

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
COMMISSION ON IMMIGRATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association supports legislation and/or
2 administrative standards to ensure due process and access to appropriate legal assistance
3 for persons arrested or detained in connection with immigration enforcement actions.
4

5 FURTHER RESOLVED, That such standards should provide that enforcement actions
6 and subsequent criminal and immigration proceedings are carried out in a manner that
7 ensures that:

- 8 a. Individuals are provided notice of the right to consult with an attorney and
9 afforded access to competent legal counsel who are adequately versed in
10 criminal and immigration law, and/or access to co-counsel who are
11 qualified in those fields, while subject to any immigration-related
12 enforcement activity, including interviews, processing appointments,
13 hearings, and any procedure that may result in criminal prosecution or an
14 individual's detention or removal from the United States.
- 15 b. Individuals receive a legal orientation, including notice of their right to
16 remain silent, right to confront witnesses, right to a trial, and a complete
17 and accurate translation of the investigation and proceedings in a language
18 they comprehend that enables them to understand their rights.
- 19 c. Individuals have adequate access to telephones in order to consult with
20 counsel and members of their family, and indigent individuals are
21 permitted to make an adequate number of telephone calls to counsel or
22 family members free of charge.
- 23 d. Attorneys are given an adequate opportunity to consult, in private, with
24 each client and to investigate and evaluate the facts and circumstances
25 (including the potential impact of a criminal conviction on the individual's
26 immigration status, the strength of the government's case and any
27 defenses or claims for relief the client may be in a position to assert).
- 28 e. Individuals have a full and fair opportunity to consider any plea offer and
29 to confer with counsel regarding the offer.
- 30 f. Individuals have a full and fair opportunity to assert any defenses or
31 claims for relief.
- 32 g. Individuals are permitted to waive their rights only if the waiver is
33 knowing and voluntary.
- 34 h. Individuals who have a reasonable basis for seeking relief from removal
35 are provided with a full and fair hearing before an immigration court to
36 determine their eligibility for such relief.
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39 FURTHER RESOLVED, That emergency assistance should be provided to minor
40 children whose parents are arrested or detained;

41

42 FURTHER RESOLVED, That the American Bar Association encourages bar
43 associations to raise awareness of the rights available to individuals taken into custody
44 during workplace immigration enforcement actions, assist in the provision of pro bono
45 legal services to individuals who cannot afford to hire an attorney, and facilitate effective
46 representation through training programs for court appointed and pro bono counsel.

REPORT**Introduction**

In recent years, immigration enforcement actions have multiplied in both number and scope. Worksite arrests have increased markedly, from 500 in 2002 to 5,000 in 2007.¹ The final 2008 numbers are already on track to far surpass all previous years. The men, women, and children caught up in these actions have been charged with civil immigration violations, as well as federal identity theft and document fraud. These charges carry severe consequences, including prison, deportation, and family separation.

In May 2008, in what has become a prominent example of why reform is needed, federal officials raided Agriprocessors, Inc., a meatpacking plant in Postville, Iowa, and arrested 400 workers. At the time, this was the largest enforcement action to date, and showed an increasingly aggressive approach by U.S. Immigration and Customs Enforcement (“ICE”), a division of the Department of Homeland Security (“DHS”). Since this action, there have been reports of additional large scale actions almost every month.

Out of the 400 arrested at Postville, over 300 men, women, and children working at the plant were charged with the federal crimes of identity theft and document fraud. A few juveniles and sole care providers were released, but most were shuttled through a “fast-track” system that has been strongly criticized by many observers for its failure to provide those arrested with due process, including effective assistance of counsel.

A government translator who was on the scene wrote the following account:

Driven single-file in groups of 10, shackled at the wrists, waist and ankles, chains dragging as they shuffled through, the slaughterhouse workers were brought in for arraignment, sat and listened through headsets to the interpreted initial appearance, before marching out again to be bused to different county jails, only to make room for the next row of 10.²

On October 9, 2008, ICE agents executed a search warrant on a poultry processing plant in South Carolina, arresting 331 suspected undocumented noncitizens, including six minors. Of these, 11 currently face criminal charges, including re-entry after deportation, aggravated identity theft, false statements or counterfeit documents. Eighty-three were released on humanitarian

¹ ICE Fact Sheets: FAQ About Worksite Enforcement, August 2008, available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>. Last accessed October 10, 2008.

² Erik Camayd-Freixas, Ph.D., “Interpreting after the Largest ICE Raid in U.S. History: A Personal Account” (June 13, 2008), available at <http://www.monthlyreview.org/mrzine/camayd-freixas120708.html>. Last accessed November 18, 2008.

