

Proposed Policies Target Children for Deportation

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“Children do not immigrate, they flee.”
- Fernando Stein, MD, FAAP, president, American Academy of Pediatrics¹

Children, regardless of their place of birth, deserve safety and protection from harm. When children cross international borders to find refuge, it is because there is no protection for them at home. Children coming to the United States/Mexico border are escaping El Salvador, Honduras, and Guatemala, countries where violence leaves families with no choice but to flee or face gang recruitment, sexual and gender-based atrocities, or murder.² The majority of these children merit protection under international law.³

The Trump administration has announced a series of new policies that, if fully implemented, would criminalize and traumatize vulnerable migrant children and eliminate meaningful adherence to child welfare norms. This brief outlines the ways in which these policy proposals will undermine basic human rights protections for children, and offers recommendations for the administration and Congress to work together to protect children seeking refuge in the United States.

The administration’s three proposals

The Trump administration has put forward three policy proposals that will work in concert to harm children. These three proposals include:

1. Expedite immigration court case processing: Immigration judges have been instructed by memo to fast-track all cases of children in government custody who do not have a sponsor with whom they can potentially reunify in the United States.⁴

2. Reconsider the category of children designated as unaccompanied: The federal government for years has operated on the principle that children continue to receive child welfare protections provided by the “unaccompanied” designation until the U.S. Department of Homeland Security (DHS) formally terminates the designation.⁵ Yet, key provisions of the president’s Executive Order on Border Security⁶ and DHS Secretary Kelly’s implementing guidance⁷ propose new procedures that could result in continuous reviews of all unaccompanied designations.

3. Prosecute family members who help children reach safety: The Trump administration has directed federal law enforcement to bring criminal and civil action against “any individual who—directly or indirectly—facilitates the illegal smuggling” of a child into the United States.⁸

America's history of protecting unaccompanied children

Three laws govern how the U.S. government should treat unaccompanied immigrant children in the immigration system. U.S. law defines “unaccompanied alien children” as those under age 18 who do not have lawful immigration status and do not have a parent or legal guardians in the United States available to provide care and custody.

Flores v. Reno Settlement Agreement (1997)⁹

This 1997 class action settlement established standards for the treatment of unaccompanied immigrant children in federal custody.

Homeland Security Act (2002)¹⁰

This law defined “unaccompanied alien child” and gave the Office of Refugee Resettlement (ORR) under the Department of Health and Human Services (HHS) responsibility for the care and custody of unaccompanied children because of its expertise in child welfare practices.

Trafficking Victims Protection Reauthorization Act (TVPRA, 2008)¹¹

This law expanded protections for those children designated as unaccompanied.

Key among them are:

- Child welfare principles must underpin custody determinations
- Children from countries other than Mexico and Canada must be placed in formal non-expedited removal, ensuring notice and opportunity to be heard by a neutral adjudicator instead of summary deportation
- When applying for asylum, unaccompanied children must first have their applications heard in administrative interviews rather than in an adversarial trial
- Unaccompanied children are exempt from two bars to asylum, the first prohibiting asylum if the application is filed more than one year after arriving in the United States and the second prohibiting asylum if the United States can send the individual to a safe third country
- HHS must ensure representation by legal counsel “to the greatest extent practicable”¹²

Proposed policies would harm children

Full implementation of the three policy proposals described above will harm children and undermine our nation's most basic values.

More children will face prolonged detention

The tremendous spike in enforcement under the Trump administration,¹³ combined with the administration's proposal to prosecute individuals suspected of helping someone enter the United States without permission,¹⁴ will create fear among caregivers who might otherwise step forward to take custody of unaccompanied children. Children are released from ORR

David suffered severe abuse in his home country, where his father beat him and his mother nearly every night, and his older brother threatened to kill him. When he fled alone to the United States, David was placed in ORR custody, where National Immigrant Justice Center (NIJC) attorneys found him eligible for asylum and Special Immigrant Juvenile Status. Despite his eligibility, ORR denied David's release. Unable to bear staying detained for the months and possibly years it would take to obtain protection, David chose to return to his abusive home. **Children should not be forced to choose between persecution and prolonged detention.***

custody when a willing family member or friend agrees to care for the child and ensure her compliance with immigration court proceedings. If sponsors are afraid to come forward, more children will remain in ORR custody for indefinite periods of time.

