



**Statement for the Record by Kids in Need of Defense (KIND)
“For the Rule of Law, An Independent Immigration Court”
House Subcommittee on Immigration and Citizenship
January 20, 2022**

Kids in Need of Defense (KIND) is the leading national organization working to ensure that no child faces immigration court alone. KIND was founded by the Microsoft Corporation and the United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie. We have served more than 20,000 unaccompanied children in removal proceedings, trained over 57,000 attendees in pro bono representation of these children, and formed pro bono partnerships with over 700 corporations, law firms, law schools, and bar associations. KIND’s social services program facilitates the coordinated provision to unaccompanied children of counseling, educational support, medical care, and other services. Additionally, the organization’s programs in Mexico and Central America work to address the root causes of forced migration and help protect the safety and well-being of migrant children at every phase of their migration journey.

Through our work, KIND attorneys witness how political interference in the immigration courts has real world consequences for children in immigration proceedings. The current status of the immigration courts, run by the Executive Office for Immigration Review (EOIR) under the Department of Justice (DOJ), gives authority to the Attorney General to drastically alter precedent and policy and to limit judicial discretion. KIND supports the establishment of an independent, Article I immigration court in order to improve due process, reduce political influence, and increase judicial independence. This new court should include a separate children’s division with specially trained judges and government attorneys to address the unique needs of children in immigration court.

An independent immigration court should include a discrete children’s division which should be structured to ensure due process and child-friendly court practices.

Unaccompanied migrant children are among the world’s most vulnerable individuals. They have traveled hundreds or thousands of miles to the United States, often completely on their own, to escape extreme violence, sexual abuse, human trafficking, and other dangers. Often alone, these children face daunting obstacles in navigating the U.S. immigration system and obtaining potentially life-saving legal protection. The vulnerabilities of these children, and the complexity of U.S. immigration law, demand a unique system to adjudicate their claims that includes the right to an attorney and a specialized court that is centered in child-friendly court practices. This children’s division of a new court system should be solely dedicated to the adjudication of children’s claims, and it should focus on the best interests of children, including prioritizing child safety, permanency, and well-being. The children’s court should be overseen by a specially

trained corps of judges who have experience working with children. The children's court should employ a less adversarial approach than traditional immigration court, and Department of Homeland Security (DHS) attorneys representing the government in these cases should be trained in child-sensitive practices and children's unique claims for immigration relief. With specialized judges and attorneys, with knowledge of special procedures affecting the adjudications of children's cases, there will be new efficiencies that will also help reduce the current, and prevent future, court backlogs.

Until such a court is established, EOIR should renew and expand dedicated children's dockets within the existing immigration courts. Immigration judges presiding over these dockets should receive specialized training on ways to employ child sensitive procedures whenever a child respondent or witness is present in the courtroom. This training should include methods for explaining the proceeding to children; encouraging children to freely discuss the elements of their claims; child-sensitive questioning techniques, including trauma-informed interviewing and adjudication methods; and an understanding of the limits of a child's ability to provide testimony. Immigration courts should also work to facilitate legal representation for all children and encourage judges to delay or close children's cases until and unless they are able to secure a lawyer.

An independent immigration court would remedy the problematic authority of the Attorney General to alter immigration law precedent.

Under current law, the Attorney General has "certification" authority to transfer cases before the Board of Immigration Appeals (BIA) to him or herself. The Attorney General can also reopen and self-refer cases that were previously decided by the BIA. The Attorney General's decisions in these cases have precedential and binding effect on immigration judges and the BIA. This broad authority has been misused to alter immigration law in the past, and it almost certainly will be misused in the future. Creating an independent court housed outside DOJ would remove this problematic authority.

Certification authority was used frequently during the Trump Administration. In several of these cases, the Attorney General forced judges to proceed with cases even where the individual was likely to receive legal relief from the U.S. Citizenship and Immigration Service (USCIS) if given enough time. For example, in the now-vacated case *Matter of Castro-Tum*, then-Attorney General Jeff Sessions ruled that immigration judges and the BIA do not have general authority to administratively close cases and instead have such authority only when "a previous regulation or settlement agreement has expressly conferred it."¹ In *Matter of L-A-B-R-*, the Attorney General similarly restricted judges' use of continuances, allowing the exercise of that docket management tool "only for good cause shown."² In *Matter of S-O-G- & F-D-B-*, the Attorney General

¹ 27 I&N Dec. 271, 283 (A.G. 2018).

² 27 I&N Dec. 405 (A.G. 2018).

eliminated an immigration judge's ability to exercise his or her independent discretion to terminate proceedings.³

These decisions had a significant detrimental impact on unaccompanied children's cases by limiting their access to legal relief and counsel. Many unaccompanied children qualify for Special Immigrant Juvenile status (SIJS), which is a form of relief that requires children to appear before USCIS and/or state family courts. These proceedings, which occur in different fora and according to schedules beyond the control of unaccompanied children or EOIR, are imperative to accessing SIJS and other forms of humanitarian protection. In the past, judges often granted continuances or administrative closure to allow other fora to complete their determinations before proceeding with a court hearing. The Attorney General decisions noted above, along with other political pressure on immigration judges, led many judges to deny motions for hearing delays, thereby denying many children the opportunity to have their claims fully or fairly considered. In addition to awaiting review for SIJS applications, continuances can be a valuable tool in delaying a case while an unaccompanied child tries to obtain a lawyer, which can be a difficult process for anyone, but especially for a child migrating without a parent.

