

Women's Refugee Commission Submission to the Working Group on the Issue of Discrimination Against Women in Law and Policy

Women deprived of liberty

This submission was prepared by the Women's Refugee Commission to be considered for contribution to the upcoming report of the UN Working Group on 'Women Deprived of Liberty'. This report addresses the questions in Section IV of the questionnaire, 'Migrations and crisis situations.' This submission focuses on the increased detention of women seeking asylum at the southern U.S. border, the detention and mistreatment of pregnant women by U.S. immigration officials, and separation of families and proposed expansion of family detention. Our submission includes this introductory statement, portions of which are taken (and in some cases updated) from the Women's Refugee Commission *Prison for Survivors* Fact Sheet and full report, originally published October 2, 2017. We also submit our complete October 2017 report *Prison for Survivors*,¹ as well as our Joint Complaint on the Detention of Pregnant Women to the Department of Homeland Security's Office for Civil Rights and Civil Liberties and Office of Inspector General, originally submitted on September 26, 2017.²

Introduction

The U.S. immigration detention system is undergoing a fundamental and nearly unprecedented transformation. Long documented to be costly, with glaring gaps in oversight and accountability, detention has rose dramatically in recent years for one population in particular: women seeking protection at the southern U.S. border.³

It is not illegal to enter the U.S. to seek asylum. In fact, the right to seek asylum is guaranteed and protected under U.S. and international law,⁴ and governments may not return asylum seekers to a country where their life or liberty is at stake.⁵

Nevertheless, we have seen a fundamental shift in the response to individuals and families who are – lawfully – seeking asylum at the U.S. border. The U.S. immigration detention system has skyrocketed already high capacity of 34,000 detention beds during much of the Obama administration to approximately 44,000 individuals detained in Immigration and Customs Enforcement (ICE) custody on any given day. Over 3,000 of these spaces are in family detention centers, where parents are detained together with their children. This practice – which the Obama administration initially largely ended in 2007 – was resurrected in 2014; the Trump administration is now seeking to expand both the numbers of families in detention and the length of time that children can be detained in these facilities.⁶

¹ Women's Refugee Commission, *Prison for Survivors: The Detention of Women Seeking Asylum in the United States*, Women's Refugee Commission, October 2017, available at: <https://www.womensrefugeecommission.org/rights/resources/1528-prison-for-survivors-women-in-us-detention-oct2017>.

² "Complaint: U.S. Immigration and Customs Enforcement's Detention and Treatment of Pregnant Women," Submitted September 26, 2017. Available at: <https://www.womensrefugeecommission.org/images/zdocs/PUBLIC-VERSION-Complaint-to-CRCL-OIG-Pregnant-Women-in-ICE-Custody-11-13-17.pdf>.

³ Note that our most recent data stems from September 2017; Women's Refugee Commission does not have more recent data specifically on the numbers of women in detention.

⁴ See *Universal Declaration of Human Rights*, United Nations, Ar. 14, 1948; See also *Convention and Protocol Relating to the Status of Refugees*, UN General Assembly, 1951. See *Refugee Act of 1980*, P.L. 96-212, U.S. Congress, 1980 and *Resource: Refugee Policy Updates*, Refugee Council USA, 2017.

⁵ See *Convention and Protocol Relating to the Status of Refugees*, vol. 606. Article 33, 1967.

⁶ Women's Refugee Commission, *The Harm of Family Detention*, June 2018, available at: <https://www.womensrefugeecommission.org/images/zdocs/WRC-harm-of-family-detention.pdf>.

At the same time as the immigration detention system was expanding, the proportion of women in detention and the proportion of detained asylum-seeking women grew dramatically. The reason for their detention is not because they posed a threat to national or public security, but simply to send a message to others fleeing hard while fueling a system that has long been about profit and politics.

