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The Honorable Neil Abercrombie
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Abercrombie:

On behalf of the American Bar Association, I write to urge you to oppose the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), introduced by Representative James Sensenbrenner on December 6, 2005, in its present form. The ABA strongly opposes several key provisions in H.R. 4437 that would further diminish procedural and due process protections afforded to individuals in the immigration system. These provisions may have serious, even life-threatening, consequences for immigrants and asylum-seekers. I want to bring to your attention the ABA's concerns regarding those provisions.

Elimination of Judicial Review

Immigration laws enacted in 1996 and 2005 bar judicial review and habeas review in a significant number of instances. H.R. 4437 would eliminate judicial review in a broad array of additional situations: it would require individuals who enter on nonimmigrant visas to waive their right to administrative or judicial review; it would eliminate judicial review of visa revocations; it would eliminate judicial review and permit expedited removal of individuals determined by low-level officials to be inadmissible for a wide variety of convictions or even alleged conduct; and it would restrict appeals by imposing new procedural requirements.

Section 806 provides that any individual who enters the United States on a "nonimmigrant" visa, including visitors, skilled professionals, and students, would be unable to contest any action to deny them admission or to deport them in the future. In order to enter the United States, these individuals would have to waive their ability to contest future charges of immigration violations in an impartial hearing. Section 802 would eliminate judicial review, including habeas corpus review, of visa revocations, without regard to the basis (or lack thereof) for the revocation. It would eliminate the safeguard under current law which provides for judicial review if a visa revocation provides the sole ground for removal. Further, Section 203 of the bill would impose new and very serious sanctions that an individual would face after a visa revocation by making unlawful presence itself a crime. The seriousness of removal and criminal liability make impartial judicial review of visa revocations all the more important.

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Finally, Section 805 would deny individuals, including asylum seekers, federal court review unless they first make a “substantial showing” that an appeal of their asylum case is likely to be granted. If a federal court judge does not issue a formal certificate allowing the appeal within 60 days (with certain limited extensions available), the individual’s appeal would be automatically deemed denied.

Access to the courts is an essential feature of our system of government, and the implementation and execution of the immigration law has often been corrected by such judicial oversight. Judicial review also has been important historically in protecting immigrants’ rights and civil liberties, and we therefore oppose the provisions in H.R. 4437 which would further restrict judicial review in the immigration process.

Expansion of Expedited Removal

H.R. 4437 proposes to expand expedited removal and thereby eliminate judicial review for two broad categories of individuals. Section 407 would mandate expedited removal for individuals who enter the United States without inspection and are apprehended within 14 days of their entry within 100 miles of the border. Section 610 would permit expedited removal of individuals determined by DHS officials, not by immigration or other courts, to be inadmissible for criminal and other specified reasons. The provision would not require that the individual be convicted of any crime; instead, it would permit low-level immigration officers to decide whether an individual has admitted to committing acts which constitute the elements of a crime, and then to issue removal orders, without the safeguards provided by judicial review of either the underlying criminal allegations or the removal order.

During the expedited removal process, an individual does not have the right to legal counsel, an interpreter, an impartial adjudicator, or judicial review. A removal proceeding, on the other hand, is an evidentiary inquiry that involves both fact-finding and legal analysis to determine a person's identity and citizenship; whether or not he or she is admissible to or removable from the United States or is eligible for an immigration benefit or relief; and to what country the individual would be removed if ineligible to remain here. Although expedited removal procedures allow for credible fear determinations for potential asylum seekers, many individuals fleeing persecution may be unable or reluctant to express their fears upon arrival due to trauma, language barriers, or cultural or gender considerations. The ABA strongly believes that only impartial adjudicators, preferably immigration judges, should have the authority to enter removal orders following a formal hearing that conforms to accepted norms of due process. The decisions of these immigration judges, moreover, must be subject to administrative and judicial review. The expedited removal provisions in Section 407 and Section 610 fail in those regards and should be rejected.

