



# **THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES**

## **CONCERNS REGARDING UNACCOMPANIED CHILDREN IN IMMIGRATION COURT REMOVAL PROCEEDINGS MARCH 23, 2016**

**Prepared for the Congressional Briefing on Unaccompanied Children (UAC)**

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**"Impact of U.S. Immigration and Customs Enforcement Raids and Deportations on U.S.-Born Children, Unaccompanied Children and Families"**

### **WHO ARE WE?**

The National Association of Immigration Judges (NAIJ) is a voluntary organization of United States Immigration Judges. It also is the recognized representative of Immigration Judges for collective bargaining purposes. Our mission is to promote independence and enhance the professionalism, dignity, and efficiency of the Immigration Courts, which are the trial-level tribunals where removal proceedings initiated by the Department of Homeland Security are conducted. We work to improve our court system through educating the public, legal community and media, testimony at congressional oversight hearings, and advocating and lobbying for immigration court reform. We also seek to improve the court system and protect the interests of our members, collectively and individually, through dynamic liaison activities with management, formal and informal grievances, and collective bargaining. In addition, we represent Immigration Judges in disciplinary proceedings, seeking to protect Judges against unwarranted discipline and to assure that when discipline must be imposed it is imposed in a manner that is fair and serves the public interest.

## **WHOSE VIEWS DO WE REPRESENT?**

The NAIJ Representatives are speaking in their official NAIJ capacities and not as employees or representatives of the U.S. Department of Justice, Executive Office for Immigration Review. The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the authors' personal opinions, which were formed after extensive consultation with the membership of NAIJ.

## **IMMIGRATION COURT CASELOAD**

Our nation's Immigration Courts are overwhelmed with cases.<sup>i</sup> There are currently almost 475,000 cases pending in the 57 court locations across the country.<sup>ii</sup> In the last seven years, the number of cases pending before the courts has more than doubled.<sup>iii</sup> The Immigration Courts nationwide received 306,045 new cases in 2014 alone.<sup>iv</sup>

As a result of the ballooning backlogs at the Immigration Courts, hundreds of thousands of immigrants will be left in a state of legal limbo for more than three years on average – some much longer. The most delayed courts experience wait times of five to six years.<sup>v</sup> These wait times leave families of asylum seekers stranded abroad for years in dangerous or difficult situations, undermines recruitment of pro bono counsel, and adds to the emotional and psychological stress for respondents who live in uncertainty. Those affected are not just the respondents in Immigration Courts, but increasingly include family members who are United States citizens or lawful permanent residents, as mixed status families abound. Their futures which are intertwined with respondents are in limbo awaiting Immigration Judges' decisions as well.

Despite the sharp rise in the number of cases received, the court system is currently staffed with only 256 Immigration Judges, a number which has been widely recognized as inadequate for more than a decade.<sup>vi</sup> To put this in perspective, since 2000, the number of Immigration Judges has risen from 206 to today's 256, while the court's caseload hovered at about 150,000 to 200,000 in FY 2001 and 2002, and today it has surpassed a staggering 474,000.<sup>vii</sup>

## **UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS<sup>viii</sup>**

Experts often cite FY 2012 as the beginning of the recent "surge" of cases involving unaccompanied children, predominately from the Northern Triangle of Central America. In 2013, these children came primarily from three countries: 37% from Guatemala, 30% from Honduras and 26% from El Salvador.<sup>ix</sup> A staggering 24% of these children were under 14 years of age.<sup>x</sup>

As of October 31, 2014, there were 63,721 pending cases of unaccompanied minors in removal proceedings, with merely 32% represented by an attorney.<sup>xi</sup> At that point, data showed that when represented by an attorney 73% of the children were allowed to remain in the United States.<sup>xii</sup> In sharp contrast, without counsel to assist them, only 15% were allowed to remain,

although the realm of all possible reasons for this fact has not been fully explored as in-depth analysis would be needed.<sup>xiii</sup> Clearly, however, the very statistic raises great cause for concern.

