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March 27, 2006

The Honorable William H. Frist
Majority Leader
United States Senate
509 Hart Senate Office Building
Washington, DC 20510

Dear Majority Leader Frist:

On behalf of the American Bar Association (ABA), I write to commend you for your leadership in addressing the complex issue of immigration reform. However, I urge you to give the Senate Judiciary Committee time to continue its thoughtful deliberations on the Comprehensive Immigration Reform Act of 2006, and to permit full debate of this bill on the Senate floor. Finally, I write to express our serious concerns with key provisions of the Securing America's Borders Act, which you introduced on March 16.

Comprehensive Immigration Reform

The ABA supports comprehensive immigration reform that includes a path for undocumented individuals to adjust to lawful immigration status without departing the U.S., adequate channels for necessary future workers, and avenues for family reunification. By failing to offer a worker program, the Securing America's Borders Act does not address our nation's need for immigrant labor or the estimated 12 million undocumented people currently living and working in the United States. We commend the backlog reduction measures in Title IV of the bill. However, without more, these measures do not provide the immigration reform that we urgently need. Immigration reform should preserve family unity and national security without sacrificing due process protections or our nation's economic viability.

Elimination of Judicial Review

The ABA strongly opposes provisions in the draft legislation that eliminate or restrict administrative and judicial review for immigrants in a broad array of situations. Sections 204(d) and (g) of the bill severely limit judicial review over naturalization applications, including eliminating judicial authority to make good moral character determinations except in citizenship revocation cases. Section 504 of the bill eliminates judicial review of visa revocations, without regard to the basis (or lack thereof) for the revocation. It eliminates the safeguard under current INA § 221(i) (8 U.S.C. § 1201) which provides for judicial review if a visa revocation provides the sole ground for removal. The serious consequences of removal, as well as criminal liability under the bill for presence without a visa, make impartial judicial review of visa revocations all the more necessary. Finally, Section 507 of the bill establishes a one-judge certification process that would deny review in cases of judicial delay without exception, and without regard to the merits of the case. Access to the

The Honorable William H. Frist
March 27, 2006
Page Two

courts is an essential feature of our system of government, and the implementation and execution of the immigration laws has often been corrected by judicial oversight. Judicial review also has been important historically in protecting immigrants' rights and civil liberties. The ABA opposes deportation without administrative and judicial review, and recommends that these severe provisions be stricken from the bill.

Expansion of Expedited Removal

Section 227 of the bill expands expedited removal, and thereby eliminates judicial review in a broad array of cases. During the expedited removal process, an individual does not have the right to legal counsel, an interpreter, an impartial adjudicator, or judicial review. A removal proceeding, on the other hand, is an evidentiary inquiry that involves both fact-finding and legal analysis to determine a person's identity and citizenship; whether or not he or she is admissible to or removable from the United States or is eligible for an immigration benefit or relief; and to what country the individual would be removed if ineligible to remain here. Although expedited removal procedures allow for credible fear determinations for potential asylum seekers, many individuals fleeing persecution may be unable or reluctant to express their fears upon arrival due to trauma, language barriers, or cultural or gender considerations. The ABA strongly believes that only impartial adjudicators, preferably immigration judges, should have the authority to enter removal orders following a formal hearing that conforms to accepted norms of due process. These decisions, moreover, must be subject to administrative and judicial review. The expedited removal provisions in Section 227 fail to offer adequate due process protections, and the ABA recommends striking them from the bill.

Criminalization and Retroactivity Provisions

The ABA opposes the bill's criminalization of unlawful presence under Section 206(a). This provision of the bill would make criminals of millions of undocumented immigrant workers, as well as visitors, students, asylum seekers, and others for even minor or technical infractions. Criminalization of minor civil infractions will result in significant costs to our justice system and unduly harsh consequences for otherwise law-abiding members of our communities and workforce. The ABA also opposes the provisions in Sections 203 and 206 that make a second violation of the new unlawful presence crime an "aggravated felony." Immigrants convicted of an aggravated felony—a term which includes even misdemeanors and non-violent offenses—are generally subject to mandatory, permanent removal from the U.S., without consideration of U.S. family and community ties or other equities. Finally, the ABA opposes retroactivity provisions in immigration laws that impose burdens or reduce benefits available to individuals when they did not have the ability to take such laws into account in making their decisions or shaping their conduct. The bill contains several retroactivity provisions, including one in Section 204(a)(2) that expands the definition of "aggravated felony" to include conduct that occurred even years before the bill's enactment. The ABA recommends striking these criminalization and retroactivity provisions from the bill.

