AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
COMMISSION ON IMMIGRATION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association calls upon the Attorney General to rescind the policy of prosecuting all individuals who enter the United States without authorization at the southern border for the misdemeanor offense of illegal entry pursuant to 8 U.S.C. §1325, end the practice of expedited mass prosecution of immigrants, and allow for an individualized determination in deciding whether to file criminal charges.

FURTHER RESOLVED, That the American Bar Association urges the federal judiciary to take appropriate measures to assure that every defendant charged with the misdemeanor offense of illegal entry is represented by counsel who has had an adequate opportunity to consult with the defendant, and that any guilty plea is knowing, intelligent, and voluntary.

FURTHER RESOLVED, That the American Bar Association urges Congress to provide sufficient funding for the judiciary to enable it to take the above measures and sufficient funding to assure that each defendant receives effective assistance of counsel.

FURTHER RESOLVED, That the American Bar Association urges the Attorney General to exercise prosecutorial discretion and refrain from prosecuting asylum seekers for the offense of illegal entry.

REPORT

On April 6, 2018, the Attorney General of the United States adopted a zero-tolerance prosecution policy, which mandates the prosecution for illegal entry of everyone apprehended at our southern borders between ports of entry, including asylum seekers.[1] The "Zero Tolerance" policy mandates the prosecution under 8 U.S.C. §1325, a misdemeanor offense with a maximum penalty of six months, for all first offenders -- including asylum seekers – who enter the United States at the southern border without authorization (those individuals who have prior convictions for improper entry are to be prosecuted for illegal re-entry under 8 U.S.C. §1326, a felony).[2]

Several Former United States Attorneys Have Concluded That Devoting Prosecution Resources to the Mandatory Prosecution of Misdemeanor Improper Entry Cases Actually Detracts from Public Safety

The mandatory prosecution of misdemeanor "improper entry" prosecutions, along with another executive directive issued by the Attorney General on January 26, 2017, calling for the Department of Justice to make criminal prosecution of immigration offenses a "high priority,"[3] has led to a dramatic *decrease* in prosecutions of other, serious crimes by federal prosecutors along the southwest border.[4] A recent report from a non-partisan, non-profit data research center concludes that federal prosecutions for serious crimes such as drugs and weapons smuggling, human trafficking, environmental crimes, etc. are being neglected, due to the tremendous resources being spent on misdemeanor illegal entry cases since the inception of the Zero Tolerance policy.[5] By June 2018, in the five federal districts along the southwest border, only 6% of prosecutions -- one in seventeen cases -- were for anything other than immigration offenses.[6] A bipartisan group of former United States Attorneys summarized the problem, in a letter to the Attorney General:

> 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. Under your Zero Tolerance policy, firearms cases, violent crime cases, financial fraud cases, and cases involving public safety on Indian reservations all take a back seat to these lesser, weaker misdemeanor cases. In fact, requiring U.S. Attorneys to bring these

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1 https://www.justice.gov/opa/press-release/file/1049751/download; https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry

2 https://www.justice.gov/opa/press-release/file/1049751/download.

3 https://www.justice.gov/opa/press-release/file/956841/download.

4 A recent report shows that only 6% of federal criminal prosecutions in June 2018 along the southwest border were for non-immigration offenses, http://trac.syr.edu/immigration/reports/524/.

5 *Id.*

6 *Id.*

misdemeanor cases in every instance detracts from your own stated priority to fight gangs and violent crime by groups such as MS-13.[7]

"Operation Streamline" Presents Significant Due Process Concerns

The prosecution of large numbers of southern border crossers under a program called "Operation Streamline" first began as a pilot program in the Del Rio border sector (El Paso, Texas area) in 2005 and continued sporadically until 2018.[8] The Zero Tolerance policy expanded Operation Streamline across the southern border of the U.S.[9] The stated purpose of the program is to deter individuals from entering the United States without authorization, although there is no evidence that criminal prosecution deters migration and no evidence that Operation Streamline has deterred unlawful entry.[10] A recent study concluded that the mass criminal prosecution and incarceration of immigrants provides only "the illusion of reducing unauthorized immigration, but statistical analysis provides no evidence of any deterrent effect."[11]