Experts predict that the numbers of these children will not abate anytime soon; to the contrary, a new spike was noted beginning in the Fall of 2015.<sup>xiv</sup>

### **PRACTICAL REALITIES OF COURT PROCEEDINGS**

Immigration law is repeatedly characterized by federal circuit courts of appeal as being second only to the tax code in its complexity, and one court even stated: “[a] lawyer is often the only person who could thread the labyrinth.”<sup>xv</sup> In fact, this seems to be noncontroversial, as the Executive Office for Immigration Review (EOIR), the agency which houses our courts, recommends that all individuals in proceedings before the Immigration Court or the Board of Immigration Appeals retain qualified professional representation in light of the “complexity of the immigration and nationality laws.”<sup>xvi</sup> The recommendation is based, in part, on an awareness that removal proceedings are fundamentally asymmetrical for pro se litigants due to the fact that the United States is always represented by counsel. When the complications which arise when the respondent is an unaccompanied child are added in, the need for attorney representation is even more imperative.

Despite a highly complex body of law and many pro se litigants, an Immigration Judge sometimes addresses 50 to 70 cases during a three- to four-hour time frame at the “master” (arraignment-type) calendar. With scarce resources, and frequently through use of a foreign language interpreter, Immigration Judges must obtain answers to critical questions that bear on the child’s case and possible eligibility for relief. For example, the Immigration Judge must determine whether the child is a citizen of the United States. This is no easy determination. Place of birth alone is not necessarily sufficient; the Immigration Judge may also need to consider information about the child’s parents and grandparents.<sup>xvii</sup> When it is established that the respondent is a noncitizen, a child, just like an adult, bears the evidentiary burden to establish the time, place, and manner of entry once they are determined to be noncitizens.<sup>xviii</sup>

Frequently, cases focus on the possibility of relief from removal or eligibility for one or more statuses or benefits provided by the Immigration and Nationality Act. Many of these remedies have complicated prerequisites which are unfamiliar to the general public. An Immigration Judge must ascertain what experiences a child encountered prior to and after arriving in the United States, the reasons for coming to the United States, the circumstances of the journey, as well as assess familial relations and country conditions in the child’s homeland. For instance, abandonment, neglect, or abuse by a parent may allow the child to qualify for Special Immigrant Juvenile Status (SIJS), a type of relief that may eventually afford lawful permanent residence after completion of certain state court proceedings.<sup>xix</sup> Or, if the child has been a victim of violent crime in the United States, perhaps incident to smuggling, she may be eligible for a U visa, which is also a first step on a lengthy path to lawful permanent residency.<sup>xx</sup> Alternatively, a child may be eligible for asylum based on a form of prior persecution due to her religion, family, ethnicity, or other highly nuanced statutory bases.<sup>xxi</sup>

As a practical matter, some special dockets have been arranged in an effort to encourage and facilitate pro bono representation, and some restrictions do exist on the minimum age at which an admission can be held against a child or notice can be effectuated.<sup>xxii</sup> However, in the context of such proceedings these are extremely limited protections. Nevertheless, just like adults in removal proceedings, in order to succeed in obtaining relief from removal a child must develop the necessary factual record, provide supporting evidence and documentation and demonstrate legal eligibility and discretionary worthiness.<sup>xxiii</sup> The situation is even more complicated since many forms of relief available to children (such as the visas mentioned above that are available for abandoned or abused children or victims of crimes) must begin with proceedings which must be filed with state courts and/or agencies other than the Immigration Court, and the Judge has no authority to assist in this process.

### **CURRENT POSTURE OF APPOINTED COUNSEL FOR UNACCOMPANIED CHILDREN**

The immigration statutes and regulations foreclose appointment of free counsel for children at government expense. Local courts have “pro bono” liaisons (a volunteer position taken on by Judges for no extra compensation or recognition) who often scramble to work with local law schools and charitable groups to coordinate opportunities for free representation for children, but pro bono and low fee organizations are also overburdened and cannot provide representation to every child in need of assistance. This oft-times results in the multiple resetting of cases, and eventually the child may stop coming to court. In a particularly compelling case, an Immigration Judge may try to take it upon herself to help locate pro bono representation, but this is at the risk of being seen as using one's official status inappropriately. With thousands of cases on the docket, if Immigration Judges were tasked with finding pro bono legal representation for every minor, they would have no time to carry out their judicial functions.

