



The Association of the Bar of the City of New York

October 1, 2004

NYC Bar Association Issues Statement Opposing House 9/11 Bill

The Association of the Bar of the City of New York expresses its deep concern regarding HR 10, which we understand may be acted upon rapidly by the House of Representatives. This voluminous bill proposes many changes that would have a major impact on our domestic law and our international treaty obligations. Many of these changes pose serious constitutional issues, have major implications with regard to Americans' privacy rights and would directly affect the lives of millions in this nation. Yet, the bill appears to be moving at a speed which pre-empts careful analysis and avoids reasoned debate. To act so quickly on legislation of such import would be unconscionable, and would subvert the democratic principles we seek to exemplify to the rest of the world.

While it is impossible to provide a full analysis of HR 10 in this time frame, we have identified enough problems with this legislation to urge that HR 10 not be enacted. HR 10 would limit judicial review, reduce due process protections and generally enhance the power of the Executive Branch without the appropriate checks and balances that are at the heart of our government, our Constitution and thus, our way of life. Congress simply should not permit the Executive Branch to exercise the level of intrusion into civil liberties contemplated by this bill, notably where many of the measures in reality would have only a remote connection to the war on terror and, in many cases, no connection at all.

We address only certain portions of the bill. Our omission of comment on other aspects of the legislation should not be taken as assent to those provisions.

The legislation includes many overreaching provisions that not only do not implement, but are inconsistent with, the 9/11 Commission's recommendations. Specifically, the Association strongly opposes those provisions of the bill that violate our country's obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, and other provisions that, while purporting to target only "terrorists," really undermine basic due process protections for *all* non-citizens.

Of grave concern is Section 3032, which removes those suspected as terrorists from any protection against transfer to other countries known for their practice of torture. Indeed, there would be no protection against such transfer even if it was for the specific purpose of interrogation under torture. This section also removes the qualifying language in the existing law, "[t]o the maximum extent consistent with the obligations of the United States under the Convention." This violates our obligation under the Convention



(“CAT”). Current regulations prohibit the deportation of *any* individual to a country where it is “more likely than not” that the person will be tortured. Current deferral of removal allows for the detention of the individual in the United States, deportation to an alternate country where he or she will not be tortured, and termination of the status upon a finding that torture is no longer likely to occur. HR 10 would, in contrast, *mandate* the deportation of such an individual to a country even if it is *certain* that the individual would be tortured there. This proposal, which amounts to a tacit approval of torture, is particularly shocking in the aftermath of the recent revelations of torture by US personnel in Iraq, incidents which deeply damaged the international reputation of the United States.

The bill also generally makes CAT protection more difficult to obtain by all those who fear torture by requiring them to prove of the likelihood of torture by “clear and convincing evidence.” This is an evidentiary standard that even the most deserving applicants are unable to meet. The bill would also authorize the government to remove foreign nationals to countries that lack a functioning government, making it impossible to know whether they will suffer torture or other persecution upon their arrival. And the regulations which would be promulgated to effectuate this law would not be subject to judicial review.

Other provisions of HR 10 further curtail judicial review in some instances and prohibit it altogether in others, thereby denying non-citizens basic due process of law. The bill eliminates habeas corpus review of a variety of deportation decisions, including even review of the denial of protection under the Convention against Torture. The “Great Writ” of habeas corpus has been a long-standing safeguard against government error in the deportation of non-citizens. The Supreme Court has ruled that the availability of habeas corpus is essential to avoid “serious constitutional questions” in the face of statutes that seek to strip the federal courts’ power to review unlawful government actions. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). HR 10’s provisions, which would further restrict the already limited judicial review currently in the law, would result in prejudice because of unreviewable government misconduct and error, to tens of thousands of non-citizens who have nothing to do with terrorism and are, in many cases, integrated into our society as part of, and supporting, citizen and legal resident families.

HR 10 also drastically expands the government’s power of “expedited removal,” a provision first enacted by Congress in 1996. Incidents of abuse of this power were recently acknowledged by US Customs and Border Protection itself.¹ Section 3006 of the bill would allow the government to summarily deport some individuals with asylum claims without even an opportunity to present their claim to an asylum officer or an immigration judge. This potential for abuse is magnified even more by other provisions in the bill which virtually bar all court review, including under habeas corpus, of even the most egregious government misconduct.

In addition to drastically reduced judicial review, HR 10 also seeks to tie federal courts’ hands by limiting the courts’ power to grant stays of deportation, even in cases which involve asylum claims. The passage of this provision would burden the courts

¹ US Customs and Border Protection Press Release of August 12, 2004.
http://www.cbp.gov/xp/cgov/newsro;om/press_jreleases/08122004



with emergency briefings and result in the automatic deportation of individuals with meritorious claims.

All of the above provisions fly in the face of the 9/11 Commission's admonition that the "border and immigration system of the United States must remain a visible manifestation of our belief in freedom, democracy, global economic growth, and the rule of law, yet serve equally well as a vital element of counterterrorism." We must remain faithful to the Commission's recommendations and effectively ensure our security without unduly abridging the most basic protections of due process for immigrants. If we do not rise to this challenge, legislation that is hastily passed into law today will render our immigration system even more dysfunctional, erode our democratic principles, and make us less secure tomorrow.

Other provisions of HR 10 raise potentially serious concerns regarding privacy, by (a) allowing greater access to private personal information (for example, developing a system to provide employers with employees' criminal history information, including arrests, and not solely convictions), (b) establishing standards and a system that could serve as a method for creating a *de facto* national identification card system, and (c) creating a coordinated national computer system for tracking birth records. Traveler screening mechanisms using new techniques and approaches also are provided in this bill. While there is need for information and screening procedures in these times of heightened alert, the potential for error and misuse is great, as has been demonstrated repeatedly in our history. This potential is even more troubling as the data collected become ever more vast and inter-connected. Yet the legislation provides scant protection for the American people, largely delegating that issue to the very branch of government in which the power to collect and use the data reside.

We urge the House not to enact HR 10 and to provide a reasonable opportunity for broad public debate on its recommendations before taking any action.

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