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**Homeland
Security**

APR 23 2018

DECISION

MEMORANDUM FOR THE SECRETARY

FROM:

Kevin K. McAleenan
Commissioner
U.S. Customs and Border Protection

(b)(6);(b)(7)(C)

L. Francis Cissna
Director
U.S. Citizenship and Immigration Services

(b)(6);(b)(7)(C)

Thomas D. ...
Acting Director
U.S. Immigration and Customs Enforcement

(b)(6);(b)(7)(C)

SUBJECT:

Increasing Prosecutions of Immigration Violations

Purpose: This memo seeks your decision on increasing immigration violation prosecution referrals.

Summary: Illegal migration toward the Southwest Border (SWB) continues to rise. The two categories with the largest increases are: (1) Single Adults, now averaging over 1,000 aliens either apprehended between the ports of entry or found inadmissible at the ports of entry per day over the last 21 days, and (2) family units (FMUA), averaging over 450 for the same period. More starkly, inadmissible FMUAs encountered at and between the ports of entry during the period of April 18–19, 2018, reached the highest level since 2016—at almost 700 per day.

Family groups are one of the most challenging populations to the integrity of the immigration enforcement system both because of the strictures placed by the Flores Settlement Agreement, but also because of the costly and challenging nature of operationally addressing their particular needs and requirements. Without statutory changes and additional policy and operational intervention, U.S. Customs and Border Protection (CBP) anticipates the number of apprehensions and inadmissible aliens will continue to rise in April and May. Accordingly, the Department of Homeland Security (DHS) continues to diligently pursue numerous pathways to address this flow consistent with our laws, in coordination with federal interagency, departmental, and foreign partners.

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Background: Recent presidential direction and guidance from the Attorney General (AG) instruct the U.S. Government to increase the consequences for dangerous illegal crossings. On April 6, 2018, the President signed a Presidential Memorandum titled Ending Catch and Release at the Border of the United States and Directing Other Enhancements to Immigration Enforcement. This memorandum directed Cabinet departments to apply all available resources and tools toward enhancing immigration enforcement and ending catch and release practices.

Additionally, on April 6, 2018, the AG released a memorandum directed to all federal prosecutors titled Zero-Tolerance for Offenses Under 8 U.S.C. §1325(a).¹ In the memorandum, the AG directed each U.S. Attorney's Office (USAO) along the SWB – to the extent practicable, and in consultation with DHS – to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under §1325(a). The AG additionally directs each USAO on the SWB to work with DHS to develop guidelines to prosecute offenses under §1325(a).

In response to ongoing challenges with the flow of illegal crossings between ports of entry, and in accordance with the President's direction and AG guidance, DHS and CBP are working with the USAOs across the SWB to identify current prosecution thresholds and capacity to receive additional caseload. This will serve as a benchmark to help inform any future Department of Justice (DOJ) resource requirements. Fully realizing the zero-tolerance goals outlined in the AG's memorandum will require DOJ, the USAOs, and the U.S. Marshals Service to adjust policy thresholds and increase capacity across the southwest border. CBP and U.S. Immigration and Customs Enforcement will also have to apply additional resources toward enhanced referrals for prosecution.

The Immigration and Nationality Act (INA) authorizes the detention of certain aliens who entered the United States unlawfully until they can be removed from the United States.² Inadmissible aliens are subject to removal, and aliens who illegally cross into the United States may be subject to criminal penalties as well as removal.³ The Secretary of Homeland Security

¹ 8 U.S.C. § 1325(a) provides that prosecution in the following situations: (a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts. Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

² See, e.g., 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (providing that certain aliens subject to "expedited removal" procedures under Section 1225 "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); 8 U.S.C. § 1225(b)(2)(A) (providing that aliens who have not been determined to be clearly and beyond a doubt entitled to admission shall be detained for 8 U.S.C. § 1229a proceedings); 8 U.S.C. § 1226(a) (establishing that, subject to certain exceptions, an alien may be arrested and detained "[o]n a warrant issued by the Attorney General . . . pending a decision on whether the alien is to be removed from the United States."); 8 U.S.C. § 1226(c) (authorizing the detention of certain criminal aliens); 8 U.S.C. § 1231(a)(2) (requiring the Attorney General to detain aliens "[d]uring the removal period" as they are removed from the United States following appropriate proceedings).

³ See, e.g., 8 U.S.C. §§ 1325, 1326.

has broad legal authorities to carry out her responsibility to enforce the immigration laws.⁴ DHS could also permissibly direct the separation of parents or legal guardians and minors held in immigration detention so that the parent or legal guardian can be prosecuted pursuant to these authorities.⁵

DHS has several options for how to pursue this increased prosecution, “Zero-Tolerance” initiative:

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⁴ See 6 U.S.C. § 202 (conveying broad authority to the Secretary of Homeland Security to secure the borders and carry out immigration enforcement functions); 8 U.S.C. § 1103(a)(3) (laying out broad regulatory authority for the Secretary of Homeland Security under the INA).

⁵ For full legal analysis of this initiative, please see Attachment.

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Accordingly, we request your decision on whether to pursue increased prosecution of amenable persons crossing the United States border illegally, and your guidance on the preferred option.

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Recommendation: We recommend Option 3 as the most effective method to achieve operational objectives and the Administration's goal to end "catch and release." This initiative would pursue prosecution of all amenable adults who cross our border illegally, including those presenting with a family unit, between ports of entry in coordination with DOJ.

Option 1:

Approve/date _____ Disapprove/date _____

Modify/date _____ Needs discussion/date _____

Option 2:

Approve/date _____ Disapprove/date _____

Modify/date _____ Needs discussion/date _____

Option 3 (b)(6);(b)(7)(C)

Approve/_____ Disapprove/date _____

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