

February 21, 2017

Review of February 20, 2017 Department of Homeland Security Memoranda

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 report reviews two memoranda issued on February 20, 2017, by John Kelly, Secretary of the Department of Homeland Security (DHS).¹ The memos implement the executive orders signed by President Trump on January 25.² Tahirih issued a [summary](#) of the possible impacts of those orders on survivors of domestic and sexual violence on February 2.

The Kelly memos not only embrace and uphold the significant policy changes put forth in the orders but also add directives that are likely to further impair survivors' ability to access the protections they need and merit under existing U.S. law.³ Tahirih provides this analysis to highlight some of the additional concerns for immigrant survivors of gender-based violence raised by the Kelly memos.⁴

I. Kelly Memo: "Implementing the President's Border Security and Immigration Enforcement Improvements Policies"

This memo issues policy directives that go beyond those outlined in the orders and are likely to harm survivors of violence seeking protection, including:

1) Send asylum seekers who cross the southern border back to Mexico to go through immigration proceedings.

Although the executive order referenced DHS's authority to hold asylum seekers in a contiguous country, Section H of the Kelly memo more clearly spells out the administration's intention to require applicants for entry to the United States to remain in Mexico while their cases are processed. This could give rise to a host of violations of international and Constitutional law and would leave survivors of domestic and sexual violence vulnerable to further harm for the months and years that their cases could take to be adjudicated. As in refugee camps around the world, women and children could be forced to live in unsafe conditions, vulnerable to human trafficking, exploitation, abuse, and other harm.⁵

Furthermore, according to the memo, immigration court proceedings would be carried out remotely via video; these are wholly inadequate methods for conducting extensive hearings in which survivors of trauma such as rape and trafficking must testify in great detail about the abuse they suffered, sometimes for hours.⁶ Another concern is that it will be nearly impossible for any U.S.-based attorneys to represent asylum

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seekers while they are held in Mexico. Asylum seekers are more likely to be able to navigate the complex legal procedures and arguments of a gender-based asylum claim if they have qualified representation.⁷ Due process protections would be impossible to guarantee under these conditions, and many deserving survivors of violence would no doubt be wrongfully repatriated contrary to our longstanding international obligations.

2) Vast expansion of expedited removal to include any immigrant apprehended anywhere in the country, not just at the border.

Section G of the Kelly memo suggests that DHS will issue a new rule expanding expedited removal to its fullest application possible under statute. The memo explains that currently, expedited removal is applied to individuals who have been apprehended within 100 air miles of the border and within 14 days of their arrival; expanding it could make it applicable across the country and to anyone who cannot demonstrate that he or she has been in the United States for at least 2 continuous years.

Expedited removal is a process by which immigrants who are believed to be without legal permission to enter or remain in the United States can be immediately deported – in a matter of hours – without a hearing before an immigration judge. This process has been criticized since its inception because it can result in the wrongful deportation of people who may be eligible for protection under the law, including trauma survivors, before they have had a chance to understand the immigration process or speak with a counselor who can explain their rights.⁸

Of special concern to immigrant survivors of gender-based violence who may be subject to expanded expedited removal is that they will have an extremely limited opportunity to explain any fear of return or other legal basis upon which they could remain in the United States before being removed. A woman who had experienced extreme trauma and feared further harm upon return to her country, for example, would have to very quickly explain this to whichever officer apprehended and began her deportation. Survivors of trauma such as domestic violence may struggle to convey their past experiences or reasons for wanting to stay in the United States without legal representation as well as other counseling support.

3) Involve state and local police officers in the application of immigration laws at the border.

In Section D, the Kelly memo directs not only Immigration and Customs Enforcement (ICE) but also Customs and Border Protection (CBP) to enter into agreements with local law enforcement to enforce federal immigration law, resurrecting and actually expanding much-maligned 287(g) policies.

CBP officers are typically the first American officials to interact with individuals at the southern border. They conduct the very first interviews to determine whether individuals should be given a chance to ask for humanitarian protection. As we know, the majority of those approaching the southern border for protection are women and children fleeing gender-based violence such as rape, torture, domestic violence, or even death.

