

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES****February 13, 2006****RECOMMENDATION**

RESOLVED, that the American Bar Association opposes the detention of non-citizens in removal proceedings except in extraordinary circumstances. Such circumstances may include a specific determination that the individual (1) presents a threat to national security, (2) presents a threat to public safety, (3) presents a threat to another person or persons, or (4) 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.

FURTHER RESOLVED, that the American Bar Association supports:

- (a) the use of humane alternatives to detention that are the least restrictive necessary to ensure that non-citizens appear in immigration proceedings, including such alternatives as supervised pre-hearing release and bond based on the individual's economic means and risk of flight; and
- (b) the provision of a prompt hearing before an Immigration Judge for any alien in removal proceedings who is denied release with or without bond, including meaningful administrative review and judicial oversight.

FURTHER RESOLVED, that the American Bar Association supports, for those non-citizens detained under a final order of removal or who are detained during deportation proceedings for ninety days or more:

- (a) the establishment of mechanisms to ensure that immigration authorities have complete, accurate, and readily available information to inform the administrative review and judicial oversight of the individual's detention; and
- (b) mechanisms to ensure full compliance with the decisions of the Supreme Court in *Zadvydas v. Davis* and *Clark v. Martinez*.

REPORT

*This is the fifth report in the Commission's series of seven resolutions and reports that addresses "Immigration Detention," as explained at the beginning of the first report (107A).

I. Relevant ABA Policies

The American Bar Association has long supported providing legal protections and due process rights to immigrants and asylum seekers, including those held in immigration detention.

In 1990 the ABA supported detaining asylum seekers only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings. The ABA also encouraged ICE to explore alternative means to ensure appearance at court proceedings, such as supervised pretrial release or bond.

In 2001 the ABA opposed the involuntary transfers of detained immigrants and asylum seekers to remote facilities when it would impede access to counsel.

In 2002 the ABA urged protection of the constitutional and statutory rights of detainees, and supported promulgating into regulation the four ICE 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.

In 2004 the ABA addressed the needs of unaccompanied immigrant children in federal custody, supporting housing children in family-like settings where release was not possible.

This recommendation extends the Association's policy supporting limitations on the detention of asylum seekers to other non-citizens in removal proceedings, and supports the use of alternatives to detention in appropriate circumstances. Further, the recommendation calls for judicial review of the decision to detain immigrants and asylum seekers. The recommendation also builds on existing Association policy by supporting due process in custody review procedures, including supporting full compliance with the Supreme Court's recent decisions in *Zadvydas v. Davis* and *Clark v. Martinez*.

II. Alternatives to Detention

Immigration and Customs Enforcement (ICE) of the Department of Homeland Security (DHS) detains about 23,000 persons every day, comprising non-citizens who pose a threat to community safety or national security and those otherwise required to be detained under U.S. immigration laws. Limited detention capacity and an increasing detainee population have sparked national efforts over the past several years to integrate into ICE's general practices the use of various alternatives to detention. In FY 2005, Congress appropriated \$14.2 million in funding to ICE for the purpose of examining such alternatives. Alternatives to detention offer

the prospect of a considerable cost savings: The cost of detention is approximately \$90 per day per individual, and many alternatives cost much less.

Detention alternatives used by ICE include release on orders of recognizance (ROR), release on bond, supervised release, and electronic monitoring. Under ROR and release on bond, non-citizens are released from detention under certain restrictions or upon the posting a bond of not less than \$1,500. Supervised release programs provide generally for the release of detainees with a higher level of restriction and monitoring.

ICE's predecessor, the Immigration and Naturalization Service, first experimented with supervised release through the Appearance Assistance Program (AAP), which operated from February 1997 to March 2000. In June 2004, ICE introduced its current Intensive Supervision Appearance Program (ISAP), which is managed through the Office of Detention and Removal Operations.

Common supervision techniques used under supervised release include mandatory personal or telephonic reporting and home visits. However, ISAP also uses electronic monitoring devices, such as ankle bracelets, in cases of intensive supervision. Under ISAP, electronic monitoring is used until participants remain in compliance for thirty days.

