

June 18, 2018

Ms. Elizabeth A. Strange
First Assistant United States Attorney
District of Arizona
Two Renaissance Square 40 N. Central Avenue Suite 1800
Phoenix, Arizona 85004

Re: Impact of Prosecutions for Illegal Entry and Illegal Reentry

Dear Ms. Strange:

As a non-partisan organization dedicated to ensuring a fair and effective system of justice, we write to you to express our concern about the effect of the Attorney General’s April 6 *Memorandum for Federal Prosecutors Along the Southwest Border* (“zero-tolerance” policy) on the fairness and constitutionality of proceedings for those affected by this policy directive. So drastically overburdening the courts and defense counsel in affected cases raises the likelihood of potential injustices from a lack of due process and access to effective legal representation under the Sixth Amendment.

The role of a prosecutor, above all, is to seek justice. The U.S. Attorney Manual advises that the specific duties of a prosecutor must be viewed in the broader context of his or her duty to “mak[e] certain also that the rights of individuals are *scrupulously protected*.”¹ Thus, it is the U.S. Attorney’s responsibility to ensure that defendants’ constitutional rights are safeguarded and that procedural justice is afforded in each case.

In this instance, however, it appears that implementing the Department’s policy directive has resulted in the deterioration of the quality of justice and commitment to constitutionally-sound practices in federal courts along the southwest border of the United States. We are particularly alarmed by the use of *en masse* hearings, during which dozens of defendants plead guilty and are sentenced with minimal representation by overburdened defense counsel. While past zero-tolerance policies regarding prosecutions under 8 U.S.C. § 1325, such as “Operation Streamline,” led to significant burdens on courts and defense counsel in the affected cases,² we understand that some of the very same problems emanating from that Obama-era policy have now affected most—if not all—federal court proceedings in immigration cases along the southern border.

This rapid processing system does not allow time for consultation or investigation regarding the charges, for filing pretrial motions to suppress evidence or statements due to constitutional violations, or for discussing consequences of the conviction and potential avenues for relief. For example, on one day in April in Brownsville, Texas, there were 41 illegal entry cases; one day in

¹ USAM § 9-27.110 (emphasis added).

² Joanna J. Lydgate, *Assembly Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481, 532 (2010).

June at a federal courthouse in McAllen, Texas, 71 migrants awaited a hearing.³ Defenders have only a couple hours to meet with all those awaiting trial, affording them just a few minutes to speak with each client. Potential defenses—such as being a juvenile, mentally ill, or eligible for citizenship or asylum—slip through the cracks. Because the vast majority of these cases are resolved via plea bargain and due to the lack of individualized defense in cases that go to trial, potential legal issues may not be preserved for review on appeal.

Each of the concerns above is exacerbated for defendants who are separated from their children. A recent *Wall Street Journal* report revealed that more than 400 children had been taken from parents facing a misdemeanor charge of illegal entry or reentry during a two-and-a-half-week period from late May to early June of this year in McAllen.⁴ As of June 15, the number of children separated from parents facing criminal prosecution for illegal crossing in the last six weeks has reached nearly 2,000.⁵

These parents are forced to make a decision on how to proceed in a criminal case that will likely result in their deportation without knowledge of the location or welfare of their children. They must enter a plea without knowing the impact of a conviction on their children's immigration cases and without knowing whether they will be reunited with their children if they are convicted. The distress caused by family separation compounds the difficulty these defendants have in making an informed and voluntary plea.

This arrangement is simply intolerable in a nation governed by a constitution protecting a defendant's right to effective assistance of counsel and due process. Furthermore, the collateral consequences of the zero-tolerance policy are detrimental not only to defendants, but also to the public's faith and perception of the U.S. Attorney as an impartial officer of the court,⁶ whose conduct must be guided by the limits set forth in the Constitution and a prosecutor's code of ethics.

While the Attorney General sets the policy objectives for the Government in the exercise of its prosecutorial function,⁷ United States Attorney offices are charged with implementing these policies and bearing witness to their consequences.⁸ Thus, when the directives of the Department of Justice come in to conflict with the imperatives of due process and effective counsel set forth in our founding document, the latter must win out.

³ Debbie Nathan, *Hidden Horrors of Zero Tolerance – Mass Trials and Children Taken from Their Parents*, *The Intercept*, May 29, 2018; See Michael E. Miller, *'They just took them?' Frantic parents separated from their kids fill courts on the border*, *The Washington Post*, Jun. 9, 2018.

⁴ Alicia Caldwell, *Mass Hearings, Uncertain Futures for Migrants Separated From their Children*, *The Wall Street Journal*, Jun. 10, 2018.

⁵ Julie Hirschfeld Davis, *Separated at the Border From Their Parents: In Six Weeks, 1,995 Children*, *New York Times*, Jun. 15, 2018.

⁶ USAM § 3-2.140 ("professional abilities and the need for their impartiality in administering justice directly affect the public's perception of federal law enforcement.")

⁷ 28 C.F.R. § 0.5.

⁸ See USAM § 9-27.110, Comment (U.S. Attorneys possess wide latitude "in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law."); USAM § 3-1.130 (... "United States Attorneys conduct most of the trial work in which the United States is a party. They are the principal federal law enforcement officers in their judicial districts. In the exercise of their prosecutorial discretion, United States Attorneys construe and implement the policy of the Department of Justice.").

Your office is a symbol of the integrity and fairness of our American system of justice. The success of that system “must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process.”⁹ We strongly urge you to exercise the broad discretion appropriately afforded to you to protect the rights of the accused and ensure due process for all who may be referred for federal prosecution, irrespective of the nature of the charges or political directives.

We are happy to discuss our concerns in more detail with you or your staff. Please contact Sarah Turberville, Director of the The Constitution Project at POGO, sarah@pogo.org, with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah E. Turberville". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Sarah E. Turberville
Director, The Constitution Project at POGO

cc:

The Honorable John C. Anderson, United States Attorney, District of New Mexico
The Honorable John F. Bash, United States Attorney, Western District of Texas
The Honorable Adam L. Braverman, United States Attorney, Southern District of California
The Honorable Ryan K. Patrick, United States Attorney, Southern District of Texas
Attorney General Jeff Sessions
Deputy Attorney General Rod Rosenstein
The Honorable Merrick B. Garland, Chief Judge, U.S. Court of Appeals for the D.C. Circuit and
Chair, Executive Committee of the Judicial Conference of the United States
James C. Duff, Director, Administrative Office of the U.S. Courts
Cait Clarke, Chief, Defender Services of Administrative Office of the U.S. Courts

⁹ USAM § 9-27.001