The Trump Administration has already capitalized on the immigration detention system it inherited, continually requesting increased funding (most recently for 52,000 spaces in Fiscal Year 2019⁷). Reports from 2017 indicated that the administration identified 21,000 new detention beds in 27 facilities around the United States, which would represent a more than 50 percent increase in the current number of detention beds.⁸ Further, the Trump administration has been reported to consider allowing current short-term facilities to hold detainees for up to seven days; under these rules both these and certain other detention facilities would be held to far lower standards than the standards previously in place.⁹ These increases are occurring at the same time as even the Department of Homeland Security's (DHS) own Office of Inspector General (OIG) has found grave deficiencies in immigration detention facilities and with ICE's system of inspecting detention facilities.¹⁰ Under the administration it has become even more difficult for asylum seekers to be released from detention (though these practices have long been inconsistent, as found in our report),¹¹ and the initial threshold for making an asylum claim has been raised.¹²

The administration has made clear its intention to grow the system while reducing the basic protections the previous administration developed to try to improve treatment and conditions; regardless of the human or fiscal cost. Release from detention is erratic, conditioned on impossibly high bonds, and increasingly not permitted at all.

The administration pursues these tactics and policies despite the fact that it is aware of and has used far more humane alternatives. One in particular, the Family Case Management Program,¹³ represented the first time in decades that the government invested in a case-management approach to alternatives to detention. The program matched families seeking protection with case managers who ensured they had access to social, medical, and legal services, while also helping them understand their immigration and

⁷ See White House Addendum to the FY 2019 Budget, available at: <https://www.whitehouse.gov/wp-content/uploads/2018/02/Addendum-to-the-FY-2019-Budget.pdf>

⁸ David Nakamura, "Trump administration moving quickly to build up nationwide deportation force," *The Washington Post*, April 12, 2017, https://www.washingtonpost.com/politics/trump-administration-moving-quickly-to-build-up-nationwide-deportation-force/2017/04/12/7a7f59c2-1f87-11e7-be2a-3a1fb24d4671_story.html?utm_term=.a66ee8c432bb.

⁹ Caitlin Dickerson, "Trump Plan Would Curtail Protections for Detained Immigrants," *The New York Times*, April 13, 2017, https://www.nytimes.com/2017/04/13/us/detained-immigrants-may-face-harsher-conditions-under-trump.html?_r=0; See also *Budget Overview, Fiscal Year 2018: Congressional Justification*, DHS: U.S. ICE, pp. 138-139, https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf.

¹⁰ DHS Office of Inspector General, "ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements," June 26, 2018, available at: <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>; See also, DHS Office of Inspector General, "Management Alert—Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California," September 27, 2018, available at: <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf>.

¹¹ *Damus v. Nielsen*. Filed March 15, 2018. Available at: https://www.humanrightsfirst.org/sites/default/files/parole_litigation_Mar15.pdf. "Why Holding Asylum Seekers Without Parole is Unlawful." Eleni Bakst and Laura Gault. March 15, 2018. Available at: <https://www.justsecurity.org/53890/holding-asylum-seekers-parole-unlawful/>.

¹² *Executive Order: Border Security and Immigration Enforcement Improvements*, The White House Office of the Press Secretary, January 25, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>; See also Summary of February 13, 2017 "Asylum Division Lesson Plan Implementing Executive Orders," Tahirih Justice Center, Marcy 6, 2017, <https://www.tahirih.org/wp-content/uploads/2017/03/Tahirih-Summary-of-CFI-RFI-Changes-3.6.17.pdf>.

¹³ Women's Refugee Commission, *Family Case Management Program*, available at: <https://www.womensrefugeecommission.org/images/zdocs/Backgrounder-FCMP.pdf>.

court requirements. The program had both high compliance rates and only cost a fraction compared to the use of ICE detention space.

Prison for Survivors – Key Findings

Included with this submission is our full 2017 report, *Prison for Survivors: the Detention of Women Seeking Asylum in the United States*, which details at length the Women’s Refugee Commission’s 2016 – 2017 research into the detention of women in U.S. immigration custody. Most of the report’s findings remain relevant a year later, although one area in particular – the separation of family members – became official government policy and reached a crisis point in spring and summer of 2018 as the Trump administration implemented its zero-tolerance policy. We are including here our key findings from the report as pertains to the numbers of women in detention, their due process rights and access to justice, the conditions of detention they experience, and the barriers to release from detention they face.

