RATIONING JUSTICE: THE NEED FOR APPOINTED COUNSEL IN REMOVAL PROCEEDINGS OF UNACCOMPANIED IMMIGRANT CHILDREN

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180 UNIVERSITY OF COLORADO LAW REVIEW [Vol. 88 of Asylum Seekers.....217 III. CONGRESS MUST PROMULGATE A CATEGORICAL EXCEPTION FOR UICS TO THE INA'S PROHIBITION OF GOVERNMENT-APPOINTED COUNSEL IN REMOVAL What Process is Due?: The Matthews v. Eldridge Test219 Unaccompanied Immigrant Children's Interest in Government-Appointed Counsel......220 C. Risk of Erroneous Deprivation of Unaccompanied Alien Children's Affected Interests......225 D. Government Interest in Avoiding Fiscal and Administrative Burdens......228 INTRODUCTION

If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice. ¹

Despite hearing testimony from sixteen-year-old Edgar Chocoy expressing his certainty that gang members would kill him if he returned to Guatemala, a Denver immigration court determined that his situation did not merit asylum and ordered him removed from the United States.² Edgar did not have the benefit of counsel to aid him in making his claim for relief.³ He was found seventeen days later, murdered by the very gang members he feared.⁴ Edgar's story is common to many Central American youth who find themselves subject to removal by a United States immigration court. Seeking refuge from countries rife with violence and abject poverty, many minors set out for the United States despite knowing full well the risks of the treacherous border crossing and the probability of

^{1.} Judge Learned Hand, Keynote Speech at the Legal Aid Society's 75th Anniversary (Feb. 16, 1951), http://www.legal-aid.org/en/las/thoushaltnotrationjustice.aspx [https://perma.cc/63PG-WVUX].

^{2.} Sergio De Leon, Guatemalan Youth Slain 17 Days After Being Deported from U.S., L.A. TIMES (May 9, 2004), http://articles.latimes.com/2004/may/09/news/adfg-deport9 [https://perma.cc/MCK6-7R77].

^{3.} *Id*.

^{4.} *Id*.

apprehension and removal.⁵ Like Edgar, nearly half of these unaccompanied immigrant children (UIC)⁶ are unrepresented by counsel at any point in removal proceedings.⁷

Sadly, it was not until the United States experienced a dramatic influx of asylum-seeking Central American youth that the nation began to recognize these dire circumstances.⁸ As early as 2009, the United States Customs and Border Protection (CBP)—the Department of Homeland Security's primary mechanism for immigration enforcement along United States borders and ports of entry—began to see a dramatic uptick in unaccompanied child arrivals.⁹ The influx continued to increase in the following years, ultimately peaking in the summer of 2014, with over 10,000 UIC apprehensions recorded in both June and July of that year.¹⁰ With no end in sight to

- 6. A note on terminology: although media, agency guidance, and federal law commonly refer to the unaccompanied Central American youth entering the United as "Unaccompanied Alien Children" or UACs, the author finds the use of the word "alien" to be both dehumanizing and offensive. Accordingly, unless directly quoting a source of law or the news media, the author will use the term "unaccompanied immigrant children" or UIC to refer to the same group. The author elected to use the term "immigrant" over "non-citizen" or "migrant" because the children discussed in this article are all in proceedings within the U.S. immigration system.
- 7. AM. IMMIGRATION LAWYERS ASS'N & KIDS IN NEED OF DEF., MOST RECENT DATA ON CHILDREN AND FAMILIES IN IMMIGRATION COURTS (2016), http://www.aila.org/infonet/recent-data-children-families-immigration-court [https://perma.cc/GT5V-UZER]. Furthermore, of all the children's cases in FY 2014 and 2015 that resulted in a removal order, 89.2% were unrepresented by counsel. *Id.*
- 8. Alan Greenblatt, What's Causing the Latest Immigration Crisis? A Brief Explainer, NPR (July 9, 2014), http://www.npr.org/2014/07/09/329848538/whatscausing-the-latest-immigration-crisis-a-brief-explainer [https://perma.cc/BE2X-7T5U].
- 9. See AM. IMMIGRATION COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER 1 (2015), http://www.immigrationpolicy.org/special-reports/guide-children-arriving-border-laws-policies-and-responses [https://perma.cc/DMK8-CHTC]
- 10. Cristina Eguizabel et al., Crime and Violence in Central America's Northern Triangle: How U.S. Policy Responses are Helping, Hurting and Can be Improved, WILSON CTR. (Dec. 19, 2014), https://www.wilsoncenter.org/publication/crime-and-violence-central-americas-northern-triangle-how-us-policy-responses-are [https://perma.cc/L5BH-MTWH]. At the peak of this mass migration, over 1,000 UICs appeared at the border in a single day alone. KIDS IN NEED OF DEF.,

