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## Administrative Chaos: Responding to Child Refugees—U.S. Immigration Process in Crisis

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# Administrative Chaos: Responding to Child Refugees—U.S. Immigration Process in Crisis

Professor Lenni B. Benson\*

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### *I. Introduction*

John Oliver, the popular comedian on HBO, recently aired a twenty-five minute segment exploring the manner in which the U.S. government adjudicates children’s removal and asylum claims.<sup>1</sup> As part of that segment, he reported that at least one senior judge testified during a deposition that he had aided a child as young as four years old to understand enough immigration law to be able to proceed without an attorney.<sup>2</sup> Oliver included videos simulating how a child of that age might answer the standard queries of an immigration judge.

Judge to Child: “And if you are ordered removed, do you wish to designate a country where you will be removed?”

Child: (Long pause, then smile) “Pizza!”

Frankly, this Article will come alive and mean a great deal more to you if you stop reading and take a moment to view the Oliver program. The analysis below will be here when you return. What Oliver helps to make clear is that our immigration courts are the wrong forums to consider the protection needs of children.<sup>3</sup> In

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1. See Last Week Tonight, *Immigration Courts: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 1, 2018) (showing John Oliver’s program on April 1, 2018), <https://www.youtube.com/watch?v=9fB0GBwJ2QA>.

2. See Deposition of Immigration Judge Jack H. Weil at 69–70, *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) (No. 2:14-cv-01026), [https://www.aclu.org/sites/default/files/field\\_document/honorable\\_jack\\_h\\_weil\\_mini.pdf](https://www.aclu.org/sites/default/files/field_document/honorable_jack_h_weil_mini.pdf) (detailing ways in which young children are taught to understand immigration law). This litigation surrounds the due process right to appointed counsel for children. See *infra* note 44 and accompanying text (discussing the litigation process immigrant children face).

3. See generally Lenni B. Benson, *Finding the Forum that Fits: Child Immigrants and Fair Process*, 23 ROGER WILLIAMS U. L. REV. 419 (2018)

this Article, I will briefly survey some of the other problems in the current administrative structures where at least five different agencies and courts may be required to consider a single child's case, and why some of the current administrative decisions are making an already complex system much worse.

More than 50% of the world's refugees are children.<sup>4</sup> Yet our international law and legal processes are ill prepared to address the special needs or to fairly assess the protection claims of young people. Sadly, the United States is no exception to this rule, and in recent years the established procedures used to adjudicate children's claims have come under repeated attack. The theme of this Symposium was examining immigration adjudication and policy through the lens of actions taken by the Executive Branch. For those who seek to aid or represent youth seeking asylum or other humanitarian protection, the behavior of the Executive Branch has produced administrative chaos.

This Article was prepared in the late winter of 2017 and before the Trump Administration formally began to separate parents and children apprehended at the Southwest border.<sup>5</sup> This Article

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(discussing the appropriate forums for child immigration needs).

4. See *Trends at a Glance*, UNHCR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/globaltrends2016/> (last visited Sept. 20, 2018) ("Children below 18 years of age constituted about half of the refugee population in 2016, as in recent years.") (on file with the Washington and Lee Law Review).

5. The origin and implementation of this new policy to separate parents and children at the U.S. border was very nontransparent. It has been through litigation and Congressional oversight hearings and advocates have begun to realize how most of the implementation was "ad hoc" and the relevant agencies were poorly prepared. There were at least four or five law suits filed to challenge the legality of the separations of parents and children. Most were consolidated in the national class action brought by the Immigrant Rights Project of the American Civil Liberties Union. See, e.g., *Ms. L. v. Immigration and Customs Enf't*, No. 3:18-cv-0428-DMS-MDD (S.D. Cal. June 26, 2018) (granting plaintiffs' motion to certify class alleging that the government has a widespread policy of separating immigrants from their families). For a three-part series discussing the origins of the policy, the resulting litigation, and empirical assessments of the numbers of children impacted, see Adam Isacson et al., *Washington Office on Latin America Reports*, WOLA, <https://www.wola.org/analysis/national-shame-trump-administrations-separation-detention-migrant-families/> (last visited Sept. 20, 2018) (reporting on the policy and effect of the Administration's immigration policy) (on file with the Washington and Lee Law Review).

primarily describes the law and procedure for adjudicating claims for “unaccompanied” children, a term of art found in the federal statutes.<sup>6</sup> As a result of the family separations more than 3,000 children were re-characterized as an “unaccompanied alien child” and custody of these children was transferred to Health and Human Services away from the Department of Homeland Security.<sup>7</sup> It is beyond the scope of this Article to address all of the turmoil, heartbreak, and legal violations that resulted from this unfortunate practice of family separation. And as of the end of August 2018, there are still many children who have not been released nor reunited with family. What is clear, is that the administrative chaos described here became even more volatile, stressed, and confusing as thousands of additional children were suddenly transformed into “unaccompanied children.”

Before I outline some of the administrative and executive actions, let us examine the available data about the apprehension of unaccompanied children at our southwest border.<sup>8</sup>

Nationality	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
El Salvador	1,394	3,314	5,990	16,404	9,389	15,987	9,143
Guatemala	1,565	3,835	8,068	17,057	13,589	17,113	14,827
Honduras	974	2,997	6,747	18,244	5,409	9,305	7,784
Mexico	11,768	13,974	17,240	5,634	11,012	10,857	8,887
Totals:	15,701	24,120	38,045	67,339	39,399	53,259	40,631
Aggregate FY 2013 to FY 2017: 278,494 Unaccompanied Children							

6. See 6 U.S.C. § 279(g)(2) (2012) (defining “unaccompanied alien child” to mean a child who “has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to who there is no legal guardian in the United States”). This provision of the Trafficking Victims Protection Reauthorization Act (TVPR) is not directly integrated into the INA itself.

7. The role of the HHS is described in great depth below. See *supra* note 13 and accompanying text (discussing the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS)).

8. See *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2017*, U.S. CUSTOMS & BORDER PROT. (Dec. 15, 2017), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions-fy2017> (last visited Sept. 20, 2018) [hereinafter “CBT Stats”] (comparing the number of unaccompanied alien children at the Southwest border in 2017 and 2016) (on file with the Washington and Lee Law Review).

While these numbers are significant, especially at a time when overall apprehensions at the Southwest border are falling,<sup>9</sup> the total number of children is very small in comparison to the refugee flows in other parts of the world. For example, UNICEF reports that hundreds of thousands of children are moving from the Middle East and northern Africa in an effort to reach Europe.<sup>10</sup>

The phenomenon of children on the move is not unique to the United States.<sup>11</sup> When compared with the significantly larger number of people and children arriving in other parts of the world, we have the resources and personnel to address child migration thoughtfully. We can design and implement a system that respects the needs and abilities of children to navigate the adjudication system. But the politics of the moment and the lack of leadership within Congress, together with the current patchwork adjudication models, have only compounded the confusion and tension in adjudicating children's statutory claims for protection. For while children may, as a matter of theoretical, moral, and ethical duties, have a general claim to protection from a

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9. U.S. Customs and Border Protection (CBP) reported apprehensions in FY 2017 were 310,531 and unaccompanied children represented 41,435 of these totals. Therefore, around 13% of all apprehension represents unaccompanied children. See U.S. CUSTOMS & BORDER PROT., CBP BORDER SECURITY REPORT: FISCAL YEAR 2017 2 (2017) ("CBP recorded the lowest level of illegal cross-border migration on record."); *Southwest Border Migrations FY2018*, U.S. CUSTOMS & BORDER PROT. (June 6, 2018), <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last updated Aug. 8, 2018) (last visited Sept. 20, 2018) (listing the number of individuals apprehended at the border) (on file with the Washington and Lee Law Review); CBT Stats, *supra* note 8 (same).

10. In a 2017 fact sheet issued by the UN, UNICEF, and the IOM, the authors estimated that in the first half of 2017 Europe noted that children represented 161,087 refugee protection claims. See UNHCR, UNICEF & IOM, REFUGEE AND MIGRANT CHILDREN IN EUROPE 4 (2017), [http://www.iomvienna.at/sites/default/files/Infographic\\_on\\_Children\\_Q3\\_2017\\_.pdf](http://www.iomvienna.at/sites/default/files/Infographic_on_Children_Q3_2017_.pdf) (describing asylum application and decisions in European countries in 2017). But all of the leading international organizations note the problem with accurate data. See UNICEF, A CALL TO ACTION: PROTECTING CHILDREN ON THE MOVE STARTS WITH BETTER DATA 2 (2018), [https://www.iom.int/sites/default/files/press\\_release/file/pbn\\_02152018\\_Call%20to%20action\\_clean.pdf](https://www.iom.int/sites/default/files/press_release/file/pbn_02152018_Call%20to%20action_clean.pdf) (discussing issues with unreported migrating children).

11. On September 10, 2018, Elgar Press published a book I edited with Dr. Mary Crock that explores the treatment of migrant children in many regions of the world. See *generally* MARY CROCK & LENNI BENSON, PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE (2018).

nation-state, this Article will focus on those avenues of protection that already exist within U.S. statutory law. In other words, our Executive Branch has a duty to faithfully execute the laws. A very real part of that duty is to consider and decide children's claims for asylum and other protections.

