



June 11, 2018

The Honorable Jeff Sessions
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Impact of Prosecutions for Illegal Entry and Illegal Reentry

Dear Attorney General Sessions:

As a non-partisan organization dedicated to ensuring a fair and effective system of justice, we write to express concern about the deterioration of the quality of justice and commitment to constitutionally sound practices resulting from the new “zero-tolerance” policy for those referred for prosecution under 8 U.S.C. § 1325. While we take no position on this action as a matter of immigration policy, we are concerned about the collateral consequences of such a policy, which has resulted in a dramatic increase in federal court prosecutions. We strongly urge you to reconsider this policy.

Past zero-tolerance policies regarding section 1325, such as “Operation Streamline,” led to significant burdens on courts and defense counsel appointed to represent those in federal court in the five districts along the U.S.-Mexico border.¹ 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.²

We are especially concerned by *en masse* hearings during which dozens of defendants plead guilty and are sentenced with minimal representation by overburdened defense counsel. Due to the volume of cases and speed with which these cases are processed, defense attorneys are severely limited in quality of counsel provided, in violation of the Sixth Amendment. Specifically:

- Misdemeanor defendants who agree to plead guilty and who will likely receive a sentence of time served can quickly enter a guilty plea, whereas those who wish to invoke their right to trial must remain incarcerated until trial. This arrangement has a coercive effect on a defendant’s decision to “voluntarily” waive their constitutional right to trial.
- Defense counsel cannot communicate with pretrial detainees held at remote detention facilities, precluding counsel from developing the rapport necessary to effectively represent their clients.

¹ Joanna J. Lydgate, *Assembly Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481, 532 (2010), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1100&context=californialawreview>.

² See e.g., Letter from Ruben Cahn, Exec. Dir., Fed. Defenders of San Diego, Inc., to Barry Ted Moskowitz, Chief Judge, United States District Court Southern District of California, Jun. 4, 2018.

- Defense counsel are deprived of a meaningful opportunity to consult with their clients before their initial appearance and bond hearing.
- Arrestees may be detained for days without adequate clothing, blankets, food, hygiene, or medical care, affecting their ability to meaningfully participate in their defense.³

This rapid processing system does not allow time for consultation or investigation regarding the charges, to file pretrial motions to suppress evidence or statements due to constitutional violations, or to discuss consequences of the conviction and potential avenues for relief. Potential defenses—such as being a juvenile, mentally ill, or eligible for citizenship or asylum—slip through the cracks. For example, on one day in April at the federal courthouse in Brownsville, Texas, there were 41 illegal entry cases; one day in June at a federal courthouse in McAllen, Texas, 71 migrants awaited a hearing.⁴ Federal defenders have only a couple hours to meet with all those awaiting trial, affording them just a few minutes to speak with each client.

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.⁵ These parents—and those like them in courthouses along the southern border—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.

This arrangement dramatically undermines the ability of counsel to adequately advise their client under *Padilla v. Kentucky*.⁶ Moreover, it is simply intolerable in a nation governed by a constitution protecting a defendant’s right to effective assistance of counsel and due process.

As a former federal prosecutor, you well know the important role of effective counsel in ensuring an effective system of justice. As you observed in a 2013 letter to the Executive Committee of the Judicial Conference of the United States addressing the burden on courts and defenders as a result of the budget sequester,

Federal Courts cannot turn away cases over which there is proper federal jurisdiction. The government must provide indigent criminal defendants with counsel in order to try them....Quality representation not only promotes the rule of law and safeguards constitutional rights, it also saves money by reducing pre-trial and post-trial incarceration costs.⁷

³ Cahn letter, *supra* note 2.

⁴ 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.

⁵ Alicia Caldwell, *Mass Hearings, Uncertain Futures for Migrants Separated From their Children*, *The Wall Street Journal*, Jun. 10, 2018.

⁶ 559 U.S. 365 (2010).

⁷ Letter from Senators Chris Coons (D-DE) and Jeff Sessions (R-AL) to the Honorable William Traxler, Exec. Dir., Judicial Conference of the United States, Aug.5, 2013.

The specter of federal defenders serving as counsel in name only, coupled with mass guilty pleas in courthouses along the border, will undermine both the fairness of the proceedings and the public's faith in the integrity of the justice system.

A prosecutor's duty, above all, is to seek justice—not convictions. We urge you to reconsider the zero-tolerance policy with which the Department of Justice directs prosecutors to pursue cases. 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