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October 12, 2004

Regulations Branch
Office of Regulations and Rulings
Bureau of Customs and Border Protection
1300 Pennsylvania Avenue, NW
Washington, DC 20229

**RE: Comments on Department of Homeland Security (DHS), Bureau of
Customs and Border Protection (BCP) Notice: Designating Aliens for
Expedited Removal**

To Whom It May Concern:

On behalf of the American Bar Association, I write to express our deep concern over the Bureau of Customs and Border Protection's recent expansion of expedited removal procedures to apply to aliens whom immigration officials encounter within 100 miles of the U.S. border, per its August 11, 2004 notice in the Federal Register (Volume 69, Number 154, Pages 48877 – 48881).

The Association has consistently opposed the use of expedited removal both at our borders, and now, in the country's interior, as a policy that rolls back fundamental due process protections for immigrants and asylum seekers who may have legitimate claims for legal relief.

1. Removal decisions should be made by immigration judges, not law enforcement officers.

A removal proceeding is an evidentiary inquiry that involves both fact-finding and legal analysis to determine a person's identity and citizenship, whether or not he or she is removable from the United States or is eligible for an immigration benefit or relief, and to what country the individual should be removed if ineligible to remain here. The ABA strongly believes that only impartial adjudicators, preferably immigration judges, should therefore have the authority to enter removal orders following a formal hearing that conforms to accepted norms of due process. The decisions of these immigration judges, moreover, must be subject to administrative and judicial review.

Immigration enforcement officials are not qualified to make such independent evaluations of whether an individual is eligible for relief. Expedited removal procedures, however, enable immigration officers to effectively make such decisions, which may result in permanent separation from family, or return to a country to face torture or death. We do not allow police officers that make arrests to impose sentences; there is an independent process to establish guilt and punishment. Similarly, we should not authorize officers with the Border Patrol to issue and execute removal orders. As discussed above, removal decisions involve both factual and legal inquiries that are likely to result in error when made outside of a formal hearing process. An in-depth study by Janet Gilboy, a researcher at the American Bar Foundation, examined the work of immigration inspectors at ports of entry prior to expedited removal. In her study, "Deciding Who Gets In: Decisionmaking by Immigration Inspectors," *25 Law & Society Review* 571, 587 (1991), Gilboy reported that immigration inspectors at ports of entry often make judgments based on a traveler's nationality:

Little or no individualized inspection occurs; presentation of the country passport suffices to judge what type of individual is requesting admission. This handling implicitly reflects inspectors' notions about the individual's limited credibility, that is, lack of trustworthiness of statements or documents.

Expedited removal does not afford aliens sufficient procedural protections, including allowing them the opportunity to retain legal counsel, and therefore, it is more likely to result in error or abuse. Its use should be re-examined in light of these principles.

2. The credible fear screening process is insufficient to ensure that bona fide asylum seekers will not be summarily removed without the opportunity to present their claims.

In FY 2000, when expedited removal provisions first went into effect, more than 83,000 removal orders were issued, and approximately 3,000 people who expressed fears of returning to their home countries were referred to asylum officers for credible fear interviews - less than 10 individuals per day. This is about half the number of individuals who had sought asylum at the nation's borders in the year before the law went into effect. This calls into question the effectiveness of the screenings that immigration officials conduct when identifying potential asylum seekers. In addition, we have received reports from lawyers that admissible individuals have been improperly denied entry into the United States and that some refugees fleeing persecution are not making it through the inspections processes to a credible fear interview.

According to the report, *Illegal Aliens: Changes in the Process of Denying Aliens Entry to the United States* (GAO, March 1998), in four out of five locations visited by the GAO, INS inspectors did not document, in 18 percent of all cases, asking at least one of three questions required for determining if a credible fear interview was necessary. In a subsequent study, INS inspectors did not document asking at least one of the required questions up to 16 percent of the time. *Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process* (GAO, September 2000). The GAO also was not able to determine whether or not INS inspectors were

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correctly or incorrectly making exclusion decisions in the first place, and it did not investigate reports of abuses during the inspections processes, including denial of food, phone and bathroom privileges, and verbal abuse.


In addition, the Lawyers Committee for Human Rights has documented numerous cases of people fleeing religious persecution, ethnic violence, political repression, and human rights abuses being wrongly turned away from the United States. They also have documented incidents involving asylum seekers who narrowly avoided summary removal or who were mistreated by the INS. *Is this America: The Denial of Due Process to Asylum Seekers in the United States* (October 2000). The ABA has received reports about asylum seekers who were returned to dangerous countries before anyone even knew they had reached the United States. The ABA also has received information about asylum seekers whose deportations were intercepted before they suffered a similar fate.

These reports combined with the secrecy that surrounds the expedited removal process, the absence of independent observers, and anecdotal evidence regarding mistreatment by INS (and now ICE) inspectors, fuel concerns that these expedited processes frustrate claims by genuine refugees.

While we applaud DHS' intention of exercising prosecutorial discretion in certain circumstances, where the equities weigh in favor of providing aliens with alternatives to expedited removal such as in the case of unaccompanied alien minors, we remain deeply concerned about DHS authorizing law enforcement officials to make such decisions. Rather, for the reasons stated above, the ABA strongly supports such decisionmaking by impartial adjudicators, and procedures that give individuals a fair chance to consult with counsel and present their cases.

We believe that expanding expedited removal to the interior of the country will further erode due process for immigrants and refugees, and therefore urge you to reconsider this policy.

Sincerely,


Robert D. Evans