Almost all children apprehended at our borders are taken into federal custody and the U.S. Customs and Border Protection (CBP) drafts documents to begin formal removal proceedings.<sup>12</sup> The custody of these young people is controlled by the Office of Refugee Resettlement (ORR)<sup>13</sup> within the U.S. Department of Health and Human Services (HHS). At the same time, the case files are transferred to Immigration and Customs Enforcement (ICE), the prosecutorial division of the U.S. Department of Homeland Security (DHS). Again, usually without exception, ICE lodges a formal Notice to Appear (NTA) requiring the young person to appear and defend in a removal or deportation hearing before the Executive Office of Immigration Review (EOIR), otherwise known as the "immigration courts," a division of the Department of Justice (DOJ).

Confused yet? Let's summarize one more time:

1. Child is apprehended by CBP.
2. CBP turns the child over for detention to ORR. Most youth have been released to a relative or sponsor as mandated by a long-standing settlement agreement.<sup>14</sup>
3. ICE takes the file from CBP and files a charging document to begin removal proceedings before EOIR.

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12. Removal is the term used to describe hearings formerly known as deportation or exclusion hearings. *See* Immigration and Nationality Act (INA) § 240, 8 U.S.C. § 1229(a) (2018) (describing removal proceedings). The vast majority of children apprehended at the southern border are put into removal hearings and charged with being inadmissible at entry for lack of a visa. *See* INA § 240, 8 U.S.C. § 1229(a) (2018) (discussing the process for a removal proceeding).

13. This division of HHS is inaptly named as "refugee resettlement." For while other components do assist with refugee resettlement, the main function of the ORR for unaccompanied children is to detain the young person as part of the adjudication of the removal case. The name is completely misleading.

14. *See, e.g.,* *Reno v. Flores*, 507 U.S. 292, 292–98 (1993) (describing the rights of a child pending deportation). This litigation has a long history and resulted in a settlement. *Id.* On September 7, 2018, HHS issued proposed regulations with DHS in an attempt to supersede this settlement. *See* 83 Fed. Reg. 45,486 (Sept. 7, 2018).

Not one of those agency actors has a duty of assisting the young person to apply for statutory protection. Only the EOIR may have any responsibility for aiding a child to seek asylum, but as is outlined further below, a completely separate division of DHS, the United States Citizenship and Immigration Service (USCIS), at least initially makes the relief decisions. In the middle of all of those massive agencies, the child is rarely represented and can easily be stranded within the maelstrom of agency action and inaction.

This confusing overlap of jurisdictions and responsibility for the immigrant child is partially the result of the lack of a comprehensive statutory design. The next section explores the fundamental substantive forms of protection available to most of the immigrant youth.<sup>15</sup>

## *II. Statutory Protections in Existing Law*

The fundamental source of federal legal authority in immigration matters is the Immigration and Nationality Act (INA).<sup>16</sup> A statute that has grown and been amended since its initial adoption in 1952. While Congress has not truly, systematically addressed how children's claims should be distinguished from those of adults, there are many protections and categories found within existing law that protect children from removal and, in many cases, authorize a path to full immigrant status as a lawful permanent resident.<sup>17</sup> In 2008, the most direct

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15. For a useful article describing the processing of children arrested at the border and containing valuable flow charts, see generally Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers*, VERA CTR. ON IMMIGR. AND JUST. (Mar. 2012), <https://www.vera.org/publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers> (last visited Sept. 20, 2018) (on file with the Washington and Lee Law Review).

16. The INA is codified at 8 U.S.C. § 1101 et seq. In this Article I cite to both the INA section and the parallel citation in the U.S. Code. Most immigration attorneys and judges refer solely to the INA provisions in immigration matters. Many of the key regulations found in 8 C.F.R. are similarly numbered to the corresponding INA section.

17. A lawful permanent resident ("LPR") is a person permitted to live, work,



and significant provisions directly addressed the phenomena of unaccompanied children by creating a statutory definition in the Trafficking Victims Protection Reauthorization Act.<sup>18</sup> And while this definition does give some substantive and procedural protection to children, it is clear from the operation of the laws over the last ten years that the statutory scheme and administrative implementation has created far too many problems both for government goals of efficiency and accuracy and even more critically for fairness and access to justice for the vulnerable child seeking protection.

Here, I briefly outline the existing forms of statutory protections below because without an understanding of these substantive protections, it is difficult to fully understand why recent administrative responses and procedural changes are at risk of swamping or destroying substantive protections.

### *III. U and T Status*

Congress authorizes the USCIS to grant short-term resident status and later full immigrant status to those who have been trafficked to the United States (T status)<sup>19</sup> and to some people who have been victims of crimes within the United States (U status).<sup>20</sup> To qualify for these protections, a young person has to assemble and file an appropriate petition and document the predicate requirements. In some cases, these petitions require the applicant to document cooperation with prosecution authorities. Typically, the agency adjudication process requires six months to two years before an individual receives a final decision from the USCIS. Further, Congress has capped the number of people who can access these categories of protections,<sup>21</sup> but in the past the administrative

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and remain indefinitely in the United States. The USCIS issues a “green card” to document this status. In almost all cases, a person cannot naturalize to full U.S. citizenship without first obtaining LPR status.

18. See *supra* note 6 (defining unaccompanied alien child).

19. See INA § 101(a)(T), 8 U.S.C. § 1101(a)(T) (2012) (defining T immigrant status).

20. See INA § 101(a)(U), 8 U.S.C. § 1101(a)(U) (2012) (defining U immigrant status).

21. The T visa is capped at 5,000 annually for the principal applicants. See

view has been that people with pending applications should not be pushed through the removal system but should be allowed to complete the evaluation and adjudication process before USCIS. The immigration court has no authority to grant this protection.

### A. Family Petitions

Under the INA, a parent who has permanent resident status may sponsor his or her child to immigrate to the United States under the family-based second preference.<sup>22</sup> Stepparents are included in this category. Some youth who reach the United States could access legal status through family sponsorship provided they can clear the adjudication delays, but they may have to return to the country of origin to complete the immigration process. Congress caps the total number of youth who can immigrate in this category at a base of 114,000 per year.<sup>23</sup> There is currently a quota delay of at least two to four years, and the delays can grow longer if demand increases.<sup>24</sup> The USCIS is the sole adjudicator of the

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INA § 214(o) (2–3), 8 U.S.C. § 1184(o) (2–3) (2012) (stating numerical limitations on the number of T visas allotted per year). The U is limited to 10,000 principal applicants. *See* INA § 214(p)(2)(B), 8 U.S.C. § 1184(p) (2012) (providing numerical limits on the number of U visas allocated per year).

22. *See* INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (2012) (discussing the allocation of visas to those “who are the spouse or children of an alien lawfully admitted for permanent residence”).

23. *See id.* § 1153(a)(2)(B) (stating that, for unmarried sons and daughters of citizens, there “shall be allocated visas in a number not to exceed 114,200”). The quota allocation includes spouses and adult unmarried sons and daughters of permanent residents. The quota can be expanded by adding unused visas in other family categories. For details see *Visa Bulletin for May 2018*, U.S. DEPT STATE (Apr. 6, 2018), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-may-2018.html> (last visited Sept. 20, 2018) (summarizing the availability of immigrant numbers during May) (on file with the Washington and Lee Law Review).

24. No one can predict the exact delay. This estimate is based on observing the monthly movement of the queue in the second preference category over the past five years. In FY 2017, 61,883 spouses and minor children immigrated to the United States in this category. *See* U.S. DEPT OF STATE, CLASSES OF IMMIGRANTS ISSUED VISAS AT FOREIGN SERVICE POSTS 1–2 (2017), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableI.pdf> (reporting immigration data from 2013 to 2017). The report does not separate children from spouses. *Id.*

family petition. The immigration court has no authority to grant this protection.

A parent or stepparent who is a U.S. citizen may similarly sponsor an unmarried minor child, under the age of twenty-one as an “immediate relative” to the United States.<sup>25</sup> This category has no statutory quota limits.<sup>26</sup> Again, only USCIS can adjudicate the qualifications of the underlying visa petition. An immigration court cannot complete the young person’s adjustment to that of permanent resident unless the young person was lawfully inspected and admitted at a port of entry in the United States. In the vast majority of cases for unaccompanied youth, even those who may have a U.S. citizen parent who could sponsor them, there is no ability of the immigration court to complete the adjudication.

#### *IV. Special Immigrant Juvenile Status (SIJS)*

A path to permanent residence for those young people who have been abused, neglected, abandoned, or similarly harmed is to demonstrate to a state court with jurisdiction over the juvenile that reunification with one or both parents is not possible, and that it is in the best interest of the young person to remain within the United States.<sup>27</sup> Thus, this statutory system contemplates a bifurcated adjudication of child protection between the state of the child’s residence and the USCIS.<sup>28</sup> Moreover, Congress has limited

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25. See INA § 201(b)(2)(A), 8 U.S.C. § 1151 (b)(2)(A) (2012) (defining “immediate relatives” for sponsorship purposes).

26. In FY 2017 over 50,000 children immigrated to the United States after sponsorship by a U.S. citizen parent or stepparent. See *Visa Bulletin for May 2018*, *supra* note 23 (discussing the visa bulletin).

