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National Association of Criminal Defense Lawyers

December 14, 2005

Re: Thursday vote on H.R. 4437 (Border Protection, Antiterrorism, and Illegal Immigration Control Act)

Dear Representative:

The National Association of Criminal Defense Lawyers strongly opposes H.R. 4437 (Border Protection, Antiterrorism, and Illegal Immigration Control Act) and urges you to vote against it. Past legislation to expand deportable offenses and deny any relief for mitigating circumstances has destroyed lives and ripped families apart. This shortsighted legislation would greatly exacerbate these injustices, punish innocent and well-meaning persons for offering assistance or employment to immigrants, and overwhelm the resources of our federal criminal justice system. We add our organization to the long list of opponents from the civil rights, immigration, and business communities that recognize the harm such legislation will do to our national fabric as well as our federal judicial system.

H.R. 4437 would turn an estimated 11 million people into criminals by making unlawful presence a federal crime (rather than a civil offense) and characterizing the offense as an aggravated felony. Aside from the travesty of treating hardworking immigrants as aggravated felons, subject to severe penalties and permanent exclusion from the United States, this provision would trigger a number of constitutional rights that must be afforded to every person charged. This includes the right to counsel, the right to indictment by a grand jury, and the right to a jury trial. The federal criminal justice system is not prepared to process these cases as required by the constitution, and H.R. 4437 completely ignores the insupportable fiscal and systemic consequences of this reckless change in the law.

H.R. 4437 extends its reach beyond our country's immigrant population to criminalize innocent activity by citizens and businesses, and violations of these far-reaching criminal provisions often trigger draconian mandatory minimum sentences. For example, the bill would broaden the definition of alien smuggling to include anyone who "assists" a person to enter or remain in the country illegally. This would include offering employment to an undocumented person but also, even more shockingly, offering humanitarian assistance and possibly legal advice. If the prohibited assistance furthers another felony, the bill prescribes a five-year mandatory minimum sentence. Since H.R. 4437 would make unlawful presence a felony, this would seem to require a five-year mandatory minimum in all cases, regardless of circumstances.

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Mandatory minimum sentencing is not an effective instrument for deterring crime. Rather, at great cost to taxpayers, these laws shift sentencing discretion from judges to prosecutors, depriving judges of the ability to fashion sentences that suit the particular offense and offender and producing unwarranted sentencing disparities based on race and other factors. We are not alone in this view: the Judicial Conferences of all 12 federal circuits have urged the repeal of mandatory minimum sentences, after concluding that they are unfair and ineffective.

Also subject to mandatory minimum sentences would be virtually all immigrants convicted of unlawfully returning to the United States, a change that raises significant logistical problems. Under H.R. 4437, a person who returns unlawfully subsequent to removal would face a minimum sentence of one year, while an immigrant who returns subsequent to conviction for an "aggravated felony" would face a minimum of ten years in prison. The term "aggravated felony" covers a broad range of conduct, including minor drug offenses, and the fact that the offense may be decades old is irrelevant. This proposal would have a devastating impact on the current system of plea bargaining that allows the federal courts to efficiently process the overabundance of such cases and would greatly exacerbate regional disparities in their disposition.

We also oppose H.R. 4437's provisions that would effectively gut the already weak procedural protections that apply in the immigration context. Particularly disturbing are (1) provisions that would authorize indefinite detention of non-citizens who have not been convicted of any crime and (2) provisions that would authorize low-level immigration officials to expel, without a hearing, persons believed to be undocumented immigrants other than Mexican or Canadian citizens found within 100 miles of the border.

These restrictions on the ability of immigrants to obtain judicial review and due process will do nothing to fix our broken immigration system. Because H.R. 4437 would overburden our federal criminal justice system, expand criminal laws to ensnare innocent persons and businesses, and inflict unjust and unwarranted punishment on undocumented persons and U.S. citizens alike, we urge you to vote no.

Sincerely,

A handwritten signature in black ink that reads "Barbara Bergman". The signature is written in a cursive, flowing style.

Barbara E. Bergman
President