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grounds. The remaining individuals have all been processed for removal and are currently in detention centers in Georgia.³ It appears that after the Postville enforcement action, some additional procedures and safeguards were put in place; however, complaints have continued to arise regarding due process violations, unlawful detention, and lack of access to counsel.

In response to these concerns, Senators Menendez and Kennedy introduced the “Protect Citizens Residents from Unlawful Raids and Detention Act” in 2008 (110th Congress, 2d Session, S. 3594), which provides safeguards for U.S. citizen as well as noncitizens who are arrested and detained.

Due Process

It is inconsistent with the Due Process Clause of the Fifth Amendment for the government to deport a noncitizen without notice of the grounds for seeking his deportation and without the opportunity to be heard and to demonstrate that he is lawfully present. *See Kaoru Yamataya v. Fisher*, 23 S. Ct. 611, 23 S. Ct. 611 (1903). “Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S. Ct. 625 (1953). The Due Process Clause protects an alien subject to a final order of deportation. *Zadvydas v. Davis*, 121 S. Ct. 2491, 2501, 533 U.S. 678 (2001), *citing Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977 (1896).

Due process requires a full and fair hearing with adequate notice. *Dobrota v. INS*, 311 F. 3d 1206, 1210 (9th Cir. 2002), *citing Farhoud v. INS*, 122 F. 3d 794, 796 (9th Cir. 1997). To comport with due process requirements, the notice afforded aliens about deportation proceedings must be reasonably calculated to reach them and advise them about the hearing. *Id.*

The private liberty interests involved in deportation proceedings are substantial. *See, e.g. INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S. Ct. 1207 (1987) (“Deportation is always a harsh measure.”); *Bridges v. Wixon*, 326 U.S. 135, 154, 65 S. Ct. 1443 (1945) (“Here the liberty of an individual is at stake.... Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.... Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”).

The noncitizen’s interest in receiving notice of pending deportation proceedings, the due process rights involved in those proceedings, and the consequences for failing to appear, are

³USCIS News Release, “331 Arrested by ICE agents during search of South Carolina poultry processing plant” (October 8, 2008), www.ice.gov/pi/nr/0810/081009greenville.htm. Last accessed October 10, 2008.

matters of grave importance. *See Flores-Chavez*, 362 F. 3d at 1161, *citing Yamataya v. Fisher*, 189 U.S. 86 (1903). This is because a noncitizen facing deportation confronts the loss of a significant liberty interest, as deportation “visits a great hardship on the individual and deprives him of the right to stay and live and work in the land of freedom.” *Flores-Chavez*, 362 F.3d at 1161, *quoting Bridges v. Wixon*, 362 U.S. 135 (1945). Due process also requires that notice be sufficient to advise noncitizens of the pendency of the action and afford them an opportunity to present objections. *Gete v. INS*, 121 F.3d 1285 (9th 1997); *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306 (1950).

This recommendation supports legislation to ensure due process and access to appropriate legal assistance for persons arrested or detained in connection with immigration enforcement actions, including large-scale worksite enforcement actions. Such legislation should require notice of the right to consult with an attorney and a full and fair opportunity to assert any defenses or claims for relief.

Detention

Current ABA policy opposes detention of noncitizens except in extraordinary circumstances, which may include a specific determination that the individual presents a threat to national security, a threat to public safety, a threat to another person or persons, or a substantial flight risk. In addition, the decision to detain must comport with U.S. and international law. The ABA supports the use of humane alternatives to detention that are the least restrictive necessary to ensure that noncitizens 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.

Minimum standards of detention exist both in ABA policy and in the DHS ICE National Detention Standards. However, ICE’s detention standards are not enforceable regulations, and many facilities subject to the standards fail to meet them. Furthermore, the ICE detention standards do not apply at temporary holding facilities, such as the fairgrounds in Waterloo, Iowa, at which the Postville detainees were held.

Better safeguards are needed to ensure that cases of mistaken detention of U.S. Citizens or lawful permanent residents are avoided. An unpublished 2006 study by the Vera Institute of Justice, a New York nonprofit organization, identified 125 people in immigration detention centers across the nation who were believed by immigration lawyers to have valid U.S. citizenship claims.⁴ Φορ εξαμπλε, Πετερ Γυζμαν, α mentally disabled United States Citizen born in Los Angeles, California, was deported and wandered lost in Mexico for three months

⁴ Marisa Taylor, “U.S. Citizen’s near-deportation not a rarity,” Minneapolis StarTribune, available at <http://www.startribune.com/nation/14456137.html>. Last accessed November 17, 2008.

