

Statement for Hearing
On
“Another Surge of Illegal Immigrants Along the Southwest Border: Is this the Obama Administration’s New Normal?”

House Judiciary Committee
Subcommittee on Immigration and Border Security

February 4, 2016

By Wendy Young, President, Kids in Need of Defense

Introduction

I appreciate the opportunity to testify on behalf of Kids in Need of Defense (KIND) and to submit our views on the continuing surge of Central Americans to the United States for this hearing. KIND was founded by the Microsoft Corporation and UNHCR Special Envoy Angelina Jolie in 2008 to ensure that unaccompanied immigrant and refugee children are provided pro bono legal representation in their immigration proceedings. KIND has assisted more than 9,100 children and trained over 11,000 volunteer attorneys in our seven years of operation.

We also promote greater protection of unaccompanied children in the Northern Triangle of Central America and Mexico through assistance to children returning to their countries of origin, the provision of guidance to children applying for resettlement to the U.S., and evaluation of the prevalence and response to sexual and gender based violence against child migrants, particularly girls. This work gives us a comprehensive understanding of the urgent protection needs of children on the move throughout the region.

KIND is deeply concerned about proposals from Congress that would address the surge in refugee children and families from Central America arriving at the U.S. border through a law enforcement lens that fails to acknowledge the need to protect vulnerable individuals from rampant and targeted violence in their countries. While the recently announced U.S. refugee resettlement program is a step in the right direction, this limited response must be accompanied by full and fair access to the U.S. asylum system and complementary forms of protection for those Central American families and children who reach our border seeking safety.

The significant increase in the number of unaccompanied children coming to the U.S. in recent months is a clear indication that the root causes of their flight remain unresolved and that violence in Central America remains a persistent problem. It also underscores that the nature of the outflow of Salvadoran, Honduran, and Guatemalan families and children is fundamentally a

refugee movement. Attempting to address it as an issue of border security will fundamentally lead to ineffective policies that neither curb the migration flow nor provide the necessary protection to those who need it. The act of coming to the U.S. and applying for asylum is not illegal under our immigration laws.

Background

Congress has long recognized the unique vulnerability of unaccompanied immigrant and refugee children. The Homeland Security Act of 2002 (HSA) transferred the custody of unaccompanied children from legacy Immigration and Naturalization Service to the Department of Health and Human Services/Office of Refugee Resettlement (ORR) to ensure that children who arrive in the U.S. without a parent or legal guardian are provided appropriate care during the pendency of their immigration proceedings.¹ The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 built upon the HSA by mandating comprehensive services to unaccompanied children including the provision of pro bono legal representation to the maximum extent practicable.²

Since enactment of these two pivotal pieces of legislation, numerous steps have been taken by the range of federal agencies that have jurisdiction over unaccompanied children to address their rights as children and to improve their treatment. These include, among others:

- The expansion by ORR of shelter care facilities and foster care to house unaccompanied children in more child appropriate settings
- Issuance of guidelines by U.S. Citizenship and Immigration Services (USCIS) for the adjudication of children's asylum claims to acknowledge the challenges that children face when required to navigate the complexities of U.S. asylum law and articulate a basis for protection from persecution
- Implementation of juvenile dockets by the Department of Justice to provide more child-appropriate settings and procedures when children appear in immigration court
- Government support for the provision of pro bono legal representation to unaccompanied children
- Appointment of child advocates to address the best interests of unaccompanied children

¹ Homeland Security Act of 2002, P.L. 107-296, Sec. 462, https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf

² William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, Sec. 235(c)5 <https://www.gpo.gov/fdsys/pkg/PLAW-110publ457/pdf/PLAW-110publ457.pdf>

- More systematic training of asylum officers, immigration judges, and border patrol officers in the unique needs of unaccompanied children and how best to address them.

These steps, among many others, have constituted the building blocks toward creation of a child-oriented system that balances protection at its core with the need to determine whether a child is eligible for relief under U.S. immigration and asylum law or can be safely returned to their country of origin. It is the result of strategic policy reforms that have developed over time through interagency cooperation and consultation with civil society.

There is no doubt that the system remains imperfect. The Central American child migration crisis that exploded in spring 2014 underscored some critical weaknesses in the system that jeopardized the safety of children, including the failure to adequately ensure in some cases that children are released to sponsors who will protect the child's safety and well-being. KIND believes strongly that we must learn from this experience and implement further reforms that close these protection gaps while resisting efforts that emphasize law enforcement and deterrence of further migration.

Central American Crisis

Unaccompanied children, who range in age from toddlers to teenagers, are uniquely vulnerable, having traveled hundreds or thousands of miles without a parent or legal guardian, risking a life-threatening journey to a country they do not know. Many of the children who have been arriving from the Northern Triangle of Central America in recent years are fleeing organized criminal violence caused by gangs and drug cartels that the governments of the countries of origin—El Salvador, Honduras, and Guatemala—are unable to control. The murder rates in these countries mirror those in conflict zones. In fact, El Salvador's homicide rate is one of the highest in the world and now surpasses that experienced during the height of its civil war; Honduras and Guatemala are close behind.³

Sadly, children have been specifically targeted by the gangs and criminal rings that terrorize large parts of the Northern Triangle. The gangs attempt to forcibly recruit children, especially those in their early teens, but sometimes as young as kindergarten age. Girls are forced to become "girlfriends" of gang members, which in reality are non-consensual relationships that result in rape by one or more gang members.