Some certification decisions under the Trump Administration also limited those who could qualify for asylum in ways that were particularly harmful to unaccompanied children. In 2018, Attorney General Sessions certified to himself *Matter of A-B-*, in which he held that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."⁴ Another certification authority case, *Matter of L-E-A-*, limited grants of asylum due to a well-founded fear of persecution based on an individual's membership in a family unit.⁵ These cases, which relate directly to the asylum claims of many unaccompanied children, were vacated by Attorney General Merrick Garland.

Certification authority also highlights an inherent conflict of interest in the current structure of the immigration courts. Although trial-level immigration prosecutors are housed at DHS, DOJ's Office of Immigration Litigation defends immigration cases on behalf of the government when the cases go to federal court. When decisions rendered under certification authority are reviewed in circuit courts of appeals, the Attorney General, who acted as judge in the decisions, supervises the government attorneys who are then playing the role of prosecutor.

An independent immigration court would reduce political changes to policy that curtail due process for unaccompanied children and others in immigration proceedings.

EOIR can alter their agency policies and practices in ways that have beneficial or detrimental impact on unaccompanied children's cases, and this authority highlights another way that an independent immigration court would provide more consistency and fairness to children in court. Under the Trump Administration, EOIR's General Counsel issued a memorandum that stripped

³ 27 I&N Dec. 462 (A.G. 2018).

⁴ 27 I&N Dec. 316 (AG 2018).

⁵ 27 I&N Dec. 581 (AG 2019).

the status of “unaccompanied alien child” from some children and the corresponding legal protections that are owed to children with that status.⁶ The memorandum advised that immigration judges are not bound by DHS’s prior determinations that children meet the statutory definition of an “unaccompanied alien child” and may terminate their unaccompanied status. When children are stripped of this status, they lose the protections afforded to unaccompanied children by Congress under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).⁷ The TVPRA codified heightened legal procedures designed to uphold fairness for unaccompanied children in the U.S. immigration system and to prevent their return to danger.

Another Trump-era EOIR memorandum titled “Guidelines for Immigration Court Cases Involving Juveniles” further impairs due process protections for unaccompanied children.⁸ This memorandum replaced and weakened longstanding guidelines that directed the use of child-friendly practices, such as child-sensitive questioning techniques, to improve the ability of children to attend and meaningfully participate in immigration proceedings that may determine their safety and future. Specifically, the new guidance, while referencing the potentially complicated and sensitive nature of children’s cases, restricts judges’ discretion to consider children’s best interests in creating child-appropriate courtroom environments and advances a skeptical tone toward claims by unaccompanied children. The guidelines also dilute measures designed to address the unique developmental needs of children, including by narrowing children’s opportunities to gain familiarity with hearing environments before they are required to deliver often painful and difficult testimony in support of their legal claims.

These policy changes made at the agency level have significant legal and due process consequences for children. The harmful changes were directed explicitly at unaccompanied children by an Administration with an agenda of hostility to immigrant children. An independent immigration court would be insulated from the political agenda of the President and could not be as easily manipulated to remove such protections.

An independent immigration court would improve judicial independence of immigration judges.

As noted above, immigration judges have at times been stripped of their ability to control their dockets. The Trump Administration also worked to rush cases by implementing case completion

⁶ Memorandum from Jean King, General Counsel of Executive Office for Immigration Review, to James R. McHenry III, Acting Director of EOIR, Legal Opinion re: EOIR’s Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sept. 19, 2017), <https://cliniclegal.org/file-download/download/public/4778>.

⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

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

quotas as part of immigration judges' performance reviews.⁹ This change, which has since been revised, compelled judges to decide cases under strict deadlines or face potential discipline. The resulting pressure to rush through cases often deprived unaccompanied children of opportunities to secure essential legal representation and to obtain humanitarian protection. At times, it also led to nonsensical outcomes in which USCIS approved children's applications for humanitarian protection, yet as those children waited for the visas associated with that relief to become available, judges knowingly ordered them removed from the United States.

Immigration judges should have roles that prioritize their independence and recognize the significance of their duties. They should be evaluated on their ability to fairly administer the law, not simply the speed with which they can rush through cases. An independent immigration court would be better positioned to respect the necessity of judicial independence, impart adequate training, and reduce real and perceived bias among judges.

Conclusion

For many, resolution of immigration cases has life or death consequences. This is especially true for children fleeing violence or danger in their country of origin. The importance of these cases demands an adjudication system that is reliable, committed to fairness, and insulated from political overreach. For these reasons, KIND recommends that Congress establish an independent Article I immigration court system with a dedicated children's division. An independent court would advance due process and access to justice, helping ensure that all unaccompanied children receive a fair day in court. Until an independent immigration court system is established, it is imperative that every administrative measure be pursued to ensure fairness in children's proceedings and independence in judicial decision-making.

⁹ Memorandum from James R. McHenry III, Director, Executive Office for Immigration Review on Case Priorities and Immigration Court Performance Measures to The Office of the Chief Immigration Judge, et al, (Jan. 17, 2018), available at <https://www.justice.gov/eoir/page/file/1026721/download>.