

DIRECTOR

Robert D. Evans
(202) 662-1765

rdevans@staff.abanet.org

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SENIOR LEGISLATIVE COUNSEL

Denise A. Cardman
(202) 662-1761

cardmand@staff.abanet.org

Kevin J. Driscoll
(202) 662-1766

driscollk@staff.abanet.org

Lillian B. Gaskin
(202) 662-1768

gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

R. Larson Frisby
(202) 662-1098

frisbyr@staff.abanet.org

Kristi Gaines
(202) 662-1763

gainesk@staff.abanet.org

Kenneth J. Goldsmith
(202) 662-1789

goldsmithk@staff.abanet.org

Ellen McBarnette
(202) 662-1767

mcbarnee@staff.abanet.org

E. Bruce Nicholson
(202) 662-1769

nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS
OPERATIONS/LEGISLATIVE COUNSEL

Julie M. Strandlie
(202) 662-1764

strandlj@staff.abanet.org

INTELLECTUAL PROPERTY
LAW CONSULTANT

Hayden Gregory
(202) 662-1772

gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL

Rita C. Aguilar
(202) 662-1780

aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT

Julie Pasatiempo
(202) 662-1776

jpasatiempo@staff.abanet.org

STAFF DIRECTOR FOR
INFORMATION SERVICES

Sharon Greene
(202) 662-1014

greenes@staff.abanet.org

EDITOR WASHINGTON LETTER

Rhonda J. McMillion
(202) 662-1017

mcmillionr@staff.abanet.org

The Honorable Orrin Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

On behalf of the American Bar Association (ABA), I urge you to support a comprehensive immigration reform plan, and to oppose provisions in Senate Judiciary Chairman Arlen Specter's Comprehensive Immigration Reform Act of 2006 that fail to realistically address the U.S. undocumented population and the need for immigrant labor. The ABA believes that comprehensive reform can preserve our national security while promoting family reunification and preserving due process for immigrants and refugees. The rule of law can only be restored to our broken immigration system through this type of comprehensive reform.

Comprehensive Immigration Reform

The ABA supports comprehensive immigration reform that includes a path for undocumented individuals to adjust to lawful immigration status without departing the U.S., adequate channels for necessary future workers, and avenues for family reunification. The ABA opposes the "work and return" requirement in the bill because it fails to provide a realistic mechanism to deal with the U.S.' need for immigrant workers. Rather, the ABA supports allowing workers to adjust status to permanent residence without leaving the U.S. Further, the ABA opposes denying immigration relief to those who fail to apply for the Conditional Nonimmigrant Work Authorization program. These provisions would seriously undermine immigration reform, and deny work eligibility to otherwise law-abiding individuals. Comprehensive reform must preserve our national security, through appropriate identity and security checks, without sacrificing due process protections or our nation's economic viability.

Elimination of Judicial Review

The ABA strongly opposes provisions in the draft legislation that would eliminate or restrict administrative and judicial review for immigrants in a broad array of situations. The bill would limit judicial review for participants in the Temporary Guest Worker program, and requires workers who apply for Conditional Nonimmigrant Work Authorization to waive all rights to administrative or judicial review of a decision on their eligibility for this conditional status, or to contest any removal action, unless there is an application for asylum or related relief. Sections 712(i) and (k) of the bill codify streamlined Board of Immigration Appeals (BIA) review, permitting single member review and affirmance without opinion in certain circumstances. For federal court review, Section 707 of the bill establishes a one-judge certification process that would deny review if there is judicial delay, without regard to the merits of the case. Additionally, Section 704 of the bill would eliminate judicial review, including habeas corpus review, of visa revocations, without regard to the basis (or lack

thereof) for the revocation. It would eliminate the safeguard under current INA § 221(i) (8 U.S.C. § 1201) which provides for judicial review if a visa revocation provides the sole ground for removal. The serious consequences of removal, as well as criminal liability under the bill for presence without a visa, make impartial judicial review of visa revocations all the more necessary.

The consequences of removal are severe, including prolonged or even permanent separation from U.S. family members and communities. Access to the courts is an essential feature of our system of government, and the implementation and execution of the immigration laws has often been corrected by judicial oversight. Judicial review also has been important historically in protecting immigrants' rights and civil liberties. We oppose deportation without administrative and judicial review, which should include in-person proceedings and a decision that includes findings of fact and conclusions of law that are amenable to full and fair administrative and judicial review. We oppose the provisions which would further restrict judicial review in the immigration process.

Criminalization and Retroactivity Provisions

The ABA opposes the bill's criminalization of unlawful presence under Section 206(a). This provision of the bill would make criminals of millions of undocumented immigrant workers, as well as visitors, students, asylum seekers, and others for even minor or technical infractions. The ABA also opposes the provisions in Sections 203 and 206 that would make a second violation of the new unlawful presence crime an "aggravated felony." Immigrants convicted of an aggravated felony—a term which includes even misdemeanors and non-violent offenses—are generally subject to mandatory, permanent removal from the U.S., without consideration of U.S. family and community ties or other equities.