If children resist gang recruitment, they face rape, kidnapping, and/or murder. The weak governments that characterize the region are unable or unwilling to control the violence. Law enforcement agencies are under-resourced and plagued with corruption. For the same reasons, judicial systems fail to prosecute perpetrators; less than 2 percent of rapes, for

³ The Guardian, "U.S. Government Deporting Central Americans to their Deaths," October 12, 2016. <http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>

example, are investigated and prosecuted.⁴ Impunity is assumed, leading to even more violence.

As a result, according to the UN Refugee Agency (UNHCR), at least 58 percent of children arriving at the U.S. border have been forcibly displaced and are potentially in need of international protection.⁵ It should also be noted that the United States is not the only country receiving asylum seekers. From 2008 to 2014, UNHCR documented a 1,185 percent increase in asylum applications from El Salvador, Honduras, and Guatemala filed in Belize, Costa Rica, Mexico, Nicaragua, and Panama.⁶

Furthermore, as has been well documented, smugglers are taking advantage of vulnerable families and children and facilitating their travel to the United States. Smuggling rings are highly organized and closely associated with the very same criminal cartels that are generating the violence in the countries of origin. They prey upon their victims and exploit them even further by charging high fees to transport children as young as two years old to the U.S. border.

Fundamentally, the United States will continue to face increased migration from Central America until these conditions are resolved. Families and children who are facing mounting levels of violence that their governments are unable or unwilling to control are making the only choice available to them and the only choice that any family would make—they are fleeing for their lives in search of safe haven. As the world's leading democracy, it is not surprising that many are seeking that safety in the United States.

The Misguided Law Enforcement Response

KIND is gravely concerned that the Obama Administration has failed to adopt a comprehensive protection-oriented approach to the child migration crisis since its start, instead largely gravitating toward ineffective, expensive, and ill-conceived law enforcement measures. In actuality, the crisis began in fall 2011 when the number of unaccompanied children arriving from Central America began to noticeably increase. Every year from then forward, the numbers of children arriving at the border doubled until the height of the crisis in 2014 when more than 68,000 unaccompanied children were apprehended. This represented a nearly tenfold increase from the historical norm of 7,000-8,000 children from 2004-2011.⁷

⁴ The Daily News, "In Central America, Women are Killed with Impunity Just Because they are Women," January 10, 2014, <http://www.nydailynews.com/news/world/femicide-rise-central-america-article-1.1552233>

⁵ United Nations High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection*, (2015), pg. 6, available at http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf

⁶ UNHCR, <http://unhcrwashington.org/children>

⁷ U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Children's Program, *ACF Fact Sheet*, (updated January 2016), https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf

The crisis came to the public's consciousness when unaccompanied children began to back up at U.S. Customs and Border Patrol (CBP) stations in the Rio Grande Valley. Images of children held in cell-like rooms, sleeping on mattresses on the floor under emergency blankets, and provided triaged food and health care assistance flooded the media for weeks, creating the impression that the southern border was out of control.

In fact, weak border controls were not the source of the problem. Rather, poor planning was. Resources were inadequate to keep pace with the increased numbers, and as a result ORR lacked the bed space to facilitate the transfer of children from CBP to its custody within 72 hours as required under the TVPRA. CBP therefore had no option but to hold children for as long as two weeks in conditions largely designed for the processing of adult immigrants by an agency the mission of which is to enforce U.S. borders, not to care for vulnerable children.

This unsustainable situation then led to a series of extraordinary and unprecedented measures to gain control of the situation. This included:

- The opening of emergency care facilities on military bases in Texas, Oklahoma, and California, each of which housed hundreds of children, and streamlining release procedures to free up bed space for newly arriving children
- Fast tracking the adjudication of children's immigration cases by the immigration courts to reach decisions in their cases more quickly and to send a deterrent message to sending countries
- The use of private prison-operated family detention facilities which included lengthy detention times and inappropriate conditions for children
- Raids to arrest and deport Central American families and unaccompanied children who arrived after January 1, 2014 and have final orders of removal, regardless of whether they were represented in their immigration proceedings and had an opportunity to present their cases in immigration court.

We are concerned that these law enforcement tactics are used for deterrent purposes and to "send a message" to individuals in Central America that they should not come to the United States. When fleeing to save their lives and those of their family, unaccompanied children and mothers with young children will not be deterred by the threat of deportation. In addition to being ineffective, the use of deterrent tactics has been shown to heighten traumatic responses in a population that has already experienced intense trauma.

Use of emergency facilities to house children

KIND recognizes that the Administration is rightfully concerned about the prolonged housing of unaccompanied children in CBP stations. Custody that extends beyond three days in such

facilities violates both the Flores Agreement⁸ as well as the TVPRA.⁹ As a result, we did not oppose the use of military bases in 2014. We also supported ORR's subsequent efforts to expand its bed space in state licensed facilities to accommodate higher numbers of children; since the crisis, ORR had increased available bed space to 7,900 by August 2015.

In response to the increased arrivals from August 2015 through December 2015, the Administration again increased bed space capacity, opening temporary space that allows large scale institutionalization of hundreds of children in each facility. Thus far, such space has been established in Texas, New Mexico, Colorado, and Florida.¹⁰ These facilities are spaces designed for other uses that are being converted to house children.

