May 16, 2013

Re: ABA Opposes Grassley Amendments 39, 40, 41, 48, 51, and 53

Dear Senator:

As the Senate Judiciary Committee continues to consider S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, I write on behalf of the American Bar Association to share our views on several pending amendments. S.744, as drafted, contains several important measures to improve the fairness and effectiveness of our immigration adjudication and detention systems and the ABA opposes the adoption of any amendments to weaken or eliminate these provisions.

Lack of resources and inadequate access to legal representation and legal information have contributed to an immigration adjudication system that lacks important due process protections for many respondents and has created significant case backlogs. These problems are compounded by a system of immigration detention that too often detains people who do not pose a flight or security risk. S. 744 currently includes provisions must be preserved to help alleviate each of these problems. We therefore oppose Grassley Amendments 40 and 41, which curtail access to counsel; Grassley Amendments 39 and 48, which delay or restrict sorely needed immigration court resources; and Grassley Amendments 51 and 53, which eliminate secure alternatives to detention programs and needlessly prolong immigration detention.

Access to Counsel Increases Fairness in Immigration Proceedings

Grassley Amendments 40 and 41 would eliminate critical provisions that ensure that vulnerable immigrants have access to counsel and legal information. Grassley Amendment 40 significantly limits the scope of the Section 3502 appointed counsel provisions for unaccompanied minors, people with serious mental disabilities, and other vulnerable groups. The existing immigration system is complex and difficult to navigate even for attorneys and immigration professionals, but it is even more challenging for certain vulnerable groups. These individuals may not understand court processes or the charges against them, or have the capacity to provide basic information relevant to their case. In spite of this, they may be detained and facing removal without the assistance of counsel.

Access to counsel under Section 3502 increases court efficiency as it supports fundamental fairness and due process in immigration court proceedings. Without counsel, vulnerable individuals often languish in immigration detention at taxpayer expense while their cases move through the immigration courts. According to the National Association of Immigration Judges, “a higher percentage of attorney representation . . . would increase court efficiency and
ultimately result in cost savings.” Appointed counsel for particularly vulnerable immigrants would also decrease the length of immigration detention as it reduces the number of appeals, claims without legal basis, and continuances, and assists judges in parsing complex fact situations and testimony.

Grassley Amendment 41 would eliminate Section 3503, which codifies the Office of Legal Access Programs and expands Legal Orientation Programs (LOPs). Because noncitizens are currently not afforded government-appointed counsel, approximately 80% of individuals in detention are forced to represent themselves before the court. LOPs provide group rights presentations and other services, including pro bono referrals, to individuals held in detention facilities around the country. These services often are a person’s only chance to learn about the immigration court process and relief that may or may not be available. Section 3503 would mandate the availability of LOPs for detained noncitizens within five days of arrival into custody, provide programs to help detainees make informed decisions about their cases, and direct LOPs to identify vulnerable populations for consideration of counsel.

LOPs have been praised by the Attorney General, immigration judges, and other experts for providing efficient, cost-effective access to critical legal information. Currently, however, LOPs reach just 35 percent of detained immigrants in removal proceedings. Section 3503 would expand LOP nationally, improving efficiencies across the system. According to an April 2012 EOIR report to the Senate Committee on Appropriations, LOPs reduced the amount of time to complete immigration proceedings by an average of 12 days when compared to individuals who did not receive a legal orientation. Immigration judges report that respondents who attend LOP appear in immigration court more prepared and with a clearer understanding of the immigration court process. After listening to a group rights presentation, individuals are more likely to identify the relief for which they may be eligible and not to pursue relief for which they are ineligible. And LOPs reduce detention costs. On average, LOPs reduce the length of time in detention by six days – creating significant cost savings for DHS. As documented by EOIR’s report to the Senate Committee on Appropriations, LOP saves DHS $4 in detention costs for every dollar spent on the program.

**Necessary Resources to Improve the Efficiency and Effectiveness of the Immigration Courts**

Grassley Amendments 39 and 48 would strike Section 3501, which increases personnel resources for the immigration court system and replace it with a GAO study of the immigration courts’ workload. Amendment 48 provides that the Attorney General may increase the number of immigration judges and other immigration court and BIA staff following and consistent with the findings in the GAO report.

