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The Honorable John Morton
Director, U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street, SW
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Dear Director Morton:

The American Immigration Council (AIC) and the American Immigration Lawyers Association (AILA) have received widespread reports of restrictions on access to counsel imposed upon noncitizens detained in ICE custody and during required interactions with ICE officers. Both organizations believe the reported restrictions violate federal laws meant to protect noncitizens' access to meaningful legal representation. We are writing today to highlight our concerns in the hope of beginning a dialogue about these issues.

AIC and AILA recently conducted a nationwide survey to gather information about access to counsel and attorney-client interactions in proceedings before USCIS, CBP, and ICE. We then collaborated with Penn State Law School's Center for Immigrants' Rights to analyze more than 250 survey responses submitted by immigration attorneys practicing throughout the country. The data provided in these responses and in additional outreach efforts depict a system where restrictions on legal representation are recurrent and widespread, and where ICE officers commonly treat attorneys as adversaries. Several examples of limitations on representation are attached as an appendix to this letter.

Among attorneys who completed our survey, a substantial number reported being prohibited from accompanying their clients during interviews with ICE officers or from meaningfully participating in such interviews. These restrictions were reported across a range of interactions, including custodial interviews, interviews relating to orders of supervision, post-arrest interrogation, NSEERS summons, stays of removal, deferred action requests, and alternative to detention programs. For example, an ICE officer in Newark not only prohibited an attorney from accompanying his client during an interview, but threatened to deny bond if the attorney continued to protest. ICE officers in Las Vegas reportedly laughed when an attorney asked to see a client arrested earlier in the day, instructing a receptionist to tell him to "keep waiting." And an attorney from Massachusetts reported that the only time she was granted access to a detained client during discussions with ICE regarding terms of release was when an attorney from the Justice Department's Office of Immigration Litigation intervened with ICE on her behalf.

As related to our organizations, accounts of such restrictions appear to violate both statutory and regulatory guarantees affording noncitizens the right to counsel during interactions with ICE employees. *See, e.g.*, 5 U.S.C. § 555(b) (“A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel”); 8 C.F.R. § 292.5(b) (“Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative.”); 60 Fed. Reg. 6647, 6648 (Feb. 3, 1995) (stating that attorneys may engage in “full representation” during examinations before immigration officers).¹

Many attorneys who completed our survey also reported restrictions on their ability to communicate with or otherwise access noncitizens held in ICE detention. At the Pinal County Jail in Arizona, an attorney reported that most client consultations now take place via videoconference, a practice raising issues of attorney-client confidentiality and making it difficult for detainees to sign or meaningfully review documents. Several attorneys reported that ICE refused to provide any information regarding their detained clients unless they had an original signed Form G-28 on file. However, according to an attorney from Michigan, many jails holding ICE detainees refuse to accept overnight deliveries, thereby extending the time needed to submit Form G-28.

Obstacles facing attorneys representing or seeking to represent noncitizens in ICE custody raise particular concerns given the inherent difficulties many detainees face in securing legal representation in the first place.² Federal law guarantees noncitizens the privilege of having legal representation in removal proceedings. 8 U.S.C. § 1229a(b)(4)(A) (“[T]he alien shall have the privilege of being represented ... by counsel of the alien’s choosing who is authorized to practice in such proceedings”); 8 C.F.R. § 1240.3 (“The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292.”). To ensure the meaningful enjoyment of this right, the ability to consult with counsel cannot be limited to the removal hearing itself. Many forms of immigration relief require extensive consultation between attorneys and clients, and the outcome of a removal hearing may hinge on the ability of an attorney to personally consult with a client held in detention. It is therefore crucial that noncitizens in ICE custody not face undue obstacles in securing legal representation or conferring with counsel.

Finally, numerous attorneys reported that ICE officers had attempted to dissuade their clients from retaining an attorney or said they possessed no right to counsel in the first place. In one

¹ *Also see* Minutes of AILA/USCIS Field Operations Liaison Meeting (May 20, 2011), AILA InfoNet Doc. No. 11070861 (posted July 8, 2011) (confirming that “[a]ttorneys and/or accredited representatives should, barring safety or security concerns, be permitted to sit next to their clients during interviews.”).