While preferable to CBP stations, we remain concerned that such facilities are not set up to accommodate the full needs of children who lack family support and protection and are typically traumatized, exhausted, and confused. They also do not lend themselves to the delivery of legal services such as are normally available in ORR's ongoing custodial settings. ORR has indicated that children receive legal services at the first facility in which they are housed before they transferred to the emergency facility, and that therefore legal services are not needed at the emergency facilities. However, access to legal services should be made readily available throughout the child's custody as the child may share new information that can affect her/his case that was not shared when the child was at the previous facility. Continuity in legal services will also facilitate referral of the child's case to a legal service provider after their release.

Use of streamlined release procedures

Around the time that the child migration crisis exploded in 2014, ORR began implementing streamlined release procedures. As documented by the Associated Press, the Washington Post, and a January 28, 2016 HSGAC PSI investigative report,¹¹ these procedures included the

⁸ Flores Settlement Agreement, <http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749>; Lutheran Immigrant and Refugee Service, Women's Refugee Commission, Kids in Need of Defense, *Flores Settlement Agreement and HHS Custody*, <https://lirs.org/wp-content/uploads/2014/12/Flores-Family-Detention-Backgrounder-LIRS-WRC-KIND-FINAL1.pdf>

⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act, PL 110-457, Section 235(b)(3)

¹⁰ In December 2015, ORR announced the use and potential use of facilities in the following locations: Waxahachie, TX, capacity 700 beds; Royse City, TX (Rockwall Country), capacity 300 beds; and Holloman Air Force Base, NM, capacity 700 beds; Lakewood, CO, capacity 1,000 beds; and Homestead, FL, capacity 800 beds.

¹¹ Associated Press, "Feds' Failures Imperil Migrant Children," January 25, 2016, <http://bigstory.ap.org/article/cc07b82ec58145cca37d6ff952f334c1/ap-investigation-feds-failures-imperil-migrant-children>; The Washington Post, "Overwhelmed Federal Officials Released Immigrant Teens to Traffickers in 2014," by Abbie VanSickle, January 26, 2016, https://www.washingtonpost.com/national/failures-in-handling-unaccompanied-migrant-minors-have-led-to-trafficking/2016/01/26/c47de164-c138-11e5-9443-7074c3645405_story.html; HSGAC PSI, *Majority and Minority Staff Report - Protecting Unaccompanied Alien*

discontinuation of fingerprinting of most adults seeking to sponsor and house the children after release. In April 2014, the agency stopped requiring original copies of birth certificates to prove most sponsors' identities. It also discontinued the completion of forms that document sponsors' personal and identifying information before sending many of the children to sponsors' homes. It also eliminated criminal history checks for many sponsors.

The results have been tragic for many children. Six young people were released to a trafficker in Ohio and forced into abusive labor conditions. Others were released to sponsors who sexually abused them, denied them education, and locked them in homes where they were forced to work. Still others disappeared entirely, their whereabouts unknown.¹²

In KIND's own work providing pro bono legal services to unaccompanied children, we have witnessed children placed in precarious circumstances that have sometimes resulted in children being sexually abused, forced to work, charged money by the sponsor to support the costs of their care, or expelled from the home. It must be noted that the vast majority of sponsors who step forward to care for the children are responsible, caring family members. However, processes that have historically been in place to ensure that releases are in the best interest of the child must be restored and services put in place to ensure the safety of all released children.

The deeply disturbing cases of trafficking and other abuse of children released from ORR custody underscores the dire need for post-release services for these children to ensure their safety and well-being while they are awaiting the outcome of their immigration proceedings. Only a very small number of children receive post-release services—those who are survivors of severe trauma, for example—and the rest are left without access to assistance. If more children received or had access to social services after release from ORR custody, they would have someone to turn to if they found themselves in dangerous situations and somewhere to go if they felt unsafe. The provision of attorneys would also help, as the attorney would be another adult from whom the child could seek assistance, and the attorney would likely be able to tell if something seemed amiss in the child's life.

Handling of Children's Cases by the Immigration Courts

In July 2014, the Department of Justice announced that it would prioritize the scheduling of unaccompanied children's master calendar hearings and place them at the top of the dockets. Immigration judges were further instructed to conduct these initial hearings within 21 days of the issuance of the Notice to Appear to the child. This prioritization jeopardized due process and fundamental fairness for unaccompanied children and ignored the unique vulnerabilities that such children face in their proceedings.

[Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement,](https://www.hsgac.senate.gov/subcommittees/investigations/reports)

<https://www.hsgac.senate.gov/subcommittees/investigations/reports>

¹² Ibid.

Further exacerbating the fast tracking of cases was the failure by federal agencies to adequately record children's addresses after release, which resulted in numerous children receiving no or delayed notice of their court hearings. This undercut the child's ability to obtain legal counsel, prepare their case, or in many instances, to even appear in court because the child remained unaware that his or her hearing was scheduled. This in turn resulted in numerous in absentia notices being issued, placing the child at risk of deportation back to their home countries with no opportunity to explore their possible eligibility for asylum protection or other forms of relief. In most in absentia cases, the child was unrepresented by counsel. While nearly all children with attorneys attend their court hearings, those without counsel are less likely to appear as they remain uninformed about their rights and responsibilities in the immigration system.