Operation Streamline created a criminal process that one respected commentator has called "unlike anything anyone has ever seen in a U.S. courtroom."[12] *En masse* hearings combine the initial appearance, preliminary hearing, plea, and sentencing into one single proceeding that can last less than one minute per defendant.[13] An article describing the incomprehensible courtroom scenarios engendered by Operation Streamline was published in May 2018, along with an audio recording of a portion of the group plea proceedings from one day in a federal courtroom in Brownsville, Texas; on this day 40 individuals charged with illegal entry were questioned by the court together as a group.[14] Federal public defenders were given only a few minutes to meet, interview and prepare each client prior to the court proceedings, at which the individuals were arraigned and expected to plead guilty to illegal entry in exchange for sentences of time served.[15] Questioning by the judge predominantly was done *en masse.* Spanish interpreters were present; however, many Central American migrants who are prosecuted for improper

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[7] 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-e129ae0df0cf

[8] *See* Lydgate, Joanna, *Assembly Line Justice: A Review of Operation Streamline*, Berkeley Law School Police Brief, June 2010, https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

[9] In FY2016, Operation Streamline evidently was renamed the Criminal Consequence Initiative (CCI). See Report, *Punishing Refugees and Migrants,* Human Rights First (January 2018) p.8 &fn.5, at https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf

[10] An analysis of Operation Streamline published by the Vera Institute of Justice in June 2018 finds that the criminal prosecution of persons entering the U.S. without authorization is not an effective deterrent. https://storage.googleapis.com/vera-web-assets/downloads/Publications/operation-streamline/legacy_downloads/operation_streamline-report.pdf

[11] *Id.* at p.8.

[12] "Responding to Operation Streamline," *The Champion*, (April 2008), p.51.

[13] *Punishing Refugees and Migrants,* Human Rights First (January 2018) p.18, available at https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf

[14] *Hidden Horrors of "Zero Tolerance" – Mass Trials and Children Taken From Their Parents*, Nathan, Debbie, The Intercept (May 29, 2018), https://theintercept.com/2018/05/29/zero-tolerance-border-policy-immigration-mass-trials-children/. See also fn.23, *infra*.

[15] *Id*.

entry speak only one of many indigenous languages and may not understand Spanish.[16] Shortcomings in the process are apparent in this audio recording. The judge asked the entire group whether they were satisfied with the assistance of their attorneys and whether they had been threatened or coerced into pleading guilty.[17] A number of individuals, evidently not understanding the nature of the proceeding or the significance of the mass colloquy, or otherwise preoccupied with the separation from their children, later asked the judge whether they would be reunited with their children prior to deportation, suggesting that they were conflating their civil immigration proceeding and criminal prosecution.[18]

The Zero Tolerance illegal entry prosecution policy immediately changed the practice of Customs and Border Protection (CBP) with respect to its handling of families traveling together, due to its referral of all adults for criminal prosecution, and quickly resulted in the separation of several thousand parents and children who had entered the United States together.[19] The policy of separating children from parents in this way was intended to advance the administration's stated goal of deterrence[20] and the need to separate was based on the rationale that parents who were being criminally prosecuted were required to be detained in the custody of the U.S. Marshals Service, which could not house children.[21] In response to widespread public outcry over the inhumanity of this policy, the administration issued an executive order ending the family separation policy on June 20, 2018.[22] Since then, most adults traveling with children entering the U.S. along the southern border are not being prosecuted for illegal entry; however, the Zero Tolerance policy continues in full force for all other adults.[23]

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[16] *See* https://qz.com/1312256/many-migrant-children-arriving-in-the-us-dont-speak-spanish/, referencing a 2015 study suggesting that 30-40% of families entering the US at the Southern border from Central American countries speak only indigenous languages.

[17] *Id*.

[18] *Id*.

[19] See Report of the Office of the Inspector General, September 27, 2018, OIG-18-84, at pp.2-3, available at: https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.

[20] See, e.g., *The Hill*, June 19, 2018, "HHS Official Says Family Separation Policy Will Have 'Deterrence Effect'" available at https://thehill.com/latino/393000-hhs-official-says-family-separation-policy-will-have-deterrence-effect .