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before his family found him there.⁵ The family filed a lawsuit in federal court naming the Department of Homeland Security and senior immigration officials, alleging that Guzman's deportation was illegal, that he was coerced into waiving his legal rights as a U.S. citizen, and that immigration officials discriminated against him because of his ethnicity. The American Civil Liberties Union has cited reports of “dozens of U.S. citizens who have been wrongfully arrested, detained, or deported,” signaling that additional or new safeguards and procedures are needed to ensure that this does not occur.⁶

There are also grave concerns about the detention of families and minors in facilities that are not equipped to accommodate children. Furthermore, the detention of a single mother or father of a U.S. citizen minor child harms the child and places a burden on the community and government, who must care for the child while the parent is in immigration detention. The same is true when the caregiver of an elderly or disabled parent is detained.

Finally, many detention centers are located in rural or outlying areas, hours from major cities where pro bono programs and lawyers work and reside. This presents an even greater difficulty to providing counsel to those individuals detained in immigration custody.

This recommendation would build on current ABA policy by supporting access to legal assistance for those arrested in connection with enforcement actions; emergency assistance to minor children whose parents are arrested or detained; the release of detained individuals with appropriate monitoring or alternatives to detention, unless they are a threat to national security or public safety or present a substantial flight risk; and safeguards to avoid the mistaken arrest or detention of U.S. citizens during immigration enforcement actions.

Effective Assistance of Counsel

Noncitizens have a statutory right to counsel, *see* 8 U.S.C. § 1362 (1996), and a constitutional right to counsel based on the Fifth Amendment’s guarantee of due process. *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 374 (3d Cir. 2003). Implicit in this right to counsel is the requirement that the assistance rendered not be ineffective. “Ineffective assistance of counsel exists where, as a result of counsel’s actions (or lack thereof), ‘the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.’”

⁵ Jill Sarjeant, “Lawsuit filed over man deported and lost in Mexico,” available at <http://www.reuters.com/article/domesticNews/idUSN2747919120080227?sp=true>. Last accessed November 17, 2008.

⁶ “ACLU Demands ICE End Illegal Deportation of U.S. Citizens,” available at http://www.aclu.org/immigrants/gen/34108prs20080213.html?s_src=RSS. Last accessed November 17, 2008.

Saakian v. INS, 252 F.3d 21, 25 (1st Cir. 2001) (quoting *Bernal-Vallejo v. INS*, 195 F.3d 56, 63 (1st Cir. 1999)).

The court-appointed attorneys at Postville were federal defenders, with little or no immigration law experience. Given the complexity of immigration law, assistance and consultation with an immigration attorney is crucial for defendants to meaningfully determine whether they should reject a plea offer or negotiate a modified plea, and whether there is a basis for claiming legal status in the United States.

The recommendation supports legislation that ensures that individuals are provided notice of the right to consult with an attorney and afforded access to competent legal counsel who are adequately versed in criminal and immigration law, and/or access to co-counsel who are qualified in those fields. Such access should be provided while the individual is subject to immigration-related enforcement activities, including interviews, processing appointments, hearings, and any procedure that may result in criminal prosecution or the individual's detention or removal from the United States.

Fourth Amendment Right Against Unreasonable Searches and Seizures

In 2007, agents entered several homes in Minnesota looking for undocumented workers, based on a probation officer's suspicion that some Hispanic individuals under her supervision were in the country illegally. The names and addresses were given to Immigration and Customs Enforcement. The agents did not have a search warrant, and when asked for one, responded "We don't need one," according to a wrongful search action filed in April 2008 in federal court in Minneapolis. In 2007, ICE was sued at least four times for allegedly entering homes without a warrant in violation of the Fourth Amendment.

In Twin Falls, Idaho, a suit alleges that Customs and Border Patrol (CBP) agents approached shoppers at a warehouse store asking to see documentation of lawful presence. It is alleged that the agents had no probable cause to stop any of the individuals, many of whom were United States citizens.

The exclusionary rule, which bars evidence obtained from illegal searches and seizures, generally does not apply in civil deportation or removal proceedings. Thus, even if immigration officers entered a home illegally, an immigration judge could still grant a removal order.