Moreover, some immigration judges interpreted the directive to prioritize the scheduling of master calendar hearings far beyond the initial proceeding. They failed to allow children sufficient time to obtain counsel and required them to appear for a merits hearing within weeks. In some cases, they denied the child the necessary time to pursue asylum before USCIS or Special Immigrant Juvenile Status before a state court.

The Importance of Counsel for Unaccompanied Children in Immigration Proceedings

The lack of counsel for unaccompanied children in their immigration proceedings is a challenge that quickly worsened as the number of child migrants facing removal proceedings increased. According to Syracuse University's Transactional Records Clearinghouse (TRAC), before 2012, 62 percent of unaccompanied children were represented in their immigration court proceedings. This rate of representation steadily decreased to an all-time low of 14 percent in 2014 at the height of the child migration crisis. This representation rate has since rebounded to approximately 49 percent.¹³

It is fundamentally unfair for any child to face removal proceedings without the assistance of counsel. Our staff has witnessed children as young as three years old appear in court without an attorney. This violates due process and contradicts the U.S. principle of due process and respect for the rule of law.

KIND is therefore heartened by the Administration's increasing support for legal representation of unaccompanied children as envisioned under the TVPRA. The provision of counsel to unaccompanied children not only leads to greater justice and but also creates efficiencies in the adjudication process. The Department of Health and Human Services has increased the level of resources dedicated to supporting legal services for unaccompanied children, and the Department of Justice is conducting an assessment of efficiencies that are created when children are represented pursuant to the FY14 omnibus appropriations legislation.

¹³ Syracuse University Transactional Records Access Clearinghouse
<http://trac.syr.edu/phptools/immigration/juvenile/>

Among the efficiencies created by representation is the overwhelming appearance rate for children who have counsel. In FY15, 99.25 percent of children who were represented by counsel appeared in court.¹⁴ Counsel is able to advise their child clients of their rights and responsibilities in the immigration system and the fact that if represented, they have a very strong likelihood of being granted asylum or some other form of relief. According to TRAC, children who have counsel are five times more likely to be granted relief.¹⁵

However, much more needs to be done to close this critical legal services gap. It has also been KIND's experience that the private sector is ready and willing to serve as a critical source of legal representation for unaccompanied children. KIND alone has generated over \$100 million in pro bono assistance in the seven years in which we have been operational. We now partner with over 300 major law firms, corporate departments, bar associations, and law schools to generate this extraordinary movement of volunteers. Pro bono representation not only ensures that children who need protection receive it, but also enhances the integrity and efficiency of the immigration system.

The Administration's Recent Raids and Deportations Targeting Central Americans

The ongoing raids that were initiated at the end of 2015 and that target both families and unaccompanied children from Central America who arrived in the U.S. after January 1, 2014 are deeply troubling. It has been well documented that many of these families and unaccompanied children are fleeing severe and growing violence in Central America and are potentially eligible for U.S. protection.

The Administration has repeatedly said that it is conducting these raids to deter others from coming to the United States. This policy clearly has not worked, as the number of families and children alone has risen significantly again despite more elaborate border controls in the U.S., Mexico, and in sending countries. When mothers are desperate to save their children's lives and children see only violence in their future, deportation will not deter them.

There have been numerous reports of children being harmed and even killed within days or weeks of their deportation.¹⁶ Moreover, targeting families and unaccompanied children contradicts the Administration's repeated commitment to focus its enforcement resources on removing felons rather than families.

¹⁴ Ibid.

¹⁵ Syracuse University Transactional Records Access Clearinghouse <http://trac.syr.edu/immigration/reports/371/>

¹⁶ The Guardian, "US deporting Central American migrants to their deaths," by [Sibylla Brodzinsky](#) and [Ed Pilkington](#), October 12, 2015, <http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>; UNHCR, "Deported children face deadly new dangers on return to Honduras," January 29, 2015, <http://www.unhcr.org/54ca32d89.html>; The Los Angeles Times, "In Honduras, U.S. deportees seek to journey north again," by Cindy Carcamo, August 16, 2014; <http://www.latimes.com/world/mexico-americas/la-fg-honduras-deported-youths-20140816-story.html>

The use of harsh law enforcement tactics, often in the early hours of the morning, is indefensible. The raids have generated widespread fear in immigrant communities around the country, and not just among those Central Americans who are in the targeted categories Department of Homeland Security Secretary Jeh Johnson mentioned in his January 2016 statement.¹⁷ There have been numerous reports of children not attending school and canceling critical medical appointments out of fear of going out in public. KIND itself has seen children canceling intake appointments with our staff and sponsors failing to bring children to immigration court. Surely it cannot be the intent of the Administration to drive these vulnerable children further underground.

The recent announcement by Secretary Johnson regarding the targeted enforcement actions itself acknowledges that conditions have deteriorated in the Northern Triangle to a degree that warrants the creation of a new refugee process for those nationals.¹⁸ The creation of a refugee resettlement processing initiative in the region is certainly a step forward and a clear recognition that families and children fleeing the violence plaguing the Northern Triangle of Central America are in fact refugees in many cases. Although we strongly support this new effort, it stands in stark contrast to the enforcement actions targeting families and unaccompanied children who have presented themselves at the U.S. border and requested protection. Moreover, refugee resettlement only benefits a very few recipients and is a very slow process.

