



**Homeland
Security**

Privacy Office, Mail Stop 0655

January 7, 2021

SENT BY ELECTRONIC MAIL TO: foia@americanoversight.org

Austin Evers
Executive Director
American Oversight
1030 15th Street, NW
Suite B255
Washington, DC 20005

Re: 2020-HQFO-00729

Dear Mr. Evers:

This is the electronic final response to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated March 19, 2020, and received by this office on March 19, 2020. You are seeking final analyses that support the effectiveness of closing the southern border with Mexico in response to coronavirus, COVID-19.2. All final analyses provided to your agency by any other federal agencies, including but not limited to the Centers for Disease Control and Prevention (CDC), the National Institute of Health (NIH), the National Institute of Allergy and Infectious Diseases (NIAID), or the Food and Drug Administration (FDA), that support the effectiveness of closing the southern border with Mexico in response to coronavirus, COVID-19.

A search of the Office of the Chief Information Officer (OCIO) for records produced 28 pages that are responsive to your request. Following review, I have determined that 22 pages will be released in part and 6 pages will be withheld pursuant to Exemptions 5, 6, 7C and 7E of the FOIA as described below.

Enclosed are 22 pages with certain information withheld as described below:

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information.

Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. I determined that disclosure of law enforcement information could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

6 pages are withheld in full as described below:

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I determined that the responsive documents withheld in full qualify for protection under the Attorney-Client Privilege.

The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

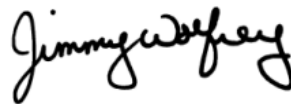
If you are not satisfied with the response to this request, you may administratively appeal. Should you wish to do so, you must send your appeal and a copy of this letter, within 90 days of the date of this letter, to: Privacy Office, Attn: FOIA Appeals, U.S. Department of Homeland Security, 245 Murray Lane, SW, Mail Stop 0655, Washington, D.C. 20528-0655 or email to foia@hq.dhs.gov, following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. Part 5 § 5.8. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS FOIA regulations are available at www.dhs.gov/foia.

Provisions of FOIA allow DHS to charge for processing fees, up to \$25, unless you seek a waiver of fees. In this instance, because the cost is below the \$25 minimum, there is no charge.

If you need any further assistance or would like to discuss any aspect of your request, please

contact and refer to **2020-HQFO-00729**. You may send an e-mail to foia@hq.dhs.gov, call 202-343-1743 or toll free 1-866-431-0486, or you may contact our FOIA Public Liaison in the same manner. Additionally, you have a right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

A handwritten signature in black ink, appearing to read "Jimmy Wolfrey". The signature is fluid and cursive, with the first name "Jimmy" and last name "Wolfrey" clearly distinguishable.

Jimmy Wolfrey
Senior Director, FOIA Operations and Management
(Acting)

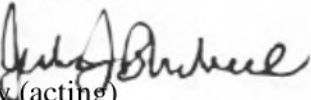
Enclosure: 22 pages



Homeland Security

March 19, 2020

MEMORANDUM FOR: CAPT Oliver Lewis, USN
Executive Secretary
U.S. Department of Defense

FROM: Julianna Blackwell 
Executive Secretary (acting)
U.S. Department of Homeland Security

SUBJECT: Request for Department of Defense (DoD) Assistance in
Support of U.S. Customs and Border Protection (CBP) on the Northern
and Southwest Borders to Prevent the Spread of the Novel
Coronavirus Disease (COVID-19) and Maintain Public Health

REFERENCE: (a) 42 United States Code (U.S.C.) Section 264, Regulation to Control
Communicable Diseases
(b) President of the United States (POTUS) Proclamation on Declaring
a National Emergency Concerning the COVID-19 Outbreak, dated
March 13, 2020
(c) Request for Extension of DoD Assistance in Support of CBP
Southern Border Security Mission through FY 2020, dated July 31, 2019
(d) Secretary of Defense Response Memorandum to Department of
Homeland Security (DHS) Request for Extension of DoD Assistance in
Support of CBP Southern Border Security Mission through FY 2020,
dated September 3, 2019

Overview

As detailed in reference (a), when the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