As it is, advocates are concerned that many individuals who merit a chance to seek asylum are unfairly and unlawfully turned away at the border. This can happen because of translation issues or because the individual is confused about the role of the officer, fears law enforcement, does not understand what information is needed in order to gain access to the system, or is uncomfortable expressing herself given fear, shame, fatigue, hunger, or a multitude of other issues. Traumatized survivors of violence should not be interviewed by anyone who is untrained in ways to mitigate harm when interviewing them and in the nuances of immigration law.

It is unlikely that local police can be adequately prepared to effectively carry out this most important screening role, which can mean the difference between a chance at safety in America as an asylee and a return to certain death or persecution in Central America.

4) Severely limit parole authority.

The Executive Orders call for the detention of all border crossers until their cases are completed, and the Kelly memo affirms that policy position. The Kelly memo goes a step further, however, and makes release on parole a near impossibility.

While the memo states that existing parole guidance – allowing for the release of asylum seekers who have demonstrated that they have a “credible fear” of persecution on a case-by-case basis – will continue to stand, it simultaneously creates significant hurdles to release. For example, even when an ICE or CBP Field Office Director authorizes parole, the Kelly memo requires in Section A (5) that “written concurrence” be provided by the Deputy Director of ICE or the Deputy Commissioner of CBP. These are both positions that oversee extensive national operations, indicating that rarely will they be able to offer support for these parole release requests. This policy all but ensures that no asylum seekers will be released from detention through the mechanism of parole.

All immigrants suffer in the confines of detention centers, but survivors of violence can be seriously harmed as detention has been shown to be re-traumatizing to those who have experienced abuse.⁹ The mental and physical health of women and children who are held in detention centers declines over time. Forcing survivors and their families to stay in detention with no option for parole will make it highly likely that many deserving applicants will either give up their claims because the conditions of detention are intolerable or will fail to obtain protection from the court due to lack of mental health counseling or legal representation, both of which are critical for survivors of trauma to succeed in an asylum case.

II. Kelly Memo: “Enforcement of the Immigration Laws to Serve the National Interest”

This memo issues policy directives that go beyond those outlined in the orders and are likely to harm survivors of violence seeking protection, including:

1) Termination of prosecutorial discretion for victims and witnesses of crime, including domestic violence.

In general, prosecutorial discretion is a necessary tool to ensure that individuals are not unfairly put through removal proceedings and that the immigration court system is not unnecessarily bogged down by cases that do not involve high priorities for removal. In Section A, the Kelly memo reiterates the orders’ sweeping priorities for removal and indicates that all individuals who are removable will be removed through immigration court proceedings or the expedited process discussed above.

The memo rescinds a 2011 directive that instructed ICE officers to exercise prosecutorial discretion in removal cases involving victims and witnesses of crimes, including domestic violence.¹⁰ The 2011 memo explained that when responding to a call for assistance, local law enforcement officers may arrest and charge both a victim and a perpetrator of domestic violence and that it was against policy to attempt to deport a victim in this situation. In addition, the 2011 memo explained that community safety is prejudiced when immigrants are deterred from reporting crimes because of a threat of deportation.

The new priorities for removal are extremely broad and encompass anyone who has not only been convicted of criminal offenses, but also anyone who has been charged or has committed acts that could form the basis of a charge. Many survivors will find themselves in this category precisely because they are abused and exploited. For example, a victim of human trafficking may have been forced or coerced to engage in criminal commercial sex acts. Applying for protection may necessitate admission of a

chargeable offense, paradoxically rendering a victim a priority for deportation even while she applies for protection.

With protections for victims of domestic violence, sexual assault, and human trafficking eviscerated, the Kelly memo leaves immigrant women and children highly vulnerable to deportation and further exploitation and abuse.

2) Revival of the Secure Communities and 287(g) programs.

These programs have both been shown to impede upon the civil rights and civil liberties of individuals across the country and make all of our communities less safe, as they discourage cooperation with law enforcement for the reporting of crimes. Domestic violence, trafficking, and sexual assault victims and their children are in grave danger of experiencing and witnessing escalating violence when they cannot safely call 911 for help.