^{5.} Sibylla Brodzinsky & Ed Pilkington, US Government Deporting Migrants to Their Deaths, GUARDIAN (Oct. 12, 2015), http://www.theguardian.com/usnews/2015/oct/12/obama-immigration-deportations-central-america [https://perma.cc/RUM8-VVVN] (reporting that since 2014 as many as eighty-three deportees have been murdered shortly after their return to El Salvador, Guatemala or Honduras).

this mass migration, on June 2, 2014, President Barack Obama declared the influx of children at the southwestern border an "urgent humanitarian situation." ¹¹

With tens of thousands of migrant children seeking asylum simultaneously, all facets of the immigration system were quickly overwhelmed, including the already-struggling corps of immigration attorneys. 12 The costs for the Department of Homeland Security (DHS) to transport and house children, as well as to process and adjudicate claims in immigration court, rose dramatically. 13 Expediency and efficiency became the maxims of the day. 14

The mounting costs and urgent nature of the crisis prompted policymakers to craft a quick response to stop the bleeding of the immigration budget and deter further border crossers.¹⁵ Regrettably, the increasing time constraints and

2014 ANNUAL REPORT (Oct. 1, 2015), https://supportkind.org/resources/2014-annual-report/ [https://perma.cc/FLM2-6672] [hereinafter KIND 2014 Report].

^{11.} OFFICE OF THE PRESS SEC'Y, RESPONSE TO INFLUX OF UNACCOMPANIED ALIEN CHILDREN ACROSS THE SOUTHWEST BORDER (2014) [hereinafter RESPONSE TO INFLUX].

^{12.} Gary Feuerberg, *Immigration Judges: Courts 'Dysfunctional'* and 'Underfunded,' EPOCH TIMES (Aug. 30, 2014), http://www.theepochtimes.com/n3/923829-immigration-judges-courts-dysfunctional-and-underfunded/ [https://perma.cc/Z48N-ZA5X] (explaining the structural inadequacies and underfunding of the U.S. immigration court system); see also Hector Becerra, *Immigration Backlogs Add to Border Crisis*, L.A. TIMES (July 9, 2014), http://www.latimes.com/nation/la-na-immigration-court-20140710-story.html [https://perma.cc/WZ7B-YVJK] (describing the massive growth in the immigration case backlog prior to the border surge and the significant additional delays due to the surge).

^{13.} Brian Bennett, U.S. Border Crisis is Draining the Immigration Budget, L.A. TIMES (July 10, 2014), http://www.latimes.com/nation/la-na-children-border-20140710-story.html [https://perma.cc/K538-VFQ9] (reporting on DHS Secretary Jeh Johnson's statements to the Senate Appropriation Committee that the border crisis had already significantly driven up overtime, detention, and transportation costs).

^{14.} See Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border: Hearing before the S. Comm. on Homeland Security & Governmental Affairs, 113th Cong. 2-5 (2014) (written testimony of FEMA Administrator Craig Fugate, CBP Commissioner Gil Kerlikowske, and ICE Principal Deputy Assistant Secretary Thomas Winkowski) (stating that the top priority of a three-fold strategy to remedy the border crisis was to "process the increased tide of unaccompanied children through the system as quickly as possible") (emphasis added).