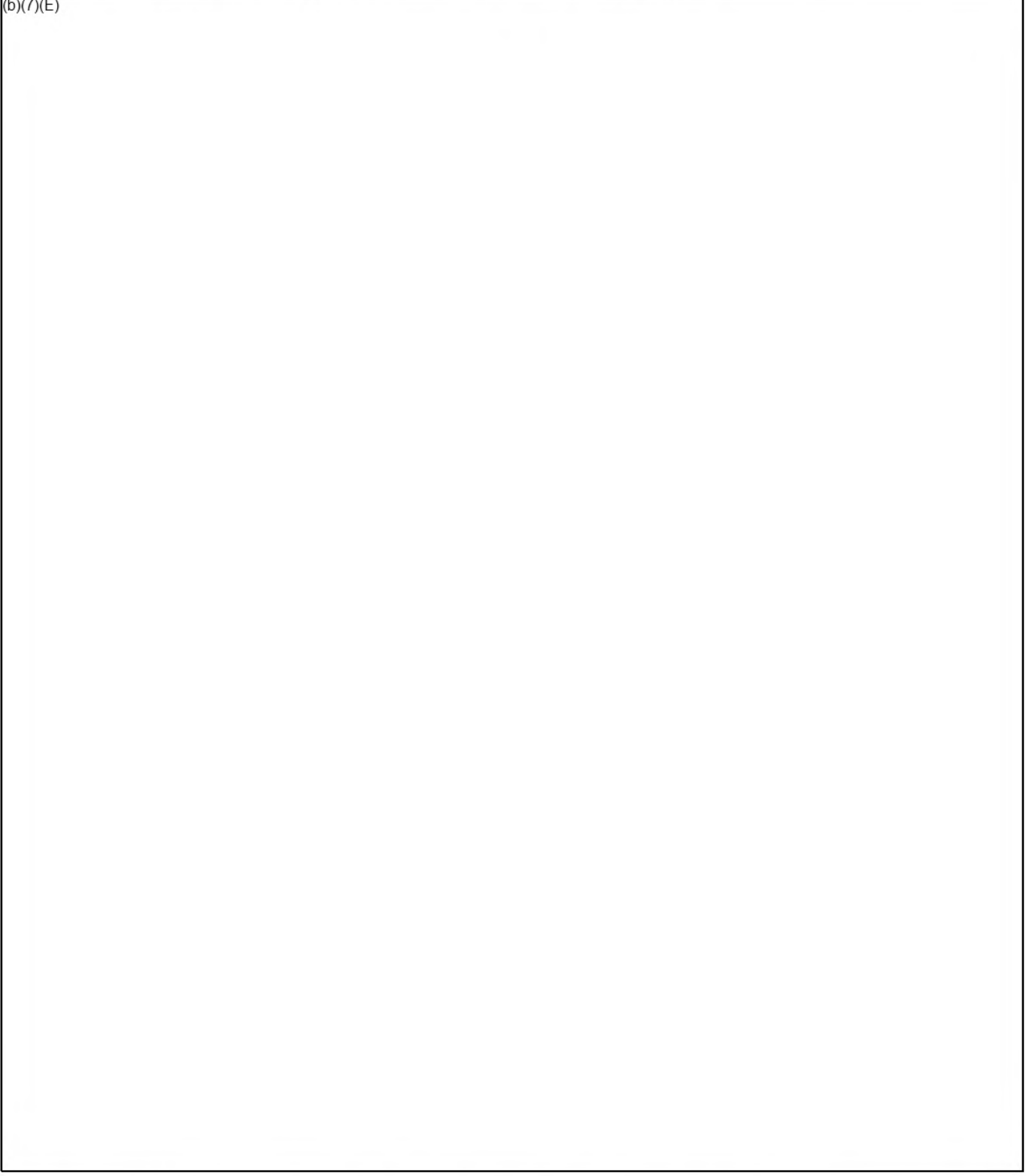
As directed by POTUS on March 13, 2020, see reference (b), the full power of the federal government is being utilized to combat COVID-19 in the United States. All components within CBP are coordinating manpower and resources to safely, humanely, and professionally address the continued public health threat. Any unknown or unresolved illegal entries into the United

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States in between Ports of Entry (POE), have the potential to spread infectious disease. CBP is undertaking enhanced enforcement and is collaborating with external partners to address cross border safety and security challenges. CBP cannot, however, effectively maintain public health measures and national security requirements without additional support.

(b)(7)(E)

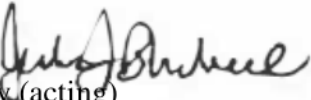




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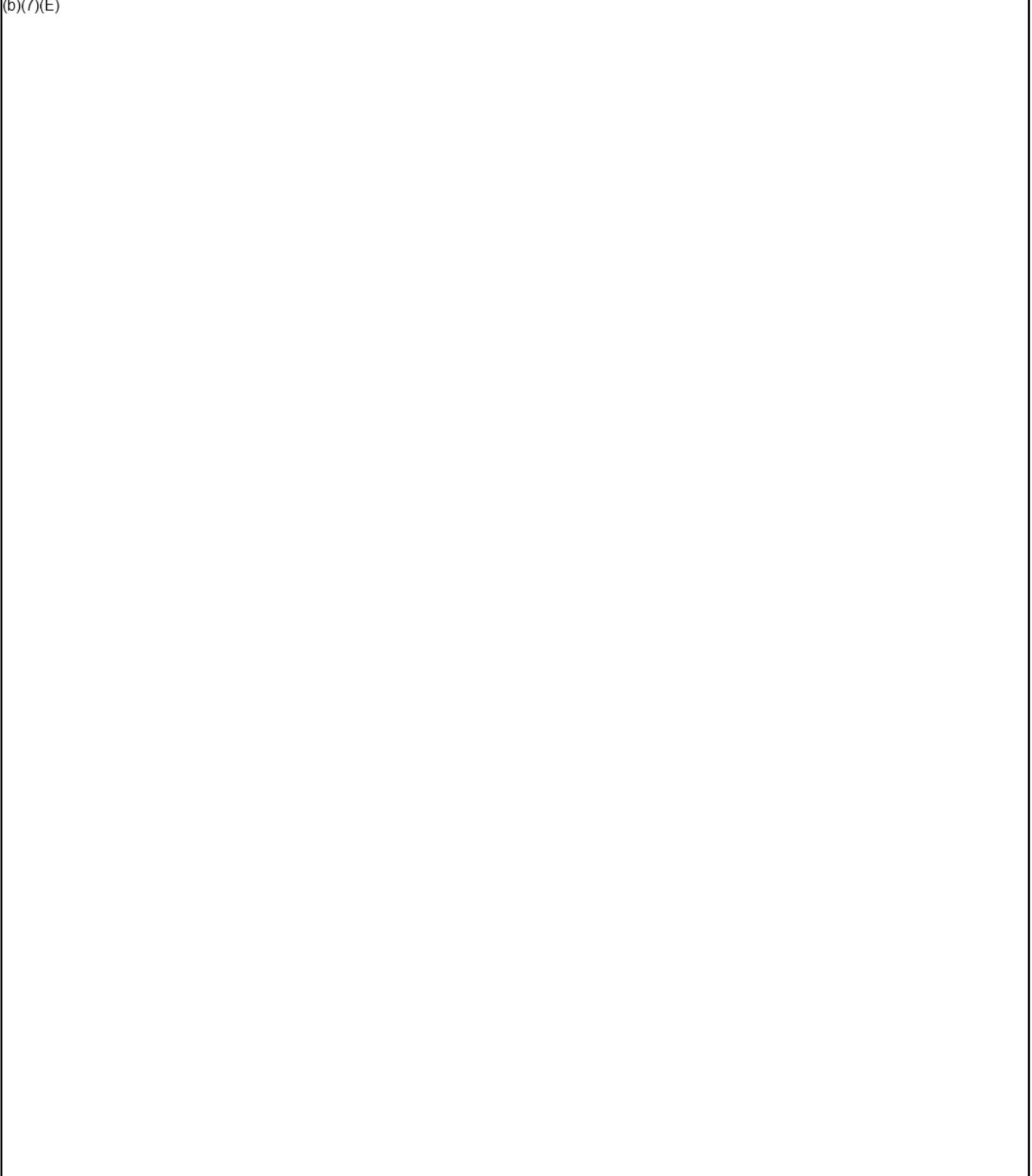
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(b)(7)(E)



DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Chapter I

Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries

Service Between the United States and Mexico

AGENCY: Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Notification of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel” as further defined in this document.

DATES: These restrictions go into effect at 11:59 p.m. Eastern Daylight Time (EDT) on March 20, 2020 and will remain in effect until 11:59 p.m. EDT on April 20, 2020.

FOR FURTHER INFORMATION CONTACT: (b)(6); (b)(7)(C) Office of Field Operations,
U.S. Customs and Border Protection (CBP) at (b)(6); (b)(7)(C)

SUPPLEMENTARY INFORMATION:

Background

Coronavirus Disease 2019 (COVID-19), a communicable disease caused by a new (novel) coronavirus named SARS-CoV-2, is a respiratory disease that can cause fever, cough, and difficulty breathing, with reported illnesses ranging from mildly symptomatic to severe illness and death. Although the virus that causes COVID-19 was originally detected in China, it has

resulted in a pandemic with cases in 158 countries, including in the United States and Mexico. On January 30, 2020, the Director-General of the World Health Organization declared the outbreak a “public health emergency of international concern” under the International Health Regulations (2005).¹ On January 31, 2020, the Secretary of the Department of Health and Human Services declared a nationwide “public health emergency” under section 319 of the Public Health Service Act, 42 U.S.C. 274d, as a result of confirmed cases of COVID-19.² On March 11, 2020, the World Health Organization announced that the COVID–19 outbreak can be characterized as a pandemic. On March 13, 2020, the President determined that the ongoing COVID-19 pandemic is of sufficient severity and magnitude to warrant an emergency determination under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207. In addition, on March 13, 2020, the President declared a national emergency under sections 201 and 301 of the National Emergencies Act, 50 U.S.C. 1601 et seq.³ The Mexican Ministry of Education has closed all schools from March 20 until April 20, and between March 23 and April 19, the Mexican government has implemented a domestic social-distancing campaign to minimize the spread of the virus that causes COVID-19.

Notice of Action

Given the outbreak and continued transmission and spread of COVID-19 within the United States and globally, I have determined that the risk of continued transmission and spread of

¹ Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) (Jan. 30, 2020), available at [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

² HHS, “Determination that a Public Health Emergency Exists,” <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

³ Proclamation 9994 of Mar. 13, 2020 on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

COVID-19 between the United States and Mexico poses a “specific threat to human life or national interests.”

U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico poses additional risk of transmission and spread of COVID-19 and places the populace of both nations at increased risk of contracting COVID-19. Moreover, given the sustained human-to-human transmission of the virus, maintaining the current level of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to COVID-19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁴ I have determined that land ports of entry along the U.S.-Mexican border will suspend normal operations and process for entry only those travelers engaged in “essential travel,” defined below, for entry into the United States. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

⁴ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 et seq.) or to a specific threat to human life or national interests,” is authorized to “take any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (e.g., to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (e.g., individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (e.g., government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (e.g., truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (e.g., sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail and ferry travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on April 20, 2020. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad Mizelle, who is the Acting General Counsel for DHS, for purposes of publication in the Federal Register.

Chad R. Mizelle

Acting General Counsel,

U.S. Department of Homeland Security



Homeland
Security

February 4, 2020

PREPARED BY THE DEPARTMENT OF HOMELAND SECURITY TO ADDRESS THE
CRISIS AT THE SOUTHERN BORDER

SUBJECT: Memorandum Concerning Continuation of the National Emergency at the
Southern Border of the United States

I. RECOMMENDATION

On February 15, 2019, President Trump issued a proclamation declaring a national emergency at the southern border of the United States (“National Emergency Declaration”). Since the National Emergency Declaration was issued, the U.S. Department of Homeland Security (“DHS”), assisted by the U.S. Department of Defense (“DOD”), has worked to secure the southern border of the United States from large numbers of illegal aliens attempting illegal entry; transnational criminal organizations that smuggle human beings and narcotics; massive influxes of methamphetamine, fentanyl, and other dangerous narcotics; and a humanitarian crisis brought about by the arrival of a large number of family units (“FMUAs”) and Unaccompanied Alien Children (“UACs”) incentivized by vulnerabilities in our laws and interior enforcement resources. The emergency at the southern border continues to exist. The support and resources made available pursuant to the National Emergency Declaration are critical to addressing this ongoing emergency.

DHS, therefore, recommends that the President continue the national emergency concerning the southern border he declared in Proclamation 9844 of February 15, 2019.

II. OVERVIEW

The ongoing border security and humanitarian crisis at the southern border of the United States continues to threaten core national security interests, including homeland defense and the security of the American people. DHS continues to apprehend large numbers of aliens attempting to illegally enter or who have illegally entered the United States. Many of those apprehended were incentivized to travel to the United States based, in part, on “pull” factors discussed below.