Prolonged detention is extremely stressful for children and negatively impacts their mental health and developmental outcomes.¹⁵ At the NIJC we have frequently observed with sadness as children like Daniel choose to abandon their legal rights to protection in the United States rather than endure such ongoing strain. The administration's proposals will force more children to make this impossible choice.

ICE will lock up more children in dangerous jails

The administration's proposed policies would expose a broad group of vulnerable children to detention in correctional facilities. Secretary Kelly's February 20, 2017 memo on interior enforcement explicitly authorizes DHS officers to arrest any "removable" individual they encounter living within the United States – including children.¹⁶ Some children arrested by U.S. Immigration and Customs Enforcement (ICE) are not placed in the custody of ORR, but in remote ICE-contracted juvenile correctional facilities¹⁷ where they are isolated from legal service providers.¹⁸ ICE's inability to safely hold adults is well-documented.¹⁹ The agency cannot be permitted to subject children to that danger.

More children will be deported without due process

Fast-tracking children's cases will make a mockery of due process and undermine protections for the most vulnerable. Children who arrive in the United States and are unable to reunite with a caregiver are some of the most at-risk individuals in the immigration system. These children face detention for the duration of their court proceedings and face insurmountable odds when left to defend themselves alone in front of an immigration judge, opposite a trained federal prosecutor. Though children in ORR custody may receive some legal screening and support, they have no right to appointed counsel. Children rarely win immigration protection on their own.²⁰

Rushing these cases through the system threatens to deprive children of the time they need to make their best case for protection in the United States, including time to find lawyers and gather evidence in support of their claims.

Children will be denied humanitarian protection

The administration's proposal to reconsider unaccompanied designation policies appears designed to undermine children's ability to seek and obtain asylum and other humanitarian protections. For children arriving alone at the border, the unaccompanied designation is critical to ensuring the procedural protections necessary to give them a shot at articulating their asylum claim.

Seeking asylum in the United States is a complex and demanding legal process that forces the asylum seeker to relive the most terrifying moments of their lives under sometimes hostile scrutiny. It is nearly impossible to win asylum without the assistance of a lawyer.²¹ Under U.S. law, children designated as unaccompanied are placed in removal proceedings in immigration court but nevertheless are given the opportunity to first present their asylum claims in a non-adversarial interview with an asylum officer specially trained in child-appropriate interviewing techniques. By contrast, those children not designated unaccompanied are placed in expedited removal proceedings,²² meaning they are summarily deported unless they can convince a border patrol agent to refer them for a credible fear screening.²³ It is cruel to expect any child—especially one reeling

from recent violence and trauma—to immediately tell her deepest fears to an armed and uniformed Border Patrol agent she has just met. Those few children who manage to express such fear face a “credible fear” screening interview that is in practice a mini asylum trial with heightened standards of review.²⁴ This entire process plays out before children have the opportunity to find lawyers.

A system of continuous review of unaccompanied designations threatens to strip protections from children who entered the United States unaccompanied but subsequently reunited with parents or legal guardians. Those children who lose their designation will be forced to present their asylum claims in immigration court, facing cross examination by a skilled government prosecutor in adversarial proceedings. Immigration judges grant asylum at drastically disparate rates depending on location (from two percent in Atlanta to 84 percent in New York).²⁵ Moreover, children denied the unaccompanied designation are subjected to additional legal bars to asylum.