^{15.} See id. Legislative and executive responses varied both in aim and effectiveness, the majority focusing on either providing aid to remedy the violence in Central America that drove the mass migration or forcing the countries of origin to bear the burden of processing the claims of their respective citizen

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lack of funds that accompanied the reprioritization of UIC cases made it effectively impossible for UICs to obtain legal counsel before appearing alone before an immigration judge. ¹⁶ Of the two billion dollars for immediate humanitarian aid, Congress allocated a meager two million dollars to the Department of Justice to cover the cost of obtaining lawyers and paralegals to help with UICs' legal needs and ensure due process. ¹⁷

The paltry government funding for UIC legal aid leaves tens of thousands of children without counsel and forced to seek relief on their own behalf in a complex, adversarial immigration system that aggressively seeks their removal. ¹⁸ It contravenes fundamental notions of procedural due process to ask immigrant children who have lived through unspeakable traumas to blindly advocate for themselves in proceedings whose outcomes could mean the difference between life and death. ¹⁹ Under these circumstances, it is hardly surprising that unrepresented UICs are five times less likely to succeed in staying removal than represented UICs. ²⁰

This Comment argues that the government's failure to provide legal representation to UICs in removal proceedings violates due process and, further, that immediate government action is required to end the ongoing violations of unrepresented UIC's rights. Part I describes the causes of and responses to the massive influx of UICs into the United States and argues that the current removal system provides inadequate procedural due process protections. Part II argues that UICs are entitled to full procedural due process protections, including a right to government-appointed counsel,

children. *Id.* Domestic responses were similarly lackluster—a meager allocation of funds to Immigration Courts to increase the number of judges processing claims, short-sighted legislation that fast-tracked scheduling and processing of removal hearings, and miniscule funding requests to help provide assistance to children subject to removal, which were ultimately denied. *Id.*

^{16.} See AM. IMMIGRATION COUNCIL, supra note 9.

^{17.} Soni Sangha, *The Border Surge, A Year Later: As Crisis Overwhelms System, Philanthropy Steps In*, Fox NEWS LATINO (June 4, 2015), http://latino.foxnews.com/latino/politics/2015/06/04/as-children-crossing-border-overwhelm-system-philanthropy-steps-in-to-help/ [https://perma.cc/TTA5-HGC3].

^{18.} CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEF., A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 62 (2014) [hereinafter A TREACHEROUS JOURNEY].

^{19.} *Id*.

^{20.} See id.

under both the Due Process clauses of the Fifth and Fourteenth Amendments and the Immigration and Naturalization Act (INA). Part III contends that because UICs are entitled to due process and uniquely vulnerable because of their history and status, Congress must promulgate a categorical exception to the INA's prohibition against government-appointed counsel in removal proceedings for UICs in light of duties imposed on the United States in international and domestic laws, the inadequacy of current procedural protections, and the heightened vulnerabilities of UICs.²¹

I. PROBLEM OVERVIEW

Between October 1, 2013, and September 30, 2014, CBP apprehended 68,541 unaccompanied immigrant children from Central America along the southwest border of the United States, a 352% increase from the 2009 fiscal year.²² Of the 68,541 children apprehended, 51,705 came from the countries of Honduras, El Salvador, and Guatemala, commonly referred to as the "Northern Triangle" of Central America.²³ Although an estimated 58% of these children possess valid claims to asylum, they are unlikely to successfully petition the relief government for from removal without representation. Many UICs are sent back to violent and dangerous countries where they are likely to experience further persecution.

In 59% of cases adjudicated between 2012 and 2014, children were forced to navigate proceedings without counsel.²⁴

^{21.} See infra Part III for a discussion of why current protections are inadequate under Matthews v. Eldridge. 424 U.S. 319 (1976). Under Matthews, to determine whether procedural safeguards are sufficient to ensure procedural due process, a reviewing body performs a balancing test. Id. at 335. First, the body evaluates the individual liberty interest of the party affected by a government action. Id. Next, the test looks to the functional fit of the procedural due process protections provided with the nature of the interest by examining the risk of an erroneous deprivation of said interest when existing procedures apply versus the probability that protections will be enhanced by additional or substitute procedural safeguards. Id. Finally, the test reviews the government's interest in maintaining current procedures as well as the fiscal and administrative burdens that may result from additional or substitute procedural safeguards. Id.

^{22.} U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN (2014).