### **ADDITIONAL PRACTICAL CONSIDERATIONS FOR CHILDREN’S CASES**

While Immigration Judges have the duty to develop the record, and may ask questions of the child and any witnesses for the purpose of eliciting relevant information that the child has not provided,<sup>xxiv</sup> many children in removal proceedings are traumatized, unable to understand English, and incapable of comprehending legal terminology or evidentiary standards. Many have fled their homelands due to past persecution, but virtually all these children have suffered some form of trauma from the journey itself. It is not clear that in the adversarial context of a courtroom a Judge can sufficiently calm a child so as to obtain the necessary information, and an Immigration Judge who is deemed to have coached a child in order to elicit information that would show eligibility for relief treads perilously close to the bounds of her proper role as an impartial adjudicator.<sup>xxv</sup>

### **PROVIDING APPOINTED COUNSEL WOULD NOT BE UNPRECEDENTED**

Government policies already reflect the reality that some vulnerable populations—such as mentally incompetent individuals—simply cannot successfully navigate immigration proceedings on their own. Since 2013, the Departments of Justice and Homeland Security implemented new policies which provide for the appointment of attorneys at government expense to mentally

incompetent detainees in immigration custody.<sup>xxvi</sup> EOIR’s implementing guidance on this policy acknowledges that “for an alien to be competent to participate in an immigration proceeding, he or she must have a rational and factual understanding of the nature and object of the proceeding and a reasonable opportunity to exercise the core rights and privileges afforded by law.”<sup>xxvii</sup>

Similarly, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) instructs the Secretary of Health and Human Services to “ensure, to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody of the [federal government] . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”<sup>xxviii</sup>

The principles which undergird the TVPRA and support the appointment of counsel for detainees suffering from serious mental capacity issues apply in equal force to the need for appointed counsel for unaccompanied children in removal proceedings. With respect to children, “[t]he law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”<sup>xxix</sup> Their vulnerability is particularly acute in removal proceedings, where they would be required to comprehend complex laws, overcome cultural and linguistic barriers, and face off against an attorney from the Department of Homeland Security. The requirements of self-representation assume a level of practical capabilities, legal sophistication, and foresight that no child realistically possesses.<sup>xxx</sup>

### **THE CONSEQUENCES OF PROCEEDING WITHOUT AN ATTORNEY**

Multiple studies confirm that the presence of an attorney is the single most significant factor in obtaining a favorable outcome in an immigration proceeding.<sup>xxxi</sup> “At every stage in immigration court proceedings, representation [i]s associated with dramatically more successful case outcomes for immigrant respondents.”<sup>xxxii</sup> Overall, legal representation correlated with up to a 43 percent increase in success rate for all respondents (adults and children) before the Immigration Court.<sup>xxxiii</sup>

### **PRIORITIZING THESE CASES IS NOT THE SOLUTION**

Ostensibly to discourage future migrants who might find the long backlogs at the Immigration Court an incentive to come to this country, a political decision was made at DOJ to prioritize these cases. Rather than follow the normal judicial practice and put newly docketed cases at the end of the court calendar, these cases have been moved to the front at the expense of others. Lacking sufficient number of Judges to hear all cases promptly, older cases are pushed farther and farther back in line. Sometimes this means that criminal aliens’ cases linger on the docket despite the fact that they are clearly deportable and other times people with valid asylum claims are left in limbo with family members back home in danger. The havoc this policy choice has caused should not be underestimated. Thousands of cases have been reset to provide these surge cases immediate hearings, consuming large amounts of staff and judge time. But even worse, it has moved cases of new arrivals, those most likely to need more time than others to

settle in and obtain counsel, to early hearings. Large numbers of juvenile cases have been decided in absentia, raising serious concerns about whether notice has been effective in the midst of such a rush, and causing extra work for all when these individuals are located, errors in notice discovered, and cases required to be reopened, not to mention the trauma they suffer at arrest by DHS agents.<sup>xxxiv</sup> The final outcome is still unknown for those with outstanding orders of removal who have not yet been located. Pro bono counsel has been unable to respond as quickly or comprehensively as they would like in assisting these juveniles and families with children. At our courts, the result of these pressures has been to further cripple a chronically underfunded system and cause it to waste precious resources rearranging a staggering docket – all with no end in sight and no clear benefit gained.