The focus of the raids on families and children with final orders of removal does not make them any more acceptable. As outlined above, the fast-tracking of cases presented by families and unaccompanied children from Central America creates insurmountable barriers to due process. This is particularly true for children or those with little education, who do not speak English and have suffered extreme trauma. Even the Board of Immigration Appeals has taken the extraordinary step of granting emergency stays of removal for many of the targeted families, notwithstanding final administrative removal orders.

No removals should take place, even for those with final orders, without confirming that those affected had fair and timely proceedings, which includes ensuring that the individual had legal representation during their proceedings, adequate time to prepare their case for protection, notice of their hearing, and a full and objective hearing. Without legal representation, families and unaccompanied children face a complex and unfair legal process, which is nearly impossible for them to navigate.

The U.S. is targeting the most vulnerable immigrants to show that it is tough on immigration enforcement and to deter future arrivals, but by singling out families and children, it is only showing weakness and fear. True leadership emanates from acting upon strong values however difficult it may be. Through its actions, the Obama Administration is betraying the values upon

¹⁷ Department of Homeland Security Secretary Jeh C. Johnson Statement on Southwest Border Security, January 4, 2016. <http://www.dhs.gov/news/2016/01/04/statement-secretary-jeh-c-johnson-southwest-border-security>

¹⁸ Ibid.

which our country was founded and setting a disturbing example for other countries that are hosting refugee populations.

Need for Return and Reintegration Assistance

If it is determined through a full and fair proceeding that they can return home safely and sustainably, unaccompanied children and families who are deported must receive assistance upon their return to their home countries. The TVPRA requires that such assistance must be made available to unaccompanied children, including family reunification and reintegration services that help them stay in their countries safely. Without this support, families and children are vulnerable to trafficking or other abuses as they flee the same and worsening violence.

KIND's own experience with our Guatemalan Child Return and Reintegration Project, implemented on a pilot basis, demonstrates that with modest but comprehensive assistance, many children can reestablish their lives in their country of origin. Such programming, however, must be built upon adequate access to full and fair immigration proceedings before any return is initiated.

Pending House Legislation Would Endanger Vulnerable Child Refugees and Child Victims of Trafficking

The Protection of Children Act (H.R. 1149)

The *Protection of Children Act* (H.R. 1149) fails to increase protections for children as the title suggests; it instead makes children more vulnerable to traffickers, criminals, and the profound negative effects of prolonged detention. In fact, the bill would put children in grave danger.

The legislation would place children in restrictive and inappropriate settings, and put an almost impossible burden on children to establish a claim for relief from removal, including severely limiting access to U.S. asylum protections. The bill would also severely restrict the family reunification process, thus cutting children off from their best source of support, both from a child welfare and financial perspective. While recent reports of inappropriate releases are highly disturbing and demand correction, we should refrain from creating barriers to release to loving families able to care for their children.

Under H.R. 1149, when children are encountered by CBP, they would be required to demonstrate that they are victims of trafficking or have a fear of return to their home country to a uniformed officer within days of their apprehension at the border. If the child, regardless of his or her age, trauma, gender, or developmental stage is unable to do so, the bill would require DHS to summarily return them to their country of origin. This would likely result in a high percentage of children alone being returned to dangerous situations where they may face trafficking, persecution, torture, or even death. Young children would likely be automatically

removed because they would be unable to voice to DHS their concerns about trafficking and fear of return.

Cursory screening procedures applied to unaccompanied children from contiguous countries—i.e., Mexico and Canada—have already been proven to be inadequate for the identification of children with protection concerns. Under the TVPRA, Mexican and Canadian children may only be returned to their country of origin after a CBP officer screens them to determine whether they have a potential claim for asylum, have not been a victim of trafficking, or cannot make an independent decision to be returned to his or her country.

While recognizing that children from contiguous countries may more easily be returned to their country of origin, this provision was intended to accommodate the fact that such children may have protection concerns meriting full consideration before the immigration courts or USCIS. However, the provision has been found to be flawed in its actual implementation when applied to Mexican children, thus jeopardizing the protection of those who cannot return safely.¹⁹ We therefore would strongly oppose their extension to Central American or other unaccompanied children.

Upon apprehension by CBP, children are tired, scared, confused, and may be suffering from dehydration or other illnesses as a result of the grueling trip. These children need time to recover from their journey and receive any necessary medical treatment, as well as explain their story to a lawyer who has experience interviewing children and knows U.S. immigration law. Children are unlikely to feel comfortable discussing all of the reasons for their flight with an armed law enforcement officer. In particular, children often will not feel safe disclosing violence they have experienced to a Border Patrol officer. In addition, post-traumatic stress disorder will prevent children from disclosing past trauma in an initial interview. Even if CBP were to implement some changes in its screening process, we do not believe it would be sufficient to ensure protection of unaccompanied children because of the extensive resources and training on child welfare that would be required to screen children effectively and appropriately.

The General Accounting Office (GAO) found in a July 2015 report²⁰ that (1) CBP's Border Patrol agents and Office of Field Operations (OFO) officers who screen unaccompanied children “have not consistently applied the required screening criteria or documented the rationales for decisions resulting from screening;” and (2) that agents made inconsistent screening decisions, had varying levels of awareness about how they were to assess certain screening criteria, and did not consistently document the reasoning for their decisions.