[21] However, because the majority of parents prosecuted for illegal entry were brought to the federal courthouse directly from CBP custody, were arraigned and received time served upon pleading guilty at their first court appearance, and then were returned to immigration custody the same day, they were never in the custody of the U.S. Marshals Service.

[22] https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.

[23] On August 30, 2018, several ABA leaders, including current President Bob Carlson, observed a group prosecution session pursuant to the Zero Tolerance/Operation Streamline policies before a Federal Magistrate in McAllen, TX. Approximately 80 individuals were arraigned and pleaded guilty *en masse* during that session. An Assistant Federal Public Defender reported to the ABA observers that this number of prosecutions was below the daily average, that the group prosecutions continue to occur daily in that courthouse, and that a few days earlier there had been two separate group prosecution sessions of approximately 100 individuals each.

Guilty Pleas Procured In *En Masse* Proceedings May Not Be Valid

There are serious concerns about the validity of guilty pleas exacted pursuant to Zero Tolerance and Operation Streamline. In 2001, the Supreme Court reiterated that undocumented immigrants are owed full due process protections, just as U.S. citizens and legal residents, under the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.[24] But today undocumented immigrants are not being granted their full due process rights in these expedited group prosecutions. It is absolutely fundamental to the American criminal justice system that any individual charged with a crime has the right to meaningful notice of the charges against them, the right to present a defense and the right to the effective assistance of counsel in developing that defense. But under the rush of these proceedings, a defense attorney has only a brief opportunity to meet his or her clients -- in a public setting -- immediately prior to a scheduled guilty plea hearing to discuss the charges and the decision whether to plead guilty. As one witness to this process has observed:

> … consultations between attorneys and defendants are held in the open – in the very same courtroom that will later hold the *en masse* trial. Within earshot of one defendant might be a relative, someone from the same hometown, the defendant's own smuggler, or someone else who may be able to exact influence upon the defendant, either during a prison sentence or upon return back home. A defendant under such circumstances would understandably be reluctant to be fully open with his or her lawyer and may withhold information that could have a real impact on his or her case.[25]

Nor can defense attorneys be expected to evaluate the limited evidence they are provided in these prosecutions, or investigate the veracity of the allegations and any potential defenses, in fulfillment of counsel's duty to provide effective assistance of counsel:

> … defense attorneys in Tucson are typically afforded no longer than 30 minutes per client for individual consultations on the morning of the trials. In this short time, a defense attorney will need to cover dozens of topics, including explaining the charges, the prosecutor's plea deal and the consequences of a guilty plea. Will the defense attorney have time to determine if the defendant has a derivative claim to U.S. citizenship? Will the defense attorney be able to screen for potential asylum claims? Will the defense attorney have sufficient time and resources to determine if any physical or mental health factors may have an impact on the outcome of the case? Thirty minutes is insufficient time to uncover all the potential avenues for legal recourse for a client, let alone to explain the consequences of a guilty plea.[26]

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[24] *Zadvydas v. Davis, et al.*, 533 U.S. 678, 690-696 (2001).

[25] "Operation Streamline – A Failure of Due Process," *National Immigrant Justice Center*, December 11, 2015, available at https://www.immigrantjustice.org/staff/blog/operation-streamline-failure-due-process.

[26] *Id.*

Defenses to improper entry do exist. Although a violation of 8 U.S.C. §1325 requires only proof of entry into the United States at an undesignated place or by eluding inspection, individuals may have valid (but complex) citizenship claims that require significant investigation. Some may have lacked the necessary criminal intent due to mental illness. Recent reports of border agents telling migrants seeking asylum at lawful ports of entry that the border is "closed" or to come back another day because there is "no room," raise the question whether viable duress or entrapment defenses may exist for individuals who were thereby prevented from entering the United States properly in order to seek asylum at a port of entry, as is lawful under United States and international law.[27]

Apart from having little opportunity to investigate viable defenses, defense counsel has very limited time to properly prepare a client to knowingly plead guilty. For example, under *Padilla v. Kentucky*, 559 U.S. 356 (2010), defense attorneys are required to advise criminal defendants of the immigration consequences of a conviction prior to pleading guilty. Convictions for illegal entry can impact eligibility for discretionary forms of immigration relief such as asylum [28] Many defendants are wholly unfamiliar with the American legal system and may have low levels of formal education. Moreover, many may be sleep deprived and dehydrated following long journeys through the desert, calling into question their ability to truly understand and meaningfully engage in the proceedings, even if there are no language barriers.[29] Worse, some of these hapless individuals have been required to sign complex "immigration waivers" in exchange for receiving sentences of time served, thereby waiving their rights to asylum or to apply for other relief from removal, in exchange for this "leniency" in criminal sentencing.[30]

