

RECOMMENDATIONS OF DETENTION/DEPORTATION WORKING GROUP

II. OVER USE OF IMMIGRANT DETENTION AND ALTERNATIVES TO DETENTION

(A) Mandatory Detention, Indefinite Detention, Expedited Removal, Prolonged Detention

- Mandatory Detention should be eliminated; DHS should be required to make individualized determinations of whether or not a noncitizen presents a danger to society or a flight risk sufficient to justify their detention.
- All DHS detention decisions should be subject to review by an Immigration Judge, ie. Immigration Judges. should be given jurisdiction to redetermine the custody of any non-citizen detained in DHS custody, including those classified as Arriving Aliens, and those with final administrative orders of removal.
- The Department of Homeland Security should aggressively pursue alternative to detention such as supervised release.
- Where detention is necessary, The Department of Homeland Security should aggressively pursue alternative forms of detention, including home detention, community-run shelters, and half-way houses.
- The Department of Homeland Security must comply with the Supreme Court's decision in *Zadvydas v. Davis* and *Clark v. Martinez*: Individuals who cannot be returned to their home countries within the foreseeable future should be released as soon as that determination is made, and certainly no longer than six months after the issuance of a final order.
- All indefinite detainees must have access to timely and fair post-order custody reviews.
- Upon release, such individuals should be released with employment authorization, so that they can immediately obtain employment.
- To address concerns related to flight risk or dangerousness, the DHS should aggressively pursue re-integration programs for indefinite detainees. Such programs would significantly mitigate any risk of danger to the community or of flight, and are less costly than detention.

(E) Alternatives to Detention

The overuse of immigration detention in the United States violates the spirit of international laws/covenants and, in many cases, also violates the actual letter of those instruments. The availability of effective alternatives renders the increasing reliance on detention as an immigration enforcement mechanism unnecessary. Through these alternative programs, there are many less restrictive forms of detention and many alternatives to detention that would serve our nation's protection and enforcement needs more economically, while still complying with international human rights law and ensuring the just and humane treatment of migrants in this country.

Detention should only be used when it is necessary. In those rare circumstances where detaining an individual is the only viable option, there should be strict standards regarding detention conditions and immigrants should have access to regular judicial review of their confinement. To help serve this end, detention standards should be codified in regulations and vigorously enforced. Parole policies should be utilized and expanded, and DHS should work more closely with the NGO community to develop alternative programs. The NGO community, through the experience of running its own programs and working with clients enrolled in government-sponsored alternatives like ISAP, is uniquely positioned to assist the government in implementing these effective alternatives that will ensure greater compliance, adhere more faithfully to international law, and guarantee significant savings of public funds.

III. CONDITIONS OF DETENTION

1. Create Detention Standards in Compliance with Human Rights Principles:

At the Human Rights Committee meeting in June 2006, the United States government cited the issuance of the Detention Standards in 2000 as evidence of compliance with international principles on the treatment of immigration detainees. In its concluding remarks, the Human Rights Committee encouraged the United States “to adopt all measures necessary for their effective enforcement.” Unfortunately, the Detention Standards issued in 2000 are not legally binding and the U.S. government has largely failed to comply with their provisions.

The U.S. government should create legally binding human rights standards governing the treatment of immigration detainees in all facilities, regardless of whether they are operated by the federal government, private companies, or county agencies. Affirmative rights to humane treatment should be created through Congressional authority as well as agency binding regulations. Experts, NGOs and directly affected community members should participate in the process of creating minimum standards and regulations through the creation of a Congressional commission.

2. Greater transparency:

The United States government should require greater transparency in contracting, oversight, and access to information regarding detention operations. The current process for ICE to contract with a county jail or prison is unknown. Unlike in the Federal Bureau of Prisons method of contracting for jail beds, there is no “Request for Proposals” or publication in the Federal Register. As a result, community groups, legal service providers, and migrants have no involvement in the government’s decision of where to locate detainees. This hidden process keeps the financial gain derived from ICE contracts a secret. Further, the government should require greater access to federal monitors, investigators, and auditors to permit NGO and detainee involvement in the oversight process. Finally, the US government should create less restrictive policies for access to jail records and detainee medical records to assist with legal representation.

3. Effective national oversight:

The United States government should create a “layered approach” to the monitoring and oversight of conditions for migrants in custody of ICE.

First, Congress should create an overarching institution, independent from DHS, which monitors every detention center and county jail with which ICE contracts. Monitors with expertise in environmental, health and hygiene, mental health, and security should routinely conduct thorough investigations at each facility. In addition, states or counties should institute facility based investigation teams, independent from

jail or county governance to receive and investigate individual and system-wide allegations of human rights abuses and constitutional violations. Alternatively, Ombudspersons or legislative committees should be created to monitor conditions on an on-going basis. Finally, such oversight institutions should be required to report to the U.S. Congress as well as the public; and all reports and investigations should be publicly available and open to outside scrutiny.

