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The Honorable Elton Gallegly
Chairman
Subcommittee on Immigration Policy and Enforcement
Committee on the Judiciary
Washington, DC 20515

The Honorable Zoe Lofgren
Ranking Member
Subcommittee on Immigration Policy and Enforcement
Committee on the Judiciary
Washington, DC 20515

Dear Chairman Gallegly and Ranking Member Lofgren:

On behalf of the American Bar Association (ABA), I write to express the ABA's views on measures to expand the Department of Homeland Security's detention authority contained in H.R. 1932, the "Keep Our Communities Safe Act of 2011." I request that you make this letter part of the record for the hearing held on May 24, 2011. In summary, the ABA believes that Congress should be taking steps to shorten and provide alternatives to, rather than prolong, detention.

Background

The American Bar Association is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers, judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. Through its Commission on Immigration, the ABA advocates for modifications in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and operates pro bono legal representation programs that encourage volunteer lawyers to provide high quality representation for immigrants, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.

The ABA opposes proposals to prolong detention, both while an immigration case is pending as well as after a final order of removal. We also oppose proposals to increase the use of mandatory detention. The ABA is committed to ensuring that foreign nationals in the United States receive fair treatment. The many obstacles to obtaining legal representation faced by immigrants in detention, and the reports we continue to receive about deficiencies in conditions of detention, are important reasons that the ABA opposes the detention of noncitizens in removal

proceedings except in extraordinary circumstances, such as when the individual presents a threat to national security or public safety, or presents a substantial flight risk.

There are cost-effective alternatives to detention that have been proven effective in ensuring that noncitizens appear in court and for removal. The ABA supports 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.

Detention and Lack of Access to Counsel Adversely Affects Case Outcomes

Noncitizens are often subject to prolonged detention, even if they do not present a threat to national security or public safety, or present a substantial flight risk. There is evidence that being detained affects the *outcome* of immigration proceedings. Newly released preliminary findings from The New York Immigrant Representation Study, a two-year project of the Judge Robert A. Katzmann Immigrant Representation Study Group, show that “[t]he two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention.”¹ The study analyzed cases in the New York immigration courts and found that only 3% of individuals who were unrepresented and detained had successful outcomes, versus 74% of individuals who were represented and released or never detained.² The stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members, or even persecution or death if deported to their native countries. In this context, getting the right result is critical.

Detention does not come cheaply: it costs U.S. taxpayers an average of \$122 per day to detain one person. Alternatives to detention are far more cost effective, at less than \$8.00 per day for full service alternative programs, including supervision and support to help ensure appearance at hearings and compliance with removal orders.³ A snapshot of the detained population on January 25, 2009 showed that of the 32,000 noncitizens in Immigration and Customs Enforcement (ICE) custody, 18,600 had pending removal cases.⁴ The average length of detention for that group was 81 days, although 13% had been detained for between 90 days and six months, 10% for between six months and one year, and 3% for one year or more. 10,873 detainees had received final orders of removal, and their average length of detention was about 114 days.⁵ The daily cost of detaining these 10,873 people for 114 days today would be over \$151 million. Alternatives to detention could be provided for a fraction of that amount.

¹ The New York Immigrant Representation Study, *Preliminary Findings*, at 1, available at <http://www.nylj.com/nylawyer/adgifs/decisions/050411immigrant.pdf>.

² *Id.* 18% of individuals who were represented but detained were successful, and 13% of individuals who were unrepresented but released or never detained.

³ The cost of providing electronic monitoring alone is under \$1.00 per day.

⁴ Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* Migration Policy Institute, at 1 (Sept. 2009), available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>. DHS Immigration and Customs Enforcement (ICE) currently detains about 33,400 people per day, or about 400,000 per year, at a cost of \$1.77 billion in FY 2010.

⁵ 114 days is the average length of detention for 10,771 of the 10,873; data was missing for the other 102 people. *See id.*

The importance of meaningful access to legal representation for individuals in removal proceedings cannot be overstated. Immigrants in detention are in administrative proceedings, but the consequences of removal can be as severe as consequences in criminal proceedings. Removal may result in permanent separation from family members and communities, or violence and even death for those fleeing persecution. Yet immigrants have no right to appointed counsel and must either try to find lawyers or represent themselves from inside detention facilities. 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, language, or educational barriers. Asylum seekers in particular may find it extremely difficult to articulate their experiences or to discuss traumatic situations with government officials. Detainees, however, face the additional obstacle of having virtually no direct access to sources of evidence or witnesses; legal representation is therefore indispensable.⁶ Nevertheless, in FY 2010 only 16% of people in detention were represented by counsel, and 40% of noncitizens overall were represented.⁷ In south Texas, where the ABA's South Texas Pro Bono Asylum Representation Project (ProBAR) operates, only about 36% of people in immigration proceedings are represented, and the quality of representation varies widely.