Key Findings – Prison for Survivors

More women are in detention than ever before, and the number of women and girls seeking asylum while in detention has grown exponentially.

- While the total number of detainees in immigration custody has increased, the percentage of women among that population has also increased—by 60 percent. In 2009, women made up nine percent of the immigration detainee population. By 2016, approximately 4,829 women were detained in ICE facilities, including family detention centers, constituting 14.6 percent of the total detained population in ICE custody that day. Between 2013 and 2016, the number of women and girl asylum seekers going through an initial asylum screening, likely while in detention, more than quadrupled. Finally, as of April 2016, a greater proportion of those in detention are women than ever before, and the number of women and girls seeking asylum while in detention has dramatically grown.¹⁴

U.S. detention practices preclude meaningful due process and access to justice for women in detention.

- Access to counsel and legal information are a necessity for understanding the asylum process. But the remoteness of detention facilities and the often erratic timeline of immigration proceedings when in detention impede access to the few existing local service providers. In addition, these service providers are themselves overburdened and under-resourced.
- Access to interpreters is crucial for key interactions with government officials and the asylum process, and yet WRC identified numerous cases of inadequate or nonexistent interpretation, particularly for those who speak minority and indigenous languages. This not only means women cannot explain their reasons for asylum, but can also result in prolonged detention.
- For those in detention, initial asylum screenings are often conducted by phone, and immigration court hearings by video. Even when a facility hosts an in-person immigration court, numerous obstacles remain, including last minute transfers away from those facilities. These practices render due process nearly impossible.

Detention practices—both treatment and conditions—ignore the needs of women and impede access to protection.

¹⁴ Data snapshot of April 30, 2016. Obtained through Freedom of Information Act (FOIA) request. On file with Women’s Refugee Commission.

- Many women expressed a fear of retaliation and a sense of powerlessness in trying to file grievances or complaints about treatment and conditions.
- Medical care and mental health care was repeatedly reported to be insufficient or denied, including in cases of serious medical conditions and pregnancy, in which mothers and babies were endangered.
- Conditions of detention are inappropriate and uncomfortable for women seeking protection. WRC identified serious concerns over privacy—including showers and toilets with little to no privacy, insufficient access to basic needs such as sanitary products, and humiliation and physical discomfort at having to wear underwear and bras that were visibly soiled from prior use. At one facility, a woman reported not having enough sanitary napkins and feeling forced to choose between buying pads or calling her children.
- At some facilities, access to meaningful recreation was often limited. Women at Mesa Verde were forced to use a much smaller recreation area than men. At Joe Corley, nearly every woman WRC interviewed reported that access to outdoor recreation was far below the required minimum of one hour each day, and consisted of time in a mid-sized indoor gym with an opening in the ceiling to allow in fresh air.
- At nearly all facilities, women reported exorbitant phone fees, making contact to the outside world impossible, or forcing some women to work for meager wages in order to be able to speak to their families.

Arbitrary high bond and no-release policies kept—and continue to keep—asylum-seeking women detained and protection denied.

- Asylum-seeking women are often subjected to prolonged detention despite posing no flight or safety risk. The need to fill beds for political or financial reasons often seems to supersede any actual concern over public safety risks.
- As a result, the conditions of release offered to women are often inconsistent, erratic, and not commensurate with the risk posed by the detained. WRC found that bond amounts varied wildly based on detention location, country of origin, and other factors. The use of bond and parole appears to have become even stricter—or even nonexistent—under the Trump administration.

Pregnant Women in Detention

(see: *September 26, 2017 Complaint on the Detention of Pregnant Women in ICE Custody* and “ICE’s policy for detention of pregnant women is a new low.”¹⁵)

Past ICE policy and relevant guidance strongly discouraged the detention of pregnant women, except in cases where women were subject to “mandatory detention” or in “extraordinary circumstances.”¹⁶ The risks of detention for women outlined in the previous section are further compounded in severity, impact and harm for pregnant women.