For many decades, aliens have illegally entered the country through the southern border. Presidents, Congresses, and the States have recognized and taken action to mitigate the danger of unchecked illegal immigration. In previous years, most illegal aliens encountered at or near the

Subject: Memorandum Concerning Continuation of the National Emergency at the Southern Border of the United States

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southern border were single adults who could be immediately repatriated to Mexico. The increase in the number of arriving FMUAs and UACs forced the United States to release into the interior of the United States a significantly larger number and percentage of aliens awaiting removal proceedings before the U.S. Department of Justice’s (“DOJ”) Executive Office for Immigration Review (“EOIR”). The situation is dangerous—for the aliens, U.S. citizens, U.S. lawful permanent residents, and the men and women of DHS—and it increasingly places national security at risk. Furthermore, the increase in the number of aliens encountered, as well as the demographics of those aliens, requires DHS to devote increased resources to providing appropriate treatment to those aliens. This diverts scarce agency resources from DHS’s critical mission sets, including counterterrorism and national security efforts; interdiction of illegal narcotics and other threats crossing the southern border; economic security initiatives; and facilitation of lawful trade and travel.

The nation is experiencing massive inflows of methamphetamine, fentanyl, and other narcotics across the southern border, fueling the opioid epidemic that continues across our nation. A critical component of DHS’s strategy to interdict these dangerous drugs is a persistent impedance and denial system—that is, a system using physical barriers to prevent individuals from entering the country in the first place—as well as increased situational awareness at the border through surveillance and other technologies and the ability to deliver an effective law enforcement resolution, *i.e.*, apprehension of an illegal entrant.

III. CIRCUMSTANCES PRESENTING A NATIONAL EMERGENCY

A. The Crisis of Today’s Migration Trends

U.S. Customs and Border Protection (“CBP”) continues to apprehend large numbers of FMUAs. The large number of arriving FMUAs has directly contributed to and exacerbated the crisis at the border. DHS is generally unable to detain FMUAs for the duration of their removal proceedings and releasing these aliens into the interior greatly reduces DHS’s ability to remove them from the country. This is so despite the fact that many of these aliens are later determined by an Immigration Judge not to have a right to remain in the United States. This dynamic has encouraged more families to attempt to illegally enter the United States, strained DHS’s and the nation’s limited resources, and exacerbated an already-severe humanitarian and security crisis. The government has taken steps to address these concerns, with limited success, but has thus far been unable to stem the flow of aliens across the southern border.

1. Snapshot of border apprehensions and emerging trends

In Fiscal Year (“FY”) 2019, U.S. Border Patrol (“USBP”) apprehended 851,508 people on the southern border. Of those 851,508 apprehensions, 56 percent were FMUAs, 35 percent were single adults, and 9 percent were UACs. In the first quarter of FY 2020, USBP apprehended over 100,000 people along the southern border, 34 percent fewer people than in the first quarter of FY 2019. Single adults comprised the majority of these apprehensions at 64 percent, followed by members of FMUAs at 27 percent, and UACs at 9 percent. The CBP Office of Field

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Operations (“OFO”) deemed 126,001 people inadmissible along the southern border in FY 2019. Of these individuals, 42 percent were arriving as FMUAs, 53 percent were single adults, and 4 percent were UACs. For the first quarter of FY 2020, OFO has encountered over 26,000 inadmissible aliens, a decrease of 12 percent compared to the first quarter of FY 2019. These inadmissible aliens consist of 51 percent arriving as single adults, 44 percent as FMUAs, and 5 percent as UACs.

In recent years, the United States has seen a large increase in the number and proportion of inadmissible aliens who assert an intent to apply for asylum or a fear of persecution or torture. However, over half of those who assert a credible fear claim during expedited removal proceedings—54 percent on average between FY 2008 and FY 2019—will ultimately fail to apply for asylum. And of those who do apply and appear at their immigration court hearings, only a minority—31 percent of all completed cases in which an asylum application was filed between FY 2008 and FY 2019—will actually be granted asylum. There are over one million pending cases in DOJ immigration courts, in addition to approximately 340,000 asylum cases pending with U.S. Citizenship and Immigration Services (“USCIS”). These massive backlogs have strained DHS’s resources and challenged its ability to effectively execute the laws passed by Congress and deliver appropriate immigration consequences: those with meritorious claims can wait years for protection or relief, and those with non-meritorious claims often remain in the country for lengthy periods of time.

Further complicating this shift in illegal immigration is the fact that a large proportion of those apprehended have been from countries other than Mexico, such as the Northern Triangle region of Central America (Guatemala, El Salvador, and Honduras) or from even more distant countries such as Angola, Bangladesh, Brazil, Cameroon, China, India, the Republic of Congo, and others. Aliens from the Northern Triangle countries, and from other countries other than Mexico, have constituted a substantial percentage of USBP apprehensions in recent years. Historically, Mexican citizens, who are generally subject and amenable to rapid cross-border repatriation because they are from a contiguous country and rarely asserted a fear of return, constituted as much as 98 percent of all U.S. border apprehensions.

A massive commitment of resources continues to be required to apprehend and process the large number of aliens who illegally enter the United States and then claim a fear of persecution or torture if returned to their home countries. DHS must locate, apprehend, and process these aliens who enter the country; DHS then must represent the Government in removal proceedings before DOJ immigration courts, where a majority of asylum applications are not granted. EOIR immigration judges must adjudicate the aliens’ claims, and they order removal in a majority of cases. For many aliens who are not detained pending their removal proceedings and who are ordered removed, DHS must then expend additional resources in order to locate, arrest, and remove them in accordance with the immigration courts’ orders. DHS’s Office of the Inspector General (“OIG”) has found that the vast majority of aliens who are released into the United States and that are later issued final orders of removal by EOIR will abscond and remain illegally in the United States. As noted above, nearly half of the aliens who assert a credible fear claim during expedited removal proceedings and are released into the United States will fail to pursue an asylum claim. And only a small percentage of aliens who assert a credible fear will ultimately

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be granted asylum. Re-apprehending these aliens in order to remove them is resource-intensive and dangerous for both the immigration officers making the arrests and the aliens themselves. As a result, very few aliens who are released into the United States are ever removed from the country, even when removal is lawfully ordered.

