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Summary of January 25 and 27, 2017 Executive Actions

Possible Impacts on Survivors of Domestic and Sexual Violence

The Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization focused on assisting immigrant women and girls. Over the last 20 years, Tahirih has provided free legal representation to over 20,000 immigrant women and children fleeing human trafficking, domestic abuse, rape, and other gender-based violence.

This memo explains some of the provisions of the three executive orders relating to immigration signed by President Trump¹ that are anticipated to have the most significant, negative impact on the ability of survivors of gender-based violence to access the protections they need and merit under existing U.S. law.²

I. “Executive Order: Border Security and Immigration Enforcement”

This order will unfairly prevent survivors of gender-based violence such as domestic abuse, sexual assault, and trafficking from accessing a full and fair procedure for determining their eligibility for protection under U.S. and international law.

Because of rampant gang violence and a lack of government protection, Central America has become one of the most dangerous regions in the world for women and children who are targeted for violence with impunity.³ Thousands of women and children therefore approach the southern border of the United States seeking protection from domestic abuse, rape, murder, torture, and trafficking and qualify as refugees under the 1951 International Refugee Convention.⁴

Specifically, this order is likely to harm survivors of violence in the following ways:

1) Detention of anyone apprehended for any violation of the law, including immigration law, for as long as ensuing proceedings take. In Section 2 (b) and Section 6, the order calls for the mandatory detention of a broad group of people for a possibly exceptional length of time. The provision could include individuals who have lived here for some time as well as those who are presenting themselves at the border to ask for protection.

Many survivors find themselves in violation of immigration laws precisely because they are abused and exploited. Some enter on a valid visa that then expires because of the deliberate failure of an abusive U.S. citizen spouse to file immigration petitions. Others unwittingly enter on an invalid visa because of the calculating fraud of a trafficker. In addition, many come to the United States fleeing violence and seeking protection through the asylum process.

These individuals must complete a lengthy legal process and extensive background checks to determine whether they will receive protection instead of deportation, and detaining them for the duration of that process is inhumane. In addition, the gender-

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based asylum process is based on complex law that has evolved through decades of litigation, and appeals to higher courts and even the Supreme Court are possible; detaining traumatized women and children throughout these cases is unconscionable.⁵ Legal delays are likely to grow exponentially, too, as more immigrants are apprehended and prosecuted for violations.

It is not only self-evident but also well-documented that the prolonged detention in prison-like immigration facilities of children and survivors of trauma such as gender-based violence is detrimental to their mental and physical health.⁶ This is because detention is itself re-traumatizing and because access to medical care specific to survivors of rape, violence, and other forms of trauma is woefully inadequate inside detention facilities. It is also well-established that detention severely limits access to counsel, which is necessary to ensure that applicants for protection receive the fair process they deserve;⁷ without it, they could be sent back to persecution and even death. The constitutionality of prolonged immigration detention has also been called into question.⁸ The order also requires that additional detention centers be built along the border, compounding all these concerns.

2) Expedited determinations of all claims of eligibility to remain in the United States. In Section 2 (c), the order calls for the expedited adjudication of all claims of eligibility to remain in the United States. This could include a range of types of cases filed by survivors of gender-based violence. In particular, claims for asylum based on gender-related persecution, such as domestic violence, trafficking, and rape, can be complex. Legal counsel must be secured, evidence gathered and presented, expert witnesses and mental health evaluators retained, and legal documents prepared and presented in order for an applicant to have any chance of receiving the protection to which she may be entitled under domestic and international law.⁹ Forcing cases to proceed in an unreasonably expedited fashion can cause the denial of cases that would otherwise merit asylum and the deportation of survivors who need protection.

In Sections 5 (b) and (c), the order seeks to immediately reallocate asylum officers and judges to detention facilities to assist with the expedited processing of cases at the border but does not call for hiring of new asylum officers and immigration judges to increase the overall adjudication corps. Unfortunately, the system is already underfunded and overtaxed; survivors around the country are waiting as many as five years for their cases to be adjudicated, and this would force all adjudications to come to a grinding halt in favor of triaging cases at the border. This is not sound policy.

