

## The Trump Administration's Checklist to Destroy the U.S. Asylum System

May 22, 2018

*"I feel peace...."*

*I want women who came here from my country to know that they are not kitchen utensils."*

– NIJC client who won asylum after fleeing sixteen years of beatings and sexual assault by her husband in Honduras, speaking about her fear that others like her will no longer be welcome in America<sup>1</sup>

The United States of America is dimming the light long held high by the Statue of Liberty, as the Trump administration slowly but surely checks off boxes on a list with the ultimate goals of closing our borders to people fleeing persecution, including children, and removing immigrant members of our communities. First introduced to the American public as dehumanizing campaign rhetoric, these policies have been integrated into our federal government policy making through the White House's early immigration executive orders and January 2018 legislative framework for immigration reform<sup>2</sup>, and most perniciously, through a series of anti-immigrant policies implemented by the Department of Homeland Security (DHS) and Department of Justice. The National Immigrant Justice Center (NIJC) calls on all members of Congress to resist each and every action on this checklist and—in actions and words— fight to preserve the right to asylum in our nation.

### The Administration's Checklist for Ending Asylum in America

- ✓ Use language that dehumanizes and demonizes asylum seekers.<sup>3</sup>
- ✓ Distort basic human rights and child welfare protections as “fraud” and “loopholes,”<sup>4</sup> ignoring the reality that asylum is an exclusive protection in U.S. law only available to those who prove they meet each element of the complex definition of refugee.
- ✓ Jail refugees and asylum seekers while they fight their cases in immigration court<sup>5</sup> and eliminate programs that provide humane and significantly cheaper alternatives to detention.<sup>6</sup>

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<sup>1</sup> NIJC's client's story was profiled by the Marshall Project. See Julia Preston, The Marshall Project, “Should America Give Refuge to Abused Women?” Apr. 27, 2018, <https://bit.ly/2KH8MyA>.

<sup>2</sup> For annotations on the White House's proposed framework for immigration-related legislation, see <https://bit.ly/2rXouPj>.

<sup>3</sup> The president recently referred to some individuals seeking to enter the country as “animals,” stating: “We have people coming into the country—or trying to come in, we're stopping a lot of them—but we're taking people out of the country, you wouldn't believe how bad these people are. These aren't people. These are animals...” See Scott Neuman, NPR, “During roundtable Trump calls some unauthorized immigrants animals,” <https://n.pr/2LaCAVh>.

<sup>4</sup> The Attorney General uses a broad brush to paint all asylum seekers arriving at the southern border as fraudsters seeing to exploit the systems. See Sari Horwitz, Washington Post, “Sessions calls on Congress to tighten rules for people seeking asylum,” Oct. 12, 2017, <https://wapo.st/2rXp3IO>. In actuality, what the Attorney General and other administration officials derisively refer to as “loopholes” are basic protections for vulnerable populations seeking to navigate a complex immigration system. See Eleni Bakst, Human Rights First, “DHS Secretary Nielsen uses alternative facts to attack children and asylum seekers,” Jan. 23, 2018, <https://bit.ly/2ISIZr8>.

<sup>5</sup> The administration has enacted a near-blanket policy of refusing requests for release on parole brought by asylum seekers, regardless of individual risk factors or entire lack thereof. As part of pending litigation on this issue, the American Civil Liberties Union points to 96% detention rates of asylum seekers at five of the largest immigration

- ✓ Keep asylum seekers locked up in jails in remote locations so it is nearly impossible for them to get lawyers.<sup>7</sup> (Without lawyers, their chances of winning asylum are dramatically lower.<sup>8</sup>)
- ✓ Eliminate the right to preliminary hearings for asylum seekers so it is harder for them to win protection.<sup>9</sup>
- ✓ Bar refugees entry into the United States when they arrive at our borders seeking safety. Give border officers free reign to say dehumanizing and hateful things to asylum seekers, and to give false information about our immigration system.<sup>10</sup>
- ✓ Tear children from their parents' arms when they arrive in the U.S. seeking safety, sending family members to different detention centers in different parts of the country.<sup>11</sup> Refuse to

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field offices. Spencer S. Hsu, Washington Post, "U.S. judge appears inclined to block Trump administration crackdown on asylum seekers," May 27, 2018, <https://wapo.st/2GDNP5d>.

<sup>6</sup> One of the administration's first immigration-related policy decisions was to terminate the "Family Case Management Program," an alternative to detention program available to asylum seekers that offered case management support throughout immigration court proceedings and boasted tremendous compliance rates and cost savings. See Aria Bendix, The Atlantic, "ICE Shuts Down Program for Asylum Seekers," June 9, 2018, <https://theatl.in.tc/2GDNWOb>.