Although ICE guidance on the detention of pregnant women remained in effect for much of 2017, Women’s Refugee Commission and others began to note an uptick in the detention of pregnant women in summer 2017, including hearing of incidents of miscarriage. Together with other organizations, we filed a complaint with DHS’s oversight agencies – the Office for Civil Rights and Civil Liberties, and the Office of Inspector General – in September 2017, documenting 10 cases of women who were detained while

¹⁵ Katharina Obser, “ICE’s Detention of Pregnant Women is a New Low,” *TribTalk – the Texas Tribune*. May 9, 2018. Available at: <https://www.tribtalk.org/2018/05/09/ices-policy-for-detention-of-pregnant-immigrants-is-a-new-low/>.

¹⁶ “Identification and Monitoring of Pregnant Detainees,” ICE Policy issued August 15, 2016, available at: https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentifierMonitoringPregnantDetainees.pdf.

pregnant, suffered from inadequate medical care, poor nutrition, suffered miscarriages, and yet remained detained for no reason other than that ICE did not follow its own policy or use its discretion to release them. In March 2018, it was reported that ICE had secretly issued a new directive pertaining to the detention of pregnant women in December 2017; the new directive ends all presumption of release for pregnant women as well as eliminates stricter oversight of their care and regular review of their custody.¹⁷ The detention of pregnant women can have devastating consequences, including women so afraid that they may withdraw their claim for protection or relief and choose deportation to a country they fear only to no longer be detained.¹⁸ The full complaint is included in this submission; as just one example, a pregnant woman was transferred no fewer than six times between facilities over a 24 hour period, a trip that was so arduous she required hospitalization after.¹⁹

Women with Children

The Trump administration's zero-tolerance policy, implemented first as a pilot in 2017 in the El Paso area²⁰ and nationally beginning in April 2018, has been well documented for its impact on families seeking protection at the U.S. border. Families were torn apart and over 2,000 children were separated from their parents. Parents were offered no or little information on what was happening to them, how they could locate their children, and how they could contact or reunite with their children. Following a criminal prosecution, parents were subsequently sent to ICE detention centers for adults, from where some were deported before they ever had a chance to reunite with their children. Children were effectively rendered unaccompanied and sent to Office of Refugee Resettlement (ORR) shelters or foster care.

Most recently, the DHS Office of Inspector General issued a report²¹ with observations of the administration's implementation of the Zero Tolerance policy and family separation practices. The report found numerous examples of harmful practices that we know had devastating consequences. The findings included that during the implementation of the zero-tolerance policy, nearly 35% of children were kept in border custody often for longer than the legal maximum of 72 hours, including many for five or more days and one child for 25 days. The report also found that parents were not given information about the fact that they were being separated; that once separated, parents were not always informed of whom to call to try to locate and speak to their child; and that even when they did contact the appropriate number they could not always receive information about or speak with their child. Further, the report found the Department of Homeland Security did not adequately track family members who were separated and had insufficient data on family separation. In one border area, the report found that while government officials *could* have reunited some parents with their children who remained in border custody, the government did

¹⁷ "Directive: Identification and Monitoring of Pregnant Detainees," ICE Directive issued December 14, 2017, available at: <https://www.ice.gov/directive-identification-and-monitoring-pregnant-detainees>.

¹⁸ See: *Prison for Survivors*.

¹⁹ See also: Roque Planas, "Two Women Say They Lost Pregnancies in Immigrant Detention Since July," *HuffPost*, September 27, 2017, available at: https://www.huffingtonpost.com/entry/immigrant-detention-pregnancy_us_59cbaee4e4b05063fe0e211b; Ema O'Connor and Nidhi Prakash, "Pregnant Women Say They Miscarried in Detention and Didn't Get the Care They Need," *Buzzfeed News*, July 9, 2018, available at: <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump>.

²⁰ See Dara Lind, "Trump's DHS is using an extremely dubious statistic to justify splitting up families at the border," *Vox*, May 8, 2018, Available at: <https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-illegal-immigration-border-asylum-families>. See also "How the Trump Administration Got Comfortable Separating Immigrant Kids from Their Parents." Jonathan Blitzer. *The New Yorker*. May 30, 2018. Available at: <https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents>.