IV. ACCESS TO COUNSEL AND DUE PROCESS FOR DETAINED IMMIGRANTS

1. Indigent Detainees in Removal Proceedings Should Be Appointed Counsel

Indigent non-citizens detained in the custody of the Department of Homeland Security (DHS) and placed into removal proceedings, should have the right to appointed counsel. Removal proceedings are legally complex, adversarial in nature, and can result in consequences that have been found by this nation's highest Court to be severe and harsh, including "the loss of property and life; or of all that makes life worth living."³⁷⁷ The Right to counsel is a due process right that is fundamental to insuring fairness and justice in proceedings. To ensure compliance with domestic and international law, court appointed counsel should be available to detained immigrants.

The need for appointed counsel for indigent non-citizens in removal proceedings is critical, especially given the current political environment, which favors vigorous enforcement of laws authorizing detention and deportation. In addition to increased use of law enforcement tactics, and the criminal prosecution of immigration violations, there is a significant growth in the number of detainees and in federal or ICE-contracted detention bed space.

In 2006, the American Bar Association, the largest national voice of the legal community, publicly expressed its support of and recommendation for the due process right to counsel for all persons in removal proceedings.³⁷⁸ Such a recommendation is consistent with U.S. domestic and national principles of a fair trial, and international standards relating to the same.

2. All detained immigrants should receive legal orientation or "Know Your Rights" presentations

ICE should ensure that non-citizens have access to legal orientation presentations. As stated above, these presentations are often the only means by which individuals learn of their rights and are given an opportunity to obtain legal representation. To ensure due process protections for all immigrants in the United States, legal service providers who seek to conduct these presentations should be allowed access to all facilities utilized by ICE. Further, following a workplace raid, detained non-citizens should receive a legal orientation presentation as soon as practicable to ensure that they are apprised of their rights under U.S. immigration law and to invoke their right to whatever relief is available to them under the law.

3. Detained non-citizens should be held in centers that are easily accessible to legal service providers and pro bono counsel

Given that the difficulties in representing detained non-citizens are exacerbated when these individuals are held in remote and/or rural locations, ICE should ensure that the facilities holding non-

³⁷⁷ *Ng Fung Ho v. White*, 259 U.S 276, 284 (1921).

³⁷⁸ American Bar Association, Commission on Immigration, Report to the House of Delegates, February 2006, *available at* http://www.abanet.org/publicserv/immigration/107b_comprehensive_immig_reform.pdf.

citizens in removal proceedings are located near the detainees' counsel or near urban areas where the detainee will have access to legal service providers and *pro bono* counsel.

4. Video-conferencing should be utilized only with the consent of the detained non-citizen

Hearings conducted by VTC violate immigrants' due process rights by denying them the right to an in-person hearing with an immigration judge. The use of video-conferencing also impedes the immigration judge's ability to assess an immigrant's credibility. These outcomes are unnecessary and unfair. Congress should consider modifications to the law to ensure that immigrants are never deprived of a meaningful day in court.

5. The Department of Homeland Security should promulgate the detention standards into regulations

As noted above, the ICE detention standards purport to establish protections for immigrants in detention, requiring access to counsel, working telephones, health care and other basic rights. The ICE detention standards are useful benchmarks, but because they are not codified into regulations, they are not enforceable in law. Congress should enact legislation requiring the agency to codify the current regulations.

6. ICE should terminate its practice of pressuring immigrants to sign stipulated orders of removal

ICE should curtail the practice of pressuring immigrants to sign stipulated removal orders until after the immigrants have had a legal orientation and an opportunity to consult with an attorney. Some immigrants may be eligible for bond or other types of immigration relief under the law. Immigrants that are ineligible for immigration relief may still be eligible for voluntary departure, a better choice for many than waiting in detention for an indeterminate period of time until they are forcibly removed. Most importantly, no one should be pressured to sign away rights granted by our laws. ICE's actions are inconsistent with the values and traditions of the American justice system. Everyone deserves a day in court and the opportunity to present their case to a judge.

