



# AMERICAN BAR ASSOCIATION

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**Statement of**

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**submitted on behalf of the**

**AMERICAN BAR ASSOCIATION**

**to the**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**for the hearing on**

**“Renewing America's Commitment to the Refugee Convention: The Refugee  
Protection Act of 2010”**

**May 19, 2010**

Chairman Leahy and members of the Committee:

As president of the American Bar Association (ABA), I appreciate this opportunity to express our support for the Refugee Protection Act of 2010. The ABA is deeply committed to ensuring that foreign nationals in the United States receive fair treatment under the nation's immigration laws and historically has emphasized access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. The Refugee Protection Act would implement critical improvements to U.S. refugee and asylum policies, and we urge the Senate to pass this legislation as soon as possible.

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 assists the operation of *pro bono* representation programs, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.

The Refugee Protection Act would modify and improve a number of U.S. immigration laws and practices that create major barriers to refugee access. Many of the bill's provisions are consistent with recommendations in a recent ABA report, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*.<sup>1</sup> While space constraints prevent us from commenting on every provision of the bill, we would like to take this opportunity to highlight several important issues.

### **Removing Arbitrary Obstacles to Asylum: the One-Year Application Deadline**

One major obstacle for asylum seekers who enter the U.S. is the requirement that applicants file their claims within one year of arrival in the country. Department of Homeland Security (DHS) data show that this procedural requirement prevents a large number of asylum seekers from asserting substantive claims of persecution. Since the imposition of the one-year deadline in late 1998, U.S. asylum officers have initiated removal proceedings for asylum applicants in more than 35,000 cases—without any consideration of the merits of their claims—solely because of the applicants' inability to file or to prove that they filed within one year of arriving in the country. An unknown number of refugees, after learning that they have missed the one-year deadline, do not file asylum claims at all. Denying a substantive hearing to so many people with potential claims of persecution in their home countries is simply unacceptable.

Genuine refugees often have good reasons for failing to file their claims immediately or soon after arrival. Many refugees are traumatized. Language barriers, as well as lack of familiarity with the law, also hinder prompt applications. Perhaps most importantly, asylum seekers experience great difficulty in finding legal representation. Presenting the significant issues in

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<sup>1</sup> The full report and executive summary are available at <http://new.abanet.org/immigration/pages/default.aspx>.

order to have an asylum application properly considered on its merits is extraordinarily difficult without help from a lawyer or another professional who specializes in asylum law. Two out of three asylum seekers lack representation in the first instance.

As a result of the deadline, people with legitimate reasons for failing to apply within one year are placed in legal proceedings in which their only chance of avoiding removal to the country of persecution is to qualify for “withholding of removal,” which requires them to establish a far greater likelihood of risk than would have been required to win asylum in the first instance. Those who are unable to meet this very high standard are expelled from the U.S. simply because they did not meet an arbitrary deadline. Those who do qualify for withholding can remain in the U.S., but are denied the right to become permanent residents or citizens and to bring their spouses or minor children to join them here.

If an asylum system is effective, the imposition of time limits is not needed to control abuse. The U.S. system, in particular, includes appropriate protections and is not subject to significant abuse, and arbitrary mechanisms aimed at controlling abuse are not needed. In fact, there is no evidence that the imposition of arbitrary time limits decreases abusive claims. On the other hand, it is clear that such restrictions limit the access of bona fide claimants to a decision on the merits of their claims. The Refugee Protection Act will address this serious problem by eliminating the one-year time limit for filing an asylum claim.

### **Ensuring an Effective and Humane System of Immigration Detention**

In recent years the number of individuals in immigration detention, many of whom are asylum seekers, has increased significantly. The Refugee Protection Act would provide important protections for asylum seekers and help to ensure an effective and humane system of immigration detention by providing for prompt and reviewable parole determinations, full implementation and enforcement of detention standards, and secure alternatives to detention for those individuals who are eligible.

For over two decades, the ABA has recommended detaining asylum seekers only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings. 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 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.

Detention also imposes a significant financial burden on the public; the federal government spent over \$1.7 billion on immigration detention in 2009. Efficient and effective use of scarce public resources should be directed toward detaining only those who pose a threat to public safety or national security, or who present a substantial flight risk. Persons who do not meet those criteria should be released under appropriate conditions to ensure compliance with their immigration proceedings. The Refugee Protection Act will accomplish this goal by codifying the current parole policy and by implementing a secure alternatives to detention program nationwide.

Alternatives to detention offer the prospect of a considerable cost savings. The cost of detention is approximately \$100 per day per person, while alternatives programs can cost as little as \$12

per day. Experience has shown that alternatives programs, designed and implemented appropriately, can be extremely effective. A pilot alternatives program coordinated by the Vera Institute of Justice between 1997 and 2000 resulted in a 93% appearance rate for asylum seekers in the program, at about half the cost of detention. Aside from the issue of the cost-effectiveness, utilizing alternatives in appropriate cases also serves to increase access to legal representation and access to critical support services for asylum seekers awaiting determination of their case.