The American Bar Association opposes the placement of electronic monitoring devices upon immigrants who would not otherwise be held in secure custody. Such use of these devices is overly restrictive and intrusive in nature. It constitutes another form of detention, rather than a meaningful alternative. ICE should implement true alternatives to detention in accordance with congressional intentions and should develop alternatives that provide social services and legal support. Alternatives to detention should use the least restrictive options necessary to ensure that an immigrant appears in court.¹

III. Post-Order Custody Reviews

ICE is further responsible through its Office of Detention and Removal (DRO) for making custody determinations for all non-citizens who are subject to deportation. DRO conducts periodic reviews of individual cases under final orders of removal from the United States in what is known as a post-order custody review. In these reviews, ICE deportation officers decide whether to release non-citizens from detention and determine if continued detention is justified and in compliance with governing laws and court precedent.

Pursuant to the Immigration and Nationality Act (INA), ICE may detain non-citizens under final orders of removal only for a period necessary to bring about actual deportation. Additionally, two U.S. Supreme Court decisions, *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), and *Clark v. Martinez*, ___ U.S. ___, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005), placed further limits on the allowable duration of detention. As a result of those decisions, ICE may not detain an individual for longer than six months after the issuance of a

¹ Commissioner John W. Martin, Jr believes that the use of electronic monitoring devices on willing participants in a program such as ISAP may be an acceptable alternative to detention.

final removal order if there is no significant likelihood of actual deportation (for example, because the home country refuses repatriation) in the reasonably foreseeable future.

Although the law limits ICE's ability to detain non-citizens indefinitely, several compliance concerns remain. ICE immigration enforcement authorities have failed to develop an appropriate appeals procedure, and for all practical purposes have absolute discretion to determine whether a non-citizen may be released from detention. Furthermore, those released from detention as a result of a post-order custody review are released under conditions of supervision, which in turn are monitored by ICE deportation officers. Again, ICE officers have absolute authority to determine whether an individual must return to custody.²

Concerns have been expressed about inadequate ICE detention standards and poor conditions at detention facilities. The New York Times has called ICE detention facilities post-September 11th "unduly harsh" and "highly restrictive."³ Reports have also indicated long delays in processing cases and detention for indefinite time periods where ICE has found "extraordinary circumstances."⁴

The American Bar Association opposes ICE detention not in compliance with the *Zadvydas* and *Martinez* decisions. ICE must promulgate detention standards by regulation to ensure uniform implementation. Furthermore, adequate appeals procedures must be developed to ensure that detainees have appropriate remedies against adverse detention determinations.

IV. Conclusion

The American Bar Association supports ICE's use of alternatives to detention to ensure that non-citizens appear in court. We recommend that ICE focus its efforts on implementing alternative programs using the least-restrictive means available. The ABA further recommends the development of prompt appeals processes for all non-citizens denied release. Additionally, the ABA recommends that ICE establish mechanisms to ensure full compliance with the law regarding post-order custody review and that it provides for proper administrative review and judicial oversight of all detention cases.

Respectfully Submitted,

Richard Peña
Chair
Commission on Immigration
February 2006

² A September 2005 study by the Catholic Legal Immigration Network, Inc. (CLINIC) concluded that the custody reviews mandated by regulation "are not being conducted on time in many locations, and in some locations are not being conducted at all." Glynn, Kathleen and Sarah Bronstein, *Systematic Problems Persist in U.S. ICE Custody Reviews for "Indefinite" Detainees* (2005).

³ Lichtblau, Eric, *US Report Faults the Roundup of Illegal Immigrants after 9/11*, New York Times, June 3, 2003.

⁴ *See id.*; Sontage, Deborah, *In a Homeland Far From Home*, New York Times Magazine, November 17, 2003.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Richard Peña, Chair

1. Summary of Recommendation(s).

The Commission on Immigration recommends that the Association oppose the detention of non-citizens in immigration removal proceedings except in extraordinary circumstances, which would include a determination, following a hearing and subject to judicial review, that a person presents a threat to national security or public safety, or presents a substantial flight risk. The recommendation supports the use of alternatives to detention, including supervised pre-hearing release and bond. The recommendation supports prompt hearings, meaningful administrative review, and judicial oversight for detainees who are denied release. For persons detained during immigration proceedings or under a final order of removal, the recommendation supports the establishment of mechanisms to ensure full compliance with Supreme Court case law.