The immigration court system needs additional resources now. Immigration reform must address the crisis in our immigration court system, which is overburdened and under-resourced. Over the past several years, DHS has dedicated more resources to immigration enforcement efforts, resulting in a 28% increase in cases received by the courts between FY 2007 (335,923) and FY 2011 (430,574). There has not been a commensurate increase in resources for the immigration courts. As a result, the immigration courts lack the resources to keep up with
current workload. In April 2013, the Transactional Records Access Clearinghouse (TRAC), a nonpartisan data gathering organization, reported that the backlog of cases pending before immigration courts had reached 330,533 cases, with pending cases waiting an average of 553 days—over one and a half years.

A GAO study would be redundant and waste government resources. There have been two significant studies in the last three years, in addition to continued statistical review by the TRAC, demonstrating the need for increased immigration court resources. Grassley Amendments 39 and 48 would be unnecessarily duplicative of these in-depth, nonpartisan studies, wasting valuable government resources. In 2010 the ABA Commission on Immigration released a study examining the immigration court system, and recommended hiring additional immigration judges, law clerks, and Board of Immigration Appeals (BIA) staff attorneys in order to address the problem of inadequate resources for large caseloads. In 2012, the Administrative Conference of the United States (ACUS), an independent, nonpartisan federal agency, studied ways to improve removal adjudications, and made findings supporting additional resources, in particular for additional support personnel.

**Appropriate, Cost-Effective Limits on Detention**

Grassley Amendment 51 would strike Section 3715, which directs the Department of Homeland Security to create secure alternatives to detention programs. Grassley Amendment 53 authorizes the indefinite detention of immigrants who pose no threat to public safety, and authorizes the prolonged detention, for months or even years, of individuals awaiting an outcome in their immigration cases, while denying them the basic due process of a bond hearing to determine whether their detention is justified.

The loss of liberty has punitive effects and works to undercut rights on many levels, including the right to counsel. Furthermore, the impact of detention is particularly negative for certain vulnerable groups, such as families enduring indefinite separation, asylum-seekers and victims of crime suffering from trauma and fearful of government authority, and those with physical or mental conditions that may be exacerbated by the lack of adequate medical care.

Among the more than 400,000 persons ICE detains annually are long-time permanent residents, sole care providers of U.S. citizen children, survivors of torture and abuse, and people with serious medical conditions who need specialized care. ICE should have the flexibility to use appropriate alternatives to detention, including release on orders of recognizance, release on bond, supervised release, and electronic monitoring, as needed in each case, including for individuals subject to mandatory detention.

**Secure Alternatives to Detention:** Immigration detention should only be used in extraordinary circumstances, such as when national security or public safety are threatened, or an individual presents a substantial flight risk. In other instances, the ABA supports the use of humane alternatives to detention, for individuals who would otherwise be detained, that are the least restrictive necessary to ensure appearance in court. Section 3715 provides for secure, sensible alternatives to detention based on individualized determinations, and directs that they should not
be used when release on bail or recognizance is sufficient to ensure appearances at immigration proceedings and public safety.

Detention also imposes a significant financial burden on the public; the federal government spent about $5 million per day on immigration detention in 2012. Expanding the use of alternatives to detention would save taxpayers millions of dollars each year. The cost of detention is approximately $164 per day per person, while alternative programs can cost less than $8 per day. Experience has shown that alternatives programs, designed and implemented appropriately, can be extremely effective. ICE’s existing alternatives program reports compliance rates of 85 to 99.7 percent. Aside from the issue of the cost-effectiveness, utilizing alternatives in appropriate cases also serves to increase access to legal representation and may allow noncitizens to fulfill their family, work, or community responsibilities while awaiting determination of their case.

**Indefinite Detention:** Grassley Amendment 53 would prolong immigration detention both while an immigration case is pending as well as after a final order of removal. The amendment would result in the unnecessary detention of thousands of individuals who would otherwise contribute to the economy, serve their communities, and support their families, which often include U.S. citizen children. This would come at great taxpayer expense, at a rate of $45,000 per detainee per year. The ABA supports full compliance with the U.S. Supreme Court’s decisions in *Zadvydas v. Davis* (2001) and *Clark v. Martinez* (2005), which place limits on the allowable duration of detention. In these decisions, the Court recognized the grave deprivation of liberty involved with long-term detention. Full compliance with the Supreme Court decisions is particularly important in light of poor detention conditions. And as Justice Scalia noted in *Clark v. Martinez*, truly dangerous individuals—whether immigrants or citizens—can already be detained under existing law.

We urge you to oppose these and any other amendments that would undermine the provisions in S. 744 which enhance access to counsel, adequately resource the immigration courts, and allow for fair and cost-effective detention decisions.

Thank you for your consideration of our views.

Sincerely,

Thomas M. Susman
Director
Governmental Affairs Office