This recommendation supports legislation that ensures that individuals arrested or detained in immigration enforcement actions receive a legal orientation, including notice of their right to remain silent, right to confront witnesses, right to a trial, and a complete and accurate translation of the investigation and proceedings in a language they comprehend that enables them to understand their rights. Further, it encourages bar associations to raise awareness of the rights

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available to individuals taken into custody during workplace enforcement actions in their communities and to assist in the provision of pro bono legal services to individuals who cannot afford to hire an attorney.

Knowing and Voluntary Waiver of Rights and Guilty Plea

The Postville action employed a “fast track” prosecution system in which federal prosecutors charged defendants with aggravated identity theft, a charge which carries a two-year mandatory minimum sentence, and offered them a deal under which they would plead guilty to a lesser offense carrying a five-month sentence. As part of the plea, defendants were required to waive any claims they might assert to lawful immigration status, effectively agreeing to automatic deportation after they served their prison time. The plea deal was good for only seven days. The defense lawyers appointed during these proceedings represented an average of seventeen (17) individuals each (in addition to their already burdensome caseload). According to subsequent reports, defendants were not fully advised of their immigration status or the immigration consequences of their pleas, and many did not even understand what they were pleading guilty to. The attorneys provided by the government had limited access to their clients and few had the time, training, or resources to properly advise their clients on the immigration issues. Most were unable to access immigration counsel, and those immigration attorneys who were present reported difficulty in gaining access to their clients.⁷

A criminal conviction, even for a minor or misdemeanor offense, can have a devastating effect on an immigrant's right to stay in the U.S. with his or her family. Effective assistance of counsel to an immigrant in a criminal matter, including advice whether or not to accept a plea agreement, includes a thorough analysis of whether or not the defendant has a claim to relief from removal in the United States or is otherwise eligible for an immigration benefit.

This recommendation supports legislation that ensures that attorneys are given an adequate opportunity to consult, in private, with each client and to investigate and evaluate the facts and circumstances (including the potential impact of a criminal conviction on the individual's immigration status, the strength of the government's case and any defenses or claims for relief the client may be in a position to assert); that individuals have a full and fair opportunity to consider any plea offer and to confer with counsel regarding the offer, as well as to assert any defenses or claims for relief; and that individuals are only permitted to waive their rights if the waiver is knowing and voluntary.

⁷ See <http://www.aila.org/content/fileviewer.aspx?docid=26039&linkid=184085>;
http://www.prweb.com/releases/AILA/Railroad_Justice/prweb1144114.htm;
<http://www.nytimes.com/2008/08/09/us/09immig.html?ei=5124&en=714952686f3fa0a6&ex=1376020800&partner=permalink&expred=permalink&pagewanted=all>;

Right to Translation of Proceedings

The right of a person facing deportation to participate meaningfully in the deportation proceedings by having them competently translated into a language he can understand is fundamental. *See Tejeda-Mata v. Immigration and Naturalization Service*, 626 F.2d 721 (9th Cir. 1980); *Matter of Tomas*, 19 I & N Dec. 464 (BIA 1987). In Postville, as in many of the other raids around the country, the individuals were given Spanish language interpreters. However, a majority of the individuals were indigenous Guatemalans who spoke Mayan languages, or were from other indigenous tribes from the Central American region. Both the defendants and the interpreters complained that the immigrants did not understand the charges against them or the consequences of the plea agreement.

This recommendation supports the provision of accurate translation services for immigrants throughout investigative and substantive proceedings.

Current ABA Policy

The ABA has adopted numerous policies in support of protections for noncitizens in detention or in immigration proceedings. Among these are policies which: support access to counsel for noncitizens in immigration-related matters, with counsel provided for indigent ; oppose 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; supports the use of humane alternatives to detention that are the least restrictive necessary to ensure appearance at immigration proceedings, including such alternatives as supervised pre-hearing release and bond based on the individual's economic means and risk of flight; supports protection of the constitutional and statutory rights of detainees through disclosure of their names, locations, and the charges against them and access by attorneys and family members. The ABA also opposes involuntary transfers of detained immigrants to remote facilities if such transfer would impede an existing attorney-client relationship or if appropriate immigration counsel is not available near the site.

This recommendation builds on these policies, adding important safeguards for individuals caught up in immigration enforcement actions. Drawing on lessons learned from Postville and other recent experiences, the recommendation addresses the need for counsel versed in immigration and criminal law; provides for emergency assistance to minor children; and supports safeguards for avoiding mistaken arrest and detention of U.S. citizens.

