



AMERICAN BAR ASSOCIATION

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Testimony of

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On Behalf of the

American Bar Association

Before the

Subcommittee on Border, Maritime and Global Counterterrorism
Committee on Homeland Security
U.S. House of Representatives

On

“Crossing the Border: Immigrants in Detention and Victims of Trafficking”

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Madam Chair, Ranking Member Souder and Members of the Subcommittee:

Good Morning. My name is Christina Fiflis and I am a member of the American Bar Association Commission on Immigration. On behalf of the American Bar Association, I appear today at the request of ABA President Karen Mathis to express the ABA's views on a number of issues related to immigration detention, in particular our ongoing concern regarding the lack of meaningful access to legal information and legal representation experienced by many immigrants in detention. We appreciate this opportunity to share our views.

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers, judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. The Commission on Immigration is comprised of 13 members appointed by the ABA President, and directs the Association's efforts to ensure fair treatment and full due process rights for immigrants and refugees within the United States. The Commission advocates for statutory and regulatory modifications in law and governmental practice consistent with ABA policy; provides continuing education to the legal community, judges, and the public about relevant legal and policy issues; and develops and assists the operation of *pro bono* programs that encourage volunteer lawyers to provide high quality representation for immigrants, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations, including unaccompanied immigrant children.

The ABA is deeply committed to ensuring that foreign nationals in the United States receive fair treatment under the nation's immigration laws. The importance of meaningful access to legal representation and materials for individuals in immigration detention cannot be overstated. While immigrants in detention are in administrative, as opposed to criminal proceedings, the consequences of removal are severe. Removal may result in permanent 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 from inside detention facilities. For all who face removal, 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. Asylum seekers in particular may find it extremely difficult to articulate their experiences or to discuss traumatic situations with

government officials. Detainees, however, face the additional obstacle of having virtually no direct access to sources of evidence or witnesses; legal representation is therefore indispensable.¹

The many obstacles to obtaining legal representation faced by immigrants in detention are one reason that the ABA opposes the detention of non-citizens in removal proceedings except in extraordinary circumstances, such as when the individual presents a threat to national security or public safety, or presents a substantial flight risk. The decision to detain a non-citizen should be made only in a hearing that is subject to judicial review. We are concerned about the growing reliance on detention, and particularly about proposals to increase the use of mandatory detention. The ABA instead supports the use of humane alternatives to detention that are the least restrictive necessary to ensure that non-citizens appear in immigration proceedings

For those that are detained, it is essential to provide uniform and consistent standards to ensure that facilities housing federal detainees are safe and humane and protect all detainees' statutory and constitutional rights. For that reason, during the late 1990's, the ABA, along with other organizations involved in *pro bono* representation and advocacy for immigration detainees, engaged in a lengthy negotiation process with the then-Immigration and Nationality Service (now Immigration and Customs Enforcement, or "ICE") to develop the current ICE Detention Standards. The Standards, which took effect in January 2001, are comprehensive and encompass a diverse range of issues, including access to legal services. The ABA was instrumental in developing the four "legal access" standards, which include: Access to Legal Materials; Access to Group Presentations on Legal Rights; Telephone Access; and Visitation. As discussed below, an additional "legal access" standard, entitled Detainee Transfers, was subsequently adopted by ICE, with the encouragement and support of the ABA.

As a key stakeholder in developing the Standards, the ABA is committed to their full and effective implementation. In 2001, the Commission on Immigration established the Detention Standards Implementation Initiative (Initiative). Under the Initiative, the Commission recruits lawyers, law firms, and bar associations to participate on a *pro bono* basis in special delegations to tour selected detention facilities and report their observations on the facilities' implementation

¹ American Bar Association, *American Justice Through Immigrants' Eyes*, 2004, at 53, available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeyes.pdf>. According to one study, asylum seekers are four to six times more likely to succeed if represented. See A. Schoenholtz and J. Jacobs, "The State of Asylum Representation: Ideas for Change," 16 *G'town. Immig. L.J.* 739 - 740 (Summer 2002). See also http://uscirf.gov/countries/global/asylum_refugees/2005/february/legalAssist.pdf at 239.

of the Standards, with an emphasis on the four legal access standards. The delegation reports are then presented to ICE and the findings discussed in regular meetings between ICE and the ABA.

While the development of the Detention Standards was a positive step, it appears that ICE's annual inspection process alone is not adequate to ensure detention standards compliance. In the six years that have passed since the Detention Standards went into effect, it has become clear to us that the lack of a legal enforcement mechanism has seriously undermined the effectiveness of the Standards. For that reason, the ABA recently expressed its strong support to the Secretary of Homeland Security for a petition for rulemaking by several organizations to promulgate detention standards into regulations. The ABA believes that promulgating regulations would help ensure that detained immigrants are treated humanely and have meaningful access to the legal process.

Apart from the Detention Standards Implementation Initiative, the ABA regularly receives information on detention issues through reports from our own *pro bono* projects in Harlingen, Texas and Seattle, Washington, as well as from individual attorneys representing detained immigrants, national and local immigrant advocacy groups, and direct letters and phone calls from detained immigrants around the country. Since 2003, we have received letters from detainees at over one hundred facilities across the United States. While limitations of time and space prevent us from providing a comprehensive list of current problems, we do want to highlight a few of the recurring issues that we believe are cause for serious and continuing concern about the state of our immigration detention system.

