released after six months in New York area facilities report having suffered sleep deprivation, body cavity searches after each meeting with their attorneys, and physical abuse by guards that left them bloodied. The prolonged incarceration and conditions of their confinement are the subject of a class action lawsuit filed by detainees held in both state and federal facilities. Detainees claim that they were deliberately kept in custody long after they received voluntary departure or final removal orders while authorities sought to investigate – without probable cause – whether they had any ties to terrorism. Class members also allege that they were interrogated without being advised of their right to counsel, verbally and physically abused, and prohibited from practicing their religion.³⁴ None of them were found to have any link to terrorist activity.³⁵

Many of those detained have not been charged with any crime or even an immigration violation. The government has relied heavily on the material witness statute³⁶ to arrest and detain persons who it believes may have information pertaining to terrorism or September 11. A federal judge in New York has ruled that the government's use of the material witness statute is illegal.³⁷ The

³¹ Stuart Taylor, Jr., *Don't Treat Innocent People Like Criminals*, NAT'L J., Dec. 8, 2001.

³² David Firestone, *Federal arrest leaves Maruitanian bitter/Man among others held after Sept. 11*, HOUSTON CHRON., Dec. 9, 2001.

³³ Mary Sanchez, *Immigrants, advocates say innocents caught in terror dragnet*, KANSAS CITY STAR, Nov. 26, 2001.

³⁴ See Class Action Complaint and Demand for Jury Trial ¶¶ 3-5, *Turkmen et al. v. Ashcroft et al.*, No. CV-02-2307 (E.D.N.Y. filed Apr. 17, 2002).

³⁵ Steve Fainaru, *Detainees Offer Glimpse of Life in N.Y. Facility*, WASH. POST, Apr. 17, 2002, at A1.

³⁶ 18 U.S.C. § 3144.

³⁷ *U.S. v. Awadallah*, 2002 WL 755793 (S.D.N.Y. Apr. 30, 2002).

exact number of people detained under the material witness statute is unknown due to the government's secrecy in conducting the inquiry.³⁸

It is important to note that the government does not claim that any of the hundreds of individuals who have been arrested and detained are terrorists or have any information about the tragic events of September 11. They are merely individuals who were swept up in the INS's enforcement operations that followed the horrific September 11 events. In many cases, the FBI interviewed and cleared the individuals but failed to release them from detention. Many have not been convicted of any crime nor had any criminal charges filed against them. Nevertheless, the individuals have been detained at length, often in locations not disclosed to them or their families and in which they have little or no access to phones, visitors, information or lawyers.³⁹

Monitoring of detention standards

The INS has approved and issued four Detention Standards relating to detainees= access to counsel and legal information. These standards, issued November 2000, were negotiated with the American Bar Association and cover detainees= access to telephones, visitation policy, presentations of group legal rights and access to law libraries, as well as a variety of other aspects of detention. This is the first time the INS has instituted standards that apply to all facilities holding INS detainees and will hopefully eliminate the variations that have existed among detention centers regarding attorney access to detained clients.

The standards, however, have not been adopted as formal rules, nor do they address the common practice of transferring detainees from one remote facility to another without notice to counsel. Most importantly, the standards currently apply in full only to a minority of the 900 detention facilities used by the INS. Although the standards are being phased in nationwide, the INS lacks sufficient resources to ensure that the standards are rigorously enforced.

In view of the increasing reliance on such non-INS facilities, the INS should facilitate efforts to implement monitoring by independent observers to ensure enforcement of the detention standards. It is a common and accepted international practice for detention centers to receive visits by impartial organizations that evaluate conditions and ensure that the individuals subject to detention are being treated appropriately. A recent example of such monitoring is the Red Cross's visits to over 30 places where Taliban prisoners are being held.⁴⁰ The observers should monitor the INS's compliance with statutory and regulatory rules pertaining to detention and be able to meet privately with detainees to verify the conditions of confinement and their welfare.

³⁸ Steve Fainaru and Amy Goldstein, *Judge Rejects Jailing of Material Witnesses*, WASH. POST, May 1, 2002, at A1.

³⁹ See James Ridgeway, *After 9-11, Official Terror Kicks In*, VILLAGE VOICE, Apr. 17-23, 2002; Steve Fainaru, *Detainees Offer Glimpse of Life in N.Y. Facility*, WASH. POST, Apr. 17, 2002, at A1.

⁴⁰ *Red Cross allowed access to detainees*, ASSOCIATED PRESS, Dec. 27, 2001.

ABA Interests

The ABA has long-standing interests in and has played an active role in protecting the due process rights of immigrants and asylum seekers. Over the years the House of Delegates has adopted a number of policies respecting the right to fair hearings and due process safeguards in all immigration matters (exclusion, deportation and asylum). These policies range from strenuously objecting to expedited processes where the applicant is denied a hearing before an impartial adjudicator (February 1983), to defending the availability and scope of administrative and judicial review (February 1983), and supporting the right to retain counsel and enjoy full representation (February 1983). The ABA has appeared as *amicus curiae* in the Supreme Court on related due process issues.