As discussed above, the Kelly memo directs not only ICE but also CBP to engage local law enforcement officers in administering complex immigration laws. It is possible that local police will be able to initiate the expedited removal process for a mother when she calls to report sexual violence against her child, for example, tearing families apart and possibly leaving children even more vulnerable to their abusers.

3) Any DHS officer can initiate removal at anytime, anywhere.

In Section C of the memo, Secretary Kelly instructs all DHS personnel to “initiate enforcement actions against removable aliens encountered during the performance of their official duties.” This includes anyone a DHS officer believes is in violation of immigration laws. There may be many moments when survivors of domestic and sexual violence encounter DHS officers, either when complying with requirements to check-in and demonstrate adherence to court dates or when attending interviews for certain applications. These survivors may have admitted to violating immigration laws in the course of filing their applications for protections. The memo simply indicates that DHS officers should follow the priorities for removal listed in Section A, but again, that section includes such broad categories that every undocumented immigrant in America, including those eligible for humanitarian relief, could well fall into one or more of those priority categories.

4) Shift resources away from services for immigrants to deportation.

While ICE’s function is primarily to detain, prosecute, and deport immigrants, there are several functions inside the agency that could be seen as “advocating on behalf of immigrants” under Section D of the memo. These could include important services that ICE provides to victims of human trafficking as well as many services associated with the tens of thousands of immigrants who are housed in detention facilities by ICE each day, such as: monitoring for compliance with the Prison Rape Elimination Act; ensuring community liaison services; providing mental and physical health services to detainees; complying with detention standards; facilitating access to legal orientation programs; and access to other services for detainees. Implementing these programs and providing these services are an aspect of immigration enforcement itself.

Terminating these functions immediately with the purpose of shifting resources to deportation will have a significant impact on victims of human trafficking, domestic violence, and sexual assault who find themselves part of ICE investigations or detained by ICE.

5) End application of the Privacy Act to immigrants.

In Section G, Secretary Kelly rescinds a 2009 memo which required that personal information in the DHS record systems be subject to the Privacy Act regardless of an individual’s immigration status. Now,

survivors of domestic violence, sexual assault, and human trafficking may have their information shared publicly, making their location and other information available to their persecutors. While there are statutory provisions in the Violence Against Women Act that protect survivors who have already applied for protection under U.S. law, all other immigrant survivors could be exposed to significant danger from their abusers.

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

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

¹ “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” and “Executive Order: Enhancing Public Safety in the Interior of the United States,” February 20, 2017, available at www.dhs.gov.

² “Border Security and Immigration Enforcement Improvements,” “Enhancing Public Safety in the Interior of the United States,” January 25, 2017, available at www.whitehouse.gov.

³ 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.

⁴ The Tahirih Justice Center, “Summary of January 25 and 27, 2017 Executive Actions: Possible Impacts on Survivors of Domestic and Sexual Violence,” February 2, 2017, available at <http://www.tahirih.org/wp-content/uploads/2017/02/Summary-of-January-25-and-27-Executive-Orders-FINAL.pdf>.

⁵ See generally Women’s Refugee Commission at <https://www.womensrefugeecommission.org/gby>, and Amnesty International, “Female Refugees Face Physical Assault, Exploitation, and Sexual Harassment on Their Journey Through Europe,” January 18, 2016, available at <https://www.amnesty.org/en/latest/news/2016/01/female-refugees-face-physical-assault-exploitation-and-sexual-harassment-on-their-journey-through-europe/>.

⁶ Chicago Appleseed Foundation, “Videoconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court,” August 2, 2005, available at http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf.

⁷ See, for example, American Immigration Council, “Access to Counsel in Immigration Court,” September 28, 2016, <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

⁸ Human Rights First, “Frequently Asked Questions: Asylum Seekers and the Expedited Removal Process,” November 2015, available at <http://www.humanrightsfirst.org/sites/default/files/FAQ-asylum-seekers-and-the-expedited-removal-process.pdf>.

⁹ 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/>.

¹⁰ “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,” June 17, 2011, available at <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.