## **THE SOLUTION**

Obviously, a dramatic influx of resources is needed to address this continuing crisis. While it cannot be denied that additional resources are desperately needed immediately, resources alone cannot solve the persistent problems facing our Immigration Courts. The problems highlighted by the response to the recent "surge" underscores the need to remove the Immigration Court from the political sphere of a law enforcement agency and assure its judicial independence. Structural reform can no longer be put on the back burner. Since the 1981 Select Commission on Immigration, the idea of creating an Article I court, similar to the U.S. Tax Court, has been advanced.<sup>xxxv</sup> In the intervening years, a strong consensus has formed supporting this structural change.<sup>xxxvi</sup> For years experts debated the wisdom of far-reaching restructuring of the Immigration Court system. Now “[m]ost immigration judges and attorneys agree the long term solution to the problem is to restructure the immigration court system....”<sup>xxxvii</sup>

The time has come to undertake structural reform of the Immigration Courts. It is apparent that until far-reaching changes are made, the problems which have plagued our tribunals for decades will persist. For years NAIJ has advocated establishment of an Article I court. We cannot expect a different outcome unless we change our approach to the persistent problems facing our court system. Acting now will be cost effective and will improve the speed, efficiency and fairness of the process we afford to the public we serve. Our tribunals are often the only face of the United States justice system that these children experience, and it must properly reflect the principles upon which our country was founded. Action is needed now on this urgent priority for the Immigration Courts. It is time to stop the cycle of overlooking this important component of the immigration enforcement system – it will be a positive step for enforcement, due process and humanitarian treatment of unaccompanied children in our proceedings.

## **FOR ADDITIONAL INFORMATION, CONTACT**

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<sup>i</sup> Human Rights First, *The U.S. Immigration Court: A Ballooning Backlog that Requires Action*, <http://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf>

<sup>ii</sup> *Backlog of Pending Cases in Immigration Courts as of January 2016*, TRAC Immigration, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php) (last accessed Mar. 17, 2016)

<sup>iii</sup> *Id.*

<sup>iv</sup> Exec. Office for Immigration Review, *FY 2014 Statistics Yearbook* A2 (Mar. 2015).

<sup>v</sup> TRAC, *Id.*

<sup>vi</sup> Memorandum from Attorney General Alberto Gonzales, *Measures To Improve the Immigration Courts and the Board of Immigration Appeals*, Aug. 9, 2006, <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf>

<sup>vii</sup> TRAC, *Id.*

<sup>viii</sup> For continuously updated statistics on the number of juvenile cases pending before the Immigration Courts, including the percentages of those who are represented by counsel, see TRAC's report located at: <http://trac.syr.edu/phptools/immigration/juvenile/>

<sup>ix</sup> Best Practices for Representing Unaccompanied Children in Removal Proceedings, Immigrant Legal Resource Center, <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACBestPractices.authcheckdam.pdf> (last accessed Mar. 17, 2016.)

<sup>x</sup> *Id.*

<sup>xi</sup> TRAC, Representation for Unaccompanied Children in Immigration Court, <http://trac.syr.edu/immigration/reports/371/> (last accessed Mar. 17, 2016)

<sup>xixii</sup> *Id.*

<sup>xiii</sup> *Id.*

<sup>xiv</sup> Hector Vanegas, *The Injustice of deporting children without representation*, THE LOS ANGELES TIMES OP ED, Mar. 17, 2016; Evan Perez, *First on CNN: U.S. sees new spike In number of children, families crossing border*, CNN Sept. 21, 2015, <http://www.cnn.com/2015/09/21/politics/us-children-crossing-border-spike/>.

<sup>xv</sup> *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004)

<sup>xvi</sup> U.S. Dep't of Justice, Immigration Court Practice Manual § 2.2(a); U.S. Dep't of Justice, BIA Practice Manual § 2.2(a)

<sup>xvii</sup> Immigration and Nationality Act (INA) §§ 301(c)–(h), 8 U.S.C. §§ 1401(c)–(h)

<sup>xviii</sup> INA § 291, 8 U.S.C. § 1361.

