March 18, 2016

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security
245 Murray Lane, SW
Washington, D.C. 20528

Dear Secretary Johnson:

On behalf of the American Bar Association (ABA), I write to express our strong objection to the Department of Homeland Security’s (DHS) extensive use of electronic ankle monitors as a condition of release from detention for Central American parents arriving with their children at the U.S. border. The ABA supports alternatives to detention, but we are concerned that DHS has adopted ankle monitors as a default for the release of recently-arrived families instead of considering other less-restrictive options that would be appropriate in many cases. This is especially troubling in light of the vulnerability of these women and children, and we encourage DHS to abandon this practice.

It is widely recognized that this population is fleeing extraordinary levels of violence in their home countries and is seeking protection in the form of asylum and withholding of removal. As you know, the majority of this population comes from three countries – El Salvador, Guatemala and Honduras – that are among the most dangerous in the world, all regularly placing among the top five countries with the highest homicide rates globally. Credible fear passage rates for those who are screened have remained high, around 88%, a strong indicator that this population presents valid claims to asylum. These extraordinary rates of violence and high credible fear passage rates demonstrate the need for a humanitarian response to families arriving at our southern border seeking refuge. Unfortunately, DHS instead has relied on an enforcement-based approach, resurrecting the long-discredited practice of family detention and implementing overly restrictive custody determination and release procedures.

The ABA believes that any restrictions or conditions placed on noncitizens to ensure their appearance in immigration court or for their removal should be the least restrictive, nonpunitive means necessary to further these goals. The use of electronic monitors is an extreme measure that is often overly restrictive and intrusive in nature. Wearing the monitoring device carries serious social stigma and may cause harmful physical and psychological effects. Wearers report being perceived as criminals in the community and treated accordingly. They are subjected to audible broadcast messages and may be required to spend hours tethered to an outlet charging the device each day. Some wearers also report adverse physical effects such as swelling of the ankle, tingling sensations and a burning sensation on the skin. Ankle monitors also may impede ability of these families to access counsel and to fully prepare their cases for immigration court.

The ABA supports the use of humane alternatives to detention. However, we believe that electronic monitoring is a form of restriction on liberty similar to detention, rather than a meaningful
alternative to detention. This measure should only be used in limited circumstances where there has been an individualized determination establishing a genuine flight risk based on objective factors or a criminal history. For this reason, the ABA opposes the automatic placement of electronic monitoring devices upon immigrants who would not otherwise be held in secure custody. For the vast majority of these families, DHS should expand the use of release on recognizance, reasonable bond, and parole. For those cases where there has been a determination that some measure is necessary to ensure appearances, DHS should implement community-based alternatives programs that incorporate social service and legal support mechanisms, and utilize ankle monitors only as a last resort.

When there are objective factors that justify the use of ankle monitors, DHS should implement consistent and clear criteria for enrolling people into the program based on individualized determinations. Standards should also be developed for determining how long individuals will be supervised under the program, and there should be clear procedures and accountability for ensuring the end of monitoring when appropriate. Currently, DHS’s stated policy is to not use electronic monitoring on minors, pregnant women or others with significant health conditions. DHS should expand those exempted from this practice to other vulnerable populations including nursing mothers, the elderly, and individuals with a broader range of health conditions.

The ABA also opposes DHS’s practice of prohibiting detained mothers from being accompanied by counsel at meetings with ICE officers during which alternatives to detention and terms of release will be discussed or determined. The law related to detention and release options is complicated and varies widely based on the individual’s immigration history and ties to the United States. Refusing to allow counsel to accompany detained mothers raises serious due process concerns, particularly in light of recent allegations of improper coercion and inaccurate information being provided to detainees regarding their release options. We are similarly troubled that counsel is often not permitted to accompany individuals during their mandatory reporting appointments with DHS after release, which may determine when the electronic monitoring will be terminated. Individuals should have the right to have counsel present at all stages of their immigration proceedings and processes, particularly at critical junctures that will determine their custody and release status.

The ABA recognizes the need for DHS to ensure that individuals attend their hearings in removal proceedings and otherwise meet their obligations in the immigration process. However, we must do so by means that are humane, fair, and effective and that upholds our values as a country.

Sincerely,

Paulette Brown
President

cc: Alejandro Mayorkas, Deputy Secretary, U.S. Department of Homeland Security
    Sarah Saldaña, Director, U.S. Immigration and Customs Enforcement