¹⁹ Government Accountability Office, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody*, July 2015, <http://www.gao.gov/assets/680/671393.pdf>; UNHCR, *Findings and Recommendations Related to the 2012 - 2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border*, June 2014, http://americanimmigrationcouncil.org/sites/default/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf

²⁰ *Ibid.*

UNHCR conducted fact-finding missions along the U.S.-Mexico border and also found significant failures regarding CBP's screening of unaccompanied Mexican children. UNHCR found that while the law is clear regarding DHS's burden to establish that each Mexican unaccompanied child does not have an international protection need, CBP's operational practices continue to reinforce the presumption of an absence of protection needs among Mexican children.

The experiences of children with whom KIND has worked demonstrate the insurmountable challenges of assessing the persecution and violence faced by children under cursory screening procedures:

- **Maria** was kidnapped by a local gang and raped daily. She managed to escape and fled to the United States. Maria did not reveal what had happened to her until she was interviewed in ORR custody a number of days after her apprehension by a social worker trained in child interviewing techniques. If this Act were law, CBP officers, not child welfare experts, would be required to determine whether Maria was a trafficking victim and feared return. It is unlikely that Maria would have shared her traumatic experiences with a Border Patrol officer of whom she was scared, particularly soon after her apprehension.
- **Jesus**, at just three years old, was sent by his family to the United States after his family received threats of harm against him. Jesus's family witnessed the torture and beheading of another toddler in their community by gangs. Because H.R. 1149 eliminates the current requirement under the TVRPA that children be independently able to make a decision to withdraw their request for admission at the border, a child as young as Jesus would most likely be automatically returned to his country.

H.R. 1149 would also provide for extended CBP custody of children instead of transfer within 72 hours to a child-appropriate facility administered by ORR, as currently required under the HSA and the TVRPA. As witnessed in 2014, CBP short-term holding facilities are not designed to house children. It is also unreasonable to ask CBP officials and agents to spend their time caring for children in their custody instead of focusing their limited resources on law enforcement activities that target individuals who present a danger to the United States.

The results of extended CBP custody of children were clearly evidenced during the height of the child migration crisis in 2014; children huddled in crowded holding cells, slept on mattresses on the floor, and received only minimal services. The cost of converting such facilities to become appropriate settings for children who range in age from toddlers to teenagers would likely be exorbitantly high.

H.R. 1149 would also effectively undermine due process. Under the Act, if a child in CBP custody has successfully made a claim of trafficking or fear of return, he or she would only have 14 days to obtain counsel and prepare his or her case before appearing before an immigration judge. These accelerated removal proceedings would make it even more difficult for a child to find an attorney who can help them articulate their claim for relief. This would be exacerbated

by the legislation's prohibition of government support for the provision of legal services to these children.

KIND's own experience working with unaccompanied children underscores the critical need to recognize the unique vulnerabilities of children in their immigration proceedings. Our legal staff and our volunteer attorneys spend numerous hours developing trust with the child client so that they feel comfortable articulating their experiences to us and so that we can determine whether or not they may be eligible for some form of protection under U.S. law.

In addition, the fast-tracked procedures during a child's stay in federal custody as envisioned under H.R. 1149 also would undermine the progress made since passage of the TVPRA in developing a strong corps of pro bono attorneys to represent children in their immigration proceedings. KIND has trained more than 11,000 attorneys from our 300 major law firm, corporate, bar association, and law school partners to provide high quality representation to children in their proceedings. This private sector initiative not only serves the interests of the children in question, it also serves the government by ensuring the efficiency and fairness of the proceedings. Pro bono lawyers who are dedicating their time, resources, and expertise on a volunteer basis will be unable to serve children effectively if the children are in detention and the proceedings are drastically expedited.

In addition, under this legislation, children would be required to file their initial request for asylum before an immigration judge. Under the TVPRA, unaccompanied children are provided the opportunity to present their case in a non-adversarial setting before an asylum officer trained in refugee law. This more informal setting is more conducive to the ability of children to comfortably articulate their reasons for seeking protection in the United States.

Requiring children to first appear before an immigration judge not only has adverse consequences for the children, but it will prove highly problematic to the immigration court system. The system is already backlogged with almost 500,000 pending cases, and if judges are required to adjudicate more cases of unrepresented children, it will only further clog an overwhelmed system.²¹ Without the proper support, legal representation, and access to information, relief would be nearly impossible to obtain, even with a strong trafficking or asylum claim.

Finally, H.R. 1149 would change the eligibility criteria for abused, abandoned, or neglected children to gain protection through Special Immigrant Juvenile Status. Many children currently eligible for this form of immigration relief have been saved from being sent back to an abusive parent in their home country. For children who suffered abuse at the hands of a parent in their home country, they can now live in the United States with a parent who will protect them and keep them safe. If H.R. 1149 were to become law, hundreds of children could be sent back to dangerous situations, forced to live on the streets or in abusive homes.

²¹ http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php

The Asylum Reform and Border Protection Act (H.R. 1153)

The *Asylum Reform and Border Protection Act* (H.R. 1153) would roll back critical protections for children under the TVPRA, expand the inappropriate use of immigration detention for children, limit access to both due process and protections available to children under both asylum and SIJS, and fail to provide for the safe and sustainable repatriation of children.