<sup>7</sup> About 30% of immigrants are detained in remotely located jails that are more than 100 miles from the closest legal service provider. See Kyle Kim, Los Angeles Times, "Immigrants held in remote ICE facilities struggle to find legal aid before they're deported," <https://lat.ms/2fUFwr8>. Many asylum seekers are held in these remote facilities for months or years, left to feel that it would "take a miracle" to find a lawyer to assist them. See National Immigrant Justice Center, What Kind of Miracle: The Systemic Violation of Immigrant's Right to Counsel at the Cibola County Correctional Center (Nov. 2017), <https://bit.ly/2IDXsXK>.

<sup>8</sup> Across the board, immigrants with attorneys are more likely to obtain protection from deportation due to the complex nature of the immigration laws. See Ingrid Eagly and Steve Shafer, American Immigration Council, Access to Counsel in Immigration Court (Sept. 28, 2016), <https://bit.ly/2dHD4EZ>.

<sup>9</sup> On March 5, 2018, the Attorney General issued a precedential decision in a case called *Matter of E-F-H-L-*, vacating a previous decision of the Board of Immigration Appeals affirming that all asylum applicants are entitled to a full evidentiary hearing. *Matter of E-F-H-L-*, 27 I.&N. Dec. 226 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1040936/download>. Advocates fear the decision will be used to deny asylum applicants the basic right to present their case, especially those most vulnerable refugees who are suffering recent trauma and may require additional assistance in preparing these claims. Former Immigration Judge Jeffrey Chase discussed this and other concerns with the decision, see Jeffrey Chase, "The A.G.'s strange decision in *Matter of E-F-H-L-*," Mar. 10, 2018, <https://bit.ly/2s1ainp>.

<sup>10</sup> The systemic practice of turning away asylum seekers who seek to present at ports of entry, plus these and other derogatory statements made with impunity by Customs and Border Protection officers, have been documented in ongoing litigation brought by Al Otra Lado and individual asylum seekers. See American Immigration Council, "CBP Practice of Turning Away Asylum Seekers at U.S. Southern Border is Systematic, Documented in New Legal Filing," Nov. 14, 2017, <https://bit.ly/2KKaaAO>.

<sup>11</sup> The administration is regularly separating families when they seek asylum at the southern border, whether they present at a port of entry or attempt to enter between ports. More than 700 children, including more than 100 under the age of four, have been torn from their parents just this fiscal year. See Caitlin Dickerson, The New York Times, "Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border," Apr. 20, 2018, <https://nyti.ms/2qOS9sI>.

establish protocols so parents can speak with their children or at least find out where their children are.<sup>12</sup>

- ✓ Criminalize asylum seekers and prosecute all individuals who cross the U.S. border to seek safety.<sup>13</sup> (In the process, violate the United States' obligations under the Refugee Convention).<sup>14</sup>
- ✓ Categorize refugee children taken from their parents as "unaccompanied,"<sup>15</sup> prolong the detention of immigrant children in Office of Refugee Resettlement shelters,<sup>16</sup> and threaten to detain and deport family members who come forward to care for them.<sup>17</sup> Use this manufactured crisis as an excuse to detain children on military bases.<sup>18</sup>

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<sup>12</sup> An NIJC attorney recently met with three women who were separated from their young children after CBP officers referred them for prosecution for illegal entry. All three women are seeking asylum in the United States after fleeing years of violence at the hands of their intimate partners and gang members. When NIJC first met the women, none had been able to speak to their children or even been informed of their whereabouts after nearly three weeks in government custody.

<sup>13</sup> Richard Gonzales, NPR, "Sessions Says 'Zero Tolerance' for Illegal Border Crossers, Vows to Divide Families," May 7, 2018, <https://n.pr/2s1sopx>.

<sup>14</sup> Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees, incorporated into the 1967 United Nations Protocol Relating to the Status of Refugees, as ratified by the United States in 1968, states: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

<sup>15</sup> When DHS separates children from their parents or legal guardians at the border, it designates these children as "unaccompanied" and transfers them to the custody of the Office of Refugee Resettlement within the Department of Health and Human Services. See Caitlin Dickerson, The New York Times, "Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border," Apr. 20, 2018, <https://nyti.ms/2qOS9sI>.

<sup>16</sup> The Office of Refugee Resettlement frequently disregards its legal mandate to release children to the least restrictive setting as quickly as possible; often these delays are justified by allegations of gang affiliation routed in little to no evidence. See Jonathan Blitzer, The New Yorker, "Why are undocumented minors spending so much time in custody," Mar. 8, 2018, <https://bit.ly/2Ga0vC9>.