²³ Id

^{24.} Representation for Unaccompanied Children in Immigration Court,

Of those 59%, only 15% successfully petitioned to remain in the United States.²⁵ The other 85%—approximately 10,825 children—received orders for removal or voluntary departure.²⁶ Conversely, when a UIC had counsel, the court allowed the child to remain in the United States in 73% of cases.²⁷

This Part provides context for the urgent need for government-appointed counsel for unaccompanied children facing removal. Section I.A.1 discusses the regional "push factors" that led to the massive influx of UICs into the United States.²⁸ In Section I.A.2, this Comment analyzes the United States government's response to the UIC influx, highlighting the government's decision to prioritize costeffectiveness over the protection of UICs who likely qualify for asylum. Section I.B then demonstrates how one particular aspect of the government's response—the lack of governmentappointed counsel to UICs—diminishes the due process protections afforded to UICs in removal proceedings. Lastly, Section I.B explores the efforts of non-profit organizations and legal advocacy groups to provide counsel to UICs. It ultimately maintains that the remaining assistance gap for UICs in removal proceedings must be closed if the government is to meet its constitutional obligation to provide due process of law.

TRANSACTION RECORDS ACCESS CLEARINGHOUSE (Nov. 25, 2014), http://trac.syr.edu/immigration/reports/371/ [https://perma.cc/P78Q-5HTZ] [hereinafter TRAC].

26. *Id.* If a petitioner is unable to prove eligibility for permanent relief, he or she will often, in the alternative, request a voluntary departure order. Chelsea Walsh, *Voluntary Departure: Stopping the Clock for Judicial Review*, 73 FORDHAM L. REV. 2857, 2868 (2005). Prior to the commencement or completion of a hearing on the petitioner's deportability, petitioners may be permitted to voluntarily depart from the Unites States at their own expense. *Id.* For the government, voluntary departure expedites and reduces the cost of removal. *Id.* However, although an order of voluntary departure eliminates many lengthy time bars for authorized re-entry, for petitioners fleeing persecution it is of little benefit, as they still are obligated to return to their feared country of origin.

^{25.} Id.

^{27.} See TRAC, supra note 24.

^{28.} The purpose of this Section is twofold: first, it demonstrates the desperate conditions ought be considered in asylum adjudications under a "credible-fear" standard, and second, it supports the later argument that expedited removal proceedings which deny UICs the right to counsel are ineffective in deterring future border crossing.

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A. The Border Crisis

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1. Causes of the Influx of Unaccompanied Immigrant Children

The primary migration push factor for the youth of Guatemala, El Salvador, and Honduras (commonly referred to as "the Northern Triangle") is the violence associated with the increased presence of drug cartels and local gangs. For decades, stories of the Mexican drug trade—stories of violence, extortion, kidnapping, and government corruption—have permeated the United States' news cycle.²⁹ The pervasive violence and unrest has led to decades-long United States involvement in an attempt to combat Mexican and Central American drug trafficking and promote stability within the region.³⁰ Little has come from even the most targeted and costly of efforts.³¹ What has developed is a perpetual "game of

^{29.} See Jason M. Breslow, The Staggering Death Toll of Mexico's Drug War, PBS (July 27, 2015), http://www.pbs.org/wgbh/frontline/article/the-staggeringdeath-toll-of-mexicos-drug-war/ [https://perma.cc/JS2A-CHBA] ("[B]etween 2007 and 2014—a period that accounts for some of the bloodiest years of the nation's war against the drug cartels-more than 164,000 people were victims of homicide."); see also Tracy Wilkinson, In Mexico, Extortion is a Booming Offshoot of Drug War, L.A. TIMES (Mar. 18, 2012), http://articles.latimes.com/ 2012/mar/18/world/la-fg-mexico-extortion-20120319 [https://perma.cc/DSL5-TZSK] ("[A]lmost every segment of the economy and society, including businesses, teachers and priests, has been subjected to extortionists who exploit fear of cartels."); Rodrigo Aguillera, Corruption: Tackling the Root of Mexico's Most Pervasive Ill, HUFFINGTON POST (Nov. 28, 2012), http://www.huffingtonpost.com/ rodrigo-aguilera/mexico-corruption_b_2206967.html [https://perma.cc/X9QK-8FMV] ("[I]t's hard to think of any other issue that, besides corruption, has had such a toxic pervasiveness in Mexican society.").

