Statement for the Record by Kids in Need of Defense (KIND)

"Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

House Judiciary Subcommittee on Immigration and Citizenship

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Kids in Need of Defense (KIND) is the leading national organization working to ensure that no child faces immigration court alone. KIND was founded by the Microsoft Corporation and the United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie. We have served more than 20,000 unaccompanied children in removal proceedings, trained over 50,000 attorneys, paralegals, and law students on pro bono representation, and formed partnerships with 644 corporations, law firms, law schools, and bar associations. KIND also helps children who are returning to their home countries to do so safely and to reintegrate into their home communities. In addition, we seek to change law and policy to improve the protection of unaccompanied children in the United States and to build a stronger regional protection framework throughout Central America and Mexico.

Through our work, KIND has observed how the Trump administration's sweeping restriction of judicial independence and due process in the immigration court system has impaired vital legal protections for unaccompanied children. Leveraging structural defects in that system—not least its vulnerability to the political influence of the Department of Justice (DOJ)—the administration has pushed through a host of policy changes and rulings that undermine the fairness and impartiality of proceedings while also decreasing their efficiency.

Some of these shifts have expressly targeted unaccompanied children. A 2017 Executive Office for Immigration Review (EOIR) memorandum, for instance, advised that immigration judges may reject the Department of Homeland Security's (DHS) determination of a child's "unaccompanied alien child" status[1] and thereby strip the due process safeguards that status provides. That same year, EOIR weakened longstanding guidelines for accommodating the unique developmental needs of children during proceedings.[2]

Many other, broader changes in court policy have had particularly damaging consequences for unaccompanied children. Those changes include the 2018 imposition of draconian case completion

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[1] Federal law defines an "unaccompanied alien child" as a child under the age of 18 who has no lawful immigration status and for whom there is no parent or legal guardian in the United States, or no parent or legal guardian available to provide care and custody. 6 U.S.C. 279(g)(2).

[2] Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, Dec. 20, 2017, https://www.justice.gov/eoir/file/oppm17-03/download.

quotas on immigration judges,[3] coupled with restrictions on the use of docket management tools like continuances and administrative closure. The resulting pressure to rush through cases often deprives unaccompanied children of opportunities to secure essential legal representation and to obtain humanitarian protection. Most troubling, these shifts have led to nonsensical outcomes in which USCIS has approved children's applications for humanitarian protection, yet as those children waited for the visas associated with that relief to become available, judges knowingly ordered them removed from the United States.

Judges should not have to render decisions with life-or-death consequences for unaccompanied children based on this or any administration's political interference. The rulings of immigration courts should reflect fair and impartial application of law and faithful observance of due process and Congressional intent. To achieve this standard, KIND urges Congress to transfer the immigration courts out of the executive branch altogether. The establishment of an independent Article 1 immigration court system—in which judges have the discretion and independence they need to manage and decide cases and to uphold due process of law—would help ensure that all unaccompanied children receive a fair day in court.

Structural defects in the current immigration court system

Structural defects in the current immigration court system frustrate due process and judicial independence. EOIR and the immigration courts operate within the executive branch, leaving them subject to the political interference of the administration in power. The courts' specific residence in the Department of Justice means that the Attorney General functions as both chief prosecutor and lead judge, an irreconcilable conflict of interest that risks the pursuit of policy priorities at the expense of fundamental fairness. Compounding these problems, immigration judges are in the Attorney General's employ and classified as government attorneys, an arrangement giving DOJ far-reaching control over judges' case management, court location, and employment status.

Taken together, these infirmities allow the executive branch to drive new policies and rulings that advance its agenda while weakening due process and limiting the ability of judges to reach fair and impartial decisions. Addressed below are a series of measures taken by the Trump administration with precisely those effects.

