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Dear Senator:

As the Senate continues to consider the complex issue of immigration reform, I write on behalf of the American Bar Association to urge you to support comprehensive reform legislation that provides a realistic and meaningful approach to national security and the need for immigrant labor, promotes family reunification, and provides crucial due process safeguards for immigrants and asylum seekers.

### **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. We support these provisions in the Comprehensive Immigration Reform Act of 2006 (CIRA), offered by Chairman Specter as an amendment to S. 2454, which includes a program to address our nation's need for immigrant labor as well as the status of the estimated 12 million undocumented people currently living and working in the United States. We further support the DREAM Act provision, which provides a path to lawful status for undocumented immigrants who entered the U.S. as children and have significant ties to this country.

### **Due Process and Judicial Review**

The ABA commends the Judiciary Committee for holding a hearing on the court reform provisions in Title VII of Chairman Specter's mark (Title V of S.2454, the Securing America's Borders Act (SABA)). Equal access to justice is a cornerstone 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. Shifting thousands of immigration appeals to the U.S. Court of Appeals for the Federal Circuit will likely have far-reaching consequences, and the possible ramifications of such a proposal should be thoroughly studied beforehand. The consolidation of appeals in the Federal Circuit would increase the expense of pursuing appellate relief for those who live far away, and may be particularly burdensome or even prohibitive for immigrants represented by non-profit agencies or pro bono counsel. The ABA also opposes the one-judge certification process in Section 707 of the Chairman's mark (Section 507 of SABA) that would deny review in cases of judicial delay without exception, and without regard to the merits of the case.

## **Criminalization and Retroactivity Provisions**

The ABA opposes criminalizing unlawful presence, and commends the Judiciary Committee for eliminating from CIRA the provision which would have made criminals of millions of undocumented immigrant workers, visitors, students, asylum seekers, and others for even minor or technical infractions. The ABA also opposes retroactivity provisions in immigration laws that impose burdens on individuals who did not have the ability to take such laws into account in shaping their conduct, and commends the Judiciary Committee for adding Section 204(h) to alleviate the retroactivity provisions in the Chairman's mark. The provisions remain in Section 204(a) of SABA, which could bar immigrants from citizenship for conduct that occurred even years before the bill's enactment. The ABA urges the Senate to refrain from including these retroactivity provisions in the final bill.

## **Expansion of Expedited Removal**

The ABA strongly opposes the "expedited removal" summary deportation process. During expedited removal an individual does not have the right to legal counsel, an interpreter, or review by an impartial adjudicator. Removal decisions are made by low-level immigration officers, without the opportunity for judicial review. Although expedited removal procedures allow for credible fear determinations for potential asylum seekers, the procedures are not currently being applied consistently, and asylum seekers are improperly being denied review. A removal proceeding, on the other hand, provides due process protections by providing an evidentiary inquiry that involves both fact-finding and legal analysis to determine whether an individual is eligible for immigration relief. 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 and that any decision be subject to administrative and judicial review. The ABA opposes any expansion of expedited removal, and recommends excluding the expedited removal provisions in Section 227 of CIRA (and SABA) from the Senate bill.

## **Mandatory and Indefinite Detention**

The ABA opposes detaining immigrants, except in extraordinary circumstances, including when national security or public safety are threatened, or when an immigrant presents a substantial flight risk. The ABA opposes the mandatory detention provision in Section 131 of CIRA (Section 225 of SABA), which fails to consider effective alternatives to detention and would impose significant costs on Department of Homeland Security resources and on taxpayers, and recommends striking it from the bill. The ABA would support an amendment expanding 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. Such alternatives should include supervised pre-hearing release and bond based on an individual's economic means and risk of flight. For those immigrants who remain in detention, the ABA would support an amendment encouraging the Department of Homeland Security to house immigrants near their attorneys, or in locations where immigration legal assistance is available.