^{30.} See Manuel Roig-Franzia & Juan Forero, U.S. Anti-Drug Aid Would TargetMexican Cartels, Wash. Post (Aug. 8, 2007). http://www.washingtonpost.com/wp-dyn/content/article/2007/08/07/ AR2007080702114.html?sub=new [https://perma.cc/E3BC-76MU] (reporting on the Bush Administration's "multiyear aid deal to combat drug cartels in Mexico that would be the biggest U.S. anti-narcotics effort abroad since a seven-year, \$5 billion program in Colombia"); see also Ioan Grillo, U.S. Troops Aid to Mexico in Drug War, NPR (Oct. 6, 2011), http://www.npr.org/2011/10/06/141128178/u-stroops-increase-aid-to-mexico-in-drug-war [https://perma.cc/77D9-QQ8H] (reporting that the United States "supplied Mexico with state-of-the-art military hardware, including Black Hawk helicopters and surveillance drones").

^{31.} Rebecca Gordon, *The US's War on Drugs' has Spiraled Dangerously Out of Control*, NATION (Mar. 23, 2015), http://www.thenation.com/article/can-you-say-blowback-spanish-failed-war-drugs-mexico-and-united-states/ [https://perma.cc/B4FC-MXCA].

squeeze the balloon. Put pressure on the cartels in one area, and the drug trade just pops up somewhere else."³²

Beginning in 2006, increased efforts to root out the drug trade³³ forced the leading Mexican cartels to move their operations to the neighboring Central American countries of Guatemala, El Salvador, and Honduras.³⁴ By July 2013, Mexico's two principal drug cartels had moved over 90% of their trafficking operations southward to the Northern Triangle.³⁵ The Northern Triangle countries quickly became "critical and hotly contested slices of territory for cartels funneling narcotics into the United States."³⁶

Violence surged in the Northern Triangle as Mexican cartels vied for control over territory that local gangs had historically controlled.³⁷ From 2004 to 2013, 143,588 homicides occurred in the Northern Triangle, around 41.9 homicides per

^{32.} Ted Galen Carpenter, *The Child Migrant Crisis is Just the Latest Disastrous Consequence of America's Drug War*, WASH. POST (July 21, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/07/21/the-child-migrant-crisis-is-just-the-latest-disastrous-consequence-of-americas-drug-war/[https://perma.cc/G8YC-SC9Y].

^{33.} Paris Martinez, Mapping the Presence of Mexican Cartel Presence in Central America, INSIGHT CRIME (July 2, 2013), http://www.insightcrime.org/news-analysis/map-of-mexican-cartel-presence-in-central-america [https://perma.cc/4EGF-MNYT].

^{34.} See Carpenter, supra note 32. These cartels include the Zetas, a cartel known for its brutally excessive violence, and the Pacific Cartel, an alliance of the former Sinoloa and Gulf cartels. *Id.*

^{35.} See Martinez, supra note 33.

^{36.} Julie Turkewitz, Fear is Driving Young Men Across the Border, ATLANTIC 2014), http://www.theatlantic.com/international/archive/2014/06/ credible-fear-whats-driving-central-americans-across-the-us-border/373158/ [https://perma.cc/B4J6-57TW]. As they spread throughout the region, the Mexican cartels encountered initial territorial conflicts not only with each other, but also with the vast network of transnational criminal organizations and street gangs, which already controlled large portions of the region. Id. Gangs such as the Mara Salvatrucha (MS-13) and Bario 18 had dominated the Northern Triangle for decades through extortion of local businesses, street level drug sales, contract assassinations, and other minor criminal activities. Id. In 2011, the Salvadorian government estimated that the major gangs in El Salvador alone had over 9,000 members in prison and over 27,000 members on the streets. Id. With equivalent numbers in Guatemala and Honduras, gang membership within the region could safely be estimated to be well over 100,000 members. See DOUGLAS FARRAH & PAMELA PHILLIPS LUM, CENTRAL AMERICAN GANGS AND TRANSNATIONAL CRIMINAL ORGANIZATIONS: THE CHANGING RELATIONSHIPS IN A TIME OF TURMOIL http://www.ibiconsultants.net/_pdf/central-american-gangs-andtransnational-criminal-organizations-update-for-publication.pdf [https://perma.cc/FZ3D-582P].

