February 6, 2019

The Honorable Matthew G. Whitaker
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Acting Attorney General Whitaker:

On behalf of the American Bar Association and its over 400,000 members, I write to express our serious concern over the ongoing process of mandatory, _en masse_ criminal prosecutions of large groups of immigrants and asylum-seekers at the southern border and urge you to rescind the policies that interfere with individual rights and jeopardize fairness in our system of justice.

As you know, on April 6, 2018, former Attorney General Jeff Sessions issued a memorandum directing United States Attorney's Offices along the southwest border to adopt a zero-tolerance policy for all offenses referred for prosecution under section 1325(a), which prohibits illegal entry into the United States (“zero-tolerance policy”)\(^1\). The policy made no exception for families traveling together and resulted in thousands of children being separated from their parents, some of whom have still not been reunited. While the zero-tolerance policy is not currently being applied to adults arriving with children, the policy remains in force for other adults, including those seeking asylum.

The zero-tolerance policy expands a previous border prosecution initiative, known as Operation Streamline. Established in 2005, Operation Streamline established a practice of _en masse_ hearings that combine the initial appearance, preliminary hearing, plea, and sentencing into a single proceeding that can last less than one minute per defendant. Federal public defenders are often given only minutes to meet, interview, and prepare each client prior to the court proceedings. The judge then sequentially asks each individual in the group a series of questions in open court, some of which involve highly-sensitive topics such as mental health issues.

In August 2018, I was among a group of ABA leaders that visited the southern border and observed a group prosecution pursuant to the zero-tolerance/Operation Streamline policies before a Federal Magistrate in McAllen, Texas. We witnessed first-hand the serious deficiencies in this process. Approximately 80 individuals were arraigned _en masse_ and pleaded guilty during that session. It appeared that many of the individuals did not even comprehend what was happening to them. It is fundamental to the American criminal justice system that any individual charged with a crime has the right to meaningful notice of the charges against him or her, the right to present a defense, and the

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\(^1\) Department of Justice, Office of the Attorney General, Memorandum to Federal Prosecutors along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6, 2018).
right to the effective assistance of counsel in developing that defense. The prosecutions currently taking place fail this test in every regard.

In addition to violating the due process rights of the defendants, the zero-tolerance policy also has adverse consequences for the justice system. The policy has led to a decrease in prosecutions of other serious crimes by federal prosecutors along the border. As a bipartisan group of former United States Attorneys voicing their concerns about the zero-tolerance policy noted, “It is a simple matter of fact that the time a Department attorney spends prosecuting misdemeanor illegal entry cases, may be time he or she does not spend investigating more significant crimes like a terrorist plot, a child human trafficking organization, an international drug cartel or a corrupt public official.”

The application of the zero-tolerance policy to asylum-seekers is especially problematic and may be a violation of the 1951 United Nations Convention Relating to the Status of Refugees (Convention) and its 1967 Protocol, a convention to which the U.S. is a party. The Convention protects refugees from return to persecution and prohibits countries from penalizing them for illegal entry or presence in most cases.

Moreover, these policies are unlikely to accomplish their purpose. The stated goal of the zero-tolerance policy and Operation Streamline is to deter individuals from entering the United States without authorization. However, there is little evidence that criminal prosecution deters migration. Desperate individuals and families, particularly those fleeing violence and persecution, will continue to risk all to seek safe haven in the United States. According to a June 2018 report by the Vera Institute of Justice, an analysis of the Operation Streamline program strongly suggests that the zero-tolerance policy “will fail in its stated goal of deterring future immigration, at tremendous cost to immigrants, the court system, and due process.”

For these reasons, we urge you to: 1) formally rescind the zero-tolerance policy; 2) end the practice of expedited mass prosecution of immigrants, and allow for an individualized determination in deciding whether to file criminal charges; 3) ensure each defendant receives effective assistance of counsel; and 4) exercise prosecutorial discretion and refrain from prosecuting asylum seekers for the offense of illegal entry. The ABA believes that the U.S. can and must balance protecting border security with ensuring fairness and due process for all those present in our country. Taking these steps will help to ensure we meet that goal.

Thank you for your consideration of our views.

Sincerely,

Robert M. Carlson

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2 Open letter to Attorney General Jefferson B. Sessions, June 18, 2018, available at: https://medium.com/@formerusattorneys/bipartisan-group-of-former-united-states-attorneys-call-on-sessions-to-end-child-detention-e129ae0d0f0ef

3 Vera Institute of Justice, Operation Streamline: No Evidence that Criminal Prosecution Deters Migration (June 2018).

4 Id., at page 8.