Natalie suffered years of sexual and emotional abuse at the hands of a family member in her country of birth. After fleeing to the United States, she spent months in ORR custody before being reunified with her mother at the age of 12. Because of the depth of the trauma she endured, Natalie was not able to articulate the reasons for her flight to Border Patrol or to any of the officials with whom she communicated during her time in ORR custody. Only after rebuilding trust with her mother and learning to feel safe in her surroundings did Natalie reveal why she had fled her country. Thanks to her unaccompanied designation and its child-friendly protections, Natalie was able to present her asylum claim in a non-adversarial interview with an asylum officer trained to interview children. She remained eligible for protection despite having applied more than a year after arriving in the United States. Natalie was ultimately granted asylum, protection that would almost certainly been denied her had she been stripped of her unaccompanied designation. **Young survivors of violence need the protections provided by the “unaccompanied” designation.***

The Trump administration and Congress must protect immigrant children

Policy Recommendations

For Congress:

1. Nullify the Executive Order on Border Security and Immigration Enforcement Improvements and all implementing guidance.
2. Engage in robust oversight of DHS compliance with the *Flores* settlement, the TVPRA of 2008, and the Refugee Act of 1980. Require regular reporting from DHS on the number of minors in its custody and the standards governing facilities used to detain minors.
3. Request information from DHS on all updated policies and procedures regarding the processing of unaccompanied children and determination of unaccompanied status.

For the Department of Justice:

Immediately end the expedited case processing of children in ORR custody who do not have sponsors. No child should be forced to seek protection in court without an attorney or on an expedited basis.

For the Department of Homeland Security:

1. Immediately end the practice of detaining children in ICE custody. Unaccompanied children should be placed in the care and custody of ORR and mothers with children should never be

detained, especially when compassionate community-based alternatives to detention are equally effective in securing court compliance.²⁶

2. Designate every child held in immigration custody without a parent as an “unaccompanied alien child” and place them in the care and custody of ORR.
3. Ensure that all children can access child-friendly legal processes and procedures by following the 2013 U.S. Citizenship and Immigration Services (USCIS) Asylum Division guidance, which instructs that USCIS should maintain the unaccompanied designation unless formally terminated.
4. Refrain from criminal and civil prosecution of parents and other caregivers of unaccompanied children.
5. Ensure that all front-line staff across relevant DHS components complete trauma-informed, culturally competent, and developmentally appropriate training on working with children and identifying children who have experienced trafficking, are unable to make independent decisions, and/or fear return to their countries of origin.

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**Children’s names have been changed for their protection.*

¹ Fernando Stein, MD, FAAP, President, American Academy of Pediatrics (AAP), [AAP Statement on Protecting Immigrant Children](#), January 25, 2017.

² See, e.g., Kids in Need of Defense, [Neither Security Nor Justice: Sexual and Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala](#), at p. 10 (“[s]urvivors of SGBV [sexual and gender-based violence] by gangs endure a network of gang surveillance and control that they cannot escape within the borders of their country, and from which their states do not protect them”).

³ U.N. High Commissioner for Refugees, [Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection](#), Mar. 2014.

⁴ See MaryBeth Keller, Chief Immigration Judge, Memorandum: Case Processing Priorities, Jan. 31, 2017.

⁵ See Ted Kim, Acting Chief, USCIS Asylum Division, [Memorandum: Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children](#), May 28, 2013, available at.

⁶ Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

⁷ John Kelly, Secretary of DHS, [Memorandum: Implementing the President’s Border Security and Immigration Enforcement Improvements Policies](#), Feb. 20, 2017, available at [hereinafter “Border Security memo”].

⁸ Border Security memo at § M.

⁹ *Reno v. Flores*. 507 U.S. 292 (1992). Among other protections, the settlement agreement requires: 1) each non-citizen child be placed in the least restrictive setting; 2) each non-citizen child be released from federal custody without unnecessary delay; and 3) each non-citizen child be provided, while in federal custody, education, legal services, and appropriate physical and medical care.