<sup>17</sup> A freshly signed memorandum of agreement between DHS and the Department of Health and Human Services (DHHS)—which provides care and custody to unaccompanied immigrant children—requires DHHS to share massive amounts of biometric and other information about the children in its care and their potential sponsors with ICE. This agreement essentially requires undocumented persons in the United States to choose between coming forward to care for a beloved child in need or protecting themselves and their family from immigration detention and deportation. See Eli Hager, The Marshall Project, "Trump's Quiet War on Migrant Kids," <https://bit.ly/2rydruK>. Potential sponsors' fears are not simply hypothetical; in late 2017, DHS unleashed an enforcement operation against more than 400 family members and friends who volunteered to sponsor and care for children who arrived in the United States unaccompanied. NIJC documented this enforcement operation in an administrative complaint to the Office of the Inspector General, available at <https://bit.ly/2wZZIIO>. See also John Burnett, NPR, "ICE Has Arrested More Than 400 In Operation Targeting Parents Who Pay Smugglers," Aug. 18, 2018, <https://n.pr/2GDK0Np>.

<sup>18</sup> Marie Solis, Newsweek, "Trump Administration Planning to House Migrant Children on Military Bases as Shelters Reach Capacity," May 15, 2018, <https://bit.ly/2L4pJnJ>.

- ✓ Increase the already-crushing backlog of cases in immigration court by stripping immigration judges of tools to manage their dockets, such as administrative closure.<sup>19</sup>
- ✓ Unilaterally reopen a court decision that is based on years of legal precedent<sup>20</sup> as a strategy to potentially destroy asylum protections for the most vulnerable, including survivors of domestic violence.<sup>21</sup>
- ✓ Turn immigration judges into enforcement officers by imposing quotas for them to order more deportations.<sup>22</sup>
- Deliberate ways to terminate the judicial consent decree that requires the safe and humane treatment of immigrant children who come to the U.S. alone seeking safety. In its place, create regulations that prioritize DHS's operational needs and disregard the needs of the child.<sup>23</sup>

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<sup>19</sup> Administrative closure has served for decades as an important “docket management tool” that gives immigration judges the often crucial authority to “temporarily remove a case from an Immigration Judge’s active calendar or from the Board’s docket.”<sup>19</sup> *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017). Yet under pressure to increase removals, the use of the practice declined dramatically under this administration up and until the moment when the Attorney General announced his decision to strip immigration judges of the authority to use administrative closure in nearly all cases. *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). Largely due to these policies, the immigration court backlog has grown by 145,000 cases under the first year of the Trump administration. *See* Reade Levison, Reuters, “Exclusive: Under Trump, prosecutors fight reprieves for people facing deportation,” Mar. 29, 2018, <https://reut.rs/2pOjWss>.

<sup>20</sup> 8 C.F.R. § 1003.1(h) provides the Attorney General the authority to take decisions issued by the Board of Immigration Appeals and certify them to himself for the purpose of issuing a new interpretation of law. Long criticized as an unusual and potentially dangerous grant of judicial authority to the executive branch, this authority has become a weapon in the hands of Attorney General Sessions.

<sup>21</sup> In a case called *Matter of A-B-*, the Attorney General has expressed his intent to answer the question of whether and under what circumstances victims of “private criminal activity” merit protection under the United States asylum laws. Because the underlying case in *A-B-* is that of a woman seeking protection from a brutal history of domestic violence, there is grave reason to fear that the Attorney General may use this decision to “turn back the clock on the protections we offer survivors of domestic violence.” *See* Tahirih Justice Center, “Asylum Under Threat: the AG’s Review of *Matter of A-B-*,” Mar. 14, 2018, <https://bit.ly/2IW7Bht>. *See also* Jane Fonda and Karen Musalo, *The New York Times*, “Her Husband Beat Her and Raped Her. Jeff Sessions Might Deport Her,” May 17, 2018, <https://nyti.ms/2ILYoZc>.

<sup>22</sup> In the face of fierce opposition from immigration judges themselves, the Department of Justice has imposed case quotas on immigration judges, requiring completion of at least 700 cases per year, a goal most judges describe as nearly impossible. *See* Betsy Woodruff, *The Daily Beast*, “New Quotas for Immigration Judges are ‘Incredibly Concerning,’ Critics Warn,” Apr. 2, 2018, <https://thebea.st/2IzQP8v>. *See also* National Association of Immigration Judges, “Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges,” Oct. 1, 2017, <https://bit.ly/2rWsbou>.

<sup>23</sup> A leaked draft of these proposed regulations has been obtained by the *Washington Post*. The regulations would, among other things, allow DHS to separate families merely due to the agency’s operational needs and give the executive branch unfettered authority to self-license its family detention centers in an effort to circumvent judicially imposed limits on the amount of time families may be jailed pending their immigration court proceedings. *See* Maria Sachetti, *Washington Post*, “DHS proposal would change rules for minors in immigration detention,” May 9, 2018, <https://wapo.st/2IAjHtg>.

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**NIJC calls on elected officials to prevent the administration from dismantling the U.S. asylum system, and to work tirelessly to restore the protections that have already been eliminated.**