² *See, e.g.*, National Immigration Law Center, *et al.*, “A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers” (July 2009) (“[H]iring counsel is a luxury that the majority of detained immigrants cannot afford”); National Immigrant Justice Center, “Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court” (September 2010) (calculating that in 2009 “80 percent of detainees were held in facilities which were severely underserved by legal aid organizations”); Human Rights Watch, “A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States” (June 2011) (stating that detainee transfers “can render attorney-client relationships unworkable” and “separate immigrants from the evidence they need to present in court.”).

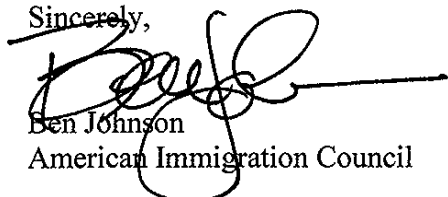
telling example, an attorney in Virginia said an ICE officer told a woman who later retained her services that there was “no point” in hiring a lawyer. Similarly, an attorney from Des Moines reported that ICE officers have told his clients that hiring an attorney is unnecessary because they will only “steal” from them. While our organizations share ICE’s concern with “notarios” and other unscrupulous individuals who take advantage of vulnerable noncitizens, the mere existence of such fraud cannot justify the demonization of the entire legal profession.

In addition to the troubling accounts received from our members, our organizations are further concerned by the difficulty we have experienced in ascertaining ICE’s policy regarding access to counsel. Prior to the creation of the Department of Homeland Security, the Immigration and Naturalization Service issued an “Examinations Handbook” with extensive guidance addressing when noncitizens were entitled to be notified of their right to counsel,³ when counsel could be present during interrogations before Service officers,⁴ and when counsel should be notified prior to initiating contact with their clients.⁵ By contrast, the Detention and Removal Operations Policy and Procedure Manual (DROPPM) contains scant guidance regarding noncitizens’ right to counsel.⁶ Moreover, while the Performance Based National Detention Standards (PBNDS) set forth general guidelines regarding access to counsel, they give individual detention centers great leeway in establishing specific policies in detainee handbooks.

Access to counsel not only aids noncitizens in navigating our often complex immigration system, but also improves the quality and efficiency of immigration proceedings. By opening a dialogue with ICE, we hope to better understand why ICE continues to restrict noncitizens’ access to counsel, and to provide input on new guidance that better reflects existing statutory and regulatory protections. This dialogue will also inform a White Paper on access to counsel we are drafting with Penn State Law’s Center for Immigrants’ Rights. Our efforts are premised on the idea that noncitizens and ICE officers have a mutual stake in a functional, transparent, and just legal system of which access to counsel is an essential part.

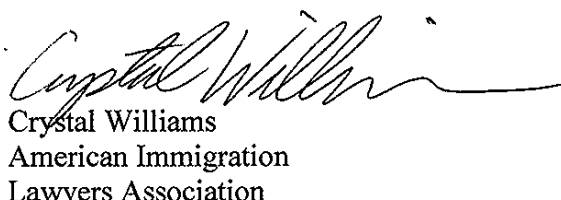
Please do not hesitate to contact us if you have any questions about our request. We look forward to future opportunities to discuss these concerns with you.

Sincerely,



Ben Johnson
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³ INS Examinations Handbook (1988) at I-75 (“An alien arrested without warrant is entitled to representation and shall be similarly advised.”).

⁴ *Id.* at I-76 (“If the person desires to consult counsel or have counsel present, interrogation must be suspended until such desires have been satisfied.”).

⁵ *Id.* at I-79 (“The general policy is that notice should be given to the attorney of an interview of the client.”).

⁶ By comparison, both the USCIS Adjudicators Field Manual and the CBP Inspectors Field Manual contain guidance regarding the rights of attorneys during agency interviews. *See, e.g.*, AFM chapters 12.1, 15.2, 15.4, 15.8; IFM chapters 2.9, 17.1(e), 44.8(d), 44.9.

cc:

Noah Kroloff, Chief of Staff, DHS

John Sandweg, Counselor to the Secretary and Deputy Secretary, DHS

Esther Olavarria, Counsel to the Secretary, DHS

Ivan Fong, General Counsel, DHS

Seth Grossman, Chief of Staff, Office of the General Counsel, DHS

Suzanne Barr, Chief of Staff, ICE

Beth Gibson, Assistant Deputy Director, ICE

Peter Vincent, Principal Legal Advisor, ICE

Riah Ramlogan, Deputy Principal Legal Advisor, ICE

**APPENDIX—ATTORNEY ANECDOTES SUBMITTED
IN RESPONSE TO AIC/AILA COUNSEL SURVEY**

ATTORNEY #1

The following is based on a phone conversation with an attorney in Des Moines, Iowa:

Officers in the ERO ICE Office in Des Moines, Iowa, generally bar access to counsel during ICE interviews. My clients have appeared at this office for custodial interviews, interviews related to orders of supervision and for general questioning. When my clients have been brought to this office immediately following an arrest, I have not been able to call them and they have not been able to call me. In almost all cases, I have not been allowed to enter the room where the ICE officer was interviewing my client. In one instance when I insisted on being present during questioning of my client, I was told that I could observe the officer while he questioned my client but I could not speak. I was told that if I opened my mouth, I would be “kicked out.”