Express rollbacks of unaccompanied children's due process protections

In recent years, EOIR has carried out a series of harmful changes directed explicitly at unaccompanied children. In September 2017, EOIR's General Counsel issued a memorandum advising that immigration judges are not bound by DHS' prior determinations that children meet the statutory definition of an "unaccompanied alien child" and may terminate their unaccompanied status.[4] Additionally, in the October 2018 *Matter of M-A-C-O* decision, EOIR's Board of

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[3] Memorandum from EOIR Director to All of Judges, Immigration Judge Performance Metrics (March 30, 2018), available at http://www.abajournal.com/images/main_images/from_Asso_Press_-_03-30-2018_McHenry_-_IJ_Performance_Metrics_.pdf. Earlier that year, EOIR also announced performance goals for immigration courts. See Memorandum from James R. McHenry III, Director, EOIR, Case Priorities and Immigration Court Performance Measures, Jan. 17, 2018, https://www.justice.gov/eoir/page/file/1026721/download.

[4] Memorandum from Jean King, General Counsel of Executive Office for Immigration Review, to James R. McHenry III, Acting Director of EOIR, Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied

Immigration Appeals (BIA) held that immigration judges have initial jurisdiction over the asylum cases of unaccompanied children who turned 18 before filing their asylum applications.[5]

These changes weaken key procedural protections for unaccompanied children enshrined in the Homeland Security Act of 2002 and Trafficking Victims Protection Reauthorization Act (TVPRA). Those laws provide for an unaccompanied child's right to have her asylum case first heard in a non-adversarial setting before a trained U.S. Citizenship and Immigration Services (USCIS) asylum officer,[6] as well as to an exemption from the one-year filing deadline that generally applies to asylum applications.[7] Such protections, like DHS' initial determination of who meets the definition of an "unaccompanied alien child," have been interpreted to attach for the duration of a child's immigration proceedings, as children are still required to attend and participate in their own complex immigration cases even after they turn 18 or are reunified with a parent.

Redeterminations of a child's unaccompanied status, together with restrictions on that child's access to USCIS asylum adjudications, not only create confusion for children, attorneys, and adjudicators, they also expose children to more adversarial and less child-appropriate processes. In so doing, they contravene the specific intent of Congress to ensure particularly vulnerable children can meaningfully access humanitarian protections that help ensure they are not returned to harm.

What is more, these changes compound the administrative demands on an already overburdened system. Applications for legal relief may be duplicated or transferred between different departments and agencies as redeterminations occur, creating additional paperwork and unnecessary delays. These results undermine, not enhance, the efficiency of our immigration courts and the faithful administration of our immigration laws.

Making matters worse, in December 2017 EOIR issued a memorandum titled "Guidelines for Immigration Court Cases Involving Juveniles" that further impairs due process protections for unaccompanied children.[8] This memorandum replaced and weakened longstanding guidelines that directed the use of child-friendly practices, such as child-sensitive questioning techniques, to improve the ability of children to attend and meaningfully participate in immigration proceedings that may determine their safety and future. Specifically, the new guidance, while referencing the potentially complicated and sensitive nature of children's cases, restricts judges' discretion to consider children's best interests in creating child-appropriate courtroom environments and advances a skeptical tone toward claims by unaccompanied children.

The guidelines also dilute measures designed to address the unique developmental needs of children, including by removing language related to the use of telephone conferences and narrowing children's opportunities to gain familiarity with hearing environments before they are required to deliver painful and difficult testimony in support of their legal claims. These changes

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Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sept. 19, 2017), https://cliniclegal.org/sites/default/files/resources/King-9-19-17-UAC-TVPRA.pdf.

[5] 27 I & N Dec. 477 (BIA 2018).

[6] 8 U.S.C. 1158(b)(3)(C); INA 208(b)(3)(C).

[7] INA 208(a)(2)(E).

[8] Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, Dec. 20, 2017, https://www.justice.gov/eoir/file/oppm17-03/download.

run counter to the TVPRA, which was enacted in recognition of a "special obligation to ensure that these children are treated humanely and fairly."[9] Indeed, the modified guidelines heighten the risk that children will have to present their claims in an intimidating or even hostile court setting, which could lead to their cases being inadequately considered and their return to danger in the countries they fled despite their eligibility for legal protection. Unfortunately, over half of unaccompanied children in removal proceedings—tens of thousands of them—are unrepresented by counsel,[10] making accommodations all the more critical to a vulnerable population that more often that not must navigate this complex legal process alone.