²¹ DHS Office of Inspector General, "Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy," September 27, 2018, available at: <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

not do so because sending the parent back to the border – where the separated child(ren) in some cases were still held prior to their own transfer – would have required additional paperwork.

The administration’s purported end to family separation brought with it a new attempt at deterrence: attempting to increase and prolong the use of family detention.²² As is the case with ICE detention generally, family detention creates obstacles to finding a lawyer and navigating an immigration case, as well as creates serious concerns over access to medical and mental health care and appropriate treatment.²³ Indeed, ICE’s own advisory group on family detention – a nonpartisan group of subject matter experts convened by DHS to make recommendations on how to improve family detention – issued as its top recommendation in October 2016 that ICE discontinue the detention and separation of families altogether.²⁴ The practice has also been opposed by the American Academy of Pediatrics,²⁵ as well as more recently two physicians who have consulted for DHS’s Office for Civil Rights and Civil Liberties.²⁶

Despite this, the administration has sought to overturn the legal standards and protections in place for children in government custody. These protections – including those found in the *Flores* Settlement Agreement that governs the treatment and custody of migrant children in government custody - are grounded in child welfare and protection principles, yet are being portrayed as “loopholes.” WRC is deeply concerned that the administration has proposed regulations that would gut critical protections found in *Flores*,²⁷ and earlier this summer issued a call for an increase in family detention by up to 15,000 beds.²⁸

Conclusion

As we found in our report, the U.S. immigration detention system is fundamentally broken. The experiences of women in detention are a clear warning for what is to come: dramatic expansion of the detention system concurrent with the elimination of standards that provide the only existing protections available to those in detention, and a further breakdown of the U.S. asylum system as the United States continues to curb the few remaining avenues to protection.

Protection should never be subject to partisanship. Many asylum seekers, like others, can and should be permitted to live in the community with family members or friends while they pursue their asylum cases. For women who are found through an individualized assessment to need additional attention and care, the government could place them into community-based ATD, including the case- management-focused programs that have been piloted by non-governmental organizations and ICE’s own recently terminated

²² *Executive Order: Affording Congress an Opportunity to Address Family Separation*. The White House. June 20, 2018.

Available at: <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

²³ See, for example, *Locking Up Family Values, Again*, Women’s Refugee Commission & Lutheran Immigration and Refugee Service, October 2014, available at: <https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again>.

²⁴ *Report of the ICE Advisory Committee on Family Residential Centers*. October 2016. Available at: <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

²⁵ *Detention of Immigrant Children*. Julie Linton, Marsha Griffin, Alan Shapiro. American Academy of Pediatrics. March 2017. Available at: <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>

²⁶ Miriam Jordan, “Whistle-Blowers Say Detaining Migrant Families ‘Poses High Risk of Harm,’” *New York Times*, July 18, 2018, available at: <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>.

²⁷ Joel Rose, “Trump Administration Proposes Rule To Allow Longer Detention of Migrant Children,” *NPR*, September 6, 2018, available at: <https://www.npr.org/2018/09/06/645195329/trump-administration-proposes-rule-to-allow-longer-detention-of-migrant-children>. See also: *The Harm of Family Detention*.

²⁸ Amy Taxin, “Administration seeks to expand family detention” *Associated Press*. June 24, 2018. Available at: <https://apnews.com/43eada4f72904f05ac0698938f8d3da0/Administration-seeks-to-expand-immigrant-family-detention>.

Family Case Management Program.²⁹ ATD programming and release to a sponsor are vastly more appropriate than detention to help mitigate any concerns about flight while providing women with access to medical and mental health care, housing, legal counsel, and other supports that can help them articulate an asylum or other protection claim. ATD programs have also been found to be effective in achieving the government's objective of immigration compliance.

The U.S. government should and must recognize that detention and deterrence efforts are not and never will be appropriate for those who are fleeing for their lives.

²⁹ *The Real Alternatives to Detention*, Women's Refugee Commission, National Immigrant Justice Center, et al., July 2017, <http://www.aila.org/infonet/the-real-alternatives-to-detention>.