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January 31, 2007

The Honorable Michael Chertoff  
Secretary  
U.S. Department of Homeland Security  
3801 Nebraska Avenue, NW  
Washington, D.C. 20528

**RE: Petition for Rule-Making to Promulgate Regulations Governing Detention Standards for Immigration Detainees**

Dear Mr. Secretary:

On behalf of the American Bar Association, this letter is sent in strong support of the Petition for Rule-Making to Promulgate Regulations Governing Detention Standards for Immigration Detainees, submitted by several organizations to the Department of Homeland Security (DHS) on January 25, 2007. The promulgation of regulations is essential to ensuring adequate access to legal representation and materials for individuals in immigration detention. In the six years that have passed since the DHS detention standards went into effect, it has become clear that the lack of a legal enforcement mechanism for the detention standards has seriously undermined their effectiveness. The promulgation of regulations would ensure that minimum standards for legal access are met.

The importance of meaningful access to legal representation and materials for individuals in immigration detention cannot be overstated. Immigrants do not have a right to government-appointed counsel, and must either try to find lawyers or represent themselves while inside detention facilities. When the detention standards are not implemented properly, for example when telephones do not work or legal materials are outdated or unavailable, immigrants in detention are denied due process.<sup>1</sup> I observed this firsthand during a visit to a detention center in South Texas in late 2005. For all who face removal, legal assistance is critical for a variety of reasons, including a lack of understanding of our laws and procedures due to cultural, linguistic, or educational barriers. Asylum seekers in particular, who often suffer from post-traumatic stress disorder, may find it extremely difficult to articulate their experiences or to discuss their situations with government officials.<sup>2</sup> Detainees, however, face the additional obstacle of having

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<sup>1</sup> Immigrants have a far greater likelihood of prevailing on the merits when represented by counsel. According to the United States Commission on International Religious Freedom, unrepresented asylum seekers had only a two percent chance of relief, compared with a twenty-five percent chance of relief for those who were represented by counsel. See Charles H. Kuck, *Report on Asylum Seekers in Expedited Removal*, 239, United States Commission on International Religious Freedom, 2005.

<sup>2</sup> American Bar Association, *American Justice Through Immigrants' Eyes*, 2004, at 53, available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeeyes.pdf>.

virtually no access to sources of evidence or witnesses; legal representation is therefore indispensable to them.

The DHS detention standards are the result of negotiations between the Department of Justice, the former Immigration & Naturalization Service, the ABA and other organizations involved in pro bono representation and advocacy for immigration detainees. As a key stakeholder in developing the standards, the ABA is committed to their full and effective implementation. Since 2001, the ABA has worked with Immigration and Customs Enforcement (ICE) to ensure that the standards are met, by sending delegations of volunteer attorneys to detention facilities across the country and meeting regularly with the ICE Detention Standards Compliance Unit to address the delegations' findings. The ABA also receives written correspondence and telephone calls from detainees and advocates, who describe conditions at detention facilities that indicate ongoing violations of the standards.<sup>3</sup> Since 2003, we have received letters from detainees at over one hundred facilities across the United States. These letters consistently raise problems that, if accurate, should be addressed by proper enforcement of the detention standards.

The ABA welcomes the DHS Office of Inspector General's (OIG) recent report, "Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities" (December 2006), as it highlights issues that have been reported to us consistently year after year. The report convincingly demonstrates that regulations are necessary to ensure compliance with the detention standards. In her comments to the report, ICE Assistant Secretary Julie Myers expressed confidence in ICE's annual inspections program and weekly site visits. However, as evidenced by the OIG's report as well as complaints that the ABA receives from detainees, it appears that ICE's annual inspection process alone is not an adequate mechanism for ensuring detention standards compliance.

The ABA recently compiled a list of issues of greatest concern to detained immigrants at the request of the Government Accountability Office (GAO). The issues we reported to the GAO very closely resemble those identified in the OIG's report. They are: (1) telephone calls, including calls to attorneys, are prohibitively expensive, and technology for pre-programmed, free calls to consulates and pro bono legal service providers is confusing or does not work; (2) mail does not arrive or is delayed, legal mail ("special correspondence") is opened outside the presence of detainees, and outgoing legal mail is inspected; (3) law libraries have insufficient or outdated materials, or detainees do not have access to law libraries;<sup>4</sup> (4) detainees are housed with criminals and are treated like criminals; (5) information about complaint processes and grievance procedures is not available, and grievance procedures are not followed (including complaints not being answered, and detainees being threatened with losing privileges or being reclassified for filing grievances); (6) medical and dental complaints, including medication not being received in a timely fashion, delayed treatment, pain relievers offered in response to any

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<sup>3</sup> The ABA also oversees two legal projects that provide representation to immigrants in detention: the South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, and Volunteer Advocates for Immigrant Justice (VAIJ) in Seattle, Washington. See <http://www.abanet.org/publicserv/immigration/home.html>.

<sup>4</sup> These statements are consistent with the report of the United States Commission on International Religious Freedom, which indicated that not one of the 18 facilities visited by USCIRF contained all the materials (or updates) listed in DHS detention standards. See Craig Haney, *Report on Asylum Seekers in Expedited Removal*, 186, United States Commission on International Religious Freedom, 2005.

complaint regardless of its nature; (7) unsanitary conditions, including rodents in housing areas and lack of access to bathrooms, forcing detainees to urinate and defecate into plastic bags; (8) insufficient food, or food not meeting medical or religious diet needs; (9) facility staff problems, including verbal and physical abuse, discriminatory comments based on race, nationality, or sexual orientation, lack of sensitivity to language needs of non-native speakers, lack of awareness of or sensitivity to trauma experienced by asylum seekers, and staff unwillingness to break up fights; and (10) abuse by inmates or other detainees.

In January 2006, the ABA requested that the Office of Inspector General conduct an audit focusing specifically on ICE's compliance with the detention standards. In particular, we recommended a review of the standards relating to access to counsel and legal information: Visitation, Access to Legal Material, Telephone Access, Group Presentations on Legal Rights, Detainee Transfers, and Correspondence. We also recommended that the OIG evaluate the detainee handbooks at facilities and pointed out that the model handbook included in the standards conflicts with the standards themselves. Several of our concerns were addressed in the OIG's report on the treatment of immigration detainees. These issues have been raised year after year in meetings with ICE, the DHS Office for Civil Rights and Civil Liberties, and the OIG. But still the Inspector General found, and we continue to hear, that immigrants do not have consistent, meaningful access to telephones or mail or adequate legal materials. The lack of an adequate enforcement mechanism has seriously undermined the effectiveness and purpose of the detention standards.

We need a new solution. By codifying the detention standards into regulations, DHS can meet the policy goals that led to the creation of the standards and ensure that detained immigrants are treated humanely and have meaningful access to a fair legal process.

Thank you for your careful consideration of this important issue. Please contact Kristi Gaines at the ABA Governmental Affairs Office at (202) 662-1763, or Megan H. Mack at the ABA Commission on Immigration at (202) 662-1006, if you would like any further information.

Sincerely,



Karen J. Mathis

cc: Michael P. Jackson, Deputy Secretary, Department of Homeland Security  
Julie Myers, Assistant Secretary for U.S. Immigration and Customs Enforcement  
John P. Torres, Director, Office of Detention and Removal  
Tim Perry, Deputy Assistant Director, Detention Management Division  
Richard L. Skinner, Inspector General  
Daniel W. Sutherland, Chief Officer for Office for Civil Rights and Civil Liberties