27. See INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012) (stating options for permanent residence for those that have been determined dependent on a juvenile court in the United States).

28. See Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 37 (2016) (“Existing literature takes the bifurcated state-federal structure as given, and seeks to make important improvements from within that framework. This article questions the framework itself.”). In several state courts, the bifurcated nature of the adjudication is fully examined and reaffirmed. See, e.g., *H.S.P. v. J.K.*, 223 N.J. 196, 209–10 (N.J. 2015) (discussing the role of the state courts and USCIS in obtaining special immigrant juvenile status); *Matter of Marisol N.H.*, 979 N.Y.S.2d 643, 645–46 (N.Y. App. Div. 2014) (same); see also SAFE PASSAGE

the total number of youth who can benefit from this category to 9,600 people per year.<sup>29</sup> The immigration court has no authority to grant this protection.

### A. *Asylum and Refugee Admissions*

People, including children, who have a well-founded fear of persecution or who have suffered past persecution may be considered for asylum protection within the United States or may have a claim for protection adjudicated externally and brought to the United States as a “refugee.”<sup>30</sup> The INA authorizes the President to expressly set a quota and priorities for refugee admissions from abroad.<sup>31</sup> The Trump Administration’s history of suspending all refugee admissions and then restricting the admissions and reducing the total quota is well documented in other Articles within this Volume.<sup>32</sup> But in addition to showing a

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PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS MANUAL: A STEP-BY-STEP GUIDE FOR SAFE PASSAGE PROJECT PRO BONO ATTORNEYS 1–3 (2017), <https://www.safepassageproject.org/wp-content/uploads/2017/09/Safe-Passage-Project-SIJS-Manual-summer.2017.pdf> (providing more information on the Special Immigration Juvenile Status).

29. Immigration in this category is charged to quota within the “employment based” fourth preference. Until recently there was rarely a delay due to an excessive demand. As each country is capped at 7% of the total allocation, a delay has arisen for youth from three to five countries: El Salvador, Guatemala, Honduras, and sometimes India and Mexico. *See Visa Bulletin for May 2018*, *supra* note 23 (discussing the visa bulletin).

30. *See* INA §§ 207, 208, 209, 8 U.S.C. §§ 1157, 1158, 1159 (2012) (detailing the processes for allowing refugees into the United States). There are related forms of protection such as precluding removal for those who would face torture or those who can show a higher standard of persecution under the “withholding of removal” status. Congress has also authorized a Temporary Protected Status (TPS)—a formal grant of work authorization and temporary permission to reside that will be discussed below below—but that is not typically a form of relief immediately available to new arrivals to the United States. *See generally* INA § 244, 8 U.S.C. § 1254 (2012) (providing details about temporary protected status in the United States).

31. INA § 207, 8 U.S.C. § 1157 (2012).

32. *See also* Julie H. Davis & Miriam Jordan, *Trump Plans 45,000 Limit on Refugees Admitted to U.S.*, N.Y. TIMES, Sept. 26, 2017, at A19 (describing Trump’s plans for refugee camps). On September 18, the Trump administration announced further reductions to 30,000 people for the next fiscal year. This is the lowest number in the history of the program. *See* Julie H. Davis, *Trump to Cap Refugees*

well-founded fear or the experience of past persecution, the applicant must demonstrate that the persecution was “on account” of one of the statutorily protected grounds: political opinion, race, nationality, religion, or membership in a particular social group.<sup>33</sup> This requirement known as the “nexus” requirement can be very difficult for any person to establish; it is particularly challenging for children and youth to articulate, especially where the persecution they are experiencing is from systemic organized crime within the country of origin.

If a person has reached a U.S. border, port of entry, or is apprehended within U.S. territory, he or she usually has an opportunity to make a claim of protection under the asylum provisions.<sup>34</sup> Children who are apprehended alone, for example, not in the care of a legal guardian or parent, are not subject to some of the same expedited procedures that allow border officials to summarily adjudicate claims for asylum.<sup>35</sup> Almost all unaccompanied children are exempt from those procedures and the one-year statutory deadline to seek asylum relief.<sup>36</sup> Almost all

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*Allowed Into U.S. at 30,000, a Record Low*, N.Y. TIMES (Sept. 17, 2018) <https://www.nytimes.com/2018/09/17/us/politics/trump-refugees-historic-cuts.html> (last visited Sept. 20, 2018) (discussing President Trump’s cuts in the number of refugees that can be resettled in the United States) (on file with the Washington and Lee Law Review).

33. See, e.g., Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, 36(2) HARV. INT’L REV. 45, 46 (2015) (discussing the historical context of international refugee protection); Matter of A-R-C-G-, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014) (defining the refugee status); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781 (2003) (defining a refugee as a person with a “well-founded fear of being persecuted for reasons of race, religion, nationality”) (internal citation omitted).

34. See INA § 208, 8 U.S.C. § 1158 (2012) (granting authority to apply for asylum).

35. INA § 208(a)(2)(5), 8 U.S.C. § 1158(a)(2)(5) (2012) (excluding unaccompanied children from the safe child country and time limit provisions).

36. See INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E) (2012) (discussing the authority to apply for asylum); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(7)(A) (2008) (finding that if the government challenges the child’s classification as an “unaccompanied child,” the individual may be subject to a one year deadline to apply); see also U.C. HASTINGS COLL. OF LAW CTR. FOR GENDER & REFUGEE STUDIES, CHILDREN’S ASYLUM CLAIMS: CGRS PRACTICE ADVISORY 2–3 (2015),

children from Mexico and Canada apprehended at or near the international border can be summarily returned.<sup>37</sup> Children found within the interior of the United States from these countries may have greater opportunities to pursue asylum or other protections.

Unlike all of the preceding categories of protection, immigration courts do play a role in the adjudication of children's claims. Normally, anyone put into removal proceedings may only seek asylum protection directly before the immigration judge. However, the past and current administrations have chosen to allow an unaccompanied child to first apply for asylum before a division of the USCIS known as the Asylum Office.<sup>38</sup> There a trained asylum officer conducts a non-adversarial interview and the child is not cross examined by a prosecutor. If the Asylum Office finds the child or youth is eligible for asylum, any pending removal case is usually terminated. One year after the grant of asylum, a young person can seek formal adjustment to full permanent resident status.<sup>39</sup> There is no statutory quota limiting the number of asylum grants.

However, if the Asylum Office does not find that a young person qualifies for asylum, the child's case is returned to the immigration court for adjudication of the claim on a *de novo* basis before an immigration judge. If the case is denied by the judge, the young person may appeal to the Board of Immigration Appeals and later to a federal circuit court of appeals.

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[https://cgrs.uchastings.edu/sites/default/files/CGRS\\_Child\\_Asylum\\_Advisory\\_3-31-2015\\_FINAL.pdf](https://cgrs.uchastings.edu/sites/default/files/CGRS_Child_Asylum_Advisory_3-31-2015_FINAL.pdf) (laying out jurisdictional issues for children seeking asylum); THE SAFE PASSAGE PROJECT, *THE ASYLUM MANUAL: A STEP-BY-STEP GUIDE FOR SAFE PASSAGE PROJECT PRO BONO ATTORNEYS* 11–15 (2017), <https://www.safepassageproject.org/wp-content/uploads/2017/10/Safe-Passage-Project-Asylum-Manual-v10.2017.pdf> (providing background information regarding asylum for children).

37. See APPLESEED, *CHILDREN AT THE BORDER: THE SCREENING, PROTECTION, AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS* 1 (2011), <http://www.appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf> (discussing “unaccompanied Mexican children caught at or near the border with little or no evaluation of the risks they faced upon return to Mexico”).

38. See INA § 240, 8 U.S.C. § 1229(a) (discussing the removal proceedings process).

39. See INA § 209(a)(1), 8 U.S.C. § 1159(a)(1) (2012) (discussing procedures for aliens who have been in the United States for over a year).

### V. Prosecutorial Discretion and Deferred Action

While not expressly included in the INA, it is a long tradition of the immigration agencies to allow youth to seek the end of removal proceedings or stay removal orders as a matter of agency prosecutorial discretion. While many people are familiar with the 2012 program known as Deferred Action for Childhood Arrivals (DACA),<sup>40</sup> discretion at a variety of stages in immigration adjudication has been a common feature of agency consideration of a child's request for protection.<sup>41</sup>

In sum, there are myriad forms of protection for children. Most adjudicated by the USCIS but the children's cases are structured as removal cases before the EOIR, so coordination, navigation, redundancy, inefficiency, and delays seem obvious. In recent months, the new Administration has added to the stress on this complex web. Chaos is the result.

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40. The USCIS website states that the information is no longer current, however recent litigation has preserved the eligibility to renew DACA. See *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> (last visited Sept. 20, 2018) (providing information about DACA) (on file with the Washington and Lee Law Review); see also *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> (last visited Sept. 20, 2018) (providing updated information on deferred action requests) (on file with the Washington and Lee Law Review). As of August of 2018, there are at least six different law suits addressing the Trump Administration's ability to rescind the DACA program and litigation brought challenging the Executive's authority to create such a program. In one of these suits, the federal district court ruled that the President's termination of the program was invalid. See *NAACP v. Trump*, 298 F. Supp. 3d 209, 245 (D.D.C. 2018) (rejecting termination of the program but staying the implementation of the order for ninety days) and on August 17, 2018, the district court agreed to stay its mandate on the rescission and allowing new application while the government appeals its findings; however, the court's order requiring DHS to accept renewal applications became fully effective. *Id.* at 245–46.