The Association also has adopted policy addressing a range of detention concerns. We believe that it is in the interests of both the INS and U.S. taxpayers, as well as the bar, that scarce law enforcement resources are not spent detaining persons who do not pose a threat to the community and who are not flight risks. The Association has adopted policy opposing the detention except in extraordinary circumstances and in the least restrictive environment (February 1990). The policy also urges the INS to facilitate access to counsel and to develop alternatives to detention. In February 2001, the Association passed recommendations opposing the transfer of detained immigrants and asylum seekers to facilities that impede an existing attorney-client relationship or securing representation. On the basis of these policies, the ABA and Department of Justice have engaged in negotiations to develop standards for attorney access that will be applicable to all INS detention facilities. The ABA also is coordinating delegations of bar leaders and law firm representatives to tour local detention facilities and report on compliance with the Detention Standards relating to legal access.

Conclusion

The ABA joins the rest of the nation in condemning acts of terrorism and recognizes that our nation faces many challenges in preventing future acts of violence. At the same time, we have numerous concerns about the growing reliance on immigration detention. Given the great lengths of time for which noncitizens are being detained and the deleterious consequences of long-term detention, procedural safeguards and strict time limits should be scrupulously observed to minimize hardships and prevent impermissible deprivations of liberty.

Respectfully submitted,

August 2002

Esther F. Lardent, Chair
Coordinating Committee on Immigration Law

GENERAL INFORMATION FORM

Submitting Entity: **Coordinating Committee on Immigration Law**

Submitted By: **Esther F. Lardent, Chair**

1. Summary of Recommendation(s).

The recommendation advocates respect for the Constitution, particularly with regard to the due process rights of noncitizens within the United States, and urges protection of the rights of immigration detainees by: disclosing their names and whereabouts; allowing access to attorneys and family members; promptly charging and, when appropriate, releasing detainees; holding custody hearings with the opportunity for appellate review; conducting open hearings with limited exceptions to protect individual safety and national security; and monitoring of detention facilities' compliance with detention standards.

This recommendation also proposes that the American Bar Association serve as a monitor of INS detention facilities. As in situations where the Red Cross is permitted access to prisoners of war and other individuals detained in times of conflict to ensure that the individuals are being treated according to the standards of international law, the ABA would serve as an independent monitor to ensure that the INS and the private entities that operate INS detention facilities are upholding INS detention standards.

2. Approval by Submitting Entity.

The Coordinating Committee on Immigration Law approved this recommendation at its meeting on February 2, 2002.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The ABA has long-standing interests in and has played an active role in protecting the due process rights of immigrants and asylum seekers. This recommendation would complement the existing policies that the House of Delegates has adopted respecting the right to due process safeguards in all immigration matters (exclusion, deportation and asylum).

5. What urgency exists that requires action at this meeting of the House?

The INS has already promulgated interim regulations severely curtailing due process rights in several areas of INS enforcement. Hundreds of immigrants are being detained incommunicado without charge, the allowable time period for pre-charge detention has been lengthened, the INS has been granted the authority to override the custody decisions of immigration judges, and the INS has all but

ignored a Supreme Court decision prohibiting indefinite detention. With such fundamental principles of due process and fairness at stake, the ABA needs to continue its leadership in protecting the due process rights of all.

6. Status of Legislation.

There is no pending legislation addressing these issues. The recommendation addresses INS practices that exceed statutory and constitutional authority.

7. Cost to the Association.

None

8. Disclosure of Interest.

Not Applicable

9. Referrals.

This Recommendation and Report was referred in January 2002 to the ABA sections which are the constituent members of the Coordinating Committee on Immigration Law through their committee representatives. These sections, namely, the Sections of Administrative Law, Criminal Justice, General Practice, Solo and Small Firm, Individual Rights and Responsibilities, International Law and Practice, Labor and Employment Law, and Litigation, the Young Lawyers Division, and the American Immigration Lawyers Association (an ABA-affiliated organization), are, by definition, the ABA entities with any interest in immigration law. All were initially notified through their designated representatives at the Committee business meeting at which the recommendation was discussed on December 7-8, 2001, and through subsequent communications to representatives who did not attend that meeting or the Committee meeting on February 2, 2002, at which this recommendation was approved.

The recommendation and report will be distributed to additional ABA entities including the Standing Committee on Law and National Security prior to the Annual Meeting.

10. Contact Persons (Prior to the meeting)

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11. Contact Person. (Who will present the report to the House)

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12. Contact Person Regarding Amendments to This Recommendation.

There are no known proposed amendments at this time.