<sup>xix</sup> See INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11

<sup>xx</sup> See INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

<sup>xxi</sup> See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)

<sup>xxii</sup> 8 CFR 1240.10 (c)

<sup>xxiii</sup> *Elian Gonzalez v. Reno*, 212 F. 3d 1336 (11<sup>th</sup> Cir. 2000); see also *Kahssai v. INS*, 16 F.3d 323 (9<sup>th</sup> Cir. 1994) and *Civil v. INS*, 140 F. 3d 52 (1<sup>st</sup> Cir. 1998). Respondent has a duty to corroborate his testimony under the REAL ID Act. *Kayembe v. Ashcroft*, 334 F.3d 231 (3d Cir. 2003).

<sup>xxiv</sup> INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1)

<sup>xxv</sup> See Exec. Office for Immigration Review & Nat'l Ass'n of Immigration Judges, *Ethics & Professionalism Guide for Immigration Judges 2* ("An immigration judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.") (citing 5 C.F.R. § 2635.101(b)(8)).

<sup>xxvi</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013); See U.S. Dep't of Justice, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013).

<sup>xxvii</sup> Exec. Office for Immigration Review, *Phase I of Plan to Provide Enhanced Procedural Protection to Unrepresented Detained Respondents with Mental Disorders*, at 1 (2013).

<sup>xxviii</sup> Pub. L. No. 110-457, § 235(c)(5), 122 Stat. 5044, 5079 (2008)(codified at 8 U.S.C. § 1232(c)(5))

<sup>xxix</sup> *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011); see *In re Gault*, 387 U.S. 1, 36 (1967) ("The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.").

<sup>xxx</sup> The NAIJ concerns regarding juveniles in proceedings were shared with Congress in letters dated July 22, 2014, which can be found at <http://naij-usa.org/wp-content/uploads/2014/09/NAIJ-position-ensuring-fairness-to-juveniles-Senate-7-23-14.pdf> and <http://naij-usa.org/wp-content/uploads/2014/09/NAIJ-position-ensuring-fairness-to-juveniles-House-7-23-14.pdf>.

General policy considerations regarding the benefits of attorney representation for respondents can be found at [http://naij-usa.org/wp-content/uploads/2014/06/NAIJ-position-on-attys-cost-savings-and-due-process\\_3-22-13.pdf](http://naij-usa.org/wp-content/uploads/2014/06/NAIJ-position-on-attys-cost-savings-and-due-process_3-22-13.pdf).

<sup>xxxi</sup> See Lisa Graybill & Charanya Krishnaswami, *Immigration Detention in the Rocky Mountain West: Can Emerging Models of Reform Solve Our Regional Problem?*, 92 Denv. U. L. Rev. 791, 802 (2015) (finding that represented detainees in a Northern California detention facility were three times as likely to win their case); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007) (representation is the single most important factor affecting outcomes in asylum cases before the EOIR, with represented asylum seekers prevailing in 45.6% of cases versus 16.3% for unrepresented asylum seekers); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 Harv. J. on Legis. 331, 338–39 (2013) ("In 2010, immigration judges granted fifty-four percent of asylum applications for individuals who were represented and only twenty percent for those who were not.").

<sup>xxxii</sup> Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 57 (2015).

<sup>xxxiii</sup> Eagly & Shafer, *supra*, at 49, 50.

<sup>xxxiv</sup> Cesar Attanasio, *Deporter in Chief: Obama Ordered 7,000 Immigrant Children To Be Deported Without a Court Hearing*, LATIN TIMES, Mar. 16, 2016.

<sup>xxxv</sup> COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY THE COMMISSIONERS (1981).

<sup>xxxvi</sup> Prestigious legal organizations such as the American Bar Association, Federal Bar Association, and American Judicature Society wholeheartedly endorse this reform. While not as certain as to the exact form of change desired, reorganization has also been endorsed by the American Immigration Lawyers Association, and increased independence by the National Association of Women Judges. See <http://naij-usa.org/publications/article-i-and-independence-endorsements/>

<sup>xxxvii</sup> Casey Stegall, *Long Lines, Suspended Lives: Statistics Reveal Immigration Courts Are Drowning*, FOX NEWS LATINO (Jan. 20, 2014), <http://latino.foxnews.com/latino/news/2014/01/30/long-lines-suspended-lives-immigration-court-system-in-desperate-need-its-own/>.