41. For a comprehensive discussion of the role of discretion in immigration matters, see generally SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2016).

*VI. Agency Reactions to Increased Numbers of Child  
Apprehensions*

As already noted, the increase in child arrivals is a worldwide issue, but in 2014 the federal government began to respond more formally to the dramatic increase in children arriving from the Northern Triangle of Central America: El Salvador, Guatemala, and Honduras. While the Obama Administration referred to the movement of these children as a “humanitarian crisis,” various components of the federal government began to seek ways to slow the arrivals and speed up the adjudication of cases. In theory, a fast adjudication can help deter future flows of people if the main assumption is that a significant number of the people arriving do not have bona fide refugee or protection claims. Fast adjudication and rejection and then return of the youth to the home country, would potentially deter those who come to the United States in hope of gaining many years of presence simply because the system could not complete the adjudication of their case.

Thus, in an effort to increase adjudication speeds, the EOIR announced in the summer of 2014 that all new unaccompanied child cases would be a top priority and would have a first hearing within twenty-one days of the commencement of the proceeding measured by EOIR receipt of the NTA.<sup>42</sup> To handle this directive, both ICE prosecutors and court personnel had to alter docketing patterns, reassign judges, and expand the number of people scheduled for initial or master calendar hearings. The realignment frequently meant significant postponement of other cases, some of which might have been awaiting adjudication for years in busy immigration courts. Almost immediately, most immigration judges began to realize that the case files and even the children had not caught up with the initiation of the hearings. People began to refer to the specialized rushed hearings as the “surge” docket. Advocates across the country began to organize triage screenings and mass

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42. See Memorandum from Judge Brian M. O’Leary, Chief Immigration Judge of the Exec. Office of Immigration Rev. (Sept. 10, 2014) (prioritizing detained cases) (on file with the Washington and Lee Law Review). Similarly, the agency expedited the scheduling of the removal cases of parents arriving with small children and required scheduling of these removal cases within twenty-eight days. *Id.*



orientation programs to try to prepare people for the immigration court process.

The purpose of the rushed hearings was not very clear from the beginning. The vast majority of young people appeared without legal representation and judges necessarily granted continuances so that the child could find counsel at “no expense to the government.”<sup>43</sup> Several organizations mounted legal challenges to the long-standing refusal of the immigration courts to provide appointed counsel even to indigent children.<sup>44</sup> To help meet the need for legal assistance, significant new pro bono projects were launched and many people began to expand their private practice to focus on the needs of children.

The Obama Administration, while unable to directly fund legal representation for all children, did expand several programs that for the first time provided some children with access to free counsel. In an innovative approach, the EOIR partnered with the Corporation for Community National Service and created the Justice AmeriCorps program.<sup>45</sup> With a very small allocation of funds, this program found willing nonprofit organizations in several states to host AmeriCorps fellows, both junior attorneys

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43. See INA § 292, 8 U.S.C. § 1362 (2012) (guaranteeing a right of representation but at “no expense” to the government).

44. The ACLU of Southern California, along with several other organizations, filed a lawsuit that was ultimately unsuccessful on procedural grounds. See *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016) (finding a lack of subject matter jurisdiction in the district court to consider the right to counsel due to the INA requirement of exhaustion of the removal and administrative proceedings before seeking this type of judicial review). In later litigation, a Ninth Circuit panel ruled that an unrepresented child who did have his parent present had not established a due process right to appointed counsel. See *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1129 (9th Cir. 2018) (denying the petition for appointed counsel). Litigation continues on these issues, and the challenges have sought en banc review. The Ninth Circuit ordered the government to submit written briefing in response to the *en banc* petition by March 26, 2018. See *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1151 (9th Cir. 2018) (requesting briefing).

45. See *Justice Department and CNCS Announce \$1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children*, U.S. DEPT OF JUSTICE (Sept. 12, 2014), <https://www.justice.gov/opa/pr/justice-department-and-cnsc-announce-18-million-grants-enhance-immigration-court-proceedings> (last visited Sept. 20, 2018) (announcing the Justice AmeriCorps program) (on file with the Washington and Lee Law Review).

and paralegals who were able to provide direct representation to young people under the age of sixteen at the time of arrival.<sup>46</sup> Moreover, the HHS expanded funding for some limited legal representation of children held in ORR detention. Still, the number of children able to secure counsel continued to be a problem and the significant number of children's cases in the court overwhelmed the free resources.

At the same time that the EOIR was expediting the first hearings for unaccompanied children, the USCIS Asylum Office similarly stated that it would put children's filings as a top priority and would typically try to schedule children for an asylum interview within three weeks of receipt of the application. Simultaneously, the Asylum Office detailed people to the southwest border to conduct interviews of adults and adults with small children inside detention centers. Consequently, the Asylum Office soon saw a growing backlog in its outstanding workload. Additionally, the already lengthy waiting periods for the adjudication of an asylum application for those who affirmatively filed and were not yet in removal proceedings grew even longer; in some cases, the wait approached three to four years of delay.

While never formally documented, it appears that the Obama Administration authorized funds to the government of Mexico in an effort to increase Mexican interdiction of Central American citizens and to increase internal immigration enforcement within Mexico. Formally called *Programma Frontero Sur*, Mexico reported in 2014 that it would expand enforcement on the southern border with Guatemala. Ultimately, Mexico reported a 70% increase in apprehensions the next year. Of these, over 18,000 children were deported by the Mexican government.<sup>47</sup> But after internal concerns about Mexico's compliance with its own domestic

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46. *Id.*

47. See Clay Boggs, *Mexico's Southern Border Plan: More Deportations and Widespread Human Rights Violations*, WOLA (Mar. 19, 2015), <https://www.wola.org/analysis/mexicos-southern-border-plan-more-deportations-and-widespread-human-rights-violations/> (last visited Sept. 20, 2018) (reporting a 117% increase in the deportation of minors) (on file with the Washington and Lee Law Review).

laws requiring protection of migrant children, the rates of removal and interdiction decreased in the following years.<sup>48</sup>

By the winter of 2016, then-Director of the EOIR, Juan Osuna, testified to the Senate Judiciary Committee that the EOIR needed expanded appropriations to handle its growing workload and a backlog of over 474,000 cases. He testified that between May 1, 2014 and the end of January 2016, the EOIR received 52,344 juveniles cases.<sup>49</sup> He also announced the EOIR would stop rushing the initial hearings for children within the first twenty-one days and instead aim for first hearings between thirty and ninety days.<sup>50</sup>

By the election in the fall of 2016, juvenile cases represented over 12% of the workload of the some of the very busy immigration courts.<sup>51</sup> Moreover, of the 60,699 cases started in FY 2016, about one-third were unrepresented.<sup>52</sup> In FY 2017, another 54,036 cases

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48. Human Rights Watch issued a lengthy report on the interdiction of children in Mexico. See HUMAN RIGHTS WATCH, CLOSED DOORS: MEXICO'S FAILURE TO PROTECT CENTRAL AMERICAN REFUGEE AND MIGRANT CHILDREN 41 n.118 (2016), [https://www.hrw.org/sites/default/files/report\\_pdf/mexico0316web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/mexico0316web_0.pdf) (reporting on Mexican refugees in America). The report included a discussion of U.S. apprehensions falling by 22% as Mexican apprehensions increased by 70%. See *id.* at n.118 (discussing the increase in unaccompanied children at the border in 2014). Politico also reported that Mexico is no longer willing to negotiate with the United States about refusing asylum applicants who pass through Mexico due to the Trump Administration's demands that Mexico fund a new border wall. See Ted Hesson, *Trump Blows Asylum Deal*, POLITICO (Apr. 19, 2018, 10:00 AM), <https://www.politico.com/newsletters/morning-shift/2018/04/19/trump-blows-asylum-deal-176430> (last visited Sept. 20, 2018) (on file with the Washington and Lee Law Review).

49. See *"The Unaccompanied Alien Children Crisis: Does the Administration Have a Plan to Stop the Border Surge and Adequately Monitor the Children?" to Revise Docketing Practices Relating to Certain Priority Cases Before the S. Comm. on the Judiciary*, 114th Cong. (2016) (statement of Juan P. Osuna, Director, Department of Justice's Executive Office for Immigration Review) (addressing the "unaccompanied child crisis").

50. See Memorandum from Judge Brian M. O'Leary, Chief Immigration Judge of the Exec. Office of Immigration Rev. (Feb. 3, 2016) (discussing changes to enforcement hearings) (on file with the Washington and Lee Law Review).

51. I have regularly tracked the percentage of juvenile cases in the New York Immigration Court, the largest immigration court in the United States. This data point is based on my monitoring of the reported data.