The strains on DHS and DOJ are particularly acute with respect to the most vulnerable populations, including female and juvenile members of FMUAs. In FY 2019, more than 321,000 minors were apprehended after crossing the southern border, either unaccompanied or as part of FMUAs. Members of FMUAs—even adult members—generally cannot be detained if any member of the FMUA is found to have a credible fear. They may be referred for detention, but generally cannot be detained due to both resource constraints and the manner in which the *Flores* Settlement Agreement has been interpreted by the courts.

As a result of that interpretation of the *Flores* Settlement Agreement, some aliens exploit our immigration laws by claiming to be FMUAs to avoid detention and obtain expedited processing. For example, DHS has identified adult aliens and accompanying alien children that entered the United States as alleged FMUA, with the children subsequently departing via commercial airlines to the Northern Triangle countries and the adults remaining in the United States. DHS has determined that these children are being used by adult aliens for the purpose of defrauding the United States in order to be released. This has led to an increase in fraudulent claims to a familial relationship where adult aliens use unrelated minors for the purpose of posing as FMUAs in order to secure release into the interior of the United States.

Since April 2019, U.S. Immigration and Customs Enforcement (“ICE”) Homeland Security Investigations (“HSI”) has deployed teams of special agents, intelligence analysts, forensic interview specialists, and document fraud examiners to the southern border to interview groups suspected of fraudulently claiming familial relationships in order to facilitate human smuggling activity. As a result, between mid-April 2019 and January 16, 2020, HSI has identified 702 fraudulent FMUAs and 1,089 fraudulent documents, and prosecuted 1,095 people for violations related to this fraud. HSI also began receiving intelligence about children who had recently entered the United States along the southern border as part of FMUAs, each of whom then departed the United States a short time later on flights accompanied by an unrelated adult who was in possession of notarized letters purporting to grant permission to fly with the child back to Honduras or Guatemala. As a result, HSI initiated (b)(7)(E) beginning in May of 2019, and to date, has encountered over 730 children who entered the United States as part of a FMUA and then departed the United States to return to the Northern Triangle a short time later.

2. The U.S. government has applied several methods to stem the flow of illegal aliens into the United States

The United States has been engaged in ongoing diplomatic negotiations with Mexico and the Northern Triangle countries to improve the situation on the southern border. While these negotiations have resulted in new initiatives being implemented throughout the region, they have not, to date, significantly affected the fundamental vulnerabilities underlying the ongoing emergency. Specific to the Northern Triangle countries, beginning in FY 2019, DHS, in

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coordination with the Department of State (“DOS”), negotiated and entered into international agreements and arrangements with each country concerning asylum cooperation, border security cooperation, and information sharing. As part of these agreements and arrangements, DHS, in coordination with DOS, will assist the Northern Triangle countries to build host government capacity in immigration matters by providing training and mentoring, planning support, technical expertise, and material and logistical assistance. DHS is currently working with the Northern Triangle countries to implement the agreements and arrangements. While the United States continues to work with Mexico to ease the burden at the southern border, large numbers of Central Americans, including those from the Northern Triangle countries, continue to enter the country. Continued action is needed to address the crisis.

DOJ and DHS issued an interim final rule governing the eligibility for asylum of aliens who are subject to, but contravene, a suspension of entry through the southern border pursuant to a presidential proclamation issued under section 212(f) or 215(a)(1) of the Immigration and Nationality Act. 83 Fed. Reg. 55934 (Nov. 9, 2018). The President issued Presidential Proclamation 9822, *Addressing Mass Migration Through the Southern Border of the United States*, on November 9, 2018, which suspended the entry of aliens between ports of entry on the southern border. 83 Fed. Reg. 57661. The suspension of entry was subsequently extended by Presidential Proclamation 9880, *Addressing Mass Migration Through the Southern Border of the United States*, on May 8, 2019. 84 Fed. Reg. 21229. The interim final rule deemed aliens who entered the United States illegally between ports of entry (“POEs”) on the southern border in contravention of a presidential proclamation (such as Proclamation 9822) ineligible for asylum, which would serve to channel migrants to a POE where they could be processed by DHS based on available resources. However, the United States is currently enjoined from implementation of the interim final rule.

B. System Capacity

Because of continued high rates of illegal crossings between POEs and inadmissible aliens presenting at POEs, combined with the limited DHS and Department of Health and Human Services (“HHS”) bed space for FMUAs and UACs, DHS continues to lack the detention capacity it needs to address the crisis. The high rates of illegal crossings between POEs also exacerbate vulnerabilities in our border-security and interior-enforcement efforts.

Improvements have been made to add temporary and expensive infrastructure, but the vast majority of CBP’s infrastructure remains fundamentally inadequate to hold FMUAs and UACs in the numbers in which they are entering the country. Most USBP stations and POEs were built decades ago to provide short-term holding for male single adults, not significant numbers of families and children, accompanied or otherwise. Yet because of the significant influx of aliens who cannot be quickly deported, DHS must rely on temporary soft-sided facilities as an alternative to traditional, “hard-sided” CBP facilities that were never designed to hold individuals for extended periods of time, especially not vulnerable populations such as families and children alongside unrelated adults. In short, the ongoing need to continue to detain large numbers of aliens—men, women, and children—continues to present serious detention and humanitarian challenges and to strain DHS resources.