Indefinite Detention of Immigrants

The ABA supports full compliance with the Supreme Court's decisions in *Zadvydas v. Davis* (2001), and *Clark v. Martinez* (2005), which place limits on the allowable duration of detention. We oppose provisions in Section 202(a) of the bill that conflict with these decisions and expand the grounds for indefinite detention, as well as apply the changes retroactively. Full compliance with the Supreme Court decisions is particularly important in light of documented failures in custody review procedures, lengthy

The Honorable William H. Frist
March 27, 2006
Page Three

administrative delays, and poor detention conditions. The ABA supports the use of humane alternatives to detention, for those who would otherwise be detained, that are the least restrictive necessary to ensure appearance in court, including supervised pre-hearing release and bond based on an individual's economic means and risk of flight, and commends the direction of further study of such alternatives in Section 222 of the bill.

State and Local Police Enforcement of Immigration Laws

The ABA opposes Section 229 of the bill, which authorizes state and local police to enforce federal immigration laws. State and local enforcement of immigration laws undermines public safety by diverting resources and deterring immigrants from reporting crimes to the police. The ABA also opposes the mandate in Section 230 to enter immigration information into the National Crime Information Center (NCIC) database in a broad array of situations. The bill would improperly and unnecessarily clog a valuable resource with information about thousands of people who may never have committed a crime. The ABA recommends striking Sections 229 and 230 from the bill.

Failure to Protect Asylum Seekers and Vulnerable Individuals

The ABA strongly believes immigration procedures must provide a fair, humane process to ensure that legitimate asylum seekers are not returned to the countries of their persecution, and that vulnerable individuals are protected. In addition to the serious problems that criminalizing unlawful presence and eliminating judicial review would have for vulnerable immigrants, Section 208(a) of the bill criminalizes unwilling use of fraudulent documents, or use of documents belonging to another person. This section, together with the provision in Section 223 that makes these crimes into "aggravated felonies," would bar asylum seekers, victims of trafficking, and other vulnerable populations from seeking refuge in the United States. These vulnerable individuals are often forced by circumstance to use false documents in order to flee their countries of persecution, or have no control over the documents that are used by their traffickers. The ABA recommends striking these troubling provisions from the bill.

Section 506 of the bill would require individuals who seek withholding of removal from the United States to prove that one "central" reason that they face persecution is on account of one of the five protected grounds for asylum. Most often, evidence of a persecutor's motive consists of an applicant's recollections of specific statements and actions of the persecutor, and necessarily requires inferences and assumptions about the thoughts of another individual. Placing the additional burden on refugees to establish the degree to which a persecutor was motivated by a particular reason is an extreme and unattainable standard of proof, as the Supreme Court explicitly acknowledged in *INS v. Elias-Zacarias* (1992). In practice, implementation of this provision will give rise to inconsistent, overly narrow, and highly subjective rulings, as well as hairsplitting by judges struggling to determine what evidence is sufficient. The ABA is deeply concerned about the unmanageable, unjust burden this provision will place on deserving refugees who already face many hurdles in obtaining evidence as they flee life-threatening conditions, and recommends striking it from the bill.

Barriers to Citizenship

The ABA believes in integrating immigrants into the United States, preparing them for citizenship, and acculturating them in core U.S. civic values. The ABA opposes retroactive provisions that disqualify immigrants from becoming citizens for conduct that would not have disqualified them when the conduct

The Honorable William H. Frist
March 27, 2006
Page Four

occurred. Sections 204(a)(2) and (a)(3) give DHS officials greater authority to deny citizenship to immigrants based on past conduct. Sections 204(d) and (g) severely limit judicial review over naturalization applications, including eliminating judicial authority to make good moral character determinations except in citizenship revocation cases. The section is titled "Terrorist Bars," but these changes apply to all applicants for citizenship. Raising these new barriers and depriving applicants of judicial review will exclude and alienate valued members of our communities. The ABA recommends striking these provisions from the bill.

We urge you to support comprehensive reform legislation that provides a realistic and meaningful approach to both national security and the need for immigrant labor, as well as crucial due process safeguards for immigrants and asylum seekers.

Sincerely,


Robert D. Evans

cc: The Honorable Harry Reid
Members of the Senate Judiciary Committee