AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association supports a range of mechanisms through which an individual who is not subject to mandatory detention under the Immigration and Nationality Act may obtain release from immigration detention including bond, parole, and release on recognizance or under an order of supervision;

FURTHER RESOLVED, That in light of the Attorney General’s recent decision in Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019), which reversed longstanding precedent by eliminating the authority of Immigration Judges (effective July 15, 2019) to grant bond to certain asylum-seekers even after they have established a credible fear of persecution or torture, the American Bar Association urges Immigration and Customs Enforcement (“ICE”) to utilize the critically important alternative of humanitarian parole as a basis for release from custody; and

FURTHER RESOLVED, That the Association urges the Department of Homeland Security to:

(a) codify the core requirements of ICE’s 2009 Parole Directive into regulation;

(b) ensure that the 2009 Parole Directive remain in full force and effect prior to or in the absence of such codification;

(c) conduct regular training programs for new and experienced ICE officers to reinforce their familiarity with and understanding of the factors set forth in the Parole Directive that support release from custody; and

(d) conduct prompt parole determinations for all asylum-seekers who have passed a Credible Fear interview and grant parole to those who have established their identities, who pose no threat to national security or public safety and who do not present a significant flight risk.
REPORT

One of the greatest obstacles to achieving a fair day in court for individuals in immigration proceedings is detention. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress imposed categories of mandatory detention for some noncitizens, expanded detention and release criteria for others, and created a broad preliminary detention requirement for asylum-seekers who attempt to seek protection at ports of entry or are otherwise placed in an accelerated removal process known as expedited removal. While the ABA has consistently opposed mandatory detention of immigrants, particularly asylum-seekers and families traveling together, the ABA’s 2019 Reforming the Immigration System Update Report has specifically identified the problems asylum-seekers face when they are subject to detention.1

Immigration and Customs Enforcement (“ICE”), part of the Department of Homeland Security (“DHS”), currently holds over 50,000 noncitizens each night in detention facilities across the United States, one of the highest numbers on record and more than the number currently authorized by Congress.2 Immigration detention results in a severe deprivation of liberty and immigration detainees are afforded far fewer procedural protections than criminal detainees.3 The ABA has long opposed the use of civil immigration detention for noncitizens in removal proceedings except in exceptional circumstances.4 The exceptions include when the individual presents a danger to the public or a national security threat, or when the individual poses a substantial flight risk.5 ABA policy contemplates procedural protections in determining detention status and requires that a decision to detain a non-citizen should be made in a hearing subject to judicial review.6

For asylum-seekers, the consequences of detention can be particularly severe. Many asylum-seekers have experienced persecution, torture, and other trauma and have been detained in their country of persecution; under those circumstances, detention can exacerbate physical, emotional and mental suffering. Individual asylum claims often

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2 Caitlin Dickerson, ICE Faces Migrant Detention Crunch as Border Chaos Spills into Interior of the Country, N.Y. TIMES, April 22, 2009.


5 Id.

6 Id.
require painstaking research and analysis, which can be difficult to conduct when an asylum-seeker is cut off from counsel and family. And given the current backlog of over 800,000 cases in immigration court, asylum-seekers are often discouraged from pursuing their claims, deterred by the prospect of months or even years in custody. Furthermore, a recent study reviewing six years of data from the immigration courts demonstrated that immigrants in detention were the least likely to obtain representation, with only 14% of detained immigrants securing legal counsel, compared with two-thirds of non-detained immigrants.

These concerns make recent changes to detention authority with respect to asylum-seekers of critical importance. In a recent decision, Attorney General William Barr severely restricted the ability of asylum-seekers to seek release from detention, eliminating the authority of immigration judges to conduct bond redeterminations. The only avenue remaining for asylum-seekers is through DHS parole authority, a discretionary determination that has been inconsistently and arbitrarily applied over the years.

Asylum-Seekers and Expedited Removal

The Immigration and Nationality Act ("INA") provides for mandatory detention of certain categories of persons, including those convicted of enumerated crimes and those who have engaged in terrorist activities. However, the INA authorizes a variety of procedural mechanisms to release noncitizens from immigration detention including release on bond, parole, or under an order of supervision. These procedures differ depending on the manner in which the individual entered the United States and whether removal proceedings are pending or have concluded.

Noncitizens who present themselves at a U.S. port of entry, such as an airport or an international bridge, and who are found to be inadmissible are generally placed in expedited removal proceedings. The INA also authorizes the use of expedited removal against individuals who enter the United States without inspection and cannot affirmatively show that they have been present in the United States continuously for the

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7 Denise Lu & Derek Watkins, Court Backlog May Prove Bigger Barrier for Migrants than Any Wall, N.Y. TIMES, Jan. 24, 2019.
8 While detained cases are prioritized in the immigration court system, a single detained asylum case can take months or even years when there is a pending appeal.
9 Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court, American Immigration Counsel 1-2 (Sept. 2016).
12 8 U.S.C. § 1226(c).
13 Id. § 1226(a) (bond); id. § 1182(d)(5)(A) (parole); id. § 1231(a)(3) (order of supervision).
14 Id. § 1225(b).
2-year period immediately prior to their arrest. Currently, this provision of the INA is only enforced against individuals who are apprehended within 100 miles of the border and within 14 days of entry.