Judges and magistrates are also placed in untenable positions presiding over these group prosecution proceedings. The Federal Rules of Criminal Procedure require that a judge make a finding, before accepting a plea of guilty to a criminal offense, that each guilty plea is entered into knowingly, voluntarily and intelligently. Fed. R. Crim. P. 11. But when a judge performs plea colloquies *en masse*, it is practically impossible to determine whether each individual knowingly and voluntarily waived his or her 5th and 6th Amendment rights against self-incrimination, the right to confront their accusers, or the right to a trial.[31] The 9th Circuit Court of Appeals has concluded that collective group

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[27] See https://theintercept.com/2018/06/16/immigration-border-asylum-central-america/.

[28] A July 18, 2018 memo from USCIS, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-,* pp. 7-8, stated that a conviction for illegal entry may be used as a negative discretionary factor to deny an otherwise valid claim of asylum. https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf.

[29] https://www.immigrantjustice.org/staff/blog/operation-streamline-failure-due-process.

[30] See recent reports by the American Immigration Council, https://www.americanimmigrationcouncil.org/research/immigration-prosecutions and Human Rights First, https://www.humanrightsfirst.org/resource/punishing-refugees-and-migrants-trump-administrations-misuse-criminal-prosecutions. Despite serious concerns about the group prosecutions, raising individual legal challenges is extremely difficult, in large part because most clients are offered time served in exchange for guilty pleas, whereas litigating issues or investigating or pursuing defenses at trial would require continuances and likely detention in federal criminal custody for months or longer.

[31] See *Boykin v. Alabama*, 395 U.S. 238, 243-244 (1969).

questioning like this, without the judge observing his duty under Rule 11 to "address the defendant personally in open court," -- which "includes both informing the defendant of her rights and determining that she understands those rights" -- violates Fed. R. Crim. P. 11(b)(1).[32] The time demands of Operation Streamline, as a practical matter, make it all but impossible for a judge to comply with this duty.

The *en masse* prosecutions and guilty pleas resulting from the Zero Tolerance and Operation Streamline policies routinely violate the American Bar Association blackletter Criminal Justice Standards for Pleas of Guilty. Standard 14-1.3(b) provides that the court should not accept the plea unless there has been "a reasonable time for deliberation" and unless the defendant has been advised by the Court pursuant to Standard14-1.4.[33] Standard 14-1.4 requires – among other things -- a judge to address a defendant "personally in open court" so that the judge can be sure that the defendant understands what is being charged, its elements, its potential penalties and also understands the nature of the trial rights that the defendant is giving up by pleading guilty, such as the right to a speedy and public trial, the right to trial by jury, the right to insist at trial that the prosecution establish guilt beyond a reasonable doubt, the right to testify or not testify at a trial, the right to be confronted by the witnesses against him, to present witnesses in his behalf, and to have compulsory process in securing their attendance.[34] The judge must also address the defendant personally to determine whether the guilty plea is fully voluntary, and specifically whether any promises or any force or threats were used to obtain the plea.[35] However, it appears commonly that many questions—such as if defendants understand the consequences of perjury, whether they are being treated for medical or psychological reasons, or if they understand everything their attorneys have explained to them—are not posed personally to defendants but are asked *en masse*.[36]

Mandatory Criminal Prosecution of Legitimate Asylum Seekers is Improper

A zero tolerance policy that prosecutes everyone for unlawful entry, including asylum seekers, deprives prosecutors of the discretion to consider each case on its merits. This is contrary to accepted norms concerning the sound exercise of prosecutorial discretion; indeed the United States Attorney Manual, prior to February 2018, stated that the decision on what charges to bring "always should reflect an individualized assessment and should fairly reflect the defendant's criminal conduct."[37]

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[32] *U.S. v. Arqueta-Ramos*, 730 F.3d 1133, 1138-1139 (9th Cir. 2013).