Draconian case completion quotas and restrictions on docket management tools

DOJ's implementation of stringent case completion requirements, along with limitations placed on judges' use of docket management tools, has severely curtailed judicial independence and undermined unaccompanied children's access to relief and counsel. In March 2018, DOJ announced new metrics for immigration judges[11] that compel hurried and incomplete consideration of legal cases with life-or-death implications. These metrics, which took effect October 1, 2018, factor the number of cases an immigration judge completes in a fiscal year into the judges' annual performance review. By linking individual judges' job evaluations to the rapid completion of cases, the performance metrics act as a disincentive to scheduling accommodations that may be critical to unaccompanied children's cases for legal protection.

Decisions issued that same year by then-Attorney General Jeff Sessions further restricted use of two of those accommodations—continuances and administrative closure—which judges have historically employed to pause court proceedings in the interests of justice. In *Matter of Castro-Tum,* Attorney General Sessions ruled that immigration judges and the Board do not have general authority to administratively close cases and instead have such authority only when "a previous regulation or settlement agreement has expressly conferred it."[12] In *Matter of L-A-B-R,* the Attorney General similarly restricted judges' use of continuances, allowing the exercise of that docket management tool "only for good cause shown."[13]

In combination, these restrictions on immigration judges' discretion to manage their own case dockets and proceedings have significantly limited unaccompanied children's access to humanitarian protection and produced nonsensical legal outcomes that place children's lives at risk. Forms of relief such as Special Immigrant Juvenile Status (SIJ) require children to appear before USCIS or state family courts. These proceedings, which occur in different fora and according to schedules beyond the control of unaccompanied children or EOIR, are imperative to

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[9] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).
[10] KIND, "Fact Sheet," https://supportkind.org/resources/kind-fact-sheet/.
[11] Memorandum from EOIR Director to All of Judges, Immigration Judge Performance Metrics (March 30, 2018), available at http://www.abajournal.com/images/main_images/from_Asso_Press_-_03-30-2018_McHenry_-_IJ_Performance_Metrics_.pdf. Earlier that year, EOIR also announced performance goals for immigration courts. *See* Memorandum from James R. McHenry III, Director, EOIR, Case Priorities and Immigration Court Performance Measures, Jan. 17, 2018, https://www.justice.gov/eoir/page/file/1026721/download.
[12] 27 I&N Dec. 271, 283 (A.G. 2018). In *Romero v. Barr*, 937 F.3d 282, 294 (4th Cir. 2019), the Fourth Circuit Court of Appeals vacated *Matter of Castro-Tum* in that circuit and affirmed the importance of the use of administrative closure.
[13] 27 I&N Dec. 405 (A.G. 2018).

accessing SIJ and other forms of humanitarian protection.[14] In the past, judges often granted continuances or administrative closure to allow other fora to complete their determinations. Now, judges are increasingly denying motions for these accommodations, effectively depriving children of an opportunity to have their claims for relief fully and fairly considered, while violating express provisions of the TVPRA prescribing specific substantive and procedural protections for unaccompanied children. Indeed, judges have gone so far as to issue removal orders for children when USCIS has approved such applications but visa numbers are not yet available, *despite USCIS's determination that it is not in the child's best interest to return to her home country.* These senseless orders, which are a direct result of the administration's interference in judges' docket management practices, violate due process and threaten children's safety.

In addition, the new policy measures have significantly elevated barriers to children's access to representation. Docket management tools such as continuances and administrative closure enable judges to temporarily postpone hearings to afford children an adequate opportunity to secure and establish trust in counsel who can evaluate and prepare their cases and help ensure due process. Such counsel can mean the difference between life and death; indeed, non-detained immigrants without representation are five times less likely than their represented counterparts to win relief,[15] and often face the prospect of return to countries where their safety is in jeopardy. The reduced availability of these critical tools, then, makes it more difficult for unaccompanied children to acquire representation and demonstrate eligibility for relief. As a consequence, this vulnerable population faces an elevated risk of return to harm.