Under the statutory and regulatory provisions of expedited removal, an individual who expresses a fear of return to her country or place of last residence is examined to determine whether she can establish a “credible fear” of persecution or torture. If the individual can establish a significant possibility of meeting the eligibility requirements for protection, the expedited removal process is voided and the individual has the opportunity to raise his or her claim before an immigration judge. Once credible fear has been established, the non-citizen may be paroled into the country, on a case-by-case basis, for “urgent humanitarian reasons” or “significant public benefit,” provided the noncitizen presents neither a security risk nor a risk of absconding. In the first instance, the Department of Homeland Security makes this discretionary determination, and throughout the history of expedited removal, both DHS and legacy INS officials have been criticized for inconsistent determinations.

According to the federal regulations, there are five categories of noncitizens who may meet the parole standards: (1) those with serious medical conditions, making detention inappropriate; (2) pregnant women; (3) juveniles; (4) witnesses in judicial, legislative, or administrative proceedings in the United States; and (5) noncitizens for whom continued detention is not in the public interest. A grant of parole may be made by a wide range of ICE officials at various levels of the immigration system. A grant of parole is an exercise of discretion by the Secretary of DHS, and a denial is not reviewable by the courts (including an immigration judge).

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15 Id. § 1225(b)(1)(A)(iii)(II).
18 8 C.F.R § 235.6(a)(1).
19 Id. § 212.5(b).
21 Id. § 212.5(b).
22 The authority to grant parole may be exercised by “the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing.” Id. § 212.5(a).
23 8 U.S.C. § 1226(e). Pursuant to Homeland Security Act §§ 102(a), 441, 1512(d), and 1517; 116 Stat. at 2142-43, 2192, 2310, and 2311; 6 U.S.C. §§ 112, 251, 552(d), and 557; and 8 C.F.R. § 2.1, the Attorney General’s authority under INA § 236(e), 8 U.S.C. § 1226(e), was transferred to the DHS Secretary, and references to the Attorney General in the statute are deemed to refer to the DHS Secretary.
In 2005, the Board of Immigration Appeals ("BIA") issued a precedential decision holding that those who are placed in expedited removal proceedings after having entered the United States without inspection, but who pass a credible fear interview and are placed into removal proceedings before an Immigration Judge, are eligible for a custody redetermination hearing before the Immigration Judge.\(^{24}\) Over the past 14 years, this decision has empowered immigration judges to evaluate thousands of custody determinations each year for noncitizens seeking protection under our asylum laws. Recently, in *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), Attorney General Barr reversed this longstanding decision and eliminated the authority of Immigration Judges to grant bond to those created in *Matter of X-K-*, effective July 15, 2019.\(^{25}\) Once this holding is implemented, all asylum-seekers who are placed in expedited removal proceedings and demonstrate a credible fear of persecution or torture will remain detained pending their removal proceedings, unless DHS decides to grant parole.

Parole authority has been applied inconsistently and arbitrarily for decades. To address this problem and reiterate the availability of parole, John Morton, then Assistant Secretary of ICE, issued a December 8, 2009 parole memo titled, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture" ("2009 Parole Directive").\(^{26}\) This memo set out more precise standards and procedures for the evaluation of parole for inadmissible noncitizens who had passed a credible fear interview. The 2009 Parole Directive referenced the five parole categories enumerated in the federal regulations and listed above, but attempted to provide additional guidance on what constituted release in the “public interest.” The 2009 Parole Directive instructed that each detainee’s eligibility for parole should be considered on its own merits, but that generally if an individual passes a credible fear interview, establishes his or her identity, and is neither a flight risk or a danger to the community, absent additional factors, parole would generally be in the public interest.\(^{27}\) The 2009 Parole Directive also set forth several procedural requirements on the adjudication of parole, including:

- As soon as practicable following a credible fear determination, providing arriving noncitizens with notice of their parole process including the date of the interview and the deadline for submitting documentation in a language they understand;\(^{28}\) and

- Providing an automatic parole review no later than seven days following a credible fear finding, and if parole is denied, providing notification and the

\(^{24}\) *In re X-K-*, 23 I&N Dec. 731 (BIA 2005).


\(^{27}\) Id. ¶ 6.2.

