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CITY BAR

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Hon. John Boehner
Speaker, U.S. House of Representatives
H-232, The Capitol
Washington, DC 20515

Hon. Nancy Pelosi
Minority Leader, U.S. House of Representatives
H-204, The Capitol
Washington, DC 20515

Dear Speaker Boehner and Minority Leader Pelosi:

I write on behalf of the New York City Bar Association to oppose H.R. 1932, the "Keep Our Communities Safe Act of 2011," which was marked up and ordered to be reported out of the House Judiciary Committee on July 14, 2011.[1] The bill's proposal to expand the Department of Homeland Security's authority to categorically detain noncitizens for prolonged, and in some cases indefinite, periods of time — without individualized bond hearings, and without meaningful administrative or judicial review — violates the Due Process Clause of the Fifth Amendment and would result in the unnecessary and costly incarceration of many individuals who present neither any meaningful risk of flight nor any danger to public safety.

The Association is one of the oldest lawyer associations in the United States, with over 23,000 members in the United States and across the world. Founded in 1870, the Association has a longstanding commitment to advancing sensible, fair, and humane immigration laws and policies through its Committee on Immigration and Nationality Law, which organizes and sponsors educational programs and issues reports and recommendations on current immigration law issues. Members of the committee regularly represent noncitizens before the immigration branches of DHS and before the Executive Office of Immigration Review, and many committee members have clients who have been detained in immigration detention facilities throughout the United States.

The provisions of H.R. 1932 implicate a number of serious constitutional concerns. The Supreme Court has emphasized that "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects,"[2] and

[1] *See* House of Representatives, Committee on the Judiciary, Transcript of Markup of H.R. 1932, Keep Our Communities Safe Act Of 2011; H.R. 2480, Administrative Conference of the United States Reauthorization Act of 2011; H.R. 704, The Security And Fairness Enhancement For America Act of 2011; and H.R. 1002, Wireless Tax Fairness Act of 2011 (July 14, 2011), available at http://judiciary.house.gov/hearings/pdf/7%2014%2011%20HR%201932%20HR%202480%20HR%201002.pdf.

that "[i]n our society liberty is the norm, and detention . . . without trial is the carefully limited exception."[3] Accordingly, the Court has required adherence to strong procedural protections to prevent the unnecessary detention of individuals who do not present any significant flight risk or danger to public safety.[4] As the Court recognized in *Zadvydas v. Davis*, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[5] In *Demore v. Kim*, the Court upheld mandatory detention of certain categories of noncitizens during their removal proceedings, but only for the "brief period necessary for [completing] removal proceedings," which, on the record before the Court, was a period of approximately 47 days "in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal [to the Board of Immigration Appeals]."[6] Applying the Supreme Court's due process principles, many lower federal courts have held that due process requires individualized bond hearings for noncitizens facing the prospect of longer term detention while removal proceedings are still pending.[7]

H.R. 1932 violates these due process principles, aiming far afield of its purported public safety goals by unconstitutionally authorizing detention — of both noncitizens with final orders of removal and noncitizens whose removability has not yet been determined — beyond the permissible limits defined by the Supreme Court and the lower federal courts. First, section 2(a) of the proposed legislation confers DHS with sweeping authority to indefinitely detain many noncitizens with final orders of removal without individualized bond hearings. In *Zadvydas*, the Supreme Court held that following a removal order, noncitizens only may be detained for the "period reasonably necessary to secure removal," which it presumed to be six months, and that immigration officials may not indefinitely detain individuals solely because no country will accept their return.[8] The Court also emphasized that preventive detention based on dangerousness alone is unconstitutional unless limited to "especially dangerous" persons and accompanied by strong procedural protections.[9] In *Clark v. Martinez*, the Court applied its holding in *Zadvydas* to all noncitizens detained under the post-removal detention statute, including Mariel Cubans whose removal was not reasonably foreseeable due to the lack of a repatriation agreement with Cuba.[10] The proposed legislation seeks to circumvent these limits. It authorizes detention without individualized bond hearings for noncitizens who have already served their criminal sentences but who cannot be physically removed because of diplomatic concerns or their country's refusal to accept deportees.

Second, section 2(b)'s expansion of detention without individualized bond hearings for noncitizens in removal proceedings will lead to prolonged detention of many individuals whose detention is not justified by any appreciable risk of flight or danger to public safety. Especially given the staggering backlogs of cases in the immigration court system, removal proceedings can extend for many months and even years before the court determines whether an individual will be removed. As a result, in recent years

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[2] Zadvydas v. Davis, 533 U.S. 678, 690 (2001); *see also* Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

[3] United States v. Salerno, 481 U.S. 739, 755 (1987).

[4] *Zadvydas*, 533 U.S. at 690-91.

[5] *Id.* at 690.

[6] Demore v. Kim, 538 U.S. 510, 513 (2003).

[7] *See* Diop v. ICE/Homeland Security, __ F.3d __, 2011 WL 3849739 (3d Cir. Sep. 1, 2011); Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011); Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942 (9th Cir. 2008); Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005); Ly v. Hansen, 351 F.3d 263, 267, 271-72 (6th Cir. 2003); Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455 (D. Mass. 2010); Monestime v. Reilly, 704 F. Supp. 2d 453 (S.D.N.Y. 2010); Alli v. Decker, 644 F. Supp. 2d 535 (M.D. Pa. 2009); Sengkeo v. Horgan, 670 F. Supp. 2d 116 (D. Mass. 2009); Bourguignon v. MacDonald, 667 F.Supp.2d 175 (D. Mass. 2009); *see also* Welch v. Ashcroft, 293 F.3d 213, 224 (4th Cir. 2002).