V. ISSUES FACED BY VULNERABLE POPULATIONS

(A) Detention/ Deportation Issues Impacting Unaccompanied Children

- Urge lawmakers to pass the Unaccompanied Alien Child Protection Act of 2007 re-introduced by Senator Feinstein in March 2007. It has twice been passed by the U.S. Senate in unanimous votes in both the 108th and 109th sessions of Congress and offers the promise of systemic reform and protection of unaccompanied immigrant children that would provide the requisite responsibility, transparency, and accountability of all governmental stakeholders, thereby facilitating the protection of unaccompanied children. However, the House of Representatives failed to entertain a vote on the legislation in both sessions of Congress. In the 110th Congress, it is likely that the proposed bill will go before both chambers of Congress and be incorporated into a comprehensive immigration reform bill. **BUT** need to urge lawmakers to increase the age of juveniles eligible to apply for Special Immigrant Juvenile Status from 18 to 21 years (otherwise half of applicant pool for SIJS is left out).

- Remove children from jail-like detention centers and place them in home-like facilities. Due care should be given to rights delineated for children in custody in the ABA Standards for the Custody, Placement, and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States.
- In abiding faithfully to a best interest of the child standard, there should be a mechanism through which this information can be given weight or credence in removal proceedings. In situation where return has been decided, measures should be undertaken to ensure the safety of the child upon return. Examples include: assessment of country conditions and the ability of the competent authorities to protect the minor; home assessment in the case of potential family reunification or the securing of alternative arrangements with the competent child welfare authorities.
- Alternatively, ORR should increase funding for guardians *ad litem* or Child Advocates for unaccompanied children who are going through removal proceedings. These Advocates can help identify the children's eligibility for relief, and advocate for their best interests. Lawmakers should be urged to pass introduced legislation that would establish child advocates and allow for their involvement in immigration proceedings and related matters.
- Temporary Protected Status should be amended to grandfather unaccompanied children whose parents have TPS so they can derive status through their parents.
- A specific BP/ICE juvenile protocol, inclusive of Flores standards, with plans for implementation and accountability. There must be mandatory training for BP personnel on the Flores settlement, and legal rights of minors.
- BP must allow visits by independent non-governmental organizations and representatives to their processing and holding stations so that conditions of detention can be monitored.
- Unaccompanied minors must never spend more than 48 hours in BP custody. Temporary holding cells that imprison minors are not appropriate settings for any child to spend more time than is absolutely necessary. The Office of Civil Rights and Civil Liberties made this recommendation in a report released internally within DHS in the spring of 2006. These recommendations and other changes in BP policy must be implemented immediately.
- BP must begin providing adequate food and water immediately to all detained minors. Children cannot be allowed to subsist for 3 or 4 days or more eating only crackers and drinking tap water.
- There must be no private contract for the operation of BP facilities. While Wackenhut Corporation has taken over the transportation of BP detainees along the U.S./Mexico border, unaccompanied minors should never be held or transported by officials working for private corporations, who will have even less accountability for the treatment of juvenile detainees than DHS.

(Recommendations for city/state authorities)

- Require that all Administration for Children's Services intake forms, permanency hearing reports, and service plan review forms include the question, "where were you born?" for children with

whom ACS has contact along with instructions on the form to the worker to refer that young person to an immigration attorney for consultation.

- Create a SIJS unit within ACS under the Director of Immigrant Services.
- Fund a non-profit organization whose sole purpose would be to help young people in guardianships obtain SIJS. Assuming the SIJS Unit is created, this could be done by reallocating Department of Youth and Community Development funds currently being used to fund nonprofits to help youth in foster care to those who seek to aid children who are being appointed a legal guardian.
- Propose to the State Legislature that all Family Court and Surrogate's Court judges be required, in the course of every Family Court proceeding to ask the child's place of birth and if s/he is found to be born outside the U.S., to refer the young person to the appropriate nonprofit to ensure all immigration options are explored.
- If a child is not living with his or her parents at enrollment or is enrolled by someone other than his or her parents, the school shall provide the youth with a list of free legal providers.

(B) Situation of Immigrant Women Detained in the United States

- In collaboration with legal service providers and non-governmental organizations that work with detained immigrant women, ICE should develop gender-specific detention standards that address the medical and mental health concerns of immigrant women who have survived mental, physical, emotional or sexual violence.
- In collaboration with legal service providers and non-governmental organizations that work with detained immigrant women, ICE should elaborate on current standards that address the medical treatment of detained pregnant or post-natal immigrant women.
- The Department of Homeland Security should codify the detention standards in legally binding regulations so that the protections these standards offer detained immigrants will be enforced.
- Whenever possible, immigrant women who are suffering the effects of persecution, abuse, or who are pregnant or nursing infants, should not be detained. If these vulnerable women cannot be released from ICE custody, the Department of Homeland Security should develop alternative programs such as intense supervision or electronic monitoring, typically via ankle bracelets. These alternatives have proven effective during pilot programs. They not only are more humane for immigrants who are particularly vulnerable in the detention setting or who have family members who require their presence, but they also cost, on average, less than half the price of detention.³⁷⁹
- As a part of its normal reporting of statistics on the makeup of the detained immigrant population, ICE should be required to collect and report gender-specific data that will help service providers better understand the female detention population. This data should include the proportion of detainees who are asylum seekers and the proportion who have reported being victims of violence.