By limiting children's access to counsel and foreclosing avenues to relief before USCIS, the policy changes cited also make immigration courts less efficient. Attorneys enhance efficiency by, among other actions, identifying children's grounds of eligibility for relief—or, conversely, helping them understand when they may lack such eligibility—and enabling immigration judges to spend less time explaining to children the court's processes. Similarly, continuances and administrative closure can improve efficiency by allowing immigration judges to pause certain cases pending adjudications outside the court system, thereby conserving court resources. USCIS case approval in such instances often enables the termination of court proceedings and consequent reduction of the court backlog. It comes as no surprise, then, that changes introduced under the Trump administration to curb judicial independence have contributed to that backlog's growth. Indeed, from FY 17 to the present, the backlog has ballooned from over 600,000 cases to nearly 1.1 million.[16]

Misuse of case certification authority

The protection claims of unaccompanied children often relate to sexual and gender-based violence, gang violence, and/or harm suffered due to a child's membership in her family unit. Under the Trump administration, such claims—along with others common to this vulnerable population—have come under direct attack, making unaccompanied children's access to relief an outsize target.

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[14] Other applications for humanitarian relief often filed by unaccompanied children in removal proceedings and adjudicated by USCIS include U visas for victims of crimes and T visas for trafficking survivors.

[15] American Immigration Council, "Access to Counsel in Immigration Court" (Sep. 26, 2018); https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[16] TRAC, "Immigration Court Backlog Tool" (Accessed Jan. 27, 2020); https://trac.syr.edu/phptools/immigration/court_backlog/.

In particular, Attorneys General have used their authority to certify immigration court cases for review and to issue binding rulings on them—an authority intended to ensure the fair administration and interpretation of our immigration laws—to instead undermine the viability of asylum claims like those above. Certified cases including *Matter of A-B-* and *Matter of L-E-A-* illustrate this misuse and underscore the danger of housing the immigration court system within the executive branch.

In March 2018, Attorney General Jeff Sessions certified to himself *Matter of A-B-*, a case in which the BIA had overturned an immigration judge's denial of asylum on the basis of severe domestic violence by the applicant's ex-husband. Three months later, the Attorney General issued his opinion in the case and held that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[17] The ruling overlooks the widespread and severe sexual- and gender-based violence and gang violence that is driving children to flee their homes and countries in search of safety. While legally defective in numerous respects, the decision nonetheless elevated barriers to relief for many unaccompanied children facing danger.

Subsequently, in July 2019, Attorney General William Bar issued a decision in the certified case *Matter of L-E-A-*.[18] This opinion, rooted in flawed legal analysis, appears designed to limit grants of asylum due to a well-founded fear of persecution based on an individual's membership in a family unit. Among other infirmities, the decision fails to properly reflect evidence, noted by KIND and other amici in a March 2019 brief, that Congress intended to allow children to assert family-based asylum claims.[19]

The previous year, in *Matter of E-F-H-L-*—another case certified for review—Attorney General Sessions vacated the BIA's prior ruling finding that individuals applying for asylum are entitled to an evidentiary merits hearing on their application.[20] The Attorney General's decision, issued years after that Board precedent, threatens to result in immigration judges' summary rejection of asylum cases based on written applications alone, without oral testimony from the applicant.

Such rejections would impede due process in cases with the highest of stakes. Many applicants for asylum do not have attorneys to assist them in navigating complex immigration laws and must prepare their applications on their own, frequently in a language with which they have only limited familiarity. Consequently, their applications may insufficiently reflect the extent of the persecution they fear or experienced. Evidentiary hearings in immigration court allow asylum seekers to explain the facts and circumstances giving rise to their claims and to clarify any misunderstandings or confusion before the judge renders a decision.

Enhanced political control over key immigration court cases

In addition to its misuse of the certification process, the Trump administration has adopted a range of measures that enhance political control over key cases in the immigration court system. An interim final rule issued by EOIR in August 2019 exemplifies this effort.[21] The rule authorizes

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[17] *Matter of A-B-*, at 320.
[18] 27 I&N Dec. 581 (A.G. 2019)
[19] Brief for KIND, et al. as Amici Curiae, *Matter of L-E-A-*, 27 I.&N. Dec. 40 (BIA 2017), 27 I.&N. Dec. 494 (A.G. 2018).
[20] *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018).
[21] 84 Fed. Reg. 44537 (Aug. 26, 2019).