3) Swift deportation – also possibly denying rights to appeal or any chance to apply for another form of legal status. In Section 2 (d), the order requires that DHS “remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed.” The language does not define “rejected,” leaving it open to narrow interpretation as “after consideration by an initial adjudications officer or trial court” rather than the Constitutionally-required due-process understanding, “after all available appeals have been exhausted”.

Gender-based asylum cases involve complex litigation in an imperfect system, and a claim may fail several times while the case travels through the long and arduous appeals process. Prompt removal is a grave concern if it results in violation of an individual’s constitutional right to exhaust all avenues for appeal. In other words, “lawfully rejected” must encompass nothing less than a full and fair opportunity to exhaust all remedies and ensure that a survivor of violence is not unlawfully returned to her country to face persecution.

Furthermore, it is not clear if this provision refers only to those applications for asylum made by individuals who approached the border seeking protection, or if it applies to all immigrants in the United States. For example, it is possible to interpret this provision to mean that a survivor living without documentation in the United States who applies for another form of relief, such as a U visa, might also be “promptly removed” in the event that her initial application is rejected. Such rejections happen often

even to survivors of domestic and sexual violence who merit legal protection due to ineffective assistance of counsel, lack of knowledge of the law, and other factors. Immediately deporting anyone with a failed application represents a significant danger for victims of trafficking, domestic violence, and sexual abuse who may choose not to report crimes, cooperate with law enforcement, or otherwise seek protection if they could be deported immediately upon rejection of a claim.

II. “Executive Order: Enhancing Public Safety in the Interior of the United States”

This order begins with the sweeping and unsupported premise that “many” immigrants who “overstay or otherwise violate the terms of their visas present a significant threat to security and public safety.” It is important to note that each year, thousands of undocumented immigrant survivors of violence are ultimately granted permission to remain in the United States under long-standing statutes passed by Congress with bi-partisan support, because they have *assisted in the investigation and prosecution of a crime* committed against them. In fact, these undocumented women help to expose dangerous criminals in our communities. In addition, some survivors’ loss of legal status is directly related to the violence they face, as abusive U.S. citizen or lawful permanent resident spouses refuse to file the required petitions. Proposing measures as this order does that will deter community collaboration with policing efforts will make all Americans, and all victims of violence, less safe.

The order goes on to declare that so-called “sanctuary” jurisdictions have caused “immeasurable harm to the American people and to the very fabric of our Republic.” In fact, all victims of domestic and sexual violence, as well as trafficking, must feel safe in calling 911 to seek protection from local police, no matter what their immigration status, in order to prevent victimization and stop perpetrators. The order dangerously requires that local law enforcement engage in immigration enforcement, which can only lead to more unreported crimes of violence against all members of our communities, including immigrant women and other vulnerable populations.

Specifically, this order is likely to harm survivors of violence in the following ways:

1) Prioritize a wide array of immigrants for deportation. In Section 5, the order requires the Secretary of Homeland Security to prioritize for deportation a broad range of individuals that will encompass many survivors of domestic and sexual violence otherwise eligible for protection. In Sections 5 (a), (b), and (c), the order prioritizes anyone who has been convicted of any criminal offense, charged with any criminal offense, or who “has committed acts that constitute a chargeable criminal offense.” This could include immigrant women who call 911, for example, while being abused. If their abusers claim that they are also being abused, and charges are filed on both parties, then a victim of domestic violence will be immediately prioritized for deportation, even if she could have qualified for a form of immigration protection. She may fear removal because of violence in her home country, or because she has children she would be forced to leave behind; regardless, simply for seeking help, she could be deported. This is not only grossly unfair and directly contrary to the policy behind the bi-partisan-supported and repeatedly reauthorized Violence Against Women Act and Trafficking Victims Protection Act, it will have a chilling effect on calls for help and the reporting of crimes, leaving all of us less safe.

Section 5 (f) seeks to prioritize anyone against whom an “order of removal” has been issued, but does not consider the multiple levels of appeals and changes of circumstance that can help a survivor of domestic and sexual violence finally access the life-saving protections for which she may be eligible. Immigration judges may issue removal orders when someone doesn’t speak English, is unaware of the law, unprepared to present evidence, cannot find or afford a lawyer, or never received notice of a hearing because she was moving around among domestic violence shelters as she fled abuse. Implementing this section could lead to the rash deportation of immigrant survivors who actually qualify for *relief* from deportation. And Section 5 (g) allows any immigration officer to decide in his or her judgment whether an immigrant “otherwise poses a risk to public safety or national security,” a huge

amount of discretion to give thousands of officers across the country with no guidance or accountability whatsoever.