[33] American Bar Association Criminal Justice Standards for Pleas of Guilty, Standard 14-1.3(b), available at: https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#1.1

[34] American Bar Association Criminal Justice Standards for Pleas of Guilty, Standard 14-1.4, available at: https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#1.1

[35] American Bar Association Criminal Justice Standards for Pleas of Guilty, Standard 14-1.5, available at: https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#1.1

[36] *Punishing Refugees and Migrants,* Human Rights First (January 2018) p.19, available at https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf.

[37] *United States Attorneys' Manual*, § 9-27.300.

Zero tolerance policy also violates American law and American treaty obligations concerning the proper treatment of asylum seekers. Section 208(a)(1) of the Immigration and Nationality Act explicitly states that a person who "arrives" at our borders "*whether or not at a designated a port of arrival* ... may apply for asylum." The Universal Declaration of Human Rights, adopted by the United States, states, "Everyone has the right to seek...asylum from persecution."[38] The 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention"), adopted after World War II's refugee crisis, protects refugees from return to persecution, prohibits countries from penalizing them for illegal entry or presence, and requires that member countries provide refugees with certain minimum protections and rights.[39] The United States helped lead efforts to draft the Convention and ratified its 1967 Protocol on November 1, 1968, legally binding itself to the Convention's provisions.[40] Article 31 of the Convention, acknowledging that "a refugee whose departure from his country of origin is usually in flight, is rarely in a position to comply with the requirements for legal entry" and "that the seeking of asylum can require refugees to breach immigration rules,"[41] provides:

> 1. The Contracting States **shall not impose penalties, on account of their illegal entry or presence,** on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
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> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.[42]

These provisions protect refugees from experiencing penal consequences as the result of their illegal entry or illegal presence, subject to three qualifying conditions: 'directness', 'promptness' and good cause.[43] It is "well-settled" that this provision applies to asylum-

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[38] United Nations General Assembly, sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdfMigrants.phttp://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.
[39] The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, UNHCR (September 2011), available at https://www.unhcr.org/4ec262df9.pdf
[40] *Punishing Refugees and Migrants, The Trump Administration's Misuse of Criminal Prosecutions*, Human Rights First, January, 2018, at p. 11-12, available at: https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf.
[41] *Id.,* at p.12.
[42] The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, UNHCR (September 2011), available at https://www.unhcr.org/4ec262df9.pdf
[43] Office of the United Nations High Commissioner for Refugees, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Dr. Cathryn Costello, et al., (July 2017), at p.10, available at: http://www.refworld.org/pdfid/59ad55c24.pdf.

seekers.[44] Such persons are "*prima facie* entitled to the protections of Article 31(1) until a final decision on their protection need has been administered in a fair procedure."[45] Under accepted readings of the Refugee Treaty, refugees are not required to have come directly from their country of origin and what is reasonably prompt presentation to authorities showing good cause for their illegal entry or presence depends on the circumstances of the individual case.[46] Each breach of a treaty obligation gives rise to State responsibility and Article 27 of the 1969 Vienna Convention on the Law of Treaties provides that a contracting party (such as the United States) may not invoke the provisions of its internal or domestic law as justification for its failure to perform a treaty.[47]

Despite this, it has been credibly reported that border crossers seeking asylum have been asked to sign plea agreements waiving their claim for asylum in exchange for "leniency" in criminal sentencing.[48] In a Phoenix illegal entry prosecution of an asylum seeker who had experienced severe abuse in Mexico due to his sexual orientation, the prosecutor told the defense attorney that she could remove the immigration rights waiver from the plea agreement, but that in return the prosecutor would recommend a more severe sentence to the judge.[49]

Additionally, the Department of Homeland Security's Office of the Inspector General reported in 2015 that Border Patrol's practices on criminal referrals for individuals who express a fear of return are problematic.[50] In some locations, individuals who claim fear do not undergo the credible fear determination process until after they have been prosecuted and, if convicted, have served their time.[51] As the OIG report noted, "referring for prosecution aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968."[52]

Accordingly, the Zero Tolerance policy requiring mandatory criminal prosecution of legitimate asylum seekers appears to violate America's treaty obligations.