52. See *Juveniles—Immigration Court Deportation Proceedings*, TRAC IMMIGR., <http://trac.syr.edu/phptools/immigration/juvenile/> (last visited Sept. 20, 2018) (tracking the number of unaccompanied juveniles at the border) (on file

begun and the percentage of children unrepresented increased to approximately 70% of the children.<sup>53</sup>

Further, most children's cases were resolved not by adjudications within the immigration court itself, but because ICE agreed to a closure of the case, either because relief was available to the child before USCIS or due to an exercise of prosecutorial discretion. Immigration courts did not reach the goal of speedy adjudication. The average immigration case required 957 days for completion in the fall of 2016.<sup>54</sup>

At this same time, the USCIS implemented a centralization of the adjudication of children's petitions for Special Immigrant Juvenile Status (SIJS).<sup>55</sup> These petitions had been filed at regional USCIS service centers or in the specific district office where a young person might reside. The centralization in a new National Benefits Center in Missouri soon resulted in a significant shift in the criteria and adjudication of the SIJS petitions. The USCIS adjudicators, who are not required to be attorneys, began to return petitions to children and counsel (if represented), rejecting state court juvenile orders making the required "special findings" or seeking additional evidence to verify and corroborate the state

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with the Washington and Lee Law Review).

53. *Id.*; see also Monica Cordero, Clarisa Shocin & Annie Nova, *Backlog in New York Immigration Court Leaves Most Undocumented Children Without Lawyers*, WNYC NEWS (Nov. 27, 2017), <https://www.wnyc.org/story/backlog-ny-immigration-court-leaves-most-undocumented-children-without-lawyers/> (last visited Sept. 20, 2018) (describing a delay in "more than 88,000 [cases] involving undocumented youths").

54. See *Immigration Court Processing Time by Outcome by Removals, Voluntary Departures, Terminations, Relief, Administrative Closures*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php) (last updated June 2018) (last visited Sept. 20, 2018) (listing the amount of time it took to complete immigration cases in Los Angeles) (on file with the Washington and Lee Law Review). In 2017 the average was 930 days. *Id.* This data does not segregate juvenile cases from those of adults, but it may be that juvenile cases would similarly require many days and months, primarily because the child is seeking relief in other fora such as the Asylum Office or before USCIS.

55. See *USCIS to Centralize Processing of Special Immigrant Juvenile Cases*, U.S. CITIZENSHIP & IMMGR. SERVICES (Nov. 1, 2016), <https://www.uscis.gov/news/alerts/uscis-centralize-processing-special-immigrant-juvenile-cases> (last updated Nov. 1, 2016) (last visited Sept. 20, 2018) (providing information about the centralization of the SIJ program) (on file with the Washington and Lee Law Review).

court rulings. By statute the USCIS is required to adjudicate this particular petition within 180 days, but national advocates began to report delays in adjudication and many reported pending petitions of more than nine to twelve months. Most importantly, and relevant to this Article, the USCIS began to apply standards found in a new guidance document known as the Adjudicator's Policy Manual.<sup>56</sup> Despite neither change in existing regulations nor formal promulgation of the 2011 proposed amendments to the existing regulations, the USCIS began to return and deny petitions relying primarily on this guidance document and its new standards for adjudication. While it is beyond the scope of this Article to fully articulate all the problems with changing adjudication standards by policy or guidance documents, it is a central tenant of administrative law that agencies must usually create new "rules" through formal notice and comment rulemaking or, in some situations, by agency adjudication.<sup>57</sup> New obligations created through guidance documents are vulnerable to later judicial challenge.<sup>58</sup> While this consolidation of adjudication began in the fall of 2016, the USCIS has continued to reevaluate standards used to adjudicate SIJS petitions and recently a USCIS counsel memorandum confirmed that the agency was revisiting and investigating prior adjudicatory standards.<sup>59</sup>

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56. See *Part J—Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter1.html> (last visited Sept. 20, 2018) (detailing the purpose and background of the manual) (on file with the Washington and Lee Law Review). The policy manual was not promulgated through publication in the Federal Register and does not formally amend the published regulations found in 8 C.F.R. § 204.11. However, many of those regulations have been superseded by subsequent statutory amendments and cannot be relied upon in their entirety. See SAFE PASSAGE PROJECT, *supra* note 28, at 1 n.1 (providing "information and instructions for each stage of the multiple phases of a Special Immigrant Juvenile Status (SIJS) case").

57. See 5 U.S.C. §§ 551(4), 553 (2012) (defining "rule" and setting forth notice and comment Rulemaking procedures).

58. Generally, rules or procedures that create new binding obligations are legislative rules requiring notice and comment. See Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 566 (2012) (introducing the topic of non-legislative rules compared to rules that require notice and comment rulemaking).

59. See Liz Robins, *A Rule is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES, July 23, 2018, at A22 (noting that, despite the

With the adjudication of SIJS petitions slowing down, the delays soon directly impacted the immigration courts. ICE and many immigration judges were reluctant to terminate a deportation proceeding if the USCIS had not yet completed adjudication of the young person's eligibility for SIJS. Accordingly, the typical response was for the immigration judge to grant a further continuance, not a closure, keeping the already crowded dockets full of cases where no action might be necessary if USCIS approved the petition. After the new Administration came to power, advocates reported direct opposition to these continuances by ICE counsel. Typically, the government attorney would argue that "relief was speculative" and ask the judge to go forward on finding the young person removable. Advocates for the children would usually argue for additional time or make the argument that even if the court did go forward and order removal, such action would force the advocate for the child to either seek asylum or appeal to the Board of Immigration Appeals, or if no further relief was available, later necessitate a complex motion to reopen once the USCIS would grant the petition. The burden on the immigration judges and the waste of court time is obvious.

While these details in procedure may seem complex or obscure, the cumulative impact was to use many more hours of court, prosecutor, and defense advocates' time. And, of course, for children who did not have counsel, understanding the technical arguments or how to preserve eligibility was likely impossible. While each case is unique, the data appears to show that a child who is represented is able to complete the removal case with a positive outcome six times more frequently than the unrepresented child.<sup>60</sup> At the same time, the EOIR began to report an increase in

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headline, the change is not through a "rule" but policy guidance interpretations and adjudications). The growing number of denials of SIJS petitions was also explored by reporters at Politico. See Ted Hesson, *Travel Ban at SCOTUS*, POLITICO (Apr. 25, 2018, 10:00 AM), <https://www.politico.com/newsletters/morning-shift/2018/04/25/travel-ban-at-scotus-182935> (last visited Sept. 20, 2018) (discussing updates in employment and immigration policy) (on file with the Washington and Lee Law Review). This article quotes the USCIS General Counsel as stating that the agency believes some state courts lack the ability to return a child to the custody of their parent after age eighteen and that this is a legal basis to refuse eligibility for SIJS. *Id.*

60. See *Children in Immigration Court: Over 95 Percent Represented by an*

children failing to appear and thus an increase in in absentia orders of removal. While some immigration judges were concerned about ordering a young person removed when evidence of actual service of the NTA was not provided, many judges did issue such orders. And the BIA ruled that an immigration judge should accept as proof of service the address supplied by the ORR to ICE and the EOIR as sufficient to meet the agency requirements before an in absentia order of removal could be issued.<sup>61</sup>

In short, the change in scheduling and adjudications before the EOIR, the Asylum Office, and the USCIS all combined to slow down the completion of removal cases. Perhaps seeing no gain in completing cases and no advantage to the rapid scheduling, shortly after the inauguration, the new Acting Chief Immigration Judge, Mary Beth Keller, issued an agency memorandum rescinding the 2014 and 2016 prioritization of children's cases.<sup>62</sup> Instead, the memorandum instructed court administrators to schedule

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*Attorney Appear in Court*, AM. IMMIG. COUNCIL (May 16, 2016), <https://www.americanimmigrationcouncil.org/research/children-immigration-court-over-95-percent-represented-attorney-appear-court> (last visited Sept. 20, 2018) (detailing the obstacles children who must represent themselves in the immigration court system face) (on file with the Washington and Lee Law Review); see also Fernanda Santos, *It's Children Against Federal Lawyers in Immigration Court*, N.Y. TIMES, at A10 (Aug. 20, 2016), <https://www.nytimes.com/2016/08/21/us/in-immigration-court-children-must-serve-as-their-own-lawyers.html> (last visited Sept. 20, 2018) ("Every week in immigration courts around the country, thousands of children act as their own lawyers, pleading for asylum or other type of relief in a legal system they do not understand.") (on file with the Washington and Lee Law Review).

61. The Attorney General certified this case to himself on his own motion, vacated the ruling of the BIA and requested amici briefing in 27 I & N Dec. 187 (A.G. 2018). Despite multiple opposing amici briefs in this pro se case, the Attorney General ruled that unless DHS consents, an immigration judge has no authority to use "administrative closure" in immigration cases. See *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 279 (A.G. 2018) (holding that "immigration judges and the Board do not have the general authority to suspend indefinitely immigration proceeding by administrative closure").

62. See Memorandum from Mary Beth Kelly, Chief Immigration Judge, to all Immigration Judges (Jan. 31, 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf> (rescinding earlier prioritization of cases involving children in the immigration courts) (on file with the Washington and Lee Law Review).

children's cases within ninety days of receipt and to no longer prioritize adult with children cases at all.<sup>63</sup>

In 2017, the Asylum Office continued to prioritize juvenile filings, and unlike the immigration court, it did not stop the prioritization. Still, backlogs grew and, for a variety of reasons, the workload of the asylum offices grew. The agency reported in January 2018 that more than 311,000 applications were pending nationwide, and the agency formally ended the prioritization of juvenile cases.<sup>64</sup>

Contributing to the delay in the completions before the Asylum Office (and therefore a slow return of the case to the immigration court if the application is not granted) was a new administration directive that directed the Asylum Office to question children about whether their parents had paid smugglers to bring them to the United States. In some situations, this made the adults who were caring for children afraid to attend the asylum office interviews.

Further, many divisions of DHS began to investigate whether any of the applicants were involved in gang activity in the country of origin or within the United States. Children began to be questioned, not only by asylum officers, but in some situations were referred to special units within ICE where they were asked about whether they were in a gang or "knew anyone in a gang." In early summer of 2017, ICE rearrested hundreds of youth (the exact number is unclear) and detained these youth in secure ORR or ICE facilities. In many of these cases, ICE alleged they were involved in gang activity or associated with gang members. In July of 2017, the ACLU of Northern California filed an action on behalf of A.H., a young man caught up in the ICE round up known as Operation Matador.<sup>65</sup> He was taken from his mother's home in Long Island,

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63. *Id.*

64. See Press Release, U.S. Citizenship and Immigr. Services, USCIS to Take Action to Address Asylum Backlog (Jan. 31, 2018) ("Citizenship and Immigration Services (USCIS) announced today that the agency will schedule asylum interviews for recent applications ahead of older filings, in an attempt to stem the growth of the agency's asylum backlog."). For further discussion, see *infra* note 69 and accompanying text (providing insight on the number of refugee children arriving in the United States).

65. See *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1202 (N.D. Cal. 2017) (certifying the class and granting a partial injunction). This order subsequently



New York without notice to her or to his counsel, flown to California, and locked into a secure facility.<sup>66</sup> It took weeks of litigation before A.H. was first transferred to a New York juvenile detention facility managed by ORR and ultimately ordered released by an immigration judge nearly six months after his original arrest.<sup>67</sup> But without the litigation, it is unclear if the hearing before the immigration judge would have ever taken place. This litigation, known by the last name of his parent, Saravia, has resulted in hearings for many of the detained youth and, at least of those cases known to me, all but one has resulted in a finding that the young person is not a danger to himself or others and the ORR was ordered to release the young person.<sup>68</sup>

At least in the beginning of FY 2018, it appeared that the rate of children arriving seemed to decrease. In the first half of FY 2018, the CBP reported that between 3,000 and 4,000 children have been apprehended each month—a decrease of 24% based on the same time period in 2017.<sup>69</sup> Still, if apprehensions continue to follow

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created a process of custody review hearings called *Saravia* hearings in the immigration courts. See *Operator Matador Nets 39 MS-13 in Last 30 Days*, U.S. CITIZENSHIP & IMMIGR. SERVICES (June 14, 2017), <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days> (last visited Sept. 20, 2018) (detailing the launch of the Operation Matador) (on file with the Washington and Lee Law Review). The regulations proposed by HHS on September 7, 2018 would eliminate immigration judge authority to review HHS custodial decisions as ordered in *Saravia* and required under the *Flores* settlement. See 83 Fed. Reg. 45,406, 45,509 (outlining the new regulations). Instead the HHS proposes to create hearing officers within the HHS. See *id.* (codified at 45 C.F.R. 410.810). This proposal is particularly troubling as it substitutes HHS administrators for training hearing officers in the immigration court. *Id.*

66. *Saravia*, 280 F. Supp. 3d at 1179.

67. *Id.* at 1180.

68. While I did not represent any young person in these hearings, I organized trainings and aided advocates with a variety of organizations to prepare for the *Saravia* hearings.

69. See *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018: Southwest Border Unaccompanied Alien Children (0–17 yr. old) Apprehensions*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> (last updated July 5, 2018) (last visited Sept. 20, 2018) (listing the number of unaccompanied alien children by sector) (on file with the Washington and Lee Law Review). The apprehension of family units, parents traveling with young children, was down by over 34% during the first six months of the fiscal year. *Id.* As this article was finalized, the CBP

prior seasonal patterns, this could mean the arrival of over 42,000 children by the end of the year. This number would exceed total apprehensions in FY 2017. Thus, the pressure on the agencies to increase adjudication rates and to complete cases grows apace.

Perhaps due to this continued arrival of children or perhaps for other related reasons, the EOIR once again addressed priorities for juvenile cases and in December 2017 rescinded prior directives about conducting children's hearings and reduced many of the specific instructions to the immigration judge about the child sensitive approach.<sup>70</sup> In New York and other parts of the country, long standing segregation of children's cases from those of the regular adult population ended and it was not unusual to find new juvenile cases assigned to judges who had never previously heard juvenile cases. Further, the Attorney General had formally ended the Justice AmeriCorps program and by the winter of 2018, participants in that program no longer received docket information allowing them to identify and prepare for new unaccompanied juveniles scheduled for first hearings.

Similarly, in February 2018, the Asylum Office officially changed asylum adjudication, even for unaccompanied children's cases to a formal "First In First Out" (FIFO) system.<sup>71</sup> FIFO means that new juvenile filings should be scheduled for hearing within

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reversed its earlier predictions and reported record apprehensions and an increase in July. *Id.* Now the agency is reporting a 19% increase in children apprehensions and a 27% increase in family apprehensions. *Id.*

70. See Memorandum from MaryBeth Keller, Chief Immigration Judge, to All Immigration Judges (Dec. 20, 2017) (providing guidelines for immigration cases involving children) (on file with the Washington and Lee Law Review). For a news story comparing the prior and contemporary procedures, see Mica Rosenberg, *Exclusive: U.S. Memo Weakens Guidelines for Protecting Immigrant Children in Court*, REUTERS (Dec. 22, 2017, 10:15 PM), <https://www.reuters.com/article/us-usa-immigration-children-exclusive/exclusive-u-s-memo-weakens-guidelines-for-protecting-immigrant-children-in-court-idUSKBN1EH037> (last visited Sept. 20, 2018) ("A Dec. 20 memo, issued by the Executive Office for Immigration Review (EOIR) replaces 2007 guidelines, spelling out policies and procedures judges should follow in dealing with children who crossed the border illegally alone and face possible deportation.") (on file with the Washington and Lee Law Review).

71. See *Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling> (last updated Jan. 26, 2018) (last visited Sept. 20, 2018) (prioritizing asylum applications that are the most recently filed) (on file with the Washington and Lee Law Review).

twenty-one days, but those cases already waiting in the system will have to wait for agency resources to be adequate to schedule the asylum interview. This will potentially mean that some cases already pending in the immigration courts will be stuck, awaiting asylum adjudication before USCIS and the judge unwilling or unable over ICE objection to formally administratively close or terminate the removal hearing.

Another aspect of immigration adjudication is, of course, agency decision making. Cases may arise individually through the immigration courts and then proceed on an appeal to the BIA, the administrative appeal tribunal within the DOJ. This tribunal is created by regulation and controlled by the Attorney General as head of the DOJ. In the spring of 2018, Attorney General Sessions reached into the pool of cases before the BIA in unprecedented ways, certifying several *pro se* cases—including at least one involving a juvenile—to himself for additional review and reconsideration. What is most unusual in these *sua sponte* certifications is that many of the cases involved unpublished BIA opinions; although the Attorney General requested amici briefing on issues as he framed them, the private bar had no immediate access to the underlying cases. Calls to the EOIR and email requests to General Counsel were referred to the EOIR Director. The certifications at first seemed to concern single cases, but on further inquiry parties learned that the Attorney General had gathered several similar cases together and combined them into a single request for amici briefs.

In one case, I personally called and asked for the agency to at least tell me the name of the DHS ICE counsel or the immigration court from which the appeal originated so that briefing could be prepared with the appropriate federal circuit court of appeals law.<sup>72</sup> No response came from the queries to the EOIR. Eventually, advocates were able to spread the word about the certifications and

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72. The BIA and other immigration agencies follow the doctrine of “nonacquiescence,” meaning that the adjudicators follow the law of the circuit that governs the jurisdiction of the removal hearing or where an individual resides. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 694–712 (1989) (describing the nonacquiescence practices of the SSA and the NLRB).

in most of the cases, before amici briefs were prepared,<sup>73</sup> the underlying cases could be identified.

To people unfamiliar with immigration law, the Attorney General's ability to select and review appellate administrative positions may seem improper. It is a long-standing tradition within the BIA but has been used rather infrequently.<sup>74</sup> Professor

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73. Of additional concern in these requests for amici briefs was the very short time period for preparation and submission of briefs, frequently on complex issues of substantive asylum law or immigration procedure. Amici had to request extensions and at times the extensions were not ruled upon until the very deadline was upon the parties. *See, e.g.*, *Matter of L-A-B-R*, 27 I. & N. Dec. 245, 245 (A.G. 2018) (asking for briefing on the power of an immigration judge to grant continuances, a provision already in regulation at 8 C.F.R. § 1003.29). The current regulation allows the judge to exercise discretion and provides for continuances for "good cause." *Id.* On August 16, 2018, the Attorney General ruled in *Matter of L-A-B-R* that immigration judges must issue written decisions in granting continuances and must carefully assess whether a delay due to visa adjudication or availability is so long that a continuance is unwarranted. *See Matter of L-A-B-R*, I. & N. Dec. 405, 405 (A.G. 2018). The implications of this decision on the workload of the immigration courts and individual judges is already of concern. Twenty former judges signed a statement critiquing the decision as imposing a significant burden on the judges and potentially interfering with the judge's ability to perform his or her duties neutrally. *See Jeffrey S. Chase, Statement of Former Immigration Judges and BIA Members in Response to Matter of L-A-B-R*, OPINIONS / ANALYSIS ON IMMIGRATION LAW BLOG, <https://www.jeffreyschase.com/blog/2018/8/17/statement-of-former-immigration-judges-and-bia-members-in-response-to-matter-of-l-a-b-r-> (last visited Sept. 20, 2018) (expressing concern over the "Attorney General's latest blow to judicial independence") (on file with the Washington and Lee Law Review); *see also* Letter from Widener U., to Jeff Sessions, Attorney Gen. (Aug. 14, 2018) (critiquing new performance quotas) (on file with the Washington and Lee Law Review).

74. Typically, only one or two cases in four years would be subjected to Attorney General certification, and usually those cases involved complex issues of substantive law interpretation long debated and where splits had arisen amongst the various federal circuit courts of appeal. *See, e.g.*, *Matter of Cristoval Silva-Trevino*, 24 I. & N. Dec. 687, 709 (A.G. 2008) (certifying the case by Attorney General Mukasey), *rev'd*, 742 F.3d. 197 (5th Cir. 2014) (rejecting the Attorney General's approach to interpreting criminal convictions as involving "moral turpitude"), *vacated*, OFFICE OF THE ATTORNEY GENERAL, IN RE: MATTER OF CRISTOVAL SILVIA-TREVINO (2015), <http://www.immigrantdefenseproject.org/wp-content/uploads/2011/03/AG-Order-Vacating-Silva-Trevino-2015.pdf>; *see also* *Matter of R-A-*, 24 I. & N. Dec. 629, 632 (BIA 2008) (remanding the matter for Board reconsideration following certification by Attorney General Janet Reno and three subsequent Attorney General certifications). The case has a complicated history and after 14 years ultimately resulted in a grant of asylum for a woman who was a victim of domestic violence. For a detailed history of the case, *see Matter of R-A*, U.C. HASTINGS CTR. FOR GENDER & REFUGEE STUD.,

Margaret Taylor argues that the ability to select cases and remove them from the BIA adjudication process is particularly harmful to the appearance of neutrality in agency adjudication and has been used as a last minute tool to upend precedent.<sup>75</sup> What is particularly troubling in the rapid number of certifications issued in the winter of 2018 is that many are unusual in form and content, and many are focused on purely procedural aspects of the powers of the immigration judges to control the administration of cases before them. Jeff Chase, former immigration judge and staff attorney at the BIA, has also critiqued the recent spate of Attorney General Certifications in his blog and explained that the process was used very sparingly under both Eric Holder and Loretta Lynch.<sup>76</sup>

Indeed, the Attorney General has openly criticized the performance of the immigration courts and recently taken several steps to try to increase the speed with which cases are completed. First, in March of 2018 the EOIR announced that all judges would be subjected to performance evaluations that required the judge to meet an average of 700 decisions per year with 95% of all merits hearings concluding in one sitting.<sup>77</sup> Further, performance would

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<https://cgrs.uchastings.edu/our-work/matter-r> (last visited Sept. 20, 2018) (discussing the procedural posture of the case) (on file with the Washington and Lee Law Review).

75. See Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18, 19 (2016) (discussing decisions in controversial BIA cases).

76. See Chase, *supra* note 73 (questioning the appropriateness of a large number of class certifications by Attorney General Sessions) (on file with the Washington and Lee Law Review). In this blog, retired Judge Chase also mentions why the process is perhaps unnecessary today and is a relic of a time when the BIA lacked professional staff. *Id.*

77. See NAIJ, IMPOSING QUOTAS ON IMMIGRATION JUDGES WILL EXACERBATE THE CASE BACKLOG AT IMMIGRATION COURTS 1 (2018), [https://www.naij-usa.org/images/uploads/publications/NAIJ\\_Imposing\\_Quotas\\_on\\_IJs\\_will\\_Exacerbate\\_the\\_Court\\_Backlog\\_1-31-18\\_.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18_.pdf) (“The imposition of quotas is not the right solution to this problem and will contribute to increasing the backlog.”); see also *Hearing on Strengthening and Reforming America’s Immigration Court Before the Subcomm. on Border Sec. & Immigr. Of the Sen. Comm. on the Judiciary*, 115th Cong. 2 (2018), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf> (statement of Ashley Tabaddor, President, National Association of Immigration Judges) (“I am here today to discuss urgently needed Immigration Court Reform and the unprecedented challenges facing the

be considered below acceptable if the judge had a rate of reversal higher than 15%. While many judges may be able to complete a large number of cases quickly, those are usually in the context of courts where the respondents are recent arrivals and do not qualify for any relief based on humanitarian grounds nor have the requisite length of residence or family ties that allow them to apply for limited forms of discretionary relief. Assuming an immigration judge works forty-eight weeks a year and sits on the bench at least four days a week, completing 700 cases would require nearly five merits cases each day.<sup>78</sup> That pace would leave little time for motion practice, research, and considerations of country conditions or allowing parties much time to present witnesses or live testimony in merits hearings. Bond hearings, which may have to be conducted on an expedited basis, do not count toward case completions in the new standards.<sup>79</sup>

Second, as of April 26, 2018, as I complete this Article, Attorney General Sessions had originally announced a suspension of all of the “Know Your Rights” Legal Orientation Programs managed by the DOJ within immigration detention centers. Members of Congress and EOIR support these programs for educating individuals about their options, their lack of any relief, and reducing overall detention costs by eliminating people seeking continuances because they were under a misimpression that they could qualify for relief. However, on April 26, 2018, Attorney General Sessions’s announced that the programs would remain in

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Immigration Courts and Immigration Judges.”).

78. Judges typically have one day for preparation and office work and hear master calendar or initial scheduling hearings several days a month. Under this schedule, as many as sixty cases may be scheduled for a single morning. Merits or trial hearings for cases where the individual is contesting removal or seeking asylum or other forms of relief usually require several hours of argument and listening to witnesses. Here, I have assumed that there are 144 days of merits hearing time alone divided into 700 cases to reach 4.86 cases each merit sitting.

79. See U.S. DEPT OF JUST., MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ii n.3 (2012), <https://oig.justice.gov/reports/2012/e1301.pdf> (“Receipts’ are defined by EOIR as the total number of proceedings, bond redeterminations, and motions to reopen or reconsider received by the immigration courts during a reporting period. Our review included only proceedings receipts.”).

place but that he was ordering an assessment of their overall effectiveness.<sup>80</sup>

One of the odd characteristics of Attorney General Sessions' critiques and public statements about the operation of the immigration courts is that in tone and content they appear focused on immigration law enforcement and not on neutral adjudication. For example, in the fall of 2017 Attorney General Sessions stated, "[W]e are coming for you. . . . Securing our border, both through a physical wall and with the brave men and women of the border patrol and restoring an orderly and lawful system of immigration is part and parcel of this anti-gang strategy."<sup>81</sup> The job of prosecuting people for removal is delegated by the INA to the DHS, not the Attorney General. And while the DOJ continues to have jurisdiction to use other mechanisms of enforcement such as criminal prosecutions, the tone of the remarks weakens the independence of the EOIR and raises questions about an ex parte relationship between the DHS and EOIR. It definitely raises questions about the ability of Attorney General Sessions to serve in an adjudicator's role.<sup>82</sup>

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80. See Maria Sacchetti, *Sessions Backtracks on Pausing Legal Aid for Immigrants Facing Deportation*, WASH. POST (Apr. 25, 2018), [https://www.washingtonpost.com/local/immigration/sessions-backtracks-on-pausing-legal-aid-program-for-immigrants/2018/04/25/c0d27a12-48cb-11e8-827e-190efaf1f1ee\\_story.html?noredirect=on&utm\\_term=.1b27a71fa3d8](https://www.washingtonpost.com/local/immigration/sessions-backtracks-on-pausing-legal-aid-program-for-immigrants/2018/04/25/c0d27a12-48cb-11e8-827e-190efaf1f1ee_story.html?noredirect=on&utm_term=.1b27a71fa3d8) (last visited Sept. 20, 2018) (discussing Sessions's decision not to suspend a legal-aid program for detained immigrants while it undergoes review) (on file with the Washington and Lee Law Review).

81. See Jeff Sessions, Attorney Gen., Remarks to the Federal Law Enforcement in Boston about Transactional Criminal Organizations (Sept. 21, 2017). To be fair, some of his remarks are addressed to other division of the DOJ and concern criminal law enforcement, but when he extends to a discussion of DHS practice, it makes it difficult to see how he can be unbiased as the chief adjudicator reviewing decisions of the EOIR. It was also Sessions who announced the end of DACA, a program solely administered by the DHS. See Theresa Seiger, *Full Transcript: Session Announces End to DACA Immigration Program*, WOHIO (Sept. 5, 2017), <https://www.whio.com/news/national-govt--politics/full-transcript-sessions-announces-end-daca-immigrationprogram/ILpjUIBJWBdjH87sa9o3eO/> (last visited Sept. 20, 2018) (providing information regarding Sessions' decision not to end DACA) (on file with the Washington and Lee Law Review).