2) Requires local law enforcement to perform immigration duties. Section 8 and its subsections require state and local law enforcement officers “to perform the functions of immigration officers in relation to the investigation, apprehension, or detention” of immigrants in the U.S. Many state and local law enforcement agencies have long rejected any program that requires them to enforce complex immigration rules and undermines their ability to liaise with the communities they serve.¹⁰ Immigrant women who are being abused, trafficked, or assaulted are not likely to seek out the protection of their local police station or call 911 if they are concerned that they might be deported for doing so. Survivors and their children would therefore be unlikely to get help preventing further violence and will be much more vulnerable to abuse and exploitation.

3) Prohibits federal grant funds to states and cities that refuse to enforce federal immigration law. Section 9 lays out multiple punishments for so-called “sanctuary” states and cities that seek to engage in community policing. Federal grant funds for policing will be withheld, which could mean critical programs such as rape kit processing, investigation of domestic violence cases, service and enforcement of protection orders, and training of interviewers of child sexual assault victims. All these federal funding streams could be stopped, with obvious consequences for prevention of violence against women and children. In addition, the order requires that the Attorney General seek punitive legal action against “any entity that ... has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”

4) Reinstates Secure Communities. In Section 10, the order terminates the 2014 Priority Enforcement Program and reinstates the Secure Communities program, which allowed immigration enforcement agents to require local law enforcement to keep individuals in custody until such time as custody would transfer to immigration for the purpose of deportation. The program was maligned for a range of Constitutional issues including racial profiling and was terminated in order to foster safer communities.

III. “Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States”

This order begins by recognizing that changes to the visa process in the aftermath of the September 11, 2001 terrorist attacks have allowed for improved screening during the visa process. Yet in Section 1, the order states that “these measures did not stop attacks by foreign nationals who were admitted to the United States” and that due to deteriorating conditions in “certain countries due to war, strife, disaster, and civil unrest,” there is a higher risk of terrorists entering the United States. Whether this is true or not, the order makes sweeping, arbitrary, and dramatic changes to the refugee and asylum process in the U.S. in contravention of our international legal obligations that will have long lasting impacts for survivors of gender-based violence seeking safety.

Specifically, this order is likely to harm survivors of violence in the following ways:

1) Indefinite ban of individuals from certain countries. Section 3 halts the issuance of any immigrant and nonimmigrant entry of individuals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen for at least 90 days. The section provides that additional countries may be added after the 90 days but does not suggest when the ban might be lifted. Women and girls in the countries that are listed experience gender-based violence at the hands of their families and, in some cases, extremist armed groups. These are precisely the people that U.S. asylum and refugee law is intended to protect. The ban is not only plainly discriminatory on its face but leaves women and girls who desperately need life-saving protection out in the cold.

It remains unclear whether victims of domestic abuse from those countries who are already in the United States and applying for protection under the Violence Against Women Act, for example, will also

be excluded as their applications, in immigration law terms, technically involve “admission” to the United States as well. Although green card holders from these countries were eventually told they would be allowed in, confusion has reigned, and individuals have been wrongfully strip-searched, detained, and prevented from travel.

2) Complete stop to the U.S. refugee program. In this dramatic new policy, laid out in Section 5 of the order, the entire U.S. refugee program has been ground to a halt for at least four months. The U.S. refugee program includes the most extensive security screening process of any in the world, and the chances of any American being caught in a terrorist attack by a refugee is 1 in 3.65 billion.¹¹ Yet the order stops all refugees from coming to the United States even if they have already passed through the process and were simply waiting for flights prior to the date of the order. This section also calls for a review of the existing program, followed by the development of a new process for screening refugees, which then has to be implemented and reviewed. This will take incredible resources while refugee women and girls who fear or have suffered gender-based violence are stuck overseas without the possibility of entry and could face persecution or even death as a result.