^{37.} FARRAH & LUM, supra note 36.

day in an area of approximately 30 million people.³⁸ Over the past decade, Honduras, El Salvador, and Guatemala have topped the list of the most violent countries in the world, with respective average homicide rates of 90.4, 41.2, and 39.9 per 100,000 people in 2012.³⁹

Although the Mexican cartels shifted their strategies from initially combatting local gangs for territory to forming alliances with them, violence in the Northern Triangle has not diminished.⁴⁰ Street gangs now procure and traffic weapons, provide protection for drugs moving through the region, facilitate the sale of drugs locally, extort businesses and border control officials, recruit local children, and engage in contract killing, kidnapping, and human trafficking at the request of cartels.⁴¹ Gang members have essentially become the foot soldiers of the larger cartels, which view them as disposable agents for facilitating the local operations of their vast criminal organizations.⁴²

To maintain power and bolster membership, the gangs adopt "join or die" policies to recruit young males as soldiers, informants, and drug mules.⁴³ Those who refuse recruitment

^{38.} Assessments Capacity Project, Other Situations of Violence in the Northern Triangle of Central America: Invisible Borders, Vicious Spirals, and the Normalization of Terror, ACAPS (July 2013), http://reliefweb.int/sites/reliefweb.int/files/resources/other_situations_of_violence_in_the_northern_triangle_of_central_america_executive_summary_may_2014.pdf [https://perma.cc/AWQ8-4TWV] [hereinafter ACAPS].

^{39.} *Id.* Compare these figures to the homicide rates per 100,000 inhabitants in the Unites States or Japan, which stand at 4 and 1 respectively. *See Intentional Homicides (by 100,000 people)*, WORLD BANK (2015), http://data.worldbank.org/indicator/VC.IHR.PSRC.P5 [https://perma.cc/U9RC-K5E4].

^{40.} See FARRAH & LUM, supra note at 36.

^{41.} *Id*.

^{42.} *Id.* at 10. The growing business relationships between cartels and gangs exponentially expanded the extent of drug and criminal activity in the Northern Triangle, with devastating effects on communities. *Id.* Profitability of local drug and weapon sales, combined with a desire to control the more lucrative trafficking routes, resulted in ongoing battles for regional and local control among gangs with differing cartel alliances. *Id.* Both the urban and rural neighborhoods where the gangs exist are plagued with violence in the streets. *Id.* It has become far too common for community members to fall casualty to the crossfire. *Id.* There are few people who cannot tell a story of a friend or family member lost, collaterally or directly, to gang violence.

^{43.} See ACAPS, supra note 38; see also Turkewitz, supra note 36 ("The wave of child and teen émigrés, experts say, is related to the ascension of these gangs, who feed on the money and manpower that youths provide, and pursue them with an almost-religious persistence."); WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 7–8 (2014).

pressures are targeted at home, at school, and in the streets, living in constant fear of physical assault or death.⁴⁴ Many boys report being beaten, having friends vanish, and having to frequently relocate within a city to avoid gang members.⁴⁵ As a means of coercion, gangs often threaten young boys' family members, leaving their female relatives in constant fear of being raped, assaulted, or kidnapped.⁴⁶ Unable to live in their countries without fear of persecution, Northern Triangle youth find themselves forcibly displaced from the only home they have ever known.

Because local law enforcement is incapable of protecting citizens from pervasive violence and crime, communities in the Northern Triangle have suffered from a substantial loss of public space and economic opportunity.⁴⁷ Local businesses and street vendors are forced to close due to loss of customers. insufferable extortion by gangs, or sometimes death or injury of owners, leaving many families without a source of income.⁴⁸ Community aid organizations are forced to cease operating and assisting poor families out of safety concerns.⁴⁹ Finally, local schools, once places of protection, are now places of risk. The dangers that Northern Triangle youth face while traveling to or from school, which range from forcible recruitment to sexual assault, have forced many of these children to drop out.⁵⁰ With reduced opportunities for employment, public assistance, and education, the number of families living in extreme poverty has increased.⁵¹ Community dramatically members themselves in an environment that is not only life threatening, but also leaves them deeply entrenched in poverty, with no meaningful opportunity for education or employment.

One Honduran youth summed up the situation aptly:

In [the Northern Triangle,] people like me have one destiny, which is to end up in a gang. You're basically like a prisoner because they recruit you by force. It's a death sentence. You

^{44.} ELIZABETH KENNEDY, AM. IMMIGR. COUNCIL, NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES 2 (2014).