I think it is vital that my clients understand their rights, and when I am not able to speak with them before or during questioning, I believe they are at a serious disadvantage. For example, they may not understand the consequences of decisions ICE officers encourage them to make. ICE officers have encouraged my clients to sign stipulated removal orders and have described these orders to my clients as “voluntary departure orders.” They have said to my clients, in essence, “sign this and in two days, you’ll be drinking a beer in Mexico,” as though there are no legal consequences to the decision to sign the order.

In addition, ICE officers treat me and my clients in an unnecessarily threatening manner. Recently, an officer told me that my client had to appear for a supervision interview between 9 and 10 a.m. on a particular day. The officer explicitly stated that he would “arrest” my client if the client appeared even shortly after 10 a.m. In another recent example, an ICE officer insisted that my client bring her three young children to an order of supervision interview so the officer also could interview the children. I was not permitted to attend this interview. My clients have also been told by ICE officers that a lawyer is unnecessary, that lawyers steal from you, and that they don’t know what they’re doing.

ATTORNEY #2

The following is based on a phone conversation with an attorney in Phoenix, Arizona:

I frequently defend immigrants facing deportation and have experienced numerous problems at two heavily used detention facilities. Until a few years ago, attorneys could meet face-to-face with clients or prospective clients being held in detention at the Pinal County Jail. Now, most consultations occur via videoconference, which makes it impossible for detainees to sign or meaningfully review any documents. When face-to-face meetings can be arranged, attorneys and clients are still separated by a glass wall containing an extremely narrow slot through which papers can be passed. As a result, detainees can only receive a handful of documents at a time,

which makes it difficult for them to review large submissions. Meanwhile, at the Eloy Detention Center, CCA often prevents clients from meeting with attorneys who have travelled to the facility. Sometimes, the jail will go on “lockdown” for no apparent reason, or the client has meal period. On numerous occasions, I’ve waited most of the day for a 15-minute client meeting, and have even had to return to Phoenix without meeting with my client at all. When I’ve complained to ICE, I’m told there is nothing they can do because visitation policies are set by CCA. The obstacles are so frustrating that a lot of good attorneys don’t do detention work any more because it’s simply not feasible.

ATTORNEY #3

The following is based on an email and follow-up phone conversation with an attorney near Philadelphia, Pennsylvania:

Earlier this year, I represented numerous students from Tri-Valley University who were instructed to report for interviews at various ICE offices on the East Coast. During interviews that took place in Newark, New Jersey, I was repeatedly prohibited from being present while my clients were questioned. One officer, Special Agent Ziad Jiries, told me I could see my client when he was “good and ready,” and threatened to deny bond if I persisted in my efforts. In my absence, he and Special Agent Steven Quattrocchi extensively questioned my client about his student status and activities at Tri-Valley University. By the time the interview had concluded, they had already issued an NTA. According to my client, they joked about my efforts to be present during the interrogation.

The restrictive policy at the Newark office stands in contrast with the policy in place at the ICE offices in Philadelphia and Fairfax, Virginia, where I have been permitted to accompany my clients during questioning. By being present during the interviews, I not only gave my clients peace of mind, but made the process more efficient for the ICE officers themselves by encouraging the students to be more forthcoming.

ATTORNEY #4

The following is an excerpt from an email submitted by an attorney in Las Vegas, Nevada:

A client with no criminal record was picked up by ICE officers when his I-751 was denied. My G-28 was already in the client’s file as his attorney of record. The morning of his arrest, I called ICE’s Las Vegas Field Office and asked to speak with my client. I was told I could not speak with him because he was still in processing. At 1 p.m., I went to the ERO office, presented a copy of my signed G-28, and asked again to speak with my client. I was told I could not speak with him because he was still in processing. I waited over one hour but never got the chance to speak with my client. I was told later by another alien detained at the same office that each time the window clerk came to the back office saying that my client’s attorney was out front asking to speak with him, the officers laughed and said to tell the attorney (me) to keep waiting. The other detainee said they had been done with my client for a long time and he was just sitting in the back detention room with the other detainees. This other detainee saw and heard all of this

because she was a female and was handcuffed to a desk because she could not be held in the detention room with the male detainees.