The ABA receives written correspondence and telephone calls from detainees every day — more than 50 calls and letters each week. Almost every person who contacts the ABA lacks legal representation. The need is great, and resources are very limited. Although the DOJ Executive Office for Immigration Review (EOIR) provides a list of legal service providers, most people who contact us report that the providers listed do not answer the phone, do not take detained cases, or charge too much money. The National Immigrant Justice Center recently issued a report finding that 28% of the detention facilities surveyed, holding about 3,000 people, are not served by any legal aid organization. Eight facilities with more than 100 detainees did not have any access to legal aid organizations, including any type of legal orientation program.⁸

Many experts agree that access to counsel creates efficiency, including providing cost savings as well as fairness in the system. For example, having access to legal orientation presentations reduces detention time, as individuals learn whether or not they have relief. The ABA supports expanding the DOJ Legal Orientation Program (LOP), which currently reaches about half of detained noncitizens in removal proceedings. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings in order to educate them on the law and to explain the removal process. Based on the orientation, the detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief more readily submit to removal. According to the Department of Justice, LOPs improve the administration of justice and save the government money by expediting case

⁶ American Bar Association, *American Justice Through Immigrants' Eyes*, 2004, at 53, available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeeyes.pdf>. According to one study, asylum seekers are four to six times more likely to succeed if represented. See A. Schoenholtz and J. Jacobs, "The State of Asylum Representation: Ideas for Change," 16 *G'town. Immig. L.J.* 739 - 740 (Summer 2002). See also http://uscirf.gov/countries/global/asylum_refugees/2005/february/legalAssist.pdf at 239.

⁷ Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, *FY 2010 Statistical Year Book* (January 2011), at G1, available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf>.

⁸ Heartland Alliance National Immigrant Justice Center, *Isolated in Detention* (Sept 2010), at 8; available at <http://www.immigrantjustice.org/policy-resources/isolatedindetention/intro.html>.

completions and leading detainees to spend less time in detention.⁹ ABA provides LOPs to adults in detention in south Texas and San Diego and can unequivocally attest to the benefits that these presentations bring both to detainees and the immigration court system. The ABA supports expansion of the Legal Orientation Program to all detained and non-detained persons in removal proceedings.

Deprivation of Liberty and Inadequate Detention Conditions Necessitate Limiting the Duration of Detention

Recognizing the grave deprivation of liberty involved with long-term detention, the U.S. Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005) articulated limits on the allowable duration of detention. Under those decisions, the Department of Homeland Security may only detain a person for longer than six months after the issuance of a final removal order if there is a significant likelihood of removal in the reasonably foreseeable future. Regulations currently permit continued detention when the government asserts that: a person has a highly contagious disease posing a threat to public safety; a person's release would have adverse foreign policy consequences; a person is a national security concern; or a person is determined to be "specially dangerous" due to a "mental condition or personality disorder" and prior criminal history.

The ABA opposes proposals to expand the categories of people who can be detained indefinitely and supports full compliance with the Supreme Court's decisions in *Zadvydas v. Davis* and *Clark v. Martinez*. Prior to the Supreme Court's decisions (and even afterwards, in some cases), too many individuals languished needlessly in immigration detention at taxpayer expense, unable to be rejoined with families, seek medical and other care at their own expense, or productively contribute to the economy.

Prolonged detention, including post-final order detention, unnecessarily taxes the American people, creates liability issues for the government, and deprives noncitizens of access to the basics of human existence, including appropriate medical treatment. Since 2003, the ABA has kept records of reports of inadequate and even harmful detention conditions, received in telephone calls and written correspondence from individuals in detention. Unfortunately, the type of complaints has hardly changed in that time. In the past six months, the ABA has forwarded 10 of the most serious complaints to Immigration and Customs Enforcement (ICE), which include the story of one man who notified medical staff when he entered ICE detention that he had recently been told to seek immediate attention for pressure building in his eye. Although he immediately signed the medical release, four months passed without medical care because the facility did not follow up on requesting his medical file. After this time, he lost vision in the eye. A second man reported loss of vision in one eye and lack of adequate care to address deteriorating vision in the other. A third man reported that he fractured his spine in detention but received inadequate attention in part because he was transferred twice and the doctor in a receiving facility would not honor test results or an approval for surgery issued while the man was in the transferring facility.

⁹U.S. Department of Justice, Board of Immigration Appeals, "The BIA Pro Bono Project is Successful" (Oct. 2004); U.S. Department of Justice, Executive Office for Immigration Review, "Evaluation of the Rights Presentation" (Jan. 2000).

In 2006, at the request of the Government Accountability Office, the ABA compiled a list of detention conditions issues of greatest concern, including issues that should have been corrected if DHS's own detention standards were enforced. The list has hardly changed in five years. Common conditions complaints include: (1) telephone calls, including calls to attorneys, are prohibitively expensive and phones do not work properly; (2) mail does not arrive or is delayed, legal mail is prohibited or 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 or legal information; (4) detainees are housed with criminals and are treated like criminals; (5) grievance procedures are not followed (including 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, and inadequate treatment including pain relievers offered in response to any complaint regardless of its nature; (7) unsanitary conditions; (8) spoiled or 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 awareness of or sensitivity to trauma experienced by asylum seekers; and (10) abuse by criminal inmates or other detainees.

Conclusion

The ABA believes that the overuse of immigration detention does irreparable harm to individuals who lack adequate counsel, are separated from their families, and may be unjustly deported. We believe that a number of steps should be taken to address these concerns, including: maintaining and ensuring compliance with case law that limits prolonged and indefinite detention; using humane alternatives to detention for those who do not present a threat to national security or public safety or a substantial flight risk; and expanding pro bono programs including the Legal Orientation Program to individuals in immigration proceedings nationwide. Each of these steps would increase efficiency as well as address many of the failures in our immigration system.

Thank you for the opportunity to share our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Thomas M. Susman