³⁷⁹ Detention Watch Network, "Why Detention is Not Smart Enforcement," <http://detentionwatchnetwork.org/aboutdetention>.

- Research should be undertaken to better understand the makeup of the detained women immigrant population and the conditions they face. Such research would give service providers and advocates a better understanding of the proportion of detained immigrant women who are asylum seekers or victims of violence. It would also help clarify the frequency with which ICE detains women during pregnancy or post-natal periods.

(C) Asylum Seekers in Detention

The United States should bring its laws and practices relating to the detention of asylum seekers into line with international standards and U.S. traditions of fairness. International law requires that the detention of asylum seekers is the exception and should normally be avoided. Asylum seekers should not be subject to automatic or mandatory detention, and should only be detained in those cases where detention is necessary for public safety or to ensure national security. The need for detention should be determined in a hearing before a court or similar independent authority. Thorough reform of the U.S. detention system for asylum seekers will require a combination of legislative, regulatory and administrative actions – as well as a change in the training of DHS staff who are entrusted with assessing the need to detain individual asylum seekers. Our recommendations include:

1. **Review by an Immigration Judge.** The United States should ensure that the decision to detain an asylum seeker is promptly assessed by an independent court.
 - The Department of Homeland Security and the Department of Justice should work together to ensure that arriving asylum seekers, like other immigration detainees, have the chance to have their custody reviewed in a hearing before an immigration judge. DHS and DOJ should revise regulations to make clear that asylum seekers can request these custody determinations from immigration judges.
 - The U.S. Congress should enact legislation to ensure that immigration judges are independent of the Department of Justice, and instead part of a truly independent court system. This legislation should also provide for the right of asylum applicants to seek review of parole decisions by immigration judges.
2. **Codify INS/DHS Parole Guidelines in Formal Regulations.** The INS/DHS asylum parole guidelines should be codified into formal regulations so that asylum seekers who meet the parole criteria – criteria which include posing no danger to the community, community ties, establishing identity, and satisfying the “credible fear” standard – can be released from detention on parole. These regulations should also specify that:
 - A quality assurance procedure and an internal DHS review process should be implemented to ensure the fairness and accuracy of parole determinations.
 - An asylum seeker’s identity may be established through various kinds of evidence including the submission of identity documentation or sworn statements from individuals who can attest to the asylum seeker’s identity.
3. **Non-discrimination.** Detention policies should not discriminate against asylum seekers on the grounds of race, religion, national origin, or any other immutable characteristic. The basic principle of non-discrimination is central to international refugee and human rights law, as well as U.S. law.
4. **Children.** DHS should ensure that minors who seek asylum are not detained by DHS but are in fact promptly transferred into the care of the Office of Refugee Resettlement. Congress should enact legislation to ensure that children are provided with pro bono representation and guardians. In December

2005, the Senate passed The Unaccompanied Alien Child Protection Act of 2005 (S 119), and legislation has since been introduced that, if advanced, would ensure that unaccompanied children would be housed in shelters or foster care or with their families, and minimum care standards for detention.

- 5. Families in Detention.** Families should not be held in prison-like facilities. All efforts should be made to release families from detention and place them in alternate accommodations that are suitable for families with children.
- 6. Alternatives to Detention.** Asylum seekers should generally not be detained. In cases where it is determined that some degree of supervision is needed, DHS should consider alternatives to detention – with a presumption in favor of the least restrictive alternative - including supervised release, and for women with children, release to facilities operated by non-profit agencies. Alternatives might also include use of refugee accommodation centers, group homes, supervised release programs, release to a guarantor, or release on bond.
- 7. Improve Detention Conditions.** Asylum seekers should no longer be detained in inappropriate prison-like facilities. When detention is necessary (rather than an alternative to detention or parole), asylum seekers should be held in more humane facilities – as recommended by the U.S. Commission on International Religious Freedom. Asylum seekers should not be co-mingled with criminals or held in remote county and local jails. The Department of Homeland Security should issue regulations codifying the existing detention standards relating to access and conditions of detention. All asylum seekers should be provided with appropriate medical care, including professional counseling for survivors of torture, rape or gender-based persecution. All detention facilities that house women seeking asylum should be staffed with female officers and female health care staff.