One of these issues is the transfer of detainees. In 2001, the ABA adopted a policy opposing the involuntary transfer of detainees to facilities that impede an existing attorney-client relationship, transfers to distant locations, and the use and construction of detention space in remote areas where legal assistance generally is not available for immigration matters. In 2004, the Detainee Transfer Standard was added to ICE's National Detention Standards, requiring ICE to take into account whether a detainee is represented when deciding whether to transfer him or her. Factors ICE must consider include "whether the attorney of record is located within reasonable driving distance of the detention facility and where immigration court proceedings are taking place."²

² <http://www.ice.gov/doclib/partners/dro/opsmanual/DetTransStdfinal.pdf>

Despite this Standard, we are aware that over the past few months, ICE has been regularly transferring hundreds of immigration detainees from east coast facilities to the Port Isabel Detention Center (PIDC) in South Texas.³ These individuals often have lawyers and family members in the states where they were originally apprehended, and facilities on the east coast are located closer to metropolitan areas where legal representation is more widely available. Legal services for indigent immigrant detainees in South Texas are scarce, yet 3,200 beds are available for detainees at PIDC and the Willacy County Processing Center in Raymondville, Texas. Detainees can no longer meet with their attorneys, and the local Immigration Judges regularly deny motions by counsel to appear telephonically for removal hearings. Existing counsel must either find local counsel to make appearances, travel to South Texas, or withdraw from their clients' cases. The service providers in South Texas are only able to serve a fraction of the high volume of detainees in need of assistance when their original attorneys are forced to withdraw. These transfers are resulting in a lack of access to counsel for detainees, which is precisely what the Transfer Standard sought to prevent.

Another serious issue is lack of telephone access for detainees. Over the past year alone, detainees in 16 states told us that they have had difficulty using telephones. Without telephone access, immigrants are cut off from the ability to find legal counsel or obtain critical evidence or other information to prepare their case pro se. ICE's Telephone Access Standard provides for reasonable and equitable access to telephones, with at least one telephone per twenty-five detainees, telephones in proper working order, quick repairs, and free legal service provider and consulate calls, among other things.⁴ Specific problems detainees report in their correspondence, however, include basic mechanical issues, unavailability of phone cards for purchase, exorbitant phone card fees, improper deduction of funds from phone cards, inability to make free calls to consulates and free legal service providers as required by the Standards, lack of posting and/or translation of phone use instructions, lack of privacy, and an insufficient amount of phones per detainee.

Other common concerns regarding legal access relate to law libraries and legal correspondence. Some report having no access to the law library, while others indicate that there

³ Locations include New York, Massachusetts, Virginia, and Florida.

⁴ <http://www.ice.gov/doclib/partners/dro/opsmanual/teleacc.pdf>.

are insufficient or outdated research materials⁵ and not enough functioning typewriters, computers, or printers. We have also been told that mail either does not arrive or is delayed, and legal mail (“Special Correspondence”) is opened outside the presence of detainees and outgoing legal mail is inspected, contrary to the Standards. Finally, some report a lack of private consultation rooms for meetings with counsel. In July 2006, the ABA provided this information to the Government Accountability Office to assist in its review of ICE’s implementation of the Detention Standards.

In 2006, the ABA was one of several entities requesting that the U.S. Department of Homeland Security’s Inspector General (IG) conduct an audit of ICE’s compliance with the Detention Standards. In addition to evaluating the legal access standards in particular, we requested that the IG review detainee handbooks for accuracy and thoroughness. The IG’s recently issued report, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*, highlighted several of the issues that have consistently been reported to us year after year.

Without appropriate access to legal resources and representation, the only information detainees are oftentimes presented with comes from federal law enforcement authorities. This can create serious issues of concern. The ABA has received reports of what appears to be an increasing and inappropriate use of stipulated removal orders. Immigrants serving sentences for crimes including illegal entry are approached by government officials while in custody, and warned that if they do not sign a stipulated removal order, they will face lengthy immigration detention and ultimate deportation. As a result, detainees who may in fact be eligible for immigration relief such as asylum perceive that they have no other choice but to sign the order or face prolonged detention and certain deportation. Those who sign the orders forego their right to appear before an Immigration Judge. Pursuant to regulation, the Judge may ultimately sign the order provided he or she determines that the individual’s waiver was voluntary, knowing, and intelligent,⁶ even without seeing or speaking with the individual.

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

⁵ These statements are consistent with the report of the United States Commission on International Religious Freedom, which indicated that not one of the 18 facilities visited by USCIRF contained all the materials (or updates) listed in DHS detention standards. See Craig Haney, *Report on Asylum Seekers in Expedited Removal*, 186 (United States Commission on International Religious Freedom, 2005).

⁶ 8 C.F.R. §1003.25

the Executive Office of Immigration Review, and is currently in place in six detention facilities around the country. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings in order 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. 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.⁷ 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 both to detainees and the immigration court system. The ABA supports expansion of the Legal Orientation Program to all detained and non-detained persons in removal proceedings.

In conclusion, the ABA is deeply concerned about the state of immigration detention in the U.S. and wants to emphasize particularly the need for accountability to ensure that detainees have consistent, fair access to counsel and the legal system. We believe that a number of steps should be taken to address these concerns, including: promulgating immigration detention standards into regulation; using humane alternatives to detention for those who do not present a substantial flight risk, or threat to national security or public safety; where detention is appropriate, providing detention bed-space in populated areas where legal assistance is more readily available and not transferring detainees away from existing counsel; and expanding the Legal Orientation Program to individuals in immigration proceedings nationwide. Each of these steps would significantly assist immigration detainees' access to legal information and representation, a necessary step toward addressing many of the serious problems in our immigration detention system.

Thank you, again, for this opportunity to share our views.

⁷U.S. Department of Justice, Board of Immigration Appeals, "The BIA Pro Bono Project is Successful" (Oct. 2004); U.S. Department of Justice, Executive Office for Immigration Review, "Evaluation of the Rights Presentation" (Jan. 2000).