

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

**RECOMMENDATION**

1 RESOLVED, that the American Bar Association opposes the detention of non-citizens in  
2 removal proceedings except in extraordinary circumstances. Such circumstances may include a  
3 specific determination that the individual (1) presents a threat to national security, (2) presents a  
4 threat to public safety, (3) presents a threat to another person or persons, or (4) presents a  
5 substantial flight risk. The decision to detain a non-citizen should be made only in a hearing that  
6 is subject to judicial review.

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8 FURTHER RESOLVED, that the American Bar Association supports:

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10 (a) the use of humane alternatives to detention that are the least restrictive necessary to  
11 ensure that non-citizens appear in immigration proceedings, including such alternatives  
12 as supervised pre-hearing release and bond based on the individual's economic means  
13 and risk of flight; and  
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15 (b) the provision of a prompt hearing before an Immigration Judge for any alien in removal  
16 proceedings who is denied release with or without bond, including meaningful  
17 administrative review and judicial oversight.  
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19 FURTHER RESOLVED, that the American Bar Association supports, for those non-citizens  
20 detained under a final order of removal or who are detained during deportation proceedings for  
21 ninety days or more:

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23 (a) the establishment of mechanisms to ensure that immigration authorities have complete,  
24 accurate, and readily available information to inform the administrative review and  
25 judicial oversight of the individual's detention; and  
26  
27 (b) mechanisms to ensure full compliance with the decisions of the Supreme Court in  
28 *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.<sup>1</sup>

### **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

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<sup>1</sup> 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.<sup>2</sup>

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 11<sup>th</sup> "unduly harsh" and "highly restrictive."<sup>3</sup> Reports have also indicated long delays in processing cases and detention for indefinite time periods where ICE has found "extraordinary circumstances."<sup>4</sup>

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

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<sup>2</sup> 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).

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

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