EOIR to short-circuit the appellate process by allowing a political appointee to unilaterally decide important legal issues instead of the BIA. Specifically, when a case assigned to a single Board member has remained pending for longer than 90 days, or if one assigned to a three-member panel has remained pending more than 180 days, the EOIR Director may now take up the case personally and issue a decision. This drastic shift strengthens DOJ's top-down authority over binding immigration rulings, including rulings with consequences for unaccompanied children. In so doing, it raises the likelihood that political influence rather than the fair administration of justice will dictate critical case outcomes affecting this vulnerable population.

Likewise, the composition of the BIA itself increasingly reflects the political influence of the Trump administration. Around August 2019, DOJ named six new members to the Board, four of them to seats that DOJ added the prior year.[22] Averaged together, these six BIA judges had an asylum denial rate of 90.7 percent as lower-court immigration judges—dramatically higher than the national average of 57.6 percent.[23] The creation of these seats and selection of these judges—who significantly shift the composition of the Board—appear to advance the administration's political aims rather than judicial principles of fairness and impartiality.

"Tent Courts"

In September 2019, EOIR began conducting hearings in "tent courts" that present severe barriers to due process.[24] These facilities, located in Laredo and Brownsville, Texas, act as makeshift courtrooms for asylum seekers—including families with children—who have been placed by DHS into the "Remain in Mexico," or so-called Migrant Protection Protocols (MPP), program. Under MPP, over 59,000 asylum seekers, including at least 16,000 children, have been forced by the U.S. government to wait in dangerous conditions in Mexico pending their hearings in the United States.[25] As of September, nearly 98% of returned asylum seekers lacked counsel, leaving all too many families without essential representation during tent court proceedings.[26] Those proceedings rely exclusively on video teleconferencing,[27] through which immigration judges sitting in distant immigration courts preside over the facilities' proceedings, raising additional due process concerns that have long attended this technology.

It bears emphasis that MPP has resulted in numerous family separations, compelling hundreds of vulnerable children to seek protection alone.[28] Such foreseeable consequences of this misguided

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[22] Tal Kopan, "AG William Barr promotes immigration judges with high asylum denial rates," San Francisco Chronicle (Aug. 23, 2019); https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php#.
[23] *Id.*
[24] AILA Policy Brief, "Public Access to Tent Courts Now Allowed, but Meaningful Access Still Absent" (Jan. 20, 2020); https://www.aila.org/advo-media/aila-policy-briefs/public-access-tent-courts-allowed-not-meaningful.
[25] Human Rights First, "A Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico" (Jan. 2020); https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf.
[26] ABA, "ABA counsel testifies about concerns with Remain in Mexico immigration policy" (Nov. 19, 2019); https://www.americanbar.org/news/abanews/aba-news-archives/2019/11/aba-counsel-testifies-about-concerns-with-remain-in-mexico-immig/.
[27] *Id.*
[28] Priscilla Alvarez, "At least 350 children of migrant families forced to remain in Mexico have crossed over alone to US" (Jan. 24, 2020); https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html.

program make unaccompanied children's access to counsel and protection all the more imperative. Further, it remains critical that children of families subject to MPP receive individual screenings, as they may have independent protection claims qualifying them for relief.

Recommendations

To help ensure full observance in removal proceedings of the due process rights of unaccompanied children and others, and to foster independence, fairness, and impartiality in judicial decision-making, KIND recommends the following two actions:

(1) Establishment of an independent Article I immigration court system. Decisions reached by immigration judges can hold life or death consequences for unaccompanied children. It is critical that these judges have the time, discretion, tools, and independence necessary to fully and fairly consider the cases before them—free from political interference. To this end, KIND recommends that Congress create an independent immigration court under Article I of the Constitution. An independent court would advance due process and access to justice, helping ensure that all unaccompanied children receive a fair day in court.

(2) Before and after establishment of an independent court system, ensure that immigration judges have discretion to manage their own case dockets and proceedings. Recent decisions by the Attorney General have curtailed the discretion of immigration judges to issue continuances or administratively close cases on their dockets—important tools that judges may use to temporarily halt proceedings to afford individuals the time needed to secure legal counsel or to await adjudication of applications for relief by other courts or agencies. Discretion to use these tools is particularly critical in the case of unaccompanied children, whose applications for asylum or SIJ status are adjudicated by USCIS, rather than immigration judges. Absent discretion to manage their cases, judges may be forced to order children and others appearing before them deported, despite their need for protection and eligibility for relief.