^{45.} *Id.* at 4.

^{46.} Id. at 2.

^{47.} See ACAPS, supra note 38.

^{48.} *Id*.

^{49.} *Id*.

^{50.} *Id*.

^{51.} *Id*.

join the gang, you get killed. You don't join, they kill you. That is the life for young people. You're basically playing with your life when you decide to come [to the United States]. But we [do] it because we truly are fleeing much worse back home.⁵²

Without hope of decreased violence, improved economic circumstances, or safety through internal relocation, parents in the Northern Triangle do their best to protect their children they send them on the treacherous journey north in hopes of finding safety. As violence increased in the Northern Triangle, so too did the number of UICs attempting to cross into the United States. Indeed, as violence increased in the Northern Triangle, the Southwest border experienced an enormous uptick in UIC arrivals.⁵³ From 2012 to 2013, the number of UIC arrivals encountered by CBP rose from 24,120 to 38,045 a 58% increase. 54 Arrival numbers again increased to 68,541 in 2014, an increase of 80% from the prior year and a 248% increase from the first spike in arrivals in fiscal year 2009.⁵⁵ The unprecedented surge taxed the capacity of the immigration system, forcing Congress to provide more funding to processing the UICs. In doing so, Congress, and the pertinent federal agencies, chose to allocate additional funds in the most costeffective manner at the expense of providing UICs with procedural protections in removal proceedings.

2. Legislative and Executive Responses to the Border Crisis

The unexpected surge in UICs required quick and decisive action from the government. Regrettably, from the beginning of the surge to its peak in July 2014, Congress repeatedly

^{52.} Ivette Feliciano, With Few Lawyers, Child Migrants Fight Alone in Court to Stay in the U.S., PBS (Nov. 8, 2015), http://www.pbs.org/newshour/bb/lawyers-child-migrants-fight-alone-court-stay-u-s/ [https://perma.cc/AX8Q-RXX9].

^{53.} See ACAPS, supra note 38.

^{54.} Tom K. Wong, Statistical Analysis Shows that Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border, CTR. FOR AM. PROGRESS (July 8, 2014), https://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/ [https://perma.cc/MXX6-8C9X].

^{55.} See U.S. CUSTOMS & BORDER PROT., supra note 22.

prioritized cost-effectiveness over protecting vulnerable children. The increase of UICs at the border taxed the budgets for coordinating UIC transportation and housing, and for adjudicating UIC asylum claims, and created tension with the goal of treating UICs humanely.⁵⁶ Faced with mounting costs, Congress prioritized funds for detention and expedited removal of UICs and declined to fund direct legal assistance for UICs, many of whom had strong claims to asylum.⁵⁷

The unprecedented influx of UICs has left the United States immigration system with a number of difficult questions.⁵⁸ First, how can immigration courts efficiently and effectively perform an overwhelming number of individual removal hearings in a timely manner? Second, how can the Department of Homeland Security best allocate limited resources among multiple agencies with differing objectives? Finally, what protections are UICs entitled to given their

58. See RESPONSE TO INFLUX, supra note 11. Although numbers of UIC

20151114-story.html [https://perma.cc/F9JX-93RG] (suggesting that the cause of rising numbers in UIC arrivals was twofold: first, the "increasing success rates of smugglers who, after crackdowns in Mexico and the U.S. last year, appear to have arranged alternative smuggling routes and payoff relationships with Mexican officials"; and second, due to "a recent explosion of violence in El Salvador" after the dissolution of a two-year truce among the country's two largest gangs).

^{56.} See AM. IMMIGRATION COUNCIL, supra note 9.

^{57.} *Id.* Of those children apprehended in 2014, 51,705 were from Honduras, El Salvador, or Guatemala. *Id.* A study conducted by the United Nations High Commission for Refugees found that at least 58% of UICs from the Northern Triangle "raise international protection needs" and thus should qualify for asylum. UNITED NATIONS HIGH COMM'N FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 6 (UNHCR, 2014). [hereinafter CHILDREN ON THE RUN]. This assessment was based on either actual harm suffered by UIC interviewees prior to their forced displacement or harm likely upon return to their country of origin. *Id.* When governments are:

unwilling or unable to protect their citizens, individuals may suffer such serious violations of their rights that they are forced to leave their homes and often even their families to seek safety in another country. Since, by definition, the Governments of their home countries no longer protect the basic rights of these individuals, the international community must step in to ensure that those basic rights, as articulated in numerous international and regional instruments, are respected.