Section 5 also includes an indefinite ban on the admission of Syrian refugees and a limit to the number of refugees in 2017 to just 50,000. These bans and limitations will leave thousands of qualifying refugees who pose no danger to the United States, including women and children who may have already risked their lives to begin the refugee determination process overseas, vulnerable to persecution. At least half of Syrian refugees are children, and among adults, more than half are women.¹²

3) Requiring interviews with all visa applicants. Section 8 of the order requires that the Secretary of State suspend the Visa Interview Waiver Program and begin interviewing all individuals seeking a nonimmigrant visa. It is unclear whether this includes applicants for visas who are inside the United States already or only those who are outside the United States. For example, a person applying for U nonimmigrant status currently supplies application forms and a certifying statement from a law enforcement agency indicating that she has been a victim of a crime and has cooperated in the investigation or prosecution of that crime. The process technically involves the release of visas to those who are eligible, yet currently there is no interview of U applicants.

The majority of U and VAWA applicants are women who have survived domestic and sexual violence. Obtaining these protections allows them to safely access emergency services and break the cycle of violence in their lives. Interviews are unnecessary and severely re-traumatizing, not to mention a significant drain on resources for the immigration service. Immigrant survivors may find it hard to escape their abusive home long enough to prepare for and attend an interview, which could require significant and costly travel. Currently, very few immigration officers have the specialized training that is required to effectively and humanely interview survivors of gender-based trauma. Requiring interviews would place these life-saving protections out of reach for those who most desperately need them.

The Tahirih Justice Center will continue to monitor executive orders and their impact on survivors of trafficking, domestic abuse, and sexual violence.

For comment or questions, please contact Archi Pyati at archip@tahirih.org.

¹ “Border Security and Immigration Enforcement Improvements,” “Enhancing Public Safety in the Interior of the United States,” January 25, 2017, and “Protecting the Nation from Foreign Terrorist Entry into the United States,” January 27, 2017, available at www.whitehouse.gov.

² For decades, a number of humanitarian federal immigration laws passed with bi-partisan support have helped protect such survivors against deportation, including the Violence Against Women Act and Trafficking Victims Protection Act, which establish pathways to citizenship such as the VAWA self-petition, U nonimmigrant status, and T nonimmigrant status. In addition, immigration law codifies our international law obligations to protect refugees. See www.uscis.gov for more information about these forms of relief.

³ United National High Commissioner for Refugees, “Women on the Run,” 2015, available at <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>.

⁴ *Id.* The 1951 Refugee Convention is a treaty that establishes who qualifies as a “refugee” and places obligations upon member states to offer them protection. More about the treaty and the obligations it creates is available at www.unhcr.org.

⁵ For example, it took 14 years, action by 3 Attorneys General, concerted action by Members of Congress, and a series of appeals and remands before a Guatemalan woman named Rodi Alvarado who fled severed domestic violence was finally granted asylum. More on the case is available at <https://cgrs.uchastings.edu/our-work/matter-r>.

⁶ Tahirih Justice Center, “Righting the Wrong: Why Detention for Asylum Seeking Mothers and Children Must End Now,” 2015, available at <http://www.tahirih.org/news/new-report-righting-the-wrong/>.

⁷ Lutheran Immigration and Refugee Services and Women’s Refugee Commission, “Locking Up Family Values Again,” 2014, available at <http://lirs.org/familyvalues/>.

⁸ For more on legal challenges to immigration detention, see American Civil Liberties Union at www.aclu.org.

⁹ American Immigration Council, “Access to Counsel in Immigration Court,” 2016, available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

¹⁰ As an example of public statements by law enforcement on this issue, see Letter from the Law Enforcement Immigration Task Force to Committee on the Judiciary, July 20, 2015, available at <https://immigrationforum.org/blog/chiefs-and-sheriffs-oppose-immigration-enforcement-policies-undermining-community-policing/>.

¹¹ CATO Institute, “Terrorism and Immigration: A Risk Analysis,” September 13, 2016, available at https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf.

¹² For more information on the Syrian refugee crisis, see United Nations High Commissioner on Refugees, <http://data.unhcr.org/syrianrefugees/syria.php>.