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[44] *Id.*, at p.14-15 & fn.73 & fn.74 (citing several high court cases).
[45] *Id.*, citing to Guy S. Goodwin-Gill, Professor of International Refugee Law, University of Oxford, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection*, (October 2001).
[46] *Id.*, at pp. 17-31; see also Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection*, (October 2001) at pp. 9-11.
[47] Vienna Convention on the law of treaties (with annex), 23 May 1969, available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf
[48] See, e.g., *Punishing Refugees and Migrants, The Trump Administration's Misuse of Criminal Prosecutions*, Human Rights First, January, 2018, at p. 19-20, available at: https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf
[49] *Id.*, at p.12.
[50] Report, U.S. Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, (August 2, 2016), at p.56, available at: https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf.
[51] *Id.*
[52] *Streamline: Measuring Its Effect on Illegal Border Crossing*, DHS Office of the Inspector General, OIG-15-95 (May 15, 2015), at p. 16, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

Conclusion

For the reasons set forth above, we request that the House of Delegates adopt this resolution.

Respectfully submitted,

Lucian Dervan
Chair, Criminal Justice Section

Wendy S. Wayne,
Chair, Commission on Immigration

November 2018

GENERAL INFORMATION FORM

Submitting Entities: Criminal Justice Section, Commission on Immigration

Submitted By:

Lucian Dervan, Chair, ABA Criminal Justice Section
Wendy S. Wayne, Chair, ABA Commission on Immigration

1. Summary of Resolution(s).

This resolution urges the Attorney General to rescind the Zero Tolerance and Operation Streamline policies that mandate the prosecution of all persons alleged to have improperly entered the United States for the first time, a misdemeanor under 8 U.S.C. 1325, and urges the Attorney General to end the practice of expedited mass prosecution of immigrants and to allow an individualized determination of whether to file criminal charges. This Resolution also urges the federal judiciary to take appropriate measures to assure that every defendant charged with the misdemeanor offense of illegal entry is represented by counsel who has had an opportunity to consult with the defendant and that any guilty plea is knowing, intelligent and voluntary. Finally, the resolution urges Congress to provide sufficient funding for the federal judiciary to enable adequate resources for legal representation when entry-related criminal offenses are prosecuted, adequate investigation of viable defenses, and effective assistance of counsel to all indigent individuals who are prosecuted.

2. Approval by Submitting Entity.

This resolution was approved by the Criminal Justice Section on November 3, 2018 and by the Commission on Immigration on November 12, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The following Association policy is relevant but none would be affected by the adoption of this resolution**:**

2002 (AY) 115B:	Protection of Rights of Immigration Detainees Opposing incommunicado detention of foreign nationals and urging immigration authorities to adopt certain detention standards, including access to counsel and legal information.

2006 (MY) 107A:	Due Process Right to Counsel in Immigration Related Matters: Supporting the due process right to counsel for all persons in removal proceedings, and the availability of legal representation for all non-citizens in immigration-related matters.
2006 (MY) 107B:	Immigration Reform Supporting a regulated, orderly and safe system of immigration and the need for an effective and credible immigration enforcement strategy, including one that respects domestic and international legal norms.
2006 (MY) 107C:	Due Process and Judicial Review in Immigration Related Matters: Urging an administrative agency structure that will provide all non-citizens with due process of law and in the conduct of their hearings or appeals; supporting the neutrality and independence of immigration judges so that such judges and agencies are not subject to the control of any executive cabinet officer.
2006 (MY) 107D:	Administration of Immigration Laws Supporting a system for administering our immigration laws that is transparent, user-friendly, accessible, fair and efficient, and that has sufficient resources to carry out its function in a timely manner.
2006 (MY) 107E:	Detention in Immigration Removal Proceedings Opposing the detention of non-citizens in removal proceedings except in extraordinary circumstances; supporting the use of humane alternatives to detention that are the least restrictive necessary to ensure appearance at immigration proceedings.
2006 (MY) 107G:	Crime Victims in Immigration Related Matters Supporting avenues for lawful immigration status for victims of human trafficking and other related crimes; opposing the apprehension of victims of human trafficking and other related crimes.
2008 (MY) 111B:	Immigration Detention Standards Supporting the issuance of federal regulations that codify the DHS-ICE National Detention Standards, and the improvement, periodic review and increased