Id

arrivals initially decreased at the beginning of FY 2015, by September the CBP reported 4,476 UICs apprehended—an 85% increase of apprehensions from that month in 2014. *Id.*; see also Molly Hennessy-Fiske, More Central Americans Fleeing Violence to Enter U.S., Suggesting Another Major Surge, L.A. TIMES, (Nov. 14, 2015), http://www.latimes.com/nation/immigration/la-na-border-stats-

unique statuses as both unauthorized entrants and juvenile asylum seekers?

With the number of UIC arrivals mounting, the Executive and Legislative branches could not afford to delay answering these questions. Accordingly, President Obama issued a memorandum to Congress that described the influx of UICs as an "urgent humanitarian situation." 59 He also requested that Congress act quickly to alleviate the crisis, no matter the additional strain it might place on the notoriously backlogged immigration system.⁶⁰ Then, on July 8, 2014, the Obama Administration submitted an emergency supplemental appropriations request to address the situation on both sides of the border.⁶¹ The request included: \$1.8 billion for Health and Human Services (HHS) to care for detained unaccompanied children; \$879 million to DHS and Immigration and Customs Enforcement (ICE) to facilitate removal proceedings; \$295 million to the State Department for foreign aid to Central America; and \$60 million for the Department of Justice (DOJ) and the Executive Office for Immigration Review (EOIR), with \$45 million dedicated to the hiring of additional immigration judges and \$15 million to fund direct legal assistance of children in removal hearings. 62 Less than two weeks later, the proposed appropriations bill that stemmed from this request failed in a Senate procedural vote.⁶³

Legislative and administrative responses to the rising costs of adjudicating and sheltering UICs continued to prioritize funding detention and removal over providing legal assistance.⁶⁴ For example, on July 9, 2014, DOJ and EOIR announced a plan to "re-prioritize its [immigration court] dockets to focus on . . . unaccompanied children who [had] recently crossed the southwest border."⁶⁵ The new plan

^{59.} See RESPONSE TO INFLUX. supra note 11.

^{60.} *Id*

^{61.} Exec. Office of the President, Emergency Supplemental Request to Congress (2014).

^{62.} *Id*.

^{63.} See Am. IMMIGRATION COUNCIL, supra note 9.

^{64.} See generally Secure the Southwest Border Act of 2014, H.R. 5230, 113th Cong. § 103(b)(1); HUMANE Act, H.R. 5114, 113th Cong. § 102 (2014); Protection of Children Act of 2014, H.R. 5143, 113th Cong. § 2(1)(B)(ii); see also DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE ACTIONS TO ADDRESS THE INFLUX OF MIGRANTS CROSSING THE SOUTHWEST BORDER IN THE UNITED STATES (2014).

^{65.} DEP'T OF JUSTICE, supra note 64.

reassigned immigration judges across the country to hear UIC cases, with the majority of hearings taking place via videoconference.⁶⁶ Additionally, DOJ promulgated a new regulation allowing for the appointment of temporary immigration judges to provide additional capacity to process the enormous caseload.⁶⁷ The reprioritization plan placed a strong emphasis on "swift" and "timely" case processing "to enable prompt removal in appropriate cases."68 EOIR began to schedule the first hearing for UICs within twenty-one days after the court received their cases, giving children little time to secure counsel before appearing in immigration court.⁶⁹ Many immigration lawyers quickly dubbed this form of expedited processing the "rocket docket" system due to the alarming rate with which it fast-tracked removal of UICs.⁷⁰ The short time between apprehension and adjudication made it nearly impossible for UICs to retain counsel before appearing before an immigration judge. Nevertheless, legislation⁷¹

Cases#ixzz3qwI3cvjm [https://perma.cc/M7G5-9PVF] (reporting on the Miami Immigration Court that assigned three judges "to handle some fifty cases a day full-time").

71. First, the Secure Southwest Border Act was designed to amend the Trafficking Victims Protection Reauthorization