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 CIRA (and SABA) that conflict with these decisions and expand the grounds for indefinite detention, and that apply the changes retroactively. Full compliance with the Supreme Court decisions is particularly important in light of documented failures in custody review procedures, lengthy administrative delays, and poor detention conditions.

Finally, we urge you to support restoring a provision included in the original Chairman's mark of the CIRA, Section 715, which would expand the legal orientation program of the Executive Office for Immigration Review to immigration detainees nationwide. The legal orientation program facilitates non-citizens' access to the legal system, improves immigration court efficiency, and saves government resources. Because of its demonstrated benefits, we recommend including a similar provision in the Senate bill, and would further recommend expanding the program to all individuals in removal proceedings, whether or not they are detained.

### **State and Local Police Enforcement of Immigration Laws**

The ABA opposes the mandate in Section 231 of CIRA (Section 230 of SABA) to enter immigration information into the National Crime Information Center (NCIC) criminal database in a broad array of situations, including those in which no crime has been committed. The bill would unnecessarily clog a valuable resource, and charge state and local police with arresting people who may have committed only a civil infraction, or have temporarily been out of immigration status. Further, it would make it more difficult for state and local police and the Department of Homeland Security to identify and apprehend true criminals. The ABA also opposes Sections 229 and 232 of CIRA (Section 229 of SABA), which encourage state and local police to enforce federal immigration laws. All of these enforcement provisions would undermine public safety by diverting police resources and deterring immigrants from reporting crimes to the police, including domestic violence and human trafficking crimes. The ABA recommends striking these provisions from the Senate bill.

### **Protection for Asylum Seekers and Vulnerable Persons**

The ABA strongly believes immigration procedures must provide a fair, humane process to ensure that legitimate asylum seekers and other vulnerable persons are protected, and are not returned to the countries of their persecution. The ABA supports the protections provided to women and children under Section 506 of CIRA, "Relief for Widows and Orphans." The ABA also supports CIRA's provision to protect refugees, asylees, and other vulnerable persons in Section 208(a) (new 18 USC § 1555), but would recommend adding a discretionary "extraordinary circumstances" waiver for immigrants who, due to circumstances beyond their control, are unable to indicate an intention to apply for asylum or related relief without delay when they enter the United States. Trafficking victims and abused spouses are often enslaved by their captors—literally locked behind closed doors—for prolonged periods of time before being able to escape. Victims may be unaware of possible legal remedies or deterred from seeking assistance for fear of retaliation. It is well documented that asylum seekers are often re-

traumatized when recounting their experiences of torture or other persecution. They may have difficulty discussing what they have endured with others, including family members, religious or mental health counselors, and particularly government officials. Requiring these vulnerable individuals to apply for relief “without delay” in every situation does not take into account the reality of their circumstances, and does not truly fulfill the purpose of the amendment—to protect individuals with bona fide claims for humanitarian relief. Together with Section 222, this Section would make “aggravated felons” of victims of trafficking and other crimes, including children, who enter with false documents and are unable to immediately avail themselves of humanitarian legal protections. As “aggravated felons,” they would no longer be eligible for relief. The ABA therefore recommends adding a discretionary waiver of the “undue delay” requirement for filing for relief.

### **Preparing for Citizenship**

The ABA believes in integrating immigrants into the United States, preparing them for citizenship, and acculturating them in core U.S. civic values. We support the citizenship and civics provisions in CIRA Sections 642 and 643.

The ABA supports immigration reform legislation that would protect our national security, provide worker programs, and promote family reunification, without sacrificing due process for immigrants and refugees. The rule of law can only be restored to our broken immigration system through this type of comprehensive reform. The ABA opposes legislative provisions that criminalize unlawful presence, restrict due process protections and judicial review, expand mandatory detention and expedited removal, and fail to offer adequate protections for asylum seekers and vulnerable persons. We urge you to support comprehensive reform legislation that provides a realistic and meaningful approach to national security and the need for immigrant labor, while preserving important due process safeguards and humanitarian protections for immigrants and asylum seekers.

Sincerely,



Robert D. Evans