[8] *Zadvydas*, 533 U.S. 678.

[9] *Id.* at 690–91.

[10] Clark v. Martinez, 543 U.S. 371 (2005)

thousands of individuals have been subjected to prolonged detention while these decisions are made. [11] In addition to the obvious personal hardships experienced by detainees and their loved ones, prolonged detention undermines noncitizens' abilities to effectively challenge their removal and their detention. Detained immigrants have exceedingly limited access to lawyers: it is estimated that 84 percent of immigration detainees have no legal representation in proceedings.[12] By authorizing prolonged detention without individualized bond hearings for large categories of noncitizens — including individuals with no criminal convictions, such as asylum seekers and survivors of torture, and long time permanent residents whose criminal histories may only involve minor or nonviolent offenses — sections 2(b)(2) and (2)(b)(3) violate the due process principles identified by the Supreme Court and lower federal courts.[13]

Moreover, by expanding mandatory custody to include individuals with old criminal convictions — who may have long ago completed serving their sentences and are now leading productive lives, or indeed who may never have been imprisoned at all — section (2)(b)(5) would also cause detention of many lawful permanent residents who may pose little risk of flight or danger to public safety. In this respect, the bill fails to heed what the U.S. Court of Appeals for the First Circuit recognized in 2009: that "the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be."[14]

Finally, H.R. 1932 fails to ensure even minimally adequate judicial review for noncitizens subject to these prolonged mandatory detention and indefinite detention provisions. Sections 2(a)(7), 2(b)(2), & 2(b)(3) of the bill make judicial review "available exclusively in habeas corpus proceedings instituted in the United States District Court for the District of Columbia, and only if the alien has exhausted all administrative remedies (statutory and regulatory) available to the alien as of right." These provisions would render the writ of habeas corpus inadequate and ineffective as a means of ensuring prompt and meaningful review of the legality of detention under the bill's provisions. Since noncitizens are detained all over the country, forcing detainees to seek judicial review in a distant court, far from where they are being held in custody, would compromise their ability to challenge their detention — even if they are among those very few detainees with access to legal representation.[15] Moreover, as the chief judge of the D.C. District Court observed earlier this year, that court already is struggling with a seriously overcrowded docket, in part due to the flood of petitions for habeas corpus filed by Guantanamo detainees.[16] Channeling hundreds of additional habeas corpus petitions by immigration detainees into the D.C. District would seriously exacerbate these existing burdens. As a result, H.R. 1932 would therefore

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[11] *See* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 598–611 (2009) (discussing large caseloads, backlogs, and other weaknesses in immigration adjudication); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010) (citing prolonged detention statistics).

[12] *See* NINA SIULC, ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM (2008), available at http://www.vera.org/download?file=1780/LOP%2BEvaluation_May2008_final.pdf (citing EOIR statistics indicating that "approximately 84 percent of detained respondents with completed immigration court proceedings lacked representation").

[13] *See* cases cited *supra* notes 6–7.

[14] Saysana v. Gillen, 590 F.3d 7, 18 (1st Cir. 2009) ("[I]t is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks."); *see also* Matter of Garcia Arreola, 25 I. & N. Dec. 267, 271 (BIA 2010); Louisaire v. Muller, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010); Monestime v. Reilly, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010); Khodr v. Adduci, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010); Scarlett v. U.S. Dep't of Homeland Sec., 632 F. Supp. 2d 714, 219 (W.D.N.Y. 2009); Waffi v. Loiselle, 527 F.Supp. 2d 480, 488 (E.D. Va. 2007).

[15] *See* SIULC, ET AL., *supra* note 12, at 1 (noting exceedingly low rates of legal representation in removal proceedings for detained noncitizens).

[16] David Ingram, *Judge Says Senate Is Injuring Federal Judiciary*, BLT: THE BLOG OF LEGAL TIMES (Feb. 28, 2011), http://legaltimes.typepad.com/blt/2011/02/judge-says-senate-is-injuring-federal-judiciary.html.

undermine the adequacy and effectiveness of habeas corpus as a means of reviewing the legality of immigration detention and raise serious constitutional concerns under the Suspension Clause.[17]

When detention is genuinely necessary and appropriate, established constitutional principles present no obstacle. The Supreme Court's decisions in *Zadvydas* and *Martinez* have not prevented DHS from continuing to detain thousands of noncitizens for longer than six months after the entry of removal orders. And as Justice Scalia noted in *Martinez*, Congress already has conferred the government with broad authority to detain individuals for longer periods of time if they cannot be removed and present serious risks to security.[18] Currently, DHS spends approximately $2 billion each year to detain almost 400,000 noncitizens, at an average daily cost of $122 per detainee. In this context, the sensible and fiscally responsible policy response is not to violate due process principles, but rather to ensure, on an individualized basis, that DHS only detains individuals who genuinely present a risk of flight or a danger to public safety and uses cost effective, less restrictive alternative to detention whenever possible.

We therefore urge you and your colleagues to oppose H.R. 1932.

Very truly yours,

Samuel W. Seymour

cc: Hon. Lamar Smith
Chairman, House Judiciary Committee

Hon. John Conyers Jr.
Ranking Member, House Judiciary Committee

Hon. Elton Gallegly
Chairman, House Judiciary Subcommittee on Immigration Policy & Enforcement

[17] INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention."); Swain v. Pressley, 430 U.S. 372, 381 (1977) (if Congress withdraws access to habeas corpus, it must provide a substitute that is neither "inadequate" nor "ineffective").

[18] *Martinez*, 543 U.S. at 386 & n.8.