H.R. 1153 eliminates protections vouchsafed by the TVPRA in a number of ways. The bill limits the definition of an unaccompanied child, and effectively restricts eligibility for trafficking and asylum protections to a very few. The bill also erodes due process for children as it allows CBP to place children traveling alone in expedited removal proceedings. The accelerated nature of these proceedings would greatly increase the likelihood that these children will not have enough time to find an attorney to represent them. This means unaccompanied children -- even babies and toddlers-- would be forced to make a case on their own while in a CBP holding cell. This thoroughly undermines any due process protections for children and places children in danger of being returned to conditions that threaten their safety and well-being and even their lives.

H.R. 1153 also creates a more complicated and adversarial asylum process for unaccompanied children. The legislation would create a higher standard for proving a threshold fear of persecution, extend the one-year asylum bar and safe third country provisions to children, and force children to present their asylum claims in a proceeding before an immigration judge instead of through an interview with an asylum officer, further burdening our backlogged immigration courts.

We are particularly concerned with the sections of the legislation that authorize detention for the duration of the child's proceedings. In addition to adding a layer of trauma to an already vulnerable population, it is difficult even for adult immigrants to obtain a lawyer and navigate the immigration system while detained.

Our child welfare system has long recognized the adverse impact of institutionalizing children. Also, by permitting the release of a child to a relative or responsible adult who then assumes responsibility for the care of the child, the federal government avoids substantial costs. It has also been demonstrated that released children, when represented by counsel, overwhelmingly appear for their court hearings; as noted above, over 99 percent of children in fact appear in immigration court when they are matched with an attorney who can advise them on their rights and responsibilities in the immigration system.

Not only would this Act extensively limit access to asylum and trafficking protections, it would virtually eliminate access to U visas for unaccompanied child victims of crimes in the United States and for Special Immigrant Juvenile Status, a two decades-old form of humanitarian protection for abused, abandoned, and neglected children. For example:

- **An eleven-year-old girl named Jocelyn** was sexually abused by her stepfather and her mother refused to protect her. Through a family member, Jocelyn was able to locate her birth father in the United States and fled for protection. If H.R. 1153 were law, CBP would be charged with determining whether Jocelyn suffered sexual abuse, an expertise far outside its scope as the law enforcement agency charged with the protection of U.S. border security.

- **A fourteen-year old girl named Lucia** was lured into the U.S. with false promises of working on a farm. After she was brought across the border, she was held in a house and raped repeatedly by unknown men. The house was raided and she was sent to an ORR therapeutic home for girls where she was able to talk about the rapes and care for the child that she conceived as a result of the rapes. If this Act were to become law, CBP would have sole authority to determine whether Lucia was a victim of a crime or trafficking in the U.S., and without access to trauma support and pre-natal care, Lucia would have been automatically returned to her traffickers who would continue to operate with impunity in the United States.

Finally, this Act provides for an extended period of time before children are transferred out of CBP custody. Thus, a child traveling alone would spend an increased amount of time in CBP custody, which has been found fundamentally inappropriate for children. If this legislation were enacted, we would once again experience the troubling situation of children in CBP custody that we witnessed during the summer of 2014 when thousands of children spent weeks in overcrowded cement holding cells near the border with insufficient food, supplies, and health services.

H.R. 1149 and H.R. 1153 are fundamentally unnecessary in their attempts to roll back protections for unaccompanied children currently available under Section 235 of the TVPRA. The TVPRA provides a framework that allows for the full adjudication of unaccompanied children's claims for protection through timely proceedings while ensuring their appropriate care in the interim. The law represents a sound approach toward balancing the ability of the U.S. government to address child migration with the protection of children fleeing human trafficking, violence, and abuses in their home countries.

Recommendations on Improving the Protection of Unaccompanied Children

Unaccompanied immigrant and refugee children are—first and foremost—children. Whenever possible they should be safely released to family who are able to care for them pending their immigration proceedings. They are entitled to due process of law, but also deserve the protection and care we would want extended to any child. In virtually every other area of U.S. law, we recognize that children require additional protections because of their reduced developmental capacity. Immigration law is no different. We should expect that all children are provided a heightened level of protection in our legal, judicial and adjudicative processes.

This is not only the humane response, but also improves court efficiency and is more cost effective than federal custody. The U.S. should adhere to three principles that ensure fair

proceedings and protect children's safety: 1) all children should have lawyers to assist them in accessing the legal protections for which they are eligible; 2) all decisions should be made with consideration for the child's best interests and child advocates must be appointed for the most vulnerable children; and 3) funding for post-release services is vital to ensure children's safety, security, and integration in their family setting and their local communities.

Access to Counsel

All children in adversarial proceedings should be afforded counsel. Upon release from ORR custody, approximately half of unaccompanied children appear in immigration court without representation. Children as young as toddlers are often forced to appear before an immigration judge in a formal courtroom. While the child is unrepresented, the government is represented by an attorney who has been trained U.S. immigration law.

Furthermore, the prioritization of hearings for unaccompanied children—the so-called “rocket dockets”— that began in fall 2014 often do not allow children enough time to find an attorney and prepare for their case. This increases the number of children going through proceedings without representation, as well as those who receive removal orders in absentia.

Every unaccompanied child should have legal representation in immigration proceedings – if necessary, at government expense. The TVPRA laid the groundwork for this by mandating that the Secretary of Health and Human Services ensure that unaccompanied children are represented by counsel to the maximum extent practicable. HHS should expand its support for the facilitation of pro bono representation by the private sector. Lawyers from the law firm and corporate communities have demonstrated great commitment to representing unaccompanied children when supported by legal services organizations that can train and mentor them. A robust mix of government-funded and pro bono representation by the private sector is needed to fill the enormous representation gap that currently exists.