ATTORNEY #5

The following is an excerpt from an email submitted by an attorney in Los Angeles, California:

A client was recently detained and subject to imminent deportation following the reinstatement of a prior removal order. I faxed ICE a Form G-28 to the detention center in Mira Loma, CA, which is about two hours from my office, but was told they would not speak with me unless they had the client's original signature on the G-28. I told ICE I could not get to the detention center to have the client sign the form, but the ICE officer [on the case] refused to speak with me. Eventually, I persuaded the officer's superiors to take the faxed form to the client to obtain an original signature. But this accommodation, which should have been provided as a matter of course, was only obtained after many phone calls and hours of frustration. I was told that the policy of Mira Loma detention center was not to accept Form G-28 unless it had an original signature. While ICE made an exception in my case, I am unsure if that extends to other similar situations.

ATTORNEY #6

The following is a summary of a phone conversation with an attorney in Detroit, Michigan:

I have worked as an immigration attorney since 1990 and have represented more than 200 clients in matters involving ICE. Over the years, the ICE office in Detroit has engaged in numerous practices that interfere with the attorney-client relationship. To begin with, ICE officers refuse to provide even basic information—such as an A-number or bond amount—to attorneys unless they have a signed G-28 on file. I am told the justification for this refusal is a “policy memo” from Washington, DC, that relies on the Privacy Act. On numerous occasions, however, ICE has provided the same information I was initially refused to the wife or girlfriend of a detainee calling from a private cell phone while inside my office.

The ramifications of this “policy” are compounded by the length of time needed to secure a signed G-28. Many local jails holding detainees on ICE's behalf refuse to accept overnight deliveries, requiring all letters to be sent by regular mail. In addition, many jails refuse to fax or otherwise transmit signed copies of Form G-28 to the relevant ICE office, requiring detainees to mail signed forms back to their attorneys, who then must express or deliver them in person to ICE. On one occasion, I had to send a Form G-28 to three different facilities because my client kept being transferred before the form arrived.

Finally, ICE officers are generally unaware that clients in ICE detention do, in fact, have a right to legal representation. ICE officers have told numerous clients they have “no right” to a lawyer or will be denied bond if they seek to obtain one.

ATTORNEY #7

The following is an excerpt from an email submitted by an attorney in Boston, Massachusetts:

I have had clients released on orders of supervision from the York, PA and Hampton Roads, VA facilities, as well as from various facilities in Massachusetts. I am never given access to my clients at the detention centers prior to their release although they are often required to agree to restrictive release provisions. Having a G-28 on file means that my client is a represented party. Even when I am in litigation regarding the client's custody, ICE does not contact me before putting my clients in the very vulnerable position of being forced to sign or not be released. The only time I was given access was when my client had the wherewithal to refuse to sign an order in my absence. My opposing counsel from the Office of Immigration Litigation intervened with ICE on my behalf, agreeing that ICE should not be speaking to my client without me present.

ATTORNEY #8

The following is based on an email and follow-up phone conversation with an attorney in Manassas, Virginia:

Earlier this year, I was contacted by a woman who was arrested in a home raid conducted by the Fairfax ICE office. The arresting officers told her they were going to deport her immediately and there was no point in calling a lawyer because a lawyer could not help her. In truth, after securing my services, the woman was released on her own recognizance, obtained a stay of removal, and is now scheduled for an adjustment-of-status hearing this fall based on her existing marriage to a U.S. citizen. Had the woman not contacted me, she would have likely been summarily removed and remained subject to the ten-year bar on admissibility.

ATTORNEY #9

The following is an excerpt from an email submitted by an attorney in Dallas, Texas:

I've worked as an immigration attorney for more than 15 years, and have seen my clients subjected to numerous restrictions on access to counsel. At the ICE district office in Dallas, I have been prohibited from meeting with clients and from being present while the clients were being questioned following arrest. On one occasion, after ICE refused to let me stay with my client during questioning, I asked to speak with a supervisor. After waiting two hours for a response, I was informed that while I was waiting, my client had been transferred to ICE's detention facility in Haskell, Texas, which is nearly 200 miles away.