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Repeated surges in immigration at the border over the past several years have also overwhelmed ICE detention capacity, and during peak migration in 2019, ICE's detained population reached over 55,000—10,000 more beds than funded—requiring both ICE and CBP to release into the interior of the country many aliens they would otherwise have detained. This dynamic has also overwhelmed ICE detention capacity. The extremely high numbers of border arrivals not only strain ICE's limited detention capacity and force releases, but they also exhaust transportation resources and the capacity of non-governmental organizations with which ICE partners to release FMUAs in a safe and orderly manner. While the current volume of border arrivals has decreased from its peak of May 2019, the current numbers are still very large and continue to overwhelm ICE resources. Additionally, migration has a significant seasonal component, with historically lower numbers of arrivals during the winter months. Unfortunately, as long as there are loopholes in U.S. immigration laws, DHS anticipates that surges at the border will continue, and ICE is no better resourced to handle the next surge than it was the previous one. As a result, when border apprehensions next increase, ICE expects to face challenges similar to those it encountered in previous years. Moreover, as DHS and DOJ will need to continue processing those who entered or sought to enter the United States illegally during past surges, these past surges will continue to have a significant adverse impact on both ICE's and the immigration courts' operations for the foreseeable future, including on ICE's ability to engage in interior enforcement.

The large number of individuals entering between POEs, particularly individuals who may have medical or other humanitarian needs, continues to strain CBP resources and create security vulnerabilities along the southern border. To patrol vast stretches of the southern border effectively, CBP strategically allocates resources and USBP agents to various regions based on factors including topography, proximity to a city or highway, historical crossing patterns, and the availability of agents and other resources. When USBP apprehends an alien who needs medical assistance, an agent must transport the alien to a hospital or medical center, which can be several hours away, and then guard the alien while the alien is in the hospital or medical center. These activities take agents away from their primary activity of patrolling and protecting the border.

During FY 2019, USBP referred more than 26,000 people to a hospital or medical facility when advanced care was needed or requested. Agents spent more than 319,000 hours providing transportation to and from medical facilities and on hospital watch. This increase in medical referrals, which forces USBP agents out of the field and into a hospital, in conjunction with CBP's limited resources, has contributed to certain stretches of the southern border being understaffed or even unguarded. As a result, the border is left vulnerable and the security of the United States is at risk. Even more troubling, USBP has evidence that criminal smuggling organizations continue to take advantage of these vulnerabilities, purposefully crossing the border after a FMUA that needs medical assistance in order to enter the country undetected.

The border crisis has also required the deployment of ICE officers and agents away from enforcement operations in the interior of the United States; this redirection of resources degrades ICE's public safety activities and puts the security of the American public at risk. Almost nine

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out of every 10 aliens administratively arrested by ICE in the interior has a criminal history or pending criminal charges, with the majority being convicted criminals. Unfortunately, during FY 2019, overall administrative arrests by ICE Enforcement and Removal Operations decreased by 10 percent from the previous fiscal year, while administrative arrests of convicted criminals decreased by 12 percent, in significant part due to the reallocation of resources in response to the crisis at the southern border. (b)(7)(E)

(b)(7)(E) As a result, the decrease in arrests and interior removals by ICE due to the need to respond to the ongoing crisis at the southern border allows convicted criminals, gang members, and other public safety threats to remain at large in communities across the United States and threaten the safety and security of Americans. The redeployment of ICE assets has caused the fugitive case backlog to increase further and limited ICE's ability to conduct national at-large operations to apprehend fugitives in the interior of the United States, with at-large arrests decreasing by 12 percent in FY 2019. Redeployment of ICE assets continues to adversely affect the number of at-large enforcement actions that ICE can take against aliens, especially those released from state or local law enforcement custody in light of the increasing number of jurisdictions that refuse to cooperate with ICE's enforcement efforts; some of these criminal aliens may be released into the country to commit additional crimes and perpetrate violence. Redeployments also continue to hinder ICE from arresting, detaining, and deporting aliens who have failed to appear at their immigration hearings or whose asylum claims were rejected by an immigration judge, thus contributing to the "pull" factors, as even those aliens who show up for their asylum hearing but are ordered deported are able to remain in the United States.

C. Humanitarian Concerns

In FY 2019, more than 62,000 Central American UACs were smuggled into or illegally entered the United States via Mexico. Parents may send these children without sufficient food or water for the multi-week journey, putting the children's lives at serious risk. As a result, USBP is forced to rescue or seek medical treatment for many of these children. Furthermore, USBP frequently conducts life-saving efforts. USBP agents carried out more than 4,900 rescues in FY 2019, and in the first three months of FY 2020, they have rescued 775 individuals. In certain remote regions along the southern border, it may be difficult to provide urgent or even life-saving medical care in a timely manner.

D. Inflow of Narcotics and Criminals

The continued pressure on DHS resources has affected the ability to address the flow of narcotics and criminals into the country. For instance, maintaining custody of FMUAs and children requires more resources than single adults because of the appropriately higher legal standards required to care for families and children. The increase in the number and proportion of families and children diverts agency resources from the critical mission of interdicting illegal narcotics crossing the southern border. Even so, in FY 2019, CBP seized 24,081 pounds of cocaine, 5,561 pounds of heroin, 130,994 pounds of methamphetamine, and 2,613 pounds of fentanyl on the southern border. CBP's FY 2019 rate along the southern border for cocaine seizures decreased 11 percent, heroin seizures increased 8 percent, methamphetamine seizures increased 17 percent,

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and fentanyl seizures increased 81 percent from the previous fiscal year. Through December of FY 2020, along the southern border, CBP has seized 5,240 pounds of cocaine, 1,213 pounds of heroin, 38,116 pounds of methamphetamine, and 589 pounds of fentanyl. So far in FY 2020 through December, HSI has seized 2,655 pounds of opioids including 1,343 pounds of fentanyl, 96,902 pounds of cocaine, and 36,891 pounds of methamphetamine. And in FY 2019, HSI seized 12,466 pounds of opioids including 3,688 pounds of fentanyl, 463,889 pounds of cocaine, and 145,117 pounds of methamphetamine. The cross-border smuggling of illegal drugs continues to threaten communities throughout our nation. The volume of drugs seized is a sober reminder that the nation is in the midst of a border security crisis on the southern border.

