ABA Opposes Amendments to Eliminate or Dilute Access to Counsel Provisions in S.744

Dear Senator:

As the Senate continues to debate S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, I write on behalf of the American Bar Association to urge you to oppose any amendments to weaken or eliminate the bill’s provisions to afford access to counsel for vulnerable persons and access to legal information for immigration detainees.

Inadequate access to legal representation and legal information has contributed to an immigration adjudication system that lacks important due process protections for many respondents and has resulted in significant case backlogs. S. 744 currently includes provisions to address these problems. The ABA supports the provisions in Section 3502 that authorize government-appointed counsel for vulnerable individuals, including individuals with mental disabilities and unaccompanied children, and in Section 3503 that provide legal information to immigration detainees. The measures included in these two sections are critically needed steps toward improving the fairness and efficiency of our immigration court system.

For this reason, the ABA urges you to oppose Senator Grassley’s Amendments 1306 and 1307, Senator Coburn’s Amendments 1350 and 1351, and any other attempts to weaken these sections of the bill.

Access to Counsel Increases Fairness and Enhances Efficiency in Immigration Proceedings

S. 744 currently provides that the Attorney General has discretion to appoint counsel in certain removal proceedings and directs the Attorney General to appoint counsel at the expense of the government for “unaccompanied alien children” (UACs) and individuals with serious mental disabilities, as well as other “particularly vulnerable” immigrants if necessary to ensure fairness and efficiency. Grassley Amendment 1306 would significantly weaken this key protection, and Coburn Amendments 1350 and 1351 would eliminate it entirely.

The immigration court system presents a challenge to navigate for any individual confronting immigration proceedings. Absent legal assistance, children and individuals with mental disabilities struggle to understand the proceedings against them, often lacking the capacity to make informed decisions on even the most basic matters impacting their cases. In fact, they may not be able even to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings. The vulnerabilities of these persons, particularly those in immigration detention, also make it difficult or impossible for them to obtain counsel on their
own. As a result, they may experience lengthy periods of detention and be ordered deported without even minimal legal advice. Providing counsel for these vulnerable individuals better ensures basic fairness and due process in these proceedings.

In addition to ensuring fairness, the presence of counsel promotes efficiency in the immigration court system. According to the National Association of Immigration Judges, when noncitizens are represented by attorneys, judges are able to conduct proceedings more effectively and resolve cases more quickly. Immigration Judges otherwise are forced to try to develop the record and identify potential claims for relief during expensive on-the-record proceedings where language barriers may also impede proceedings. In addition, lack of access to counsel can create delays that impose a substantial financial cost on the government, particularly in detained cases. Individuals with representation are also more likely to appear for their court dates and obey court orders.

The New York Times recently reported that Department of Justice officials agree that the measures would save money overall by reducing expensive prolonged detention for immigrants with disabilities. And the National Association of Immigration Judges urges that “a higher percentage of attorney representation ... would increase court efficiency and ultimately result in cost savings.” Increased representation for noncitizens would facilitate the more efficient processing of claims, lessen the burden on the immigration courts, and decrease appeal rates. Therefore any attempt to weaken or eliminate the current access to counsel provisions in S. 744 should be rejected.

**Legal Orientation Programs Improve Court Efficiency and Save Detention Costs**

Approximately 80 percent of individuals in immigration detention lack legal counsel, which, as noted above, contributes to inefficiencies in the court system. One way that detained immigrants can be provided with basic legal information is through Legal Orientation Programs (LOP). The federal LOP program is administered by the Department of Justice’s Executive Office for Immigration Review (EOIR), which currently contracts with nonprofit organizations to provide LOP services at 25 detention facilities around the country. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings to educate them on the law and to explain the removal process. Based on this orientation, the detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief – the vast majority – typically submit to removal.

The Department of Justice, immigration judges, and many immigration experts have praised the Legal Orientation Program as a cost-effective means to provide detainees access to critical legal information, contributing to immigration court efficiency and reducing detention costs. According to an April 2012 EOIR report to the Senate Committee on Appropriations, LOP reduced the amount of time to complete immigration proceedings by an average of 12 days and reduced time in detention by an average of six days – creating significant cost savings for the government. In fact, the report found that LOP saves the Department of Homeland Security four dollars in detention costs for every dollar spent on the program. However, currently only 35 percent of detainees receive LOP services. Section 3503 of S. 744 would maximize the proven benefits of the program by requiring LOPs for all detained noncitizens. Amendments that would
eliminate this needed expansion of LOP, including Grassley Amendment 1307 and Coburn Amendments 1350 and 1351, should be rejected.

S. 744’s current provisions to authorize appointed counsel when necessary for children and the mentally disabled in immigration proceedings and to expand the federal Legal Orientation Program will facilitate noncitizens’ access to justice, improve immigration court efficiency, and save government resources. We urge you to oppose any amendments to eliminate or weaken these provisions.

Sincerely,

[Signature]

Thomas M. Susman
Director
Governmental Affairs Office