¹⁰ Homeland Security Act of 2003, Pub. L. No. 107-296, 6 U.S.C. § 279(g)(2).

¹¹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, § 235.

¹² See P.L. 110-457, §235, 122 Stat. 5074 (December 23, 2008) (codified, as amended, at 8 U.S.C. §1232(c)(5)) and P.L. 107-296, §462, 116 Stat. 2202 (November 25, 2002) (codified, as amended, at 6 U.S.C. §279(b)(1)(A)); see also U.S.

Congressional Research Service, [Unaccompanied Alien Children—Legal Issues: Answers to Frequently Asked Questions](#) (R43623), Jan. 27, 2016 at p. 21

¹³ In the first months of the Trump administration, immigration arrests have already increased by more than 30 percent. See Maria Sacchetti, [ICE immigration arrests of noncriminals double under Trump](#), WASHINGTON POST, Apr. 16, 2017.

¹⁴ Border Security memo at § M.

¹⁵ See Barry Holman and Jason Ziedenis, [The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities](#), Justice Policy Institute (2006) (aggregating literature and data demonstrating the “profoundly negative impact” of detention on young people’s mental and physical well-being, education, and employment).

¹⁶ John Kelly, Secretary of DHS, [Memorandum: Enforcement of the Immigration Laws to Serve the National Interest](#), Feb. 20, 2017.

¹⁷ In these juvenile correctional facilities, ICE has often not only failed to comply with the custodial conditions for children mandated by the Flores settlement, but has also provided little if any meaningful access to legal counsel for the detained children. DHS should not separate children from their parents while simultaneously maintaining that the children are “accompanied” and subject them to conditions of criminal confinement.

¹⁸ *See id.*

¹⁹ *See, e.g.*, Human Rights Watch and CIVIC, [Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention](#), May 2017; ACLU, NIJC, and DWN, [Fatal Neglect: How ICE Ignores Deaths in Detention](#), Feb. 2016.

²⁰ *See* Fernanda Santos, [It's Children Against Federal Lawyers in Immigration Court](#), *The New York Times*, Aug. 20, 2016.

²¹ *See* Ingrid Eagly and Steven Shafer, American Immigration Council, ["Access to Counsel in Immigration Court,"](#) (Sept. 28, 2016) (finding immigrants are vastly more likely to understand how to seek relief from deportation such as asylum and to obtain such relief if they are represented); *see also* Rachel Roubein, *The Atlantic*, ["Here's How Hard It is for Unaccompanied Minors to Get Asylum,"](#) July 15, 2014.

²² *See* Border Security memo at §§ G, L. These provisions make clear that children not designated UCs who otherwise fall under the ambit of expedited removal will be placed into expedited removal. Moreover, Section G also announces the administration's intention to expand the applicability of expedited removal from undocumented people arriving at the border to any undocumented person unable to provide evidence of two years' residence in the United States. Such an expansion would result in more children being denied a fair hearing before a judge and being summarily deported upon apprehension in the interior, not just at the border.

²³ *See* U.S. Commission on International Religious Freedom, [Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal](#), Aug. 2016.

²⁴ *See* John Lafferty, USCIS Asylum Division Chief, Memorandum: Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plans, Credible Fear of Persecution and Torture Determinations, and Reasonable Fear of Persecution and Torture Determinations, Feb. 13, 2017. By raising the benchmarks for proving identity and credibility, the administration has turned what is supposed to be a screening interview into a mini asylum trial. Moreover, these changes fail to account for the special vulnerabilities of children and are likely to result in erroneous and inhumane denial of protection for children.

²⁵ *See* TRAC, ["Asylum Outcome Increasingly Depends on Judge Assigned,"](#) Dec. 2, 2016.

²⁶ *See* American Immigration Lawyers' Association, Lutheran Immigration and Refugee Service, National Immigrant Justice Center, Women's Refugee Commission, [The Real Alternatives to Family Detention](#), 2014.