The southern border is also a major entry point for criminals and gang members. In FY 2019, USBP apprehended nearly 1,000 aliens with a gang affiliation, and nearly 4,200 aliens subject to an arrest warrant. Additionally, unknown numbers of criminals and gang members have entered the United States undetected due to the security vulnerabilities created by the ongoing crisis at the southern border and the attendant strain on DHS resources.

IV. IDENTIFYING SOLUTIONS

A. Effectiveness of Physical Barriers

As DHS works to stem the flow of illegal immigration, narcotics, and the corresponding strain on the immigration system, evidence over the last few decades demonstrates that physical barriers deter illegal immigration, channel migrants to POEs or areas where they can be apprehended more easily, and allows USBP to secure greater stretches of land with fewer agents. These effects, in turn, allow USBP agents to engage in other critical activities, including drug interdiction activities between POEs.

Following the construction of walls in the San Diego, Yuma, and Tucson sectors, the number of illegal crossings and apprehensions in each area dropped appreciably. In contrast, areas without physical barriers saw an increase in apprehensions during the same timeframe. For example, two decades after the construction of barriers in the San Diego sector in the early 1990s, apprehensions had decreased by 95 percent. By contrast, Tucson sector, which was not protected by a physical barrier until the late 2000s, saw a significant increase in apprehensions during this same period. In 1992, Tucson Sector apprehended approximately 71,000 individuals. By 2000, apprehensions in that sector had increased by 768 percent, to over 616,000. Today, the vast majority of illegal crossings and apprehensions take place in areas where there is little to no physical barrier to deter illegal entries.

Relatedly, physical barriers assist CBP with channeling migrants to POEs, where they can be processed based on available resources, or to areas of the border where they can be apprehended more easily. They are especially effective to channel FMUAs and UACs, who may not have the ability to attempt to breach the border barrier. This channeling function helps ease the strain on CBP and ICE detention capacity and allows USBP to more effectively and strategically deploy its resources to maximize apprehensions.

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The physical barrier, along with corresponding infrastructure and technology, greatly increases USBP's interdiction effectiveness rate—that is, the rate at which USBP apprehends aliens who have illegally crossed the border. A physical barrier along the southern border, such as a steel bollard wall, is ideally accompanied by sensors that alert USBP agents when an alien approaches or attempts to breach the wall. The barrier is also typically adjoined by a road or other form of infrastructure that allows USBP to more quickly respond when the sensor is triggered. In areas protected by both primary and secondary barriers, the road sits between the physical barriers.

B. Department of Defense

DOD has the skills, experience, and capacity needed to provide crucial continued support to DHS's efforts to confront the border security and humanitarian crisis and to establish operational control at the southern border. The use of the Armed Forces in response to the National Emergency Declaration has thus far helped to mitigate the ongoing crisis, and DHS continues to urgently need DOD assistance. Continuation of the National Emergency Declaration will provide DOD with the continuing authority to activate and deploy members of the Ready Reserve and to undertake military construction necessary to support the use of the Armed Forces in connection with the national emergency.

1. History and scope of DOD support

DOD has the skills, experience, capacity, and resources to provide crucial support to DHS. Military resources have been deployed to help secure the southern border in response to the National Emergency Declaration, and the urgent need for these resources continues. In the past, military personnel were deployed to augment the security of our nation's northern and southern borders in the aftermath of the terrorist attacks of September 11, 2001. President Bush, in 2006, and President Obama, in 2010, both directed the deployment of Armed Forces personnel to the southern border to support the DHS border security mission. Additionally, DOD has long played a critical support role in the nation's efforts to combat illegal narcotics smuggling across both the land and maritime borders of the United States. The assistance being provided by DOD in response to the ongoing crisis at the southern border is crucial to the government's efforts to secure the border and protect the lives of Americans and foreign nationals within the United States alike.

DOD has deployed the capabilities of the Armed Forces, including planning, engineering, aviation, communications, personnel protection, and detection and monitoring activities, to support DHS efforts to address the emergent immigration and humanitarian crisis at the southern border. DOD's assistance also allows DHS to devote more personnel and resources to apprehending aliens in remote locations and seizing deadly narcotics, such as heroin, methamphetamine, and fentanyl.

DOD deployed limited medical units and personnel in order to assist when necessary in the medical evaluation and treatment of CBP-screened aliens who had been apprehended, and of CBP personnel. This critical medical presence has helped to improve the health, welfare, and

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safety of not only the aliens who have been apprehended, but of USBP agents as well. DOD's expertise in establishing and providing tactical and prolonged medical care in field conditions has been an invaluable resource to CBP personnel.

DOD has also deployed personnel and equipment in order to support DHS's situational awareness through the use of specialized detection and monitoring technology, thereby increasing DHS's ability to detect and apprehend aliens and illicit narcotics entering the United States. Importantly, DOD's use of such technology allows DHS to make more informed decisions regarding placement of USBP agents, which increases their effectiveness in addressing illegal migration and the smuggling of illicit narcotics.

Pursuant to the President's National Emergency Declaration, and under the construction authority made available by section 2808 of title 10, United States Code, to support the use of the Armed Forces, DOD has undertaken border barrier military construction projects along the southern border. Such construction has helped channel migrants to ports of entry for further processing by CBP in a safe and orderly fashion.

2. Continued DOD support remains necessary

The crisis at the southern border remains an emergency that requires the use of the Armed Forces, and DOD should be able to continue to exercise the authorities invoked by the National Emergency Declaration.