\(^{28}\) Id. ¶ 6.1.
rationale for the denial and inform the individual of her right to request a subsequent parole determination.\textsuperscript{29}

In recent years, practitioners who have worked in the field for more than ten years confirmed that ICE has been denying more parole applications, even for asylum-seekers who meet the criteria in the Parole Directive and would have been paroled in prior years.\textsuperscript{30} Practitioners also indicate that ICE relies on onerous conditions of release including unreasonably high bond amounts in conjunction with parole grants.\textsuperscript{31}

Once \textit{Matter of M-S-} takes effect, asylum-seekers will be left at the mercy of discretionary parole determinations made by individual DHS officers at the local level. Consequently, ensuring that there is a rigorous, fair, and transparent system for granting parole applications is critical to ensuring that applicants for asylum have a full opportunity to make their case before an immigration judge. For this reason, all ICE offices should be directed to use their discretion consistent with the 2009 Parole Directive. ICE should provide regular training to officers who make parole determinations and keep records of the numbers of parole grants and denials, to ensure accountability and transparency. Finally, DHS should implement a policy favoring parole without payment of bond, given the limited resources of most asylum-seekers, particularly those intercepted at the Southwest border, and instruct ICE officers that they must consider ability to pay in cases where bond is required for release.

Respectfully submitted,

Wendy S. Wayne
Chair, ABA Commission on Immigration
August 2019

\textsuperscript{29} \textit{Id.} ¶ 8.2

\textsuperscript{30} 2019 Update Report at UD 1-24; Human Rights First, \textit{Fact Sheet: Taking the Fight for Asylum-seekers to Court} (March 2018).

\textsuperscript{31} 2019 Update Report at UD 1-24.
1. **Summary of Resolution(s).** The resolution recommends codification of the core requirements of the 2009 Parole Directive into regulation. However, at a minimum, DHS should ensure that the 2009 Parole Directive remains in full force and is followed. Immigration and Customs Enforcement (ICE) should a) conduct parole determinations as a matter of course for asylum-seekers who have passed a credible fear screening and b) grant parole where asylum-seekers have established their identities, community ties, lack of flight risk and the absence of any threat to national security, public safety, or persons. DHS should also provide training programs for ICE officers regarding the relevant factors for consideration when making parole decisions. Finally, DHS should implement a policy to allow the discretion to grant parole without payment of a bond and provide guidance to ICE officers to consider ability to pay when a parole bond is required for release.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by Commission Members between April 22 and April 26, 2019. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, *2019 Update: Reforming the Immigration System*. The Update Report was released in March 2019 after 3 years of research and development.

3. **Has this or a similar resolution been submitted to the House or Board previously?** Yes.

   - **12A102** – Adoption of the ABA Civil Immigration Detention Standards which include a recommendation that a noncitizen should only be detained based upon an objective determination that he or she 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.

   - **06M107E** – opposes detention of non-citizens in removal proceedings except in extraordinary circumstances which include where the person presents (1) a threat to national security, (2) a threat to public safety, (3) a threat to another person or persons, or (4) a substantial flight risk. Also discusses procedural mechanisms to ensure due process.

   - **90M131** – Policy to improve the asylum process including facilitating
access to counsel, interpretation, and only detaining asylum-seekers in extraordinary circumstances and in the least restrictive environment necessary to ensure appearance in immigration court.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? 12A102, 06M107E, 90M131 (above). The adoption of the proposed policy would support and complement existing policy by providing additional guidance pursuant to which asylum-seekers can be released from detention on parole and result in a more consistent application throughout the country.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.


10. Referrals.
    Center on Children and the Law
    Commission on Hispanic Rights and Responsibilities
    Section of Civil Rights and Social Justice
    Section of Criminal Law
    Section of International Law
    Standing Committee on Pro Bono and Public Service
    Working Group on Unaccompanied Minor Immigrants
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
   Meredith A. Linsky
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12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution recommends that the Department of Homeland Security (“DHS”) seek codification of the core requirements of the 2009 Parole Directive into regulation. However, at a minimum, DHS should ensure that the 2009 Parole Directive remains in full force and is followed. ICE should a) conduct parole determinations as a matter of course for asylum-seekers who have passed a credible fear screening and b) grant parole where asylum-seekers have established their identities, community ties, lack of flight risk and the absence of any threat to national security, public safety, or persons. DHS also should provide training programs for ICE officers regarding the relevant factors for consideration when making parole decisions. Finally, DHS should implement a policy to allow the discretion to grant parole without payment of a bond and provide guidance ICE officers to consider ability to pay when a bond is required for release.

2. Summary of the Issue that the Resolution Addresses

DHS can enhance due process through appropriate parole and bond policies that offer noncitizens individualized assessments of flight risk and danger to the community. However, in recent years, practitioners who have worked in the field for more than ten years confirmed that ICE has been denying more parole applications, even for asylum-seekers who meet the criteria in the 2009 parole directive and would have been paroled in prior years. Practitioners have also observed that ICE increasingly relies on onerous or intrusive conditions of release, including unreasonably high bond amounts. Given the Attorney General’s recent decision in Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019), as of July 15, 2019, parole will be the only way for asylum-seekers to be released from detention after passing a credible fear interview but before the completion of their removal proceedings. It is therefore crucial that ICE follows consistent and transparent standards when considering parole applications.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The proposal would reestablish the criteria for granting parole and provide guidance to make parole more widely available for urgent humanitarian reasons, significant public benefit, and when no security or flight risk is present.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

There are no minority views.