For those individuals who are detained, it is essential to provide uniform and consistent standards to ensure that facilities housing immigration detainees are safe and humane. During the late 1990s, the ABA and several other organizations worked with the government to develop standards to govern the conditions for those in immigration detention. The ICE National Detention Standards encompass a diverse range of issues, including access to legal services. While the development of the Detention Standards was a positive step, it has become apparent that ICE's inspection process alone is not adequate to ensure facilities' full compliance. The ABA regularly receives reports from attorneys representing detained immigrants and direct letters and phone calls from detained immigrants around the country that indicate serious, continuing problems with detention facility conditions including: inadequate or prohibitively expensive access to telephones, including for calls to pro bono or retained counsel; inadequate access to legal materials; and delayed or denied medical treatment.

The Refugee Protection Act will address this problem by requiring that detention standards be strengthened and promulgated into legally enforceable regulations. We are especially pleased to note the emphasis on improving legal access standards and the bill's requirement that ICE detention facilities be located close to communities where there is a demonstrated capacity to provide free or low-cost legal representation. Currently, many immigration detention facilities are located in remote areas of the country. While this creates serious barriers to detainees who have retained counsel because of travel costs and other logistical difficulties, it is an even more serious problem for detainees who are unrepresented and need access to pro bono immigration services, which often are not available in these remote locations. While the government must understandably give consideration to the cost of detention bed space, such interests should not trump the detainees' due process right to counsel. As noted below, the ability to secure legal representation has a tremendous impact on the likelihood of success in many cases for asylum seekers.

### **Enhancing Access to Counsel and Legal Information**

A hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. Meaningful access to legal representation for persons in immigration proceedings is particularly important. The consequences of removal can be severe, resulting in 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. Legal assistance is critical for a variety of reasons, including a lack of understanding of our laws and procedures due to cultural, linguistic, or educational barriers. Statistics show that asylum seekers and others who have legal representation are significantly more likely to succeed in their immigration cases.

The Refugee Protection Act would authorize the Attorney General to appoint a lawyer to represent an alien in removal proceedings if the fair resolution or effective adjudication of the

proceedings would be served by the appointment of counsel. There are classes of vulnerable persons for whom it is particularly important to ensure appropriate legal representation for the duration of their cases, including unaccompanied alien children and mentally ill and disabled persons. These persons may lack the capacity to make informed decisions on even the most basic matters impacting their cases and are not in a position to determine on their own whether they might qualify for relief. In fact, they may not be able even to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings. However, the particular vulnerabilities of these persons also make it difficult to impossible for them to obtain counsel on their own.

Beyond the obvious interest of affected noncitizens, legal representation also benefits the government and the administration of justice through improved appearance rates in court, fewer requests for continuances, and shorter periods in detention at significant financial savings. It also deters frivolous claims. Above all, increased representation serves the government's interest in seeing that its decisions in these consequential cases turn on U.S. legal standards and merit, and not on a noncitizen's income or ability to retain private counsel.

For those who are unable to obtain counsel, one of the ways that detained immigrants can be provided with information about the legal process is through the Legal Orientation Program (LOP). The LOP is administered by the Department of Justice's Executive Office for Immigration Review, which funds nonprofit organizations to provide services at detention facilities around the country. These services include group legal rights presentations, individual orientations, self-help workshops, and pro bono referrals. The ABA has provided LOP services at the Port Isabel Detention Center in South Texas since the inception of the program, and more recently at San Diego Contract Detention Facility, and can unequivocally attest to the benefits that these programs bring both to detainees and the immigration court system.

In addition to ensuring more fair and just outcomes, the LOP contributes to immigration court efficiency and may result in savings in detention costs. A study by the Vera Institute of Justice indicates that cases for LOP participants move an average of 13 days faster through the immigration courts. Immigration judges report that respondents who attend LOP appear in immigration court better prepared and are more likely to be able to identify the relief for which they may be eligible, and not to pursue relief for which they are ineligible. Because cases for LOP participants move through the immigration courts more quickly, time spent in detention may be reduced and detention costs saved. The LOP facilitates immigrants' access to justice, improves immigration court efficiency, and saves government resources. The Refugee Protection Act's expansion of this program is a wise investment of government resources.

## **Conclusion**

The United States has historically served as a leader in global efforts to ensure the protection of refugees. However, laws and policies adopted over the past fifteen years have served to seriously undermine meaningful access and protections for refugees and asylum seekers in our country. As we celebrate the 30<sup>th</sup> Anniversary of the Refugee Act of 1980, it is time to renew our commitment to fulfilling the letter and spirit of our obligations under the 1951 Refugee Convention and restore our position as a beacon of hope to so many suffering persecution around the world. The Refugee Protection Act of 2010 will accomplish these goals, and the ABA strongly supports its enactment.