As detailed above, increased illegal immigration of vulnerable populations has strained CBP's limited resources to the point where certain segments of the southern border are understaffed or even unguarded, presenting a serious ongoing security vulnerability. DOD support to CBP to harden POEs, assist with medical evaluation, and provide detection and monitoring allows CBP to devote more agents and resources to patrolling and protecting the southern border, thus ensuring that fewer sections of the border are left vulnerable.

Further, as anticipated in Presidential Proclamation 9822, *Addressing Mass Migration Through the Southern Border of the United States*, issued on November 9, 2018, large, organized groups of aliens traveling through Mexico from Central America continue to attempt to enter the United States illegally or without proper documentation. DOD's unique ability to provide large-scale capacity, personnel, equipment, and logistical support to DHS remains a crucial aspect of DHS's efforts and attempts to maintain operational control of the southern border in response to this ongoing emergency situation. DOD's enhanced authority to support DHS's response to the emergency at the southern border has improved the safety of CBP personnel by increasing their ability to deter hostile actions against CBP personnel, which in turn has allowed CBP personnel to more efficiently and effectively prevent riots or breaches at the southern border by large groups of aliens at POEs.

The specialized capabilities and capacity of the Armed Forces are necessary to continue to support DHS in addressing these security challenges and maintaining operational control of the border.

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Continuation of the National Emergency Declaration and invocation of section 12302 of title 10, United States Code, would continue to make available to DOD emergency authority regarding the mobilization of Reserve Component military personnel to support DHS's efforts to secure the southern border. Making available this authority will continue to provide DOD needed flexibility to support DHS's efforts to secure the southern border while ensuring DOD's continued ability to defend the nation.

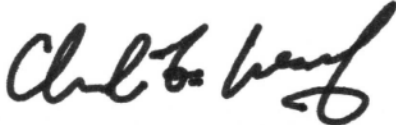
Further, a continuation of the National Emergency Declaration and determination that the ongoing emergency requires the use of the Armed Forces would continue to provide DOD the emergency authority, including authority pursuant to section 2808, title 10 United States Code, to undertake military construction not otherwise authorized by law—including construction of physical barriers and the acquisition of land on which to construct the barriers—necessary to support the use of the Armed Forces in connection with the national emergency.



Homeland
Security

February 5, 2020

MEMORANDUM FOR THE PRESIDENT

FROM: Chad F. Wolf
Acting Secretary 

THROUGH: Robert O'Brien
National Security Advisor

SUBJECT: Continuation of the National Emergency Concerning the Southern
Border of the United States

I have attached for your consideration a memorandum in support of continuation of the national emergency concerning the southern border of the United States ("Proclamation 9844").

On February 15, 2019, you issued Proclamation 9844, pursuant to Sections 201 and 301 of the National Emergencies Act (50 U.S.C. §§ 1601 *et seq.*), based on the border security and humanitarian crisis that threatens core national security interests.

Pursuant to the National Emergencies Act, the existing national emergency will automatically terminate one year following the declaration, February 15, 2020, unless you continue the national emergency. To continue the emergency, the National Emergencies Act requires, within the ninety-day period prior to each anniversary date, publication in the *Federal Register* of your determination that such emergency is to continue and transmission of a notice of the same to the Congress.

As discussed in more detail in the attached memorandum, the ongoing border security and humanitarian crisis at the southern border of the United States continues to threaten core national security interests, including homeland defense and the security of the American people. The Department of Homeland Security ("DHS") continues to apprehend large numbers of aliens, including family units, attempting to enter illegally or who have actually illegally entered the United States. Family unit apprehensions in particular strain DHS's and the nation's resources and this continued pressure on DHS resources has adversely affected DHS's ability to address the flow of narcotics and criminals into the country. Physical barriers remain one of the most effective ways to deter illegal immigration and maximize DHS resources at the border to address the crisis.

DOD has the skills, experience, and capacity needed to provide crucial continued support to DHS's efforts to confront the border security and humanitarian crisis and to establish effective

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operational control at the southern border. The use of the Armed Forces in response to the national emergency declaration has thus far helped to mitigate the ongoing crisis, and DHS continues to urgently need DOD assistance. Continuation of the national emergency declaration will provide DOD with the continuing authority to activate and deploy members of the Ready Reserve and to undertake military construction necessary to support use of the Armed Forces.

I recommend that you continue the national emergency concerning the southern border of the United States for another year in accordance with 50 U.S.C. § 1622(d), no later than February 14, 2020.

Attachment: (1) Memorandum in support of continuation of the national emergency

Subject: Continuation of the National Emergency Relating to the Southern Border of the United States

DECISION

Summary: On February 15, 2019, the President declared a national emergency at the southern border of the United States, pursuant to sections 201 and 301 of the National Emergencies Act (50 U.S.C. §§ 1601 *et seq.*), which provided the legal basis for invoking and making available Section 12303 of Title 10, United States Code. The President also declared that the emergency required use of the Armed Forces. Pursuant to section 301 of the National Emergencies Act (50 U.S.C. § 1631), that declaration invoked and made available to the Department of Defense construction authority to support the Federal Government's response, under Section 2808 of Title 10. The existing national emergency will automatically terminate on February 15, 2020, unless the President publishes in the *Federal Register* and transmits to Congress a notice continuing the national emergency before that date.

Recommendation: OGC recommends that the Acting Secretary approve and forward this package to the President to allow for the continuation of the national emergency with respect to the southern border of the United States for another year in accordance with 50 U.S.C. § 1622(d). The request to the President to continue the national emergency and a memorandum in support of continuing the national emergency are attached.

Approve/date *Alt. Prof 2/15/20* Disapprove/date _____
Modify/date _____ Needs discussion/date _____