Failure to Protect Refugees and Asylum Seekers

Our immigration procedures, particularly those pertaining to asylum, must provide for a fair, humane process and ensure that legitimate refugees are not turned away and returned to the countries of their persecution. H.R. 4437 contains many harmful measures, including provisions that will deprive many asylum seekers of federal court review and increase the detention of asylum seekers. Its passage would be inconsistent with the United States’ role as a champion of human rights and would threaten our longstanding commitment to the protection of those fleeing persecution throughout the world.

Section 805 would deny asylum seekers and others of federal court review unless they first make a “substantial showing” that an appeal of their asylum case is likely to be granted. Further, if a federal court

judge does not issue a formal certificate allowing the appeal within 60 days (with certain limited extensions available), the asylum seeker's appeal would be automatically deemed denied. Section 404 provides that any person may be denied admission to the United States if he or she happens to be from a country that has denied or delayed accepting even one person ordered removed from the U.S. There is no exception for asylum seekers. Thus, ironically, individuals who are seeking refuge from countries with whom the U.S. does not have diplomatic ties, perhaps even because of a poor record on human rights, may be turned away at our borders and returned to their persecutors. Finally, Sections 401 and 402 provide for mandatory detention of asylum seekers and others, and provides that they may be denied release from detention simply because there is available space for them in jail, even if they satisfy the release criteria. The Association believes asylum seekers should only be detained in extraordinary circumstances and supports the use of alternatives to detention when appropriate.

Section 804 of the bill would require individuals who seek withholding of removal from the United States to prove that one "central" reason that they face persecution is on account of one of the five protected grounds for asylum: race, religion, nationality, membership in a particular social group, and/or political opinion. Most often, evidence of a persecutor's motive consists of an applicant's recollections of specific statements and actions of the persecutor, and necessarily requires inferences and assumptions about the thoughts of another individual. Placing the additional burden on refugees to establish the degree to which a persecutor was motivated by a particular reason is an extreme and unattainable standard of proof. The Supreme Court has explicitly acknowledged this reality, holding in INS v. Elias-Zacarias that while the Immigration and Nationality Act requires some proof of motive, either direct or circumstantial,¹ the level of difficulty in proving motive is such that the respondent was not required "to provide direct proof of his persecutor's motives."²

In practice, implementation of this provision will give rise to inconsistent, overly narrow, and highly subjective rulings, as well as hairsplitting by judges struggling to determine what evidence is sufficient. For example, courts may have to decide how many times a persecutor must use a derogatory slur to show that he or she was motivated primarily on account of the applicant's race, if that is the only evidence of motive available. Or, if an applicant testifies that her persecutor also targeted political activists from the same student group, the judge will have to decide whether targeting one other activist is enough, or whether more than one is required to meet the burden of proof. In light of the above, the Association is deeply concerned about this provision and the unmanageable, unjust burden it will place on the asylum process, as well as deserving asylum seekers who already face many hurdles in obtaining evidence as they flee life-threatening conditions.

Mandatory Minimum Sentences

The Association strongly opposes the provisions in H.R. 4437 that would enhance or create new mandatory minimum sentences. The American Bar Association has been opposed to mandatory minimum sentences since 1968. In the third edition of the ABA Standards for Criminal Justice on Sentencing Alternatives and Procedures, Standard 18-3.21(b) unequivocally states that "[a] legislature should *not* prescribe a minimum term of confinement for any offense." The ABA has many concerns about the effects of mandatory minimums.

¹ See INS v. Elias-Zacharias, 112 S. Ct. 812 (1992).

² See *id.* at 816-17.

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First, as a general matter, mandatory minimums produce an inflexibility and rigidity in the imposition of punishment that is inappropriate for a system that we hold out to the world as a model of justice and fairness. To insist that all those convicted of a crime be lumped in the same category and be penalized identically inevitably means that the unjustness of a sentence in particular circumstances will be ignored.

Additionally, we are concerned about the high cost of imposing mandatory minimums. Numerous studies have demonstrated the extraordinary costs of incarcerating thousands of nonviolent offenders in our nation's prisons and jails. The provisions to create new mandatory minimum sentences, coupled with those to increase mandatory detention, have the potential to greatly increase the number of individuals being incarcerated in immigration-related cases, at significant cost to American taxpayers.

We urge you and your colleagues to reject these provisions and to reject the bill as a whole if these provisions are retained.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans