

## A Better Way: Uncoupling the Right to Counsel with the Threat of Deportation for Unaccompanied Immigrant Children and Beyond

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# A BETTER WAY: UNCOUPLING THE RIGHT TO COUNSEL WITH THE THREAT OF DEPORTATION FOR UNACCOMPANIED IMMIGRANT CHILDREN AND BEYOND

LAURA BARRERA\*

## INTRODUCTION

The stakes could not be higher in immigration court—families are separated; people are banished from their communities with little hope of ever legally returning; judges relegate individuals to seemingly arbitrary and indefinite detention in remote locations.<sup>1</sup> Each of these hardships—and more—flow from the threat of deportation. As the Supreme Court noted in 1922, deportation “may result . . . in . . . all that makes life worth living.”<sup>2</sup>

As has been the unfortunate norm in civil proceedings, many individuals face these trials without an attorney by their side because while the law states that respondents<sup>3</sup> in immigration court have the right to be represented by an attorney, attorneys will not be provided at the expense of the government in all but a

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<sup>1</sup> See Sarah Paoletti, *SCOTUS Immigration Decisions*, PENN CAREY LAW: NEWS & EVENTS (June 14, 2022), <https://www.law.upenn.edu/live/news/14839-scotus-immigration-decisions> [<https://perma.cc/Z6XG-MW2C>] (noting how two recent Supreme Court decisions will continue to subject non-citizens and their family members to “prolonged and arbitrary detention without meaningful judicial review”).

<sup>2</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

<sup>3</sup> See THE OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 64 (U.S. Dep’t of Just. 2018), <https://www.justice.gov/eoir/page/file/1084851/download> [<https://perma.cc/9HUT-WFKA>] (noting that “the alien should be referred to as ‘the respondent’ in immigration court”).

few, narrow circumstances.<sup>4</sup> Thus, individuals with little legal experience and who may not be fluent in English will find themselves facing experienced attorneys from the federal government—and all of this occurs before immigration judges who, more often than not, are predisposed not to recognize the humanity of respondents or take seriously the hardships that their decisions may impose.

In terms of complexity, immigration law is often said to be second only to tax law. Even seasoned professionals regularly encounter issues they have not seen before—and on top of that, immigration professionals must navigate the consistently changing administrative landscape and accede to the whims of the Department of Justice (“DOJ”) and Department of Homeland Security (“DHS”), which can change procedures and case law at will in ways that have a significant impact on immigration law practice.<sup>5</sup> Thus, it is unsurprising that attorneys and advocates who have seen the monumental power imbalance between unrepresented respondents and government attorneys play out in court to have pushed for policies advocating for universal representation in immigration court proceedings.<sup>6</sup> The reasoning makes sense—given these circumstances, it is highly unlikely that an unrepresented respondent will win a favorable outcome in immigration court,<sup>7</sup> therefore, to have a chance at achieving

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<sup>4</sup> 8 U.S.C. § 1362.

<sup>5</sup> See Press Release, *Joint Press Release: Immigration Groups File Lawsuit Challenging Trump Administration Efforts to Bar More from Asylum*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (Nov. 3, 2020), <https://cliniclegal.org/press-releases/joint-press-release-immigration-groups-file-lawsuit-challenging-trump-administration> [<https://perma.cc/7HAZ-YUY3>] (“The United States is a country where the rule of law and access to asylum protection for those fleeing for safety cannot be tossed aside for political whims.”).

<sup>6</sup> See GREG CHEN AND JORGE LOWEREE, POLICY BRIEF: THE BIDEN ADMINISTRATION AND CONGRESS MUST GUARANTEE LEGAL REPRESENTATION FOR PEOPLE FACING REMOVAL 2 (American Immigration Lawyers Association, Jan. 15, 2021), <https://www.aila.org/advocacy-media/aila-policy-briefs/legal-representation> [<https://perma.cc/GAZ9-BSV3>] (“AILA and the American Immigration Council call upon the Biden administration to take steps . . . to expand federally funded legal representation . . . for people facing removal.”); see also Michael Kagan, *Toward Universal Deportation Defense: An Optimistic View*, 2018 WIS. L. REV. 305, 307 (2018) (noting there are Supreme Court precedents that would allow advocates to make an argument that appointment of counsel should be required in removal proceedings).

<sup>7</sup> See *Asylum Denial Rates Continue to Climb*, TRAC IMMIGRATION (Oct. 28, 2020), <https://trac.syr.edu/immigration/reports/630/> [<https://perma.cc/J933-J5WN>] (illustrating that in fiscal year 2020, only 17.7 percent of asylum cases for people who did not have legal representation were granted. However, it is important to note that winning does still not

justice, all respondents should have access to free legal counsel in their removal proceedings. Many argue that this is what due process requires—others argue that it is just the *right* thing to do for our immigrant neighbors, friends, and family—even if it is not compelled by due process.

While I agree that every person in removal proceedings should have access to free legal representation, I propose that there are several major issues with the traditional advocacy pushes for universal representation in removal proceedings. First, I believe the traditional approach to universal representation in immigration court is much too narrow in terms of the legal help that should be afforded to immigrants. Second, I believe it is based on the false premise that justice is generally achievable in immigration court only if one has an attorney.

This article, written for the symposium issue of the *Journal of Civil Rights and Economic Development* on the topic of a civil right to counsel, asks advocates to consider not only the *need* for legal representation for immigrants but also the *form* that such programs should take. While I unreservedly believe that every individual in immigration court proceedings should have access to free legal representation, as advocates, we should ask ourselves what precisely we are calling for when we push for universal representation in immigration court. This article argues that pushing for universal representation in removal proceedings without considering the limits and implications of such a program could entrench further reliance on immigration court proceedings, which will not necessarily lead to more just results for immigrants. When linked to court proceedings, such policies may disempower the people they purport to help by subjecting them to proceedings that we know to be hostile, traumatizing, and victimizing.<sup>8</sup>

This article also focuses on the circumstances of Unaccompanied Children in immigration proceedings because that is one of the

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become likely when someone has legal representation, as only 31.1 percent of asylum cases were granted for respondents who did have attorneys in the same period).

<sup>8</sup> Marouf, Fatma E., *Implicit Bias and Immigration Courts*, 45 *NEW ENGLAND L. REV.* 417, 424 (2011) (“[F]ederal judges have found bias where the IJ spoke in an ‘argumentative, sarcastic, and sometimes arguably insulting manner’ engaged in ‘bullying’ until the petitioner was ‘ground to bits,’ appeared ‘unseemly,’ ‘intemperate,’ and even ‘mocking’ or took on the role of ‘a prosecutor anxious to pick holes in the petitioner’s story.’ While one may be inclined to dismiss such IJs as just ‘a few bad seeds,’ their hostile attitudes reflect an anxiety about immigration and an underlying prejudice toward potential immigrants that is actually quite widespread.” (internal citations omitted)).

narrow areas in which the federal government has taken steps to provide free legal counsel to respondents in immigration court. I focus on Unaccompanied Children to outline why conventional universal representation programs are misguided. While it is undeniable that children need access to free legal counsel in their immigration proceedings, advocates should push for initiatives that de-essentialize the immigration court system in access-to-counsel models. This article will provide one idea of how and *why* that should be done. While this analysis will be limited to Unaccompanied Children, I believe it provides a valuable study of why we must carefully consider what access-to-counsel initiatives look like, and how to think outside the courtroom about such programs.

## I. UNACCOMPANIED CHILDREN

“Unaccompanied Child” is a legally significant designation applied to certain children encountered by Department of Homeland Security agents.<sup>9</sup> United States law defines an Unaccompanied Child as a child who is under eighteen years old, has no lawful immigration status in the United States; and they have “no parent or legal guardian in the United States; or [] no parent or legal guardian in the United States is available to provide care and physical custody.”<sup>10</sup> In practice, migrant children also become “Unaccompanied” when DHS agents separate them from non-parent legal guardians. Customs and Border Protection (“CBP”) agents can deem an immigrant child’s guardianship insufficient, and children can also be separated from their biological parents at the discretion of DHS agents.<sup>11</sup>

Although Unaccompanied Children have been coming to the United States for many years, starting in 2011 children began

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<sup>9</sup> 6 U.S.C. § 279(g)(2).

<sup>10</sup> *Id.*

<sup>11</sup> See WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY 1–3 (2021) (noting DHS has “broad statutory authority . . . to detain aliens not legally admitted . . .” and that “children are not permitted in criminal detention facilities with adults, detaining adults who crossed illegally requires that any minor children under age 18 accompanying them be treated as *unaccompanied alien children* (UAC)” and transferred to the custody of HHS (emphasis added)).

arriving at the southern border in increasing numbers.<sup>12</sup> Most of these children were—and continue to be—between thirteen and seventeen, and are from Central American countries, primarily Honduras, Guatemala, El Salvador, and Mexico. However, children from all parts of the world are represented.<sup>13</sup> The vast majority of these minors have listed poverty, interfamilial violence, and gang violence as significant reasons for migrating to the United States.<sup>14</sup> In addition to children arriving at the border alone, increasingly restrictive policies implemented by the Trump Administration and continued by the Biden Administration, such as the Title 42 border closure and expulsion policy and the ironically named “Migrant Protection Protocols,” are causing families to face the impossible choice of self-separating to allow the children an attempt at entering the United States for their safety and survival through certain exceptions.<sup>15</sup> Most children have family members or friends in the United States that they hope to live with upon arrival.<sup>16</sup>

<sup>12</sup> WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 3 (2021) (“Relatively high levels of UAC apprehensions emerged 10 years ago, starting from 16,067 in [fiscal year] 2011, to 24,481 in [fiscal year] 2012, and increasing to 38,759 in [fiscal year] 2013. In [fiscal year] 2014, CBP apprehended 68,541 UAC, more than in any of the previous six years and more than four times as many as in [fiscal year] 2011.”).

<sup>13</sup> UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, CHILDREN ON THE RUN EXECUTIVE SUMMARY 4, 8 (Mar. 13, 2014), <https://www.unhcr.org/56fc26d27.html> [<https://perma.cc/L8BN-CLHE>] [hereinafter CHILDREN ON THE RUN]; see RUTH ELLEN WASEM & AUSTIN MORRIS, CONG. RSCH. SERV., R43734, UNACCOMPANIED ALIEN CHILDREN: DEMOGRAPHICS IN BRIEF 2–4 (2014) (illustrating that most Unaccompanied Children come from Honduras, Guatemala, and El Salvador); see also *Unaccompanied Children Information: Latest UC Data – FY2021*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES (Nov. 15, 2021), <https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data-fy2021/index.html#age> [<https://perma.cc/NQT2-E543>] (illustrating that most children are ages 13 to 17).

<sup>14</sup> CHILDREN ON THE RUN, *supra* note 13, at 7, 9–10.

<sup>15</sup> *What is Title 42 and How Does it Impact Children and Families*, YOUNG CENTER FOR IMMIGRANT CHILDREN’S RIGHTS (Oct. 12, 2021), <https://www.theyoungcenter.org/stories/2021/10/12/what-is-title-42-and-how-does-it-impact-children-and-families> [<https://perma.cc/4CGM-RLMX>]; see *The “Migrant Protection Protocols” Are Harming Children and Must End*, YOUNG CENTER FOR IMMIGRANT CHILDREN’S RIGHTS (Dec. 12, 2019), <https://www.theyoungcenter.org/stories/2019/12/12/the-migrant-protection-protocols-are-harming-children-and-must-end> [<https://perma.cc/4SE7-9RBC>] (noting instances where children were separated from their parents).

<sup>16</sup> Camilo Montoya-Galvez, *U.S. Shelters Received a Record 122,000 Unaccompanied Migrant Children in 2021*, CBS NEWS (Dec. 23, 2021), <https://www.cbsnews.com/news/immigration-122000-unaccompanied-migrant-children-us-shelters-2021/> [<https://perma.cc/3KFB-HZ84>].

Once a minor encounters agents from DHS, be they officers from Immigration and Customs Enforcement (“ICE”) or CBP, the officials will designate the immigrant as an Unaccompanied Child and the child will be processed accordingly.<sup>17</sup> The Unaccompanied Child designation provides certain protections—among the most significant is the right to be detained in the “least restrictive setting”<sup>18</sup> until they can be reunified with a sponsor<sup>19</sup> in the United States—as opposed to adults who are detained in stark conditions in prison-like facilities.<sup>20</sup> Another significant benefit to being categorized as an Unaccompanied Child is that it entails the opportunity to apply for asylum through a non-adversarial process adjudicated by the Asylum Office of the United States Citizenship and Immigration Services (“USCIS”).<sup>21</sup> This means that, although a deportation case will be initiated against the child, they can have their asylum case heard and considered first by USCIS. If an asylum officer denies the Unaccompanied Child’s case, the child must fight for immigration relief in a courtroom through the defensive process adjudicated by the immigration judge—these proceedings would be subject to court procedures and cross-examining by an ICE attorney.<sup>22</sup> This is significant because the asylum office tends to be less intimidating than the immigration court. Furthermore, an Unaccompanied Child will get a second chance to have their asylum case heard if the Asylum Office does

<sup>17</sup> OFF. OF REFUGEE RESETTLEMENT, ORR UNACCOMPANIED CHILDREN PROGRAM POLICY GUIDE: SECTION 1, 1.2 (U.S. Dep’t of Health and Hum. Services, July 19, 2022), <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1#1.2> [<https://perma.cc/F526-SP6B>].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (noting that a sponsor is usually someone who is approved by ORR to take physical custody of an unaccompanied child, such as family members or close family friends of the child).

<sup>20</sup> See ACLU, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES 2 (ACLU), <https://www.aclu.org/other/conditions-confinement-immigrant-detention-facilities> [<https://perma.cc/54MU-7SUJ>] (noting that immigration detainees are placed in prison-like conditions without any protections of due process); DHS, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards* 1, 7 (Jan. 29, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf> [<https://perma.cc/5633-UCVY>] (reporting results from inspection of ICE’s facilities).

<sup>21</sup> U.S. Citizenship and Immigration Services, *Asylum Procedures for Minor Children*, DEP’T OF HOMELAND SEC.: Asylum (Dec. 8, 2021).

<sup>22</sup> See HILLEL R. SMITH, CONG. RSCH. SERV.: LEGAL SIDEBAR, AN OVERVIEW OF U.S. IMMIGRATION LAWS REGULATING THE ADMISSION AND EXCLUSION OF ALIENS AT THE BORDER 4 (2018), <https://trac.syr.edu/immigration/library/P14692.pdf> [<https://perma.cc/MQ5W-HSBU>] (noting that UAC’s who are subject to removal are placed in formal removal proceedings).

not grant the application because the Asylum Office cannot deny cases; it merely refers them to the immigration court for the judge to hear the case and make a decision.<sup>23</sup> Adults in removal proceedings do not have this opportunity and must have their asylum case heard and decided by an immigration judge.

After being classified as Unaccompanied Children by DHS, children are then transferred to the custody of the Office of Refugee Resettlement (“ORR”), a branch of the Department of Health and Human Services (“HHS”), for their detention until they can be released.<sup>24</sup> Children for whom ORR can find an adequate sponsor will be released from immigration detention to their sponsor and relocate to live in whichever location the sponsor resides.<sup>25</sup> Kids are regularly released to sponsors in all fifty states.<sup>26</sup> Children for whom ORR fails to locate a sponsor or cannot accept a potential sponsor based on their guidelines for release will be transferred to a long-term immigration detention setting that is meant to be less restrictive.<sup>27</sup> Once a child is designated an Unaccompanied Child, the designation remains until it is affirmatively revoked by DHS or the immigration court, even if the child is later reunified with a parent or legal guardian.<sup>28</sup>

Typically, when DHS wants to remove someone from the United States, they are processed through what is known as section 240 removal proceedings, which are proceedings arising under the authority of section 240 of the Immigration and Nationality Act (“INA”).<sup>29</sup> All Unaccompanied Children, whether detained or released, will be processed for section 240 removal proceedings and

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<sup>23</sup> *Id.*

<sup>24</sup> Office of Refugee Resettlement, *Unaccompanied Children: About the Program* (Sept. 2, 2022), <https://www.acf.hhs.gov/orr/programs/ucs/about> [<https://perma.cc/E6AJ-R9JF>].

<sup>25</sup> Office of Refugee Resettlement, *Unaccompanied Children Released to Sponsors by State* (Sept. 29, 2022), <https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state> [<https://perma.cc/VPZ7-B7PD>].

<sup>26</sup> *See id.* (Featuring a chart illustrating that children are sent to sponsors throughout all 50 states).

<sup>27</sup> Office of Refugee Resettlement, *ORR Unaccompanied Children Program Policy Guide: Section 2* (July 19, 2022), <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-2> [<https://perma.cc/6WZ4-T8KH>].

<sup>28</sup> United States Citizenship and Immigr. Servs., *Updated Procedures for Determination of Initial Jurisdiction over Unaccompanied Alien Children*, HQRAIO 120/12a (May 28, 2013), <https://www.uscis.gov/sites/default/files/document/memos/deter-juris-asylum-app-file-unaccompanied-alien-children.pdf> [<https://perma.cc/M5UX-YDU2>]; *Matter of M-A-C-O*, 27 I&N Dec. 477 (BIA 2018).

<sup>29</sup> Immigration and Nationality Act (INA) § 240, 8 U.S.C. § 1229a.



be expected to appear in immigration court to show why they should not be removed from the United States.<sup>30</sup> A person against whom DHS has commenced removal proceedings is known in court as a “respondent,” and each respondent, regardless of age, is entitled to have an attorney represent them in their proceedings, but the U.S. government does not provide that attorney.<sup>31</sup> In effect, this means that unless someone can afford to pay for an attorney or can find one who will represent them for free, they must represent themselves in front of the immigration judge, opposite a government-trained attorney representing ICE. In such a scenario, the right to be represented becomes little more than a privilege for those who can afford it. There are generally no safeguards in place for Unaccompanied Children specifically.<sup>32</sup> In these proceedings, the respondent’s goal is typically either to terminate the proceedings and cause the removal case against them to be dropped or to file and win a defensive application for relief from removal, such as asylum.<sup>33</sup> Because the immigration court system is not a part of the judiciary but falls within the executive branch in an agency under the DOJ known as the Executive Office of Immigration Review (“EOIR”),<sup>34</sup> decisions from the immigration judge can be appealed by a respondent or the ICE attorney to the appellate body within the EOIR, the Board of Immigration Appeals (“BIA”). From there, it can be further appealed to the United States Court of Appeals, which has jurisdiction over the immigration court in which proceedings took place. Section 240 proceedings are formal proceedings conducted by an immigration judge who presides over the immigration court, which is the administrative tribunal.<sup>35</sup>

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<sup>30</sup> Cong. Res. Serv., *Unaccompanied Alien Children: An Overview* 1, 8 (2021), <https://sgp.fas.org/crs/homesec/R43599.pdf> [<https://perma.cc/89EM-QJJ2>].

<sup>31</sup> Immigration and Nationality Act (INA) § 292, 8 U.S.C. § 1362 (2011).

<sup>32</sup> Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 *STAN. J. C.R. & C.L.* 109, 115 (2014).

<sup>33</sup> Dep’t of Just. Executive Office for Immigration Review: An Agency Guide (2017).

<sup>34</sup> DEPARTMENT OF JUSTICE, *About the Office*, <https://www.justice.gov/eoir/about-office> [<https://perma.cc/AMB6-LPNK>].

<sup>35</sup> Immigration and Nationality Act (INA) § 240, 8 U.S.C. § 1229a (2011).

## II. THE HISTORY OF GOVERNMENT EFFORTS TO PROVIDE COUNSEL TO UNACCOMPANIED CHILDREN

One of the limited circumstances in which the federal government funds legal counsel for people threatened with deportation is for Unaccompanied Children in long-term ORR detention centers. Those children will be given access to free legal counsel through organizations contracted or subcontracted by ORR to provide free legal services to detained immigrant minors.<sup>36</sup> Children who are released to live freely<sup>37</sup> are relegated to the situation of all people who have cases in immigration court; they are entitled to have an attorney represent them, but one will normally not be provided by the government.<sup>38</sup> In the 2021 fiscal year alone, 107,686 Unaccompanied Children were released to sponsors and will be expected to appear in immigration court for their removal proceedings.<sup>39</sup>

With increasing numbers of Unaccompanied Children arriving in the United States, the Obama Administration took action aiming to provide attorneys to non-detained Unaccompanied Children in immigration court proceedings.<sup>40</sup> On June 4, 2014, Attorney General Eric Holder announced a partnership between the Corporation for National and Community Service and the Department of Justice to create the justice AmeriCorps program.<sup>41</sup> This program funded approximately 100 attorneys and paralegals to represent children in removal proceedings across the United

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<sup>36</sup> Office of Refugee Resettlement, *Services Provided* (2019), <https://www.acf.hhs.gov/orr/about/ucs/services-provided> [<https://perma.cc/NU4J-LBRJ>].

<sup>37</sup> See Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELATIONS (Dec. 2, 2021), <https://www.cfr.org/backgrounders/us-detention-child-migrants> [<https://perma.cc/RZY8-7QS3>]. As much as freedom is possible while in a scheme of recurring immigration court hearings and under the constant threat of deportation. *Id.*

<sup>38</sup> See Good, *supra* note 32, at 112–13.

<sup>39</sup> Office of Refugee Resettlement, *Unaccompanied Children Released to Sponsors by State* (Jun. 24, 2021), <https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state> [<https://perma.cc/F9UY-8TRV>].

<sup>40</sup> *Obama Approves \$4M To Fund Lawyers For Immigrant Children In Deportation Proceedings*, CBS NEWS (Sept. 30, 2014), <https://www.cbsnews.com/losangeles/news/obama-approves-4m-to-fund-lawyers-for-immigrant-children-in-deportation-proceedings/> [<https://perma.cc/Z933-P73R>].

<sup>41</sup> Press Release, U.S. Dep't of Just., *Just. Dep't and CNCS Announce New P'ship To Enhance Immigr. Courts And Provide Critical Legal Assistance to Unaccompanied Minors* (June 6, 2014), <https://www.justice.gov/eoir/pr/JusticeAmeriCorpsRelease06062014> [<https://perma.cc/3XTQ-KQFF>].

States.<sup>42</sup> The program was administered through grants to organizations who applied to become host sites, and the host sites were responsible for hiring their justice AmeriCorps fellows.<sup>43</sup> The program was renewed for three years until the Trump Administration discontinued support for the program in 2017.<sup>44</sup>

In 2021, amid calls for President Biden to make good on promises to be more supportive of immigrants than his predecessor, the Biden Administration announced a new pilot program to provide government-funded attorneys to Unaccompanied Children in deportation proceedings in eight cities across the U.S.<sup>45</sup> The program, known as the Counsel for Children Initiative, was announced in September 2021.<sup>46</sup> The Counsel for Children Initiative will provide government-funded counsel to certain Unaccompanied Children in immigration court proceedings in cities where the government believes it will have the greatest impact.<sup>47</sup>

### III. FREE LEGAL COUNSEL FOR UNACCOMPANIED CHILDREN SHOULD NOT BE TIED TO IMMIGRATION COURT PROCEEDINGS

All initiatives to give free legal counsel to Unaccompanied Children focus on providing them with legal representation in their removal proceedings.<sup>48</sup> With that being the main agenda,

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<sup>42</sup> *Id.*

<sup>43</sup> I got my start as an attorney in justice AmeriCorps, and while I believe the program is an imperfect attempt at counsel for Unaccompanied Children, I will be forever grateful for the training I received and the network I developed as a fellow. See U.S. Dep't of Just., EOIR's Office of Legal Access Programs (2016), <https://www.justice.gov/eoir/file/882786/download> [https://perma.cc/RLP4-QLU4].

<sup>44</sup> Nicole Einbinder, *How the Trump Administration is Rewriting the Rules for Unaccompanied Minors*, PUBLIC BROADCASTING SERVICE (Feb. 13, 2018), <https://www.pbs.org/wgbh/frontline/article/how-the-trump-administration-is-rewriting-the-rules-for-unaccompanied-minors/> [https://perma.cc/AUN6-ETLP].

<sup>45</sup> Press Release, U.S. Dep't of Just., *EOIR Announces "Access EOIR" Initiative* (2021), <https://www.justice.gov/eoir/pr/eoir-announces-access-eoir-initiative> [https://perma.cc/E9CA-7JMB].

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The program will launch in Atlanta, Houston, Los Angeles, New York City, San Diego, San Francisco, Seattle, and Portland. *Id.*

<sup>48</sup> See 8 U.S.C. § 1362 (stating that "in any removal proceedings . . . the person concerned shall have the privilege of being represented . . . by such counsel . . . as he shall choose"). In general, virtually all calls for free legal counsel for immigrants call for universal representation in immigration court. See *id.*

having the child in removal proceedings is the prerequisite for access to free representation through these government-funded efforts. However, removal proceedings are unnecessary for these children to win immigration relief and achieve a pathway to permanently stay in the United States. I believe when we tie representation to removal proceedings, we make immigration court essential when, in reality, it is legally unnecessary, inefficient, and harmful. My critique of past and current government programs providing free legal representation to children is this: when we focus on providing universal representation for Unaccompanied Children in court, we forget to ask why Unaccompanied Children are being placed in removal proceedings. In the case of Unaccompanied Children, there is seldom, if ever, a reason that they must be in immigration court proceedings to seek immigration relief. There are several reasons that the default should be that Unaccompanied Children are not placed into removal proceedings.

*A. Placing Unaccompanied Children in Removal Proceedings Ignores Children's Best Interests and Special Vulnerabilities*

In other areas of law involving children, such as family or juvenile court proceedings, it is commonly accepted that children have unique vulnerabilities and must be given special consideration.<sup>49</sup> For example, on a general level, our legal system acknowledges that many legal violations committed by children should not be processed through the regular criminal legal system but through juvenile delinquency proceedings, which are intended to take into account the ways that childhood plays a role in the actions of children, and understands the premise that children

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<sup>49</sup> See *Montgomery v. Louisiana*, 577 U.S. 190, 207–08 (2016) (holding that “Children are constitutionally different from adults for purposes of sentencing. . . . First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as well formed as an adult’s; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity”).

require a specialized environment for adjudications, distinct from adult legal proceedings.<sup>50</sup> Furthermore, diversionary and extrajudicial options are often available to mitigate the fear and discomfort children experience through regular adjudications.<sup>51</sup> In questions of family law concerning children, such as in dependency or custody cases, the best interests of the child are always fundamental for a judge to consider in any decision involving children.<sup>52</sup> By contrast, the immigration court does not have any standard procedural safeguards for children.

Children are expected to participate in the proceedings against them the same way that adults are, and any special consideration given to them is generally at the discretion of the judge. In my experience as an attorney for Unaccompanied Children, I find that it is not uncommon for judges to adopt a friendlier-than-normal courtroom manner when speaking directly to children, but that seeming gentleness did not translate into kinder decisions or hesitation to order that an unaccompanied child be deported. In addition to the lack of procedural protections, another reason that immigration court can be a treacherous and stressful experience for children is that there is absolutely no consideration given to the best interests of the child in terms of legal analysis.<sup>53</sup> The immigration judges do not consider the best interests of a child in determining whether or not to order their deportation.<sup>54</sup> This means that even if an immigration judge believes returning a child to their country of origin would harm the child, they will not consider that in making their decision.<sup>55</sup>

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<sup>50</sup> Renee VandenWallBake, *Considering Childhood Trauma in the Juvenile Justice System: Guidance for Attorneys and Judges*, AMERICAN BAR ASSOCIATION (Nov. 01, 2013), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol\\_32/november-2013/considering-childhood-trauma-in-the-juvenile-justice-system--gui/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/november-2013/considering-childhood-trauma-in-the-juvenile-justice-system--gui/) [<https://perma.cc/2URJ-W6Z5>].

<sup>51</sup> *See id.* For example, “our juvenile justice system allows for the court to treat each case and each child according to their unique circumstances and needs.” *Id.*

<sup>52</sup> *Determining the Best Interests of the Child*, CHILDREN’S BUREAU/ACYF/ACF/HHS (2020), [https://www.childwelfare.gov/pubpdfs/best\\_interest.pdf](https://www.childwelfare.gov/pubpdfs/best_interest.pdf) [<https://perma.cc/7VD2-UULX>].

<sup>53</sup> Bridgette A. Carr, *Incorporating a ‘Best Interests of the Child’ Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L. J. 120, 124–25 (2009) (“Most United States immigration proceedings include no determination regarding the best interests of the child.”).

<sup>54</sup> *Id.* at 123 (“The failure of immigration law and procedure to incorporate a ‘best interests of the child’ approach ignores a successful means of protecting children that is common both internationally and domestically.”).

<sup>55</sup> *See* U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV.: AN AGENCY GUIDE (2017),

*B. Linking Access to Government-funded Counsel to Immigration Court Proceedings Essentializes Court When, in Reality, Court is Usually Entirely Unessential for Unaccompanied Children*

i. Immigration Court does not have Jurisdiction over the Most Common Forms of Relief for Unaccompanied Children

Many people unfamiliar with the United States immigration system may be surprised to know that immigration court is not essential to access a pathway to living in the United States legally and permanently. This is especially the case for Unaccompanied Children. While the immigration court system can adjudicate some applications for immigration relief,<sup>56</sup> many applications for immigration benefits and permanent status are processed by an agency within the Department of Homeland Security: United States Citizenship and Immigration Services (“USCIS”).<sup>57</sup> An immigration judge has no authority to make decisions on applications filed with USCIS, and many types of visa petitions or applications are solely within the jurisdiction of that agency and could not be filed with an immigration court in any circumstances.<sup>58</sup> This is true of all common forms of relief for Unaccompanied Children.

The most common pathways to a permanent immigration status that Unaccompanied Children qualify for are asylum, Special

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[https://www.justice.gov/eoir/page/file/eoir\\_an\\_agency\\_guide/download](https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download) [<https://perma.cc/9UTA-QBXW>]. Unless, for example, a judge finds that a child qualifies for protection such as asylum, but that does not expressly consider best interests, rather, it is a complex legal standard considering the likelihood of persecution for specific reasons, which may align with the child’s best interest. *See id.*

<sup>56</sup> DEPT OF JUSTICE, *Immigration Court Practice Manual: Jurisdiction and Authority* (August 25, 2022), <https://www.justice.gov/eoir/reference-materials/ic/chapter-1/4> [<https://perma.cc/8V5J-DNKX>]; *see* SMITH, *supra* note 22, at 3 (explaining applications filed in court are said to be “defensive” because they are filed as a defensive from removal, rather than affirmatively filed.).

<sup>57</sup> DEPT OF JUSTICE, *supra* note 56.

<sup>58</sup> *Id.*

Immigrant Juvenile Status (“SIJS”), T visas for survivors of severe forms of human trafficking, and U visas for survivors of certain crimes committed in the United States.<sup>59</sup> USCIS has jurisdiction over all these applications. Normally, a judge would hear a defensive asylum application—however, as previously mentioned, Unaccompanied Children are granted a special opportunity by law to initially apply for asylum through USCIS because it is a non-adversarial process deemed to be more appropriate for children.<sup>60</sup> Thus, immigration judges do not have jurisdiction to adjudicate any of the most common forms of relief that Unaccompanied Children qualify for.

Although immigration judges do not have jurisdiction over most forms of legal relief for children, they *do* have the authority to decide whether or not a child should be removed from the United States.<sup>61</sup> Thus, most hearings for Unaccompanied Children whom attorneys represent consist of assuring the judge that you will be filing applications shortly with USCIS or that one or more are already pending and asking the judge to please not order the child deported while they wait for USCIS to decide their application or petition. The amount of time USCIS takes to make a decision varies from months to years.<sup>62</sup> Throughout that time, the Unaccompanied Child will generally be expected to appear in court every three to six months to update the court about the application’s status with USCIS, if the court does not decide to order that they be deported in the meantime.<sup>63</sup>

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<sup>59</sup> See American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses* (2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> [<https://perma.cc/MK2Q-YUBM>]. In my experience, this is true; it is also noted in various guides and practice advisories. See *id.*

<sup>60</sup> U.S. Citizenship and Immigr. Servs., *supra* note 28, at 2; United States Citizenship and Immigration Services, *Asylum Procedures for Minor Children*, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-procedures-for-minor-children> [<https://perma.cc/82HY-8QSS>].

<sup>61</sup> KANDEL, *supra* note 12, at 7.

<sup>62</sup> TRAC Immigration, *A Mounting Asylum Backlog and Growing Wait Times* (December 22, 2021), <https://trac.syr.edu/immigration/reports/672/> [<https://perma.cc/R6A3-KMD3>].

<sup>63</sup> KANDEL, *supra* note 12, at 15.

ii. The Department of Homeland Security Could Use Its Prosecutorial Discretion to Decline Pursuing the Removal of Unaccompanied Children

It is important to remember that immigration court proceedings are unnecessary. Perhaps this is different from other types of civil proceedings, but in immigration court, there are not two private parties with an interest in the dispute. The safety of individuals is also not an issue, or at least not of primary concern. These proceedings are solely concerned with stripping legal status from people who have legal authorization to live in the United States so they can be removed from the country, or remove individuals who do not have legal permission to be inside the United States. Also, unlike other types of proceedings, the government has full discretion in choosing which cases to prosecute.<sup>64</sup>

Such complete discretion is not unique to ICE. Law enforcement agencies regularly use discretion to determine which offenses or categories of people they will prosecute.<sup>65</sup> The Department of Homeland Security, through ICE, can and must use its prosecutorial discretion to decide which cases to prosecute given its finite resources—it is not possible or practical to bring a case against every single undocumented immigrant in the United States.<sup>66</sup> The Department of Homeland Security already uses discretion to choose which cases to prioritize. On May 27, 2021, the Principal Legal Advisor for ICE, John D. Trasviña, issued a memorandum to ICE attorneys about which types of cases they should prioritize.<sup>67</sup> Such cases that ICE attorneys should pursue were those implicating issues of national security, border security,

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<sup>64</sup> Immigration and Customs Enforcement, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities*, at 2, 6–7 (May 27, 2021), [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf) [https://perma.cc/HMW8-GJXR].

<sup>65</sup> *Id.* at 2.

<sup>66</sup> *Id.* at 3, 6.

<sup>67</sup> U.S. IMMIGR. AND CUSTOMS ENF'T, INTERIM GUIDANCE TO OPLA ATTORNEYS REGARDING CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL POLICIES AND PRIORITIES 1 (May 27, 2021), [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf) [https://perma.cc/9LLU-4LYG].



and public safety.<sup>68</sup> These categories are deemed “enforcement priorities.”<sup>69</sup>

The existence of prosecutorial discretion and enforcement priorities are essential not just for the management of ICE’s resources but also that of the EOIR. An immigration court cannot just decide not to hear a case once it is filed by ICE, so in that sense, ICE determines how many cases are on the dockets of the immigration courts.<sup>70</sup> During his Administration, President Trump signed an executive order that essentially dissolved the enforcement priorities the Obama Administration set, leaving ICE with what amounted to essentially no enforced prioritization of cases.<sup>71</sup> In other words, everyone and every violation could be a “priority” subject to imminent prosecution. During the Trump Administration, the immigration court backlog ballooned from 542,411 to an astounding 1,290,766.<sup>72</sup> The current number of cases awaiting adjudication in immigration courts is over 1.9 million as of November 2022.<sup>73</sup> This episode highlights the need for enforcement priorities as a necessary element of the immigration court system.

The enforcement priorities memo issued on May 27, 2021, stated that “U.S. Immigration and Customs Enforcement, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities (May 27, 2021) (“it generally will be appropriate to move to dismiss such proceedings without prejudice so that the noncitizen can pursue that relief before the appropriate adjudicatory body . . . [including] a child who appears prima facie eligible to pursue special immigrant juvenile status.”).<sup>74</sup> However, it would be more

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<sup>68</sup> *Id.* at 2–3.

<sup>69</sup> *Id.* at 2, 5.

<sup>70</sup> *Id.* at 8.

<sup>71</sup> See *The End of Immigration Enforcement Priorities Under the Trump Administration*, AM. IMMIGR. COUNCIL 3–4 (Mar. 7 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_end\\_of\\_immigration\\_enforcement\\_priorities\\_under\\_the\\_trump\\_administration.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf) [<https://perma.cc/YVN3-F9YE>].

<sup>72</sup> *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRAC, SYRACUSE UNIV. (January 19, 2021), <https://trac.syr.edu/immigration/reports/637/> [<https://perma.cc/75HH-22AM>].

<sup>73</sup> *Immigration Court Backlog Tool*, TRAC, SYRACUSE UNIV. (last visited Nov. 8, 2022), [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/) [<https://perma.cc/9YHP-HR8V>].

<sup>74</sup> RACHEL LEYA DAVIDSON & LAILA HLAAS, “ANY DAY THEY COULD DEPORT ME”: OVER 44,000 IMMIGRANT CHILDREN TRAPPED IN THE SIJS BACKLOG, END SIJS BACKLOG & THE

efficient and less subject to the discretion of individuals if ICE attorneys were directed not to bring cases against Unaccompanied Children, to begin with, or to make that the default.

The Department should stop prosecuting Unaccompanied Children for removal because the safety and well-being of all children, regardless of their national origin, should be prioritized. However, suppose the Department is not persuaded by the best interests of children. In that case, it should stop prosecuting Unaccompanied Children for removal because it is an inefficient and poor use of both its resources and the resources of the EOIR. Rather than be processed for court proceedings, Unaccompanied Children should be provided with free legal counsel and permitted to seek a pathway to permanent status through non-adversarial administrative processes. A smaller step would be to not default to initiating court proceedings against Unaccompanied Children and only do so in limited circumstances.<sup>75</sup> In the few cases in which a child *does* need to be in immigration court proceedings to obtain an immigration benefit, they or their counsel could simply request that an ICE attorney file the charging documents. Having no removal proceedings be the default, instead of the reverse, would be a more efficient and better use of resources for the Department of Homeland Security, the Executive Office of Immigration Review, and attorneys representing children, as well as more well-suited to the special needs and vulnerabilities of children.

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DOOR 7 (Nov. 2021), <https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/61a7bceb18795020f6712eff/1638382830688/Any+Day+They+Could+Deport+Me+Over+44%2C000+Immigrant+Children+Trapped+in+the+SIJS+Backlog+%28FULL+REPORT%29.pdf> [<https://perma.cc/L29K-RH9S>].

<sup>75</sup> See *Unaccompanied Immigrant Children*, NAT'L IMMIGRANT JUST. CTR., (last visited Nov. 8, 2022), <https://immigrantjustice.org/issues/unaccompanied-immigrant-children> [<https://perma.cc/HU5X-YBDN>]. For people who are knowledgeable about Unaccompanied Children's legal issues and immigration processing, it is not difficult to imagine scenarios in which no prosecution is the default and certain situations trigger proceedings, however, I do not believe that children should be in proceedings at all so I will not attempt to come up with a blueprint of that type of arrangement. See *id.*

*C. Immigration Courts are Easily Weaponized to fit a Policy Agenda*<sup>76</sup>

Putting children in removal proceedings increases the chances of removal, even for those eligible for a lawful immigration status. This is because while immigration judges do not have jurisdiction over most applications or petitions filed by Unaccompanied Children, they do have jurisdiction to order their removal.<sup>77</sup> Putting children in court proceedings, even if represented by attorneys, immediately heightens the risk of being deported. That risk of deportation can be swiftly increased by an administration with an anti-immigrant agenda, as we saw play out recently during the Trump Administration.<sup>78</sup>

Immigration courts and the Executive Office of Immigration Review, generally, are uniquely susceptible to weaponization due to their position within the Department of Justice. Because the EOIR is not an independent judicial body, it is subject to the direction of the Executive Branch and the United States Attorney General. Another example of a harmful policy implemented by an Attorney General during the Trump administration is the immigration judge case quota system.<sup>79</sup> Former Attorney General

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<sup>76</sup> For a more detailed explanation of the weaponization of the immigration court system, see generally POLICY BRIEF: THE WEAPONIZATION OF THE IMMIGRATION COURT SYSTEM, NAT'L IMMIGRANT JUST. CTR. (Apr. 2018), <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/201804/PolicyBriefEOIRJudicialIndependence4-12-18.pdf> [<https://perma.cc/DD7W-D464>] (discussing the EOIR's vulnerability to political sway as well as the Trump administration's attacks on the immigration court system).

<sup>77</sup> DAVIDSON & HLASS, *supra* note 74, at 22.

<sup>78</sup> See *id.* at 6, 33. This is not to say that the Trump Administration was the first, or last, to experiment with anti-immigrant policies. See *Statement from the National Immigration Justice Center*, NAT'L IMMIGRANT JUST. CTR. 2 (January 29, 2020), <https://www.congress.gov/116/meeting/house/110402/documents/HHRG-116-JU01-20200129-SD017.pdf> [<https://perma.cc/ZAF6-FXV9>]. For example, “[i]n 2003, five members of the BIA were dismissed in what is now widely considered a politically motivated ‘purge’ of left-leaning BIA members orchestrated by Attorney General John Ashcroft’s leadership team. Only a few years later, in 2008, the DOJ Office of the Inspector General found that high ranking officials under Attorney General Alberto Gonzales ‘committed misconduct, by considering political and ideological affiliations in soliciting and selecting [immigration judges].’” *Id.* (internal citations omitted). Furthermore, many anti-immigrant policies put in place during the Trump administration are still in place under the Biden administration. See Anita Kumar, *Biden Railed Against Trump’s Immigration Policies, Now Defends Them in Courts*, POLITICO (August 10, 2021), <https://www.politico.com/news/2021/08/10/biden-trump-immigration-policies-503108> [<https://perma.cc/Y3PB-BT45>].

<sup>79</sup> See Bruce Einhorn, *Jeff Sessions Wants to Bribe Immigration Judges to do His Bidding*, WASH. POST (April 5, 2018), <https://www.washingtonpost.com/opinions/jeff->

Jeff Sessions determined that immigration judges could not receive “satisfactory” performance evaluations if they did not complete 700 cases yearly.<sup>80</sup> This influenced adjudications for Unaccompanied Children, as well as all other people. Because the policy puts additional pressure on judges to complete cases as fast as possible, rather than grant continuances, it increases the likelihood of deportation for children. Where a child has an application for an immigration benefit pending with USCIS that may take years to be processed, an immigration judge might be less inclined to grant repeated continuances under a quota system, because that case will stay on their docket for years, rather than add to their completion numbers. If a judge is concerned about their case completion numbers, they may order the child’s removal instead of allowing them the time they need to obtain a visa due to processing delays and backlogs with USCIS.

This policy was compounded by another vulnerability of the immigration courts—the ability of the Attorney General to certify immigration cases to himself so that he can write a decision that will be binding across all immigration courts and the Board of Immigration Appeals.<sup>81</sup> While this ability has been available since 1940 when the Justice Department gained jurisdiction over the precursor to DHS, the Immigration and Naturalization Service (“INS”), it was generally used to resolve interdepartmental disputes until the passage of the Homeland Security Act in 2002.<sup>82</sup> Since then, the referral power has been increasingly used to allow the Attorney General to influence immigration policy more broadly.<sup>83</sup> During the Trump administration, the Attorneys General self-referred 17 cases to themselves, more than any other administration in history.<sup>84</sup> Furthermore, according to a report

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sessions-wants-to-bribe-judges-to-do-his-bidding/2018/04/05/fd4bdc48-390a-11e8-acd5-35eac230e514\_story.html [https://perma.cc/4P29-S7JP].

<sup>80</sup> *Id.* This policy was rescinded by the Biden Administration in October 2021. See *Biden Administration Rightly Removes Artificial Quotas for Immigration Judges*, AMER. IMMIGR. LAWYER’S ASSOC. (October 21, 2021), <https://www.aila.org/advo-media/press-releases/2021/biden-administration-rightly-removes-artificial> [https://perma.cc/AG5T-M2LJ].

<sup>81</sup> Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, MIGRATION POL’Y INST. 2, 3 (January 2021), [https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf) [https://perma.cc/FM6B-TZXC].

<sup>82</sup> *Id.* at 3–6.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 12.

from the Migration Policy Institute, “[t]he histories of many of these cases make it clear that they were carefully selected to achieve a particular policy goal, instead of responding to legal issues that arose organically and needed resolution.”<sup>85</sup>

One such case that former Attorney General Jeff Sessions referred to himself had to do with the way immigration judges can prioritize cases and manage their dockets. In *Matter of Castro-Tum*, the Attorney General determined that immigration judges generally did not have the authority to administratively close cases.<sup>86</sup> Administrative closure is a docket management tool that was heavily used by judges to manage their caseloads and was especially useful for closing cases for those seeking immigration benefits with USCIS.<sup>87</sup> In such cases, immigration judges would often administratively close the case while USCIS processed the application or petition, then the case could later be reopened and terminated once an individual had obtained a visa through USCIS.<sup>88</sup> This case had a massive impact on Unaccompanied Children because so many depend on applications filed with USCIS for relief from removal. Without the ability to administratively close cases, the march toward a deportation order was considerably sped up for these children.

Between the end of administrative closure and the immigration judge’s annual case quotas, merely having a case in immigration court became much riskier for Unaccompanied Children. These are just two of many policies that contributed to the weaponization of immigration court.<sup>89</sup> Although both were rescinded or vacated by Attorney General Merrick Garland, they did lasting damage and illustrate how quickly and easily the immigration court system can be weaponized to enforce a policy agenda.<sup>90</sup>

For instance, one of the most common forms of relief for Unaccompanied Children, Special Immigrant Juvenile Status,

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<sup>85</sup> *Id.*

<sup>86</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271, 293 (A.G. 2018).

<sup>87</sup> U.S. ATT’Y GEN., OOD DM 22-03 (2021).

<sup>88</sup> *Id.*

<sup>89</sup> THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (2019).

<sup>90</sup> See 28 I&N Dec. 326, 326 (A.G. 2021); see also Priscilla Alvarez, *Justice Department Eliminates Trump-Era Case Quotas for Immigration Judges*, CNN (Oct. 20, 2021), <https://www.cnn.com/2021/10/20/politics/immigration-judges-quotas/index.html> [<https://perma.cc/S7LU-DL9N>].

had a backlog of 44,000 pending cases as of April 2021.<sup>91</sup> Many of those children are forced to go to immigration court while their cases are pending for years, possibly with USCIS.<sup>92</sup> During that time, each court hearing could mean deportation for the child.<sup>93</sup>

I was an attorney working primarily with Unaccompanied Children during the Trump Administration. Over the course of four years, I saw personally how some judges changed the way they handled Unaccompanied Children's cases.<sup>94</sup> Where at the beginning of my career we could achieve administrative closure or even dismissal or termination for most of my Unaccompanied Child clients, results were dramatically different and significantly worse by late 2020. Unaccompanied Children were getting ordered removed, despite having been found to have been abused, neglected, or trafficked and despite having skilled attorneys who specialized in Unaccompanied Children's legal issues and procedures.<sup>95</sup>

Some instances brought home the system's absurdity and cruelty in equal measure. Once I listened as the judge

<sup>91</sup> DAVIDSON & HLASS, *supra* note 74 at 6.

<sup>92</sup> *Id.* ("92% of Honduran SIJS children who applied for green cards in or after May 2016 were in immigration court deportation proceedings. 90% of Guatemala SIJS children with pending green card applications and 84% of Salvadoran SIJS children with pending green card applications were in deportation proceedings.")

<sup>93</sup> *Id.* at 24 (internal quotation marks omitted). The threat of deportation that accompanies immigration court proceedings harms the mental health of children. *Id.* at 22. "Permanency—knowing you are safe, what comes next, and that you are supported—is a key factor in health and development of children, youth, and young adults." *Id.* at 24.

<sup>94</sup> See TRAC IMMIGRATION, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2016-2021* (last visited Oct. 2, 2022), <https://trac.syr.edu/immigration/reports/judge2021/denialrates.html> [https://perma.cc/LET9-X6ZG]. During this time, I mainly practiced before the Las Vegas, then Tucson immigration courts. Decisions and customs vary dramatically between courts, and between regions. *See id.*

<sup>95</sup> THE IMMIGRATION COUNSELING SERVICES, *Unaccompanied: Alone in America. About Our Organization* (last visited Sept. 20, 2022), <https://www.unaccompaniedchildren.org/about-our-501c3> [https://perma.cc/978W-LXK7]. Biden Administration issued a new policy in the summer of 2022 which is a positive step for Unaccompanied Children. See U.S. CITIZENSHIP AND IMMIGR. SERVS., *USCIS to Offer Deferred Action for Special Immigrant Juveniles* (Mar. 7, 2022), <https://www.uscis.gov/newsroom/alerts/uscis-to-offer-deferred-action-for-special-immigrant-juveniles> [https://perma.cc/2483-F4WN]. The new policy uses prosecutorial discretion to allow children who are granted Special Immigrant Juvenile Status to receive deferred action grants at the same time, thus lessening the risk of deportation. *See id.* But, as we have seen during the previous several administrations, immigration policies come and go based on political whims and those grants of deferred action could be challenged by a future administration. *See id.* Choosing not to place Unaccompanied Children in removal proceedings in addition to granting deferred action to Special Immigrant Juveniles would allow for even less risk of deportation to those children. *See id.*

complimented a child appearing before her via video from detention on his “cute” face mask (she asked if it was a puppy dog, but it turned out to be a bear). She then told his counsel that she disagreed with the motions she had filed and would issue a decision shortly. The decision that came shortly after her compliment was an order of removal—despite the child’s eligibility for Special Immigrant Juvenile Status, and even though he was represented by an attorney who had gone above and beyond to fight for him at every opportunity. This demonstrates a reality that many of us who have represented children know very well. Many times, the only semblance of child-friendliness in the Unaccompanied Children docket at immigration court is that the judge may issue the order of removal in a gentler tone.

In too many instances, it does not matter how many motions to terminate, continue, or suppress were filed in defense of a child. The deck is frequently stacked against a respondent, and the presence of counsel sometimes does little more than cast a veneer of justice of proceedings, where, in reality, there is none.

Many Unaccompanied Children have survived abuse, neglect, and poverty.<sup>96</sup> Many have stood up to gangs or abusive family members.<sup>97</sup> They are resilient beyond belief and journeyed far to find safety and stability. Very often, Unaccompanied Children are eligible for visas to stay in this country but must contend with complication after complication because of an incoherent tangle of immigration agencies. We are failing them; giving them attorneys in immigration court does not change that.

As others have said, Immigration Court would be more aptly named Deportation Court. This is especially the case for Unaccompanied Children, where immigration judges generally cannot grant their applications seeking a pathway to permanent status but can always order that the child be removed from the country. The best way to stop this is not to provide attorneys to all children in immigration court but to stop putting them in Immigration Court in the first place.

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<sup>96</sup> Immigration Counseling Service, *Unaccompanied Children: Protecting the Rights Child Refugees and Immigrants*, <https://www.ics-law.org/services/unaccompanied-children/> [<https://perma.cc/XKT7-QMKU>] (last visited Sept. 29, 2022).

<sup>97</sup> *Id.*

## CONCLUSION

In our current system, having an attorney in immigration court can be essential to obtaining a positive result. However, removal defense is only a part of the legal needs people have related to immigration. Indeed, for Unaccompanied Children specifically, many of their legal needs are related to applications and petitions filed with USCIS or state courts. By tying programs that provide government-funded counsel to removal proceedings, we are further entrenching immigration court proceedings where they are unnecessary, causing more distress for children and placing them at greater risk of deportation.

Past and current government efforts to provide counsel to children in removal proceedings are aimed at protecting especially vulnerable populations, yet they do little to address systemic issues and resulting injustices. 107,686 Unaccompanied Children were released to sponsors by ORR in the 2020 fiscal year alone.<sup>98</sup> Providing a relatively small number of attorneys in only a handful of cities is a band-aid at best and does not go far enough to provide meaningful access to justice for Unaccompanied Children.

Policy change is possible and would most effectively achieve justice for children. The Department of Homeland Security should stop placing Unaccompanied Children in removal proceedings as the default and allow them access to free legal counsel for their immigration matters that is not dependent on immigration court proceedings. While it is true that immigration procedure and policy are highly subject to influence from the executive branch, and a subsequent administration could undo any steps in the direction proposed by this article, I believe there would be substantial value in pursuing this type of policy shift nonetheless because it would be a step towards changing the status quo. Decentering immigration court proceedings for some of the most vulnerable could be expanded to more people and types of cases. As calls for universal representation in immigration court accelerated during the Trump Administration, and a new government-funded pilot program has been established for

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<sup>98</sup> Office of Refugee Resettlement, *Unaccompanied Children Released to Sponsors by State* (2021), <https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state> [https://perma.cc/LNB9-ZT4K].



Unaccompanied Children, which ties free legal services to immigration court proceedings,<sup>99</sup> now is an important time to have this conversation and to ask ourselves if we are indeed moving towards justice when we are increasing reliance on immigration court proceedings.

Court can be disempowering and victimizing with or without an attorney. It is essential to be cognizant in calls for universal representation in immigration court that we do not inadvertently legitimize what is by its nature a violent and imperialist proceeding by lending it a shadow of due process. We must remember that there are options for protecting people and moving towards more freedom for immigrants that do not involve further entrenching the immigration court system but moving away from court altogether. When programs providing counsel are limited to the context of immigration courts, more lawyers runs the risk of merely creating more legally sound injustices. Furthermore, these calls for universal representation in immigration courts, without more, run the risk of developing a public perception for those outside the immigrant advocacy world, and perhaps even within, that all someone needs to access justice in the courts is an attorney. That is patently not true and does a disservice to the greater cause of creating a more just system.

The goal should be free legal services for immigrants, of which representation in removal proceedings is a part. Modifying the structure of current and future programs providing counsel to Unaccompanied Children to expand legal help beyond the confines of immigration court could serve as a valuable blueprint for how to decenter immigration court proceedings more broadly in the future.

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<sup>99</sup> Press Release, *supra* note 45.