82. The BIA has stated that the standard for judicial recusal is whether there is evidence of bias in extrajudicial statements. See *Matter of Exame*, 18 I. & N. Dec. 303, 306 (BIA 1982) (articulating the standard for judicial review due to bias). This brief raises concerns that the Attorney General's many statements

So, Mr. Sessions has challenged the operations of the immigration courts' governing procedures. While the Administrative Procedure Act does provide some exceptions for procedural rules from notice and comment rulemaking, several of the cases Mr. Sessions certified to himself would change regulations that were promulgated after full compliance with notice and comment rulemaking. The manner of the rushed attack on the court operations, rather than a more deliberate use of administrative procedure, is likely to make further federal litigation inevitable and the manner of the DOJ actions more vulnerable to judicial intervention as running afoul of APA protections.<sup>83</sup>

### *VII. In Search of a Best Practice*

#### *A. A System that Balances Enforcement and Deterrence of Smuggling and Fraud with Fairness and Access to Justice*

The main goal of this Article has been to demonstrate that the current multi-headed hydra of agencies and procedures used to adjudicate the claims of protection for immigrant children is woefully complex, inefficient, and responsible for bureaucratic hurdles that impede fairness. While recent administrative leaders have reprioritized the processing of children's cases, sometimes rushing them forward, other times pushing them aside, the main

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indicate that he may not be able to act as an impartial adjudicator. *See generally* Brief for American Immigration Council as Amici Curiae Supporting Respondent, *In re Reynaldo Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/amicus\\_briefs/matter\\_of\\_castro-tum\\_amicus\\_brief.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/amicus_briefs/matter_of_castro-tum_amicus_brief.pdf). Further Canon 3 of judicial ethics for federal courts requires a judicial officer to act impartially. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 3(A)(6) (U.S. Courts 2014) ("A judge should not make public comment on the merits of a matter pending or impending in any court."). As explained earlier, in this capacity the Attorney General is acting as the chief adjudicator within the Department of Justice.

83. The EOIR proceedings are, in part, exempt from some of the adjudication requirements of the APA, but the rules promulgated by the agency are subject to the rulemaking provisions of the APA. *See Ardestani v. INS*, 502 U.S. 129, 134 (1991) (holding that the INA exempts the hearing procedures from the APA requirements found in §§ 556 and 557).



result is we lack a coherent and effective adjudication scheme. While greater coordination amongst the agencies could potentially lead to clarity and improvements for both the systems and the children within it, that coordination has never been demonstrated and in recent years is more highly fragmented than ever.<sup>84</sup> Even for those in government who might want to deter children from reaching the United States or who do not believe that the majority of children fleeing violence are qualified for refugee protection, the current system is not providing an efficient adjudicatory mechanism that might resolve claims without years of delay. Thus, no matter your view of the current population of children seeking protection, all may agree we need administrative coherence and a new architecture for adjudication. What we do not need is more battles over chaotic process. We are better served by turning away from tinkering on the edges of the adjudication.

### *B. Characteristics of a Better Model for Adjudication*

In the space allowed, I can only sketch out essential characteristics of a better model for administrative adjudication. As this Article is being written, the UN is convening meetings around the world and discussing new compacts on the treatment of refugees and is paying specific and careful attention to the needs of children.<sup>85</sup> But given the substantive protections already possible for children, I make the following recommendations.

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84. For a detailed and thoughtful analysis of ways to improve the existing system, see generally JENNIFER NAGDA & MARIA WOTJEN, *FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN* (2016), <https://www.gcir.org/sites/default/files/resources/2016%20Young%20Center%20Framework%20for%20Considering%20Best%20Interests%20of%20Unaccompanied%20Children.pdf>.

85. See *Global Compact for Migration*, U.N. REFUGEES AND MIGRANTS, <https://refugeesmigrants.un.org/migration-compact> (last visited Sept. 20, 2018) (“The global compact for migration will be the first, intergovernmentally negotiated agreement, prepared under the auspices of the United Nations, to cover all dimensions of international migration in a holistic and comprehensive manner.”) (on file with the Washington and Lee Law Review).

*1. Do Not Place All Apprehended Children Into Detention*

While the federal government has a legitimate concern for the immediate welfare of unaccompanied children crossing the U.S. border or seeking admission at a port of entry, detention is the last resort mechanism. Federal custody of children should be brief and handled by an agency that has no role in the enforcement of immigration laws. While the current model uses the HHS, the lack of counsel and advocates for the children held in HHS custody and the lack of a clear mechanism to secure release from detention has, over time, lessened protections for children and lengthened detention for many.<sup>86</sup> If a child cannot be released to licensed state agencies or relatives within a brief period of time, the government must find appropriate settings where children can have medical and psychological support in an environment that is the least restrictive of fundamental liberties. At the current time, many of the young people seeking to come to the United States already have close family ties and relatives within the United States, and regardless of the status of these individuals, the child should be released as soon as possible. The long-term costs and harms of detention are so high that detention cannot be further justified.

*2. Do Not Place Children in Removal Proceedings—At Least Initially*

Teeing up the removal mechanism requires that ICE and the EOIR shift priorities to the juvenile cases and ignores the possibility that most of the children might be able to secure immigration status without regard to the removal process. While DHS could always reserve the possibility of initiating removal for those children who do not have a path to status or who prove truly dangerous to the welfare of the people of the United States,<sup>87</sup> there is no need to start with removal. Instead, there should be one

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86. See *supra* notes 65–68 and accompanying text (discussing the *Saravia* hearings).

87. Most juvenile convictions do not qualify as removable offenses. This acknowledgment that some children could be dangerous is not meant to justify wide scale deportations. If the children were a danger to themselves or others, the best approach would be to refer the children to the state juvenile justice system rather than trying to create an entirely separate federal system.

component of the USCIS that is specially staffed, trained, and empowered to adjudicate all of the possible remedies or protection needs of children. This division could be carved out of the existing Asylum Office or the units within USCIS that handle humanitarian visas such as those for victims of trafficking or crimes.

*3. Adjudication Should be Conducted in a Manner Appropriate to the Age and Mental Health of the Applicant Child*

Administrative efficiency might suggest centralized filings of all children's visa petitions, but if there is no appointed counsel and no ability to conduct free medical or mental health assessments, the procedural barriers may negate the benefits of centralization. With appropriate appointed advocates for children and the ability of the public to request and seek assistance, many children may be able to avoid exploitation that can come from a lack of understanding of the legal options. Adjudication models and evidentiary requirements should be adapted to the best practices in evaluating children, not a system roughly hewn from models of adjudication designed for adults or an adversarial system.

*4. Be Transparent and Compliant with the Rule of Law*

For far too long, too many of the rules, procedures, and decisions in children's cases have not been generally available to the public. There are few reported federal court decisions setting for the standards for children seeking asylum. The AAO and USCIS should work to identify more precedent decision specifically for children's cases and ensure that the adjudications are consistent. While all agencies struggle with notice and comment rulemaking, the need for transparency and participation from the advocacy community, is more critical than ever as the number of children grow. Published rules can help guide advocates and adjudicators and provide a platform for judicial review to determine if agency adjudication is arbitrary or capricious. The failure to publish the SIJS rules after a 2008 statutory change is a

shameful abandonment of a duty to the most vulnerable.<sup>88</sup> But more rulemaking in all of the areas of adjudication would provide useful guidance, increase consistency, and clarify areas where case-by-case adjudication may be more appropriate.

### *VIII. Conclusion*

While the Trump Administration has demonstrated a penchant for irregular and erratic administrative action, it is not the first administration to struggle with adapting the complex interaction of child protection law, immigration law, and court procedures to find the right balance between fairness, efficiency, and accuracy. Perhaps the real fault lies with Congress. In 2008 Congress took a careful and measured step to officially recognize that the law needed to provide some protections for unaccompanied children as part of the TVPRA. But this is not enough.

Today it is clear that there has been a failure to fully think through and integrate the operation of the many divisions of DHS and that the operations of the Office of Refugee Resettlement are far too makeshift. It is an overgrown patchwork of overlapping jurisdictions with disparate missions. Every aspect of the administration of justice here is showing the strain. There are growing inequities in finding representation, growing numbers of children again appearing at our border, and enormous backlogs in adjudication and re-adjudication due to agency lack of clarity and coherence, and even rapid and retroactive restrictive interpretations in the substantive law.

Perhaps rather than trying to tinker at the edges with rough justice or obstacles to fairness in the administrative procedure, we need a coherent and well-designed process. Congress should invest in and guide the development of a new integrated process after deep consultation with advocates and experts in design and operation of juvenile justice systems, as well as careful assessment of the views of the myriad of adjudicators each with distinct institutional interests. And while administrative dysfunction is not limited to immigration law, here the harm is too great.

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88. Proposed rules were promulgated in 2011. Ten years have passed since the amendment of the SIJS statute by the TVPRA in 2008.

Vulnerable children are caught in the maelstrom of the administrative chaos. We can, we must, do better.