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Legislative Reform

In the 110th Congress, Senators Robert Menendez (D-NJ) and Edward M. Kennedy (D-MA) introduced S. 3594, the “Protect Citizens and Residents from Unlawful Raids and Detention Act,” which would codify many of the policies contained in the recommendation. If enacted by the House of Delegates, the recommendation will enable the ABA to advocate on behalf of similar legislation, as well as administrative measures to improve protection and assistance for individuals arrested and detained in the course of immigration enforcement actions.

Response of the Legal Profession

Finally, the recommendation calls on lawyers to provide pro bono legal services to individuals arrested during immigration enforcement actions, and urges bar associations to facilitate effective representation through training programs for court appointed and pro bono counsel. Such training programs are needed to educate lawyers about the dynamics of immigration law, the consequences of criminal convictions, the relevant laws, and strategic considerations in representing individuals in various types of proceedings.

Pro bono and legal aid lawyers can assist individuals arrested during immigration enforcement actions by:

Providing legal assistance to individuals facing criminal charges arising from the enforcement action during preliminary phases, as well as through trial or a plea agreement.

Representing individuals seeking immigration relief and assisting them in obtaining other benefits, such as medical assistance or disability benefits, for which they may be eligible under the immigration laws.

Assisting attorneys in representing noncitizens in criminal proceedings, and provide them with at least a cursory understanding of the immigration consequences of criminal convictions.

Providing pamphlets, literature, or presentations for immigrants advising them of their rights in enforcement actions and criminal proceedings, and within the immigration system.

Such assistance would go a long way toward ensuring that noncitizens are afforded due process if and when they are arrested or detained.

For the aforementioned reasons, we urge the House of Delegates to adopt the recommendation.

Respectfully submitted,
Anthony Joseph
Chair, Criminal Justice Section

Mark Agrast
Chair, Commission on Immigration
November, 2008

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GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: American Bar Association Section of Criminal Justice and ABA Commission on Immigration

Submitted By: Anthony Joseph, Chair Section of Criminal Justice and Mark Agrast, Chair, Commission on Immigration

1. Summary of Recommendation(s).
That the American Bar Association supports legislation and/or administrative standards to ensure due process and access to appropriate legal assistance for persons arrested or detained in connection with immigration enforcement actions, including large-scale worksite enforcement actions. Additionally, that Congress should provide adequate resources for the protection and assistance for victims of unsafe workplaces. Finally, encourages bar associations to raise awareness of the rights available to individuals taken into custody during workplace enforcement actions in their communities and to assist in the provision of pro bono legal services to individuals who cannot afford to hire an attorney.

2. Approval by Submitting Entity.
The recommendation was approved by the Criminal Justice Section Council on November, 12, 2008. The recommendation was approved by the Commission on Immigration on October 31, 2008.

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?
 - ◆ Due Process Right to Counsel for All Persons in Removal Proceedings: Opposes involuntary transfers of detained immigrants to remote facilities if such transfer would

impede an existing attorney-client relationship or if appropriate immigration counsel is not available near the site. Additionally, counsel should be available to all noncitizens in immigration-related matters, and indigent persons eligible for relief should be referred to pro bono or appointed counsel. Finally, counsel and guardians ad item should be appointed for unaccompanied minors and for the mentally ill and disabled in all immigration matters because these individuals are particularly vulnerable and face a variety of obstacles to accessing counsel.

- ◆ Due Process Protections in Removal Hearings and Appeals: Supports hearings that are in person and on the record, with notice and an opportunity to be heard. Reasonable discovery procedures should be adopted for immigration proceedings. Decisions should include findings of fact and conclusions of law that are amenable to review.
- ◆ Expedited Removal: Opposes expedited removal, which deprives individuals of the right to counsel and judicial review.
- ◆ Legalization: Supports legislation recognizing that undocumented immigrants now in the United States should be dealt with realistically and humanely, and that those who are otherwise law-abiding should be accorded a legal status.
- ◆ Asylees and Refugees: Supports the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge.
- ◆ Process and Interpretation of Proceedings: Supports administrative improvements to the asylum process and to the exercise of the right to counsel consistent with Section 292 of the Immigration Act; supports legislation for temporary U.S. protection for persons who may not qualify for asylum but who would be endangered if forced to leave.
- ◆ Children's Rights: Urges non-discrimination against any child based on citizenship or status; opposes efforts to restrict or deny equal access to public education, foster care or social service; urges respect for Constitutional rights to due process and civil liberty for all persons in the United States..
- ◆ Criminalization of Civil Immigration Violations: Opposes criminalization of civil violations of immigration law.
- ◆ Deportation/Removal of Non-Citizen Based Upon Conviction of a Crime: Urges Congress to restore authority to state and federal sentencing courts to waive a non-citizen's deportation or removal based upon conviction of a crime, by making a “judicial recommendation against deportation” upon a finding at sentencing that removal is

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unwarranted in the particular case or, alternatively, to give such waiver authority to an administrative court or agency. Urges federal immigration authorities to avoid interpretations of the immigration laws that extend the reach of the “aggravated felony” mandatory deportation ground. Urges states, territories, and the federal government to expand the use of the pardon power to provide relief to non-citizens otherwise subject to deportation or removal on grounds related to conviction, where the circumstances of the particular case warrant it.