The ABA opposes retroactivity provisions in immigration laws that would impose burdens or reduce benefits available to individuals when they did not have the ability to take such laws into account in making their decisions or shaping their conduct. The bill contains several retroactivity provisions, including modifications of the definition of an "aggravated felony" in Section 203(c) and its application in Section 204(a)(2), that would apply to conduct occurring before the date of enactment of the bill. The consequences of these changes are severe, since "aggravated felons" may be permanently deported from the U.S.

Barriers to Citizenship

The ABA believes in integrating immigrants into the United States, preparing them for citizenship, and acculturating them in core U.S. civic values, and therefore commends the bill's Civics Integration Grant Program. However, the ABA opposes disqualifying immigrants from becoming citizens for conduct that would not have disqualified them when the conduct occurred. Sections 204(a)(2) and (a)(3) of the bill would give DHS officials greater authority to deny citizenship to immigrants based on past conduct. Sections 204(d) and (g) of the bill would severely limit judicial review over naturalization applications, including eliminating judicial authority to make good moral character determinations except in citizenship revocation cases. The section is titled "Terrorist Bars," but these changes apply to all applicants for citizenship. Raising these new barriers and depriving applicants of judicial review will exclude and alienate valued members of our communities.

Failure to Protect Refugees and Asylum Seekers

Our immigration procedures, particularly those pertaining to asylum, must provide for a fair, humane process and ensure that legitimate refugees are not returned to the countries of their persecution. The draft legislation would require individuals who seek withholding of removal from the United States to prove that one "central" reason they face persecution is on account of one of the five protected grounds for

asylum. Most often, evidence of a persecutor's motive consists of an applicant's recollections of specific statements and actions of the persecutor, and necessarily requires inferences and assumptions about the thoughts of another individual. Placing the additional burden on refugees to establish the degree to which a persecutor was motivated by a particular reason is an extreme and unattainable standard of proof, as the Supreme Court explicitly acknowledged in *INS v. Elias-Zacarias* (1992). In practice, implementation of this provision will give rise to inconsistent, overly narrow, and highly subjective rulings, as well as hairsplitting by judges struggling to determine what evidence is sufficient. The ABA is deeply concerned about the unmanageable, unjust burden this provision would place on deserving refugees who already face many hurdles in obtaining evidence as they flee life-threatening conditions.

Indefinite Detention of Immigrants

The ABA supports full compliance with the Supreme Court's decisions in *Zadvydas v. Davis* (2001), and *Clark v. Martinez* (2005), which place limits on the allowable duration of detention. We oppose provisions in Section 202(a) of the bill that conflict with these decisions and would expand the grounds for indefinite detention. Full compliance with the Supreme Court decisions is particularly important in light of documented failures in custody review procedures, long delays in case processing, and poor detention conditions.

The ABA supports 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, including supervised pre-hearing release and bond based on an individual's economic means and risk of flight, and commends Chairman Specter's bill for directing further study of such alternatives.

Mandatory Minimum Sentences

The ABA strongly opposes the provisions in the draft legislation that would enhance or create new mandatory minimum sentences. The ABA has been opposed to mandatory minimum sentences since 1968, and has many concerns about their effects.

First, as a general matter, mandatory minimums produce an inflexibility and rigidity in the imposition of punishment that is inappropriate for a system that we hold out to the world as a model of justice and fairness. To insist that all those convicted of a crime be lumped in the same category and be penalized identically inevitably means that the unjustness of a sentence in particular circumstances will be ignored.

Additionally, we are concerned about the high cost of imposing mandatory minimums. Numerous studies have demonstrated the extraordinary costs of incarcerating thousands of nonviolent offenders in our nation's prisons and jails. The provisions to create new mandatory minimum sentences, coupled with those to increase mandatory detention, have the potential to greatly increase the number of individuals being incarcerated in immigration-related cases, at significant cost to American taxpayers.

Protecting Immigrant Victims of Fraud

The ABA supports provisions that would punish those who defraud aliens, including those who falsely represent themselves to be attorneys in immigration matters. The ABA supports mechanisms to ensure that substantive and procedural rights are not prejudiced for those who are victimized by the unauthorized practice of law.

Legal Orientation Programs

We commend Chairman Specter for calling for the expansion of the Executive Office for Immigration Review legal orientation program for immigration detainees nationwide. Legal orientation presentations facilitate non-citizens' access to justice, improve immigration court efficiency, and save government resources. Because of their demonstrated benefits, we encourage expansion of this important program to all individuals in removal proceedings, whether or not they are detained.

We urge you to support comprehensive reform legislation that provides a realistic and meaningful approach to both national security and the need for immigrant labor, as well as crucial due process safeguards for immigrants and asylum seekers.

Sincerely,


Robert D. Evans