Eliminating Fast-tracked Immigration Court Proceedings for Unaccompanied Children

Unaccompanied children have been inappropriately designated as a top priority for adjudication of their cases by the immigration courts. The Administration should immediately reverse this decision and reserve its resources for the priority adjudication of cases of individuals who present a threat to the safety and security of the United States.

Ensuring the Safety of Children while in Federal Custody and after Release

ORR must continue to expand its bed space capacity in licensed child welfare facilities to accommodate the fluctuating numbers of unaccompanied children arriving in the United States.

It should also take immediate steps to enhance the screening procedures for individuals who serve as sponsors for children upon release. This includes reinstating fingerprinting, criminal background checks, and identification procedures to ensure that potential sponsors are indeed who they say they are and do not pose a threat to the safety and well-being of the child.

ORR should also increase its support for the delivery of comprehensive psychosocial services to unaccompanied children after their release.

Addressing the Root Causes of Migration from Central America

KIND applauds Congress for providing \$750 million in funding for root causes in the FY16 omnibus spending bill. This funding will provide essential assistance to a region that the U.S. has long neglected. National child welfare and education systems in the top sending countries are weak and often unable to provide protections to at-risk children. The U.S. should work with the governments of El Salvador, Honduras, and Guatemala to enhance these systems and provide meaningful opportunities for children and young people to remain in their countries of origin safely and sustainably.

We request an additional \$750,000 in FY17 as part of a sustained and multi-year effort to address the root causes of unaccompanied child migration from these three countries. Until violence in the region significantly diminishes, unaccompanied children and families will continue to seek protection in the United States.

I mentioned earlier that KIND welcomes the Obama Administration's decision to engage with UNHCR to screen those fleeing extreme and growing violence in Central America to determine if they are eligible for U.S. protection as an important step toward recognition that the region is experiencing a refugee crisis. However, refugee resettlement is a limited response and in no way a substitute for the ability to apply for asylum in the U.S. through a full and fair process, which includes having an attorney to represent them in their case.

A key to protection will be ensuring that claims are heard in a timely way so that a long term solution can be reached—whether it is resettlement in the U.S. or in another country in the region—as quickly as possible. This is particularly important for children as an uncertain fate is damaging to their development and well-being. Child protection officers and best interest determinations must also be built into the process for cases involving children.

Claims for refugee status must be analyzed with an acknowledgment of the many different types of claims involving threats or harm by gangs, narco-traffickers, and other organized criminal syndicates—including sexual and gender-based violence targeting both girls and boys.²² Additionally, children's claims for protection must be examined with a child-sensitive lens that takes into account their development and particular vulnerability.

The Central American Minor (CAM) in-country refugee processing program must also remain in place as a complementary approach to protection. Children in the CAM program, as well as this

²² KIND, CGRS, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System*, February 2014. <https://supportkind.org/resources/a-treacherous-journey-child-migrants-navigating-the-u-s-immigration-system/>

new resettlement program, also need access to pro bono attorneys to explain the process and support them in preparing their cases.

A robust asylum process that ensures due process and fundamental fairness is the most critical component in addressing a refugee crisis. Resettlement programs can be used strategically to support this response, but must not be viewed as a substitute for U.S. asylum obligations, as well as the asylum obligations of Mexico and other surrounding countries.

Supporting the Reintegration of Children for whom Return in in their Best Interests

If after due process is afforded and a decision is made to return a child to their country of origin, the United States should support programs that assist children in the return and facilitate their reintegration into their families, homes, and communities. U.S. funding is currently narrowly focused on the construction of reception centers that provide only initial services immediately after return. Comprehensive services should be put in place that address the needs of the child on a longer-term basis. These should include education, health care, family reunification support, and jobs skills training.

Creation of a Contingency Fund to Support the U.S. Response to Migration Crises

This hearing has raised the pertinent question of whether the Central American migration crisis is the “new normal.” Only time and the robustness of the U.S. response will determine the answer to that question. To assist in finding sustainable solutions, Congress should create a contingency fund that federal agencies charged with the care of unaccompanied children, including the Departments of Homeland Security, State, Health and Human Services, and Justice, can tap into to address crises comprehensively while balancing urgent protection needs with bringing order to unforeseen migration flows.

Conclusion

Congress has a unique and important role in the response to the increased number of unaccompanied children seeking protection in the United States. Robust oversight of and provision of resources to the agencies charged with the care and custody of unaccompanied children is essential to ensure that these children are housed in safe and appropriate facilities and conditions while they are in federal custody. Children’s immigration proceedings must be fairly adjudicated in a timely way and children must be represented by pro bono counsel when they cannot afford counsel themselves. Finally, Congress should ensure that children are safely and quickly released to their families while awaiting their immigration process utilizing procedures that ensure that such releases are in the best interests of the child and ensure their safety and well-being. Ultimately, the long-term solution to the Central American migration crisis lies in addressing the root causes of the flow.

Fundamentally, we must remain steadfast in our commitment to protecting vulnerable migrants and remember that unaccompanied children are children first and foremost. KIND looks forward to working with Congress on legislation that will improve the responses of our immigration, asylum, and refugee systems to the protection of unaccompanied children.

Thank you again for the opportunity to appear before you today.