- ◆ Detention: Opposes 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.
- ◆ Detention by the INS: Opposes incommunicado detention by INS and urges protection of the constitutional and statutory rights of detainees by disclosing the names and locations of detainees, charges against them, and access to them by attorneys and family members, as well as specific due process protections.
- ◆ Detention Standards: Supports federal regulations that codify DHS Immigration and Customs Enforcement (ICE) National Detention Standards, and supports improvement, review, and increased oversight of detention standards implementation. Supports enforcing the detention standards at all detention facilities. Urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that immigration detainees not be housed with criminal inmates. Also supports improvements to the detention standards, and provides for two means of ensuring appropriate detention standards implementation: a DHS oversight office to review all ICE detention facility inspection reports; and in-depth training for all individuals who come into regular contact with detainees.
- ◆ Detention Standards for Unaccompanied Alien Children: Adopts the black letter ABA Standards for the Custody, Place and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States, dated August 2004, which address the comprehensive psychological, legal, medical, mental health, educational, and other basic needs of unaccompanied immigrant children in federal custody.

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

In recent years, immigration enforcement has grown at astounding rates, especially given the rise in worksite arrests. In 2002, there were approximately 500 arrests; in 2007, an estimated 5,000 people were arrested in worksite enforcement actions. The final 2008

numbers are already on track to far surpass all previous years. The men, women, and children caught up in these actions were charged with civil immigration violations, as well as federal identity theft and false document charges. These carry severe consequences, including prison, deportation, and family separation.

In May 2008, in what has become a prominent example of why legislation and reform is needed, federal officials raided Agriprocessors, Inc., a meatpacking plant in Postville, Iowa, and arrested 400 workers. At the time, this was the largest enforcement action to date, and showed an increasingly aggressive approach by U.S. Immigration and Customs Enforcement (“ICE”), a division of the Department of Homeland Security (“DHS”). Since this action, there have been reports of additional large scale actions.

6. Status of Legislation.

Senators Menendez and Kennedy introduced the “Protect Citizens and Residents from Unlawful Raids and Detention Act,” which is currently before the Senate Judiciary Committee (110th Congress, 2d Session, S.3594). (Note, by the way, that the legislation will no longer be pending when the House of Delegates meets, unless it has been reintroduced.)

7. Cost to the Association. (Both direct and indirect costs.) No Costs

The recommendation’s adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at all levels of government. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2009 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

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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Executive Summary

1. **Summary of the recommendation**

The Criminal Justice Section recommends that the ABA adopt new policy that supports legislation and/or administrative standards to ensure due process and access to appropriate legal assistance for persons arrested or detained in connection with immigration enforcement actions, including large-scale worksite enforcement actions. Additionally, that Congress should provide adequate resources for the protection and assistance for victims of unsafe workplaces.

2. **Summary of the issue which the recommendation addresses**

In recent years, immigration enforcement actions have multiplied in both number and scope. Worksite arrests have increased markedly, from 500 in 2002 to 5,000 in 2007. The final 2008 numbers are already on track to far surpass all previous years. The men, women, and children caught up in these actions have been charged with civil immigration violations, as well as federal identity theft and document fraud. These charges carry severe consequences, including prison, deportation, and family separation.

3. **How the proposed policy position will address the issue**

This recommendation supports legislation to ensure due process and access to appropriate legal assistance for persons arrested or detained in connection with immigration enforcement actions, including large-scale worksite enforcement actions. Such legislation should require notice of the right to consult with an attorney and a full and fair opportunity to assert any defenses or claims for relief. The proposed policy calls for non-citizens to be granted the basic right to due process of the law; the requirement by the DHS to meet bond and detention standards; Fourth Amendment rights; right to effective assistance of Counsel; and right to interpretation of proceedings.

4. **A summary of any minority views or opposition which have been identified**

None have been identified yet.