2. Approval by Submitting Entity.

On October 7, 2005, the Commission approved this recommendation.

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?

While this recommendation is consistent with existing Association policy, it does not restate it. Rather, the recommendation builds on existing Association policies and furthers the Association's commitment to providing legal protections and due process rights for immigrants and asylum seekers.

- Improving Asylum Process: asylum seekers should be detained only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings; encourages ICE to explore alternative means to ensure appearance at court proceedings, such as supervised pretrial release or bond (2/90).
- Detention: urges protection of the constitutional and statutory rights of detainees, and supports promulgating into regulation the four ICE 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 (02A115B).
- Alien Children: addresses the psychological, legal, medical, mental health, educational, and other basic needs of unaccompanied immigrant children in federal custody (04A117).
- Involuntary Transfer of Detained Immigrants and Asylum Seekers: opposes involuntary transfers of detained immigrants and asylum seekers to remote facilities if it would impede

access to counsel (01M106B).

This recommendation extends the Association's policy supporting limitations on the detention of asylum seekers to other non-citizens in removal proceedings, and supports the use of alternatives to detention under appropriate circumstances. Further, the recommendation calls for judicial review of the decision to detain immigrants and asylum seekers. The recommendation also builds on existing Association policy by supporting due process in custody review procedures, including supporting full compliance with the Supreme Court's recent decisions in *Zadvydas v. Davis* and *Clark v. Martinez*.

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

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, passed by the House of Representatives in December 2005 (see below), would mandate detention for a significant group of immigrants and asylum seekers and severely restrict the rights of immigrants in detention. The bill will be taken up by the Senate in late February or early March 2006. In addition, "unduly harsh" conditions at detention facilities, coupled with the failure of government agencies to comply with existing custody review procedures and Supreme Court case law providing for release of detainees, make this an urgently needed recommendation. The considerable cost savings that alternatives to detention would provide inform annual Congressional budget debates.

6. Status of Legislation. (If applicable.)

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), passed by the House of Representatives in December 2005, includes several provisions that this recommendation and existing Association policy oppose (see the Association's letter of December 13, 2005 to the House of Representatives). The bill mandates detention for a significant group of immigrants and asylum seekers, with very limited exceptions; eliminates judicial review in a variety of instances; increases burdens on asylum seekers and refugees; and seeks to invalidate Supreme Court precedents *Zadvydas v. Davis* and *Clark v. Martinez*.

On April 6, 2005, Representative Howard Berman introduced the Civil Liberties Restoration Act (CLRA) of 2005 (H.R. 1502). The CLRA includes provisions which would limit closed immigration hearings; require timely service of notice of charges to arrested or detained non-citizens; require individualized bond hearings to assess whether a non-citizen poses a flight risk or a threat to public safety; limits stays of release; and establish an independent regulatory agency, the Immigration Review Commission, to oversee and regulate the immigration court system.

7. Cost to the Association. (Both direct and indirect costs.)

Existing Commission and Governmental Affairs staff will undertake the Association's promotion of this recommendation, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

This recommendation is currently being circulated to Association entities and Affiliated Organizations including:

Criminal Justice
Family Law
Litigation
SCLAID
Domestic Violence
Administrative Law
Government and Public Sector lawyers
Individual Rights and Responsibilities
International Law
Young Lawyers Division
Labor and Employment
Judicial Division
Law and National Security
Commission on Law and Aging
Center for Children and the Law
CEELI
ABA Africa
LALIC
American Immigration Lawyers Association (AILA)
NLADA
San Diego Bar Association
Chicago Bar Association
Los Angeles County Bar Association
State Bar of Texas
The Association of the Bar of the City of New York
Beverly Hills Bar Association
New Jersey State Bar Association

10. Contact Person. (Prior to the meeting.)

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

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