	oversight of the standards to ensure that detained non-citizens and their families are treated humanely and have effective access to counsel and to the legal process.
2009 (MY) 101C:	Due Process and Access to Counsel in Immigration Enforcement Actions Supporting legislation and/or administrative standards to ensure due process and access to appropriate legal assistance to persons arrested or detained in connection with immigration enforcement actions.
2010 (MY) 102G:	Non-Partisan Attorneys in the Department of Justice Urging the President and the Attorney General to ensure that lawyers in the Department of Justice, and leaders of state, local and territorial legal offices, do not make decisions concerning investigation or proceedings based upon partisan political interests and do not perceive that they will be rewarded for, or punished for not, making a decision based upon partisan political interests.
2017 (MY) 10C:	Urges the President to Withdraw Executive Order 13769 Urging that the Executive Branch, while fulfilling its responsibilities to secure the nation's borders, take care that any Executive Orders regarding border security, immigration enforcement, and terrorism respect the bounds of the U.S. Constitution and facilitate a transparent, accessible, fair, and efficient system of administering the immigration laws and policies of the United States.
2018 (MY) 108E:	Urging the Executive Branch to rescind its decision to end the Deferred Action for Childhood arrivals (DACA) program and urging Congress to enact legislation protecting DACA recipients and other undocumented immigrants who were brought to the United States as children and who meet age, residency, educational and other qualifications as set forth by the U.S. Citizenship and Immigration Service ("DREAMers").
2018 (AM) 10C:	Urging Congress to enact immigration reform addressing children separated from their parents at the United States border.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This resolution will be used by the Government Affairs Office in its lobbying efforts, as well as by ABA members who wish to engage with members of Congress and the Executive Branch to advocate on behalf of the interests expressed in this resolution.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Commission on Veteran's Legal Services
Legal Aid & Indigent Defense
Commission on Disability Rights
Special Committee on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Center for Human Rights
Commission on Immigration
Racial & Ethnic Diversity
Racial & Ethnic Justice
Youth at Risk
Young Lawyer's Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
International Law
Federal Trial Judges
State Trial Judges

Law Practice Division
Science & Technology
Health Law
Litigation

11. Contact Name and Address Information. (Prior to the meeting)

Kevin J. Curtin
200 Trade Center, 3rd floor
Woburn, MA. 01801
T: (508) 423-0140
Email: kevinjcurtin@icloud.com

Wendy Wayne
ABA Commission on Immigration
Committee for Public Counsel Services
21 McGrath Highway
Somerville, MA 02143
Tel: 617-623-0591
wwayne@publiccounsel.net

12. Contact Name and Address Information. (Who will present the report to the House?)

Stephen Saltzburg
2000 H Street, NW
Washington, D. C. 20052
T: 202-994-7089
E: ssaltz@law.gwu.edu

Neal Sonnett
2 South Biscayne Blvd., Suite 2600
Miami, Florida 33131-1819
T: 305-358-2000
Cell: 305-333-5444
E: nrslaw@sonnett.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges the Attorney General to rescind the "Zero Tolerance" and "Operation Streamline" policies mandating the prosecution of all persons alleged to have improperly entered the United States for the first time, a misdemeanor under 8 U.S.C. 1325, and urges the Attorney General to refrain completely from prosecuting asylum seekers and first-time offenders, and to focus resources instead on prosecuting violent criminal activity and other serious felonies at the southern border. This Resolution also urges Congress to provide sufficient funding for the federal judiciary to ensure adequate resources for legal representation when entry-related criminal offenses are prosecuted, adequate investigation of viable defenses, and effective assistance of counsel to all indigent individuals who are prosecuted.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses the Attorney General's policies of criminal prosecution for illegal entry of all individuals entering the United States at the southern border without prior authorization under 8 U.S.C. 1325, without exercising prosecutorial discretion for asylum seekers and first-time offenders, without adequate legal resources for indigent individuals subject to such prosecutions, and in lieu of prosecutions for serious violent criminal activity in that region of the U.S.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This resolution will be used by the Government Affairs Office in its lobbying efforts, as well as by ABA members who wish to engage with members of Congress and the Executive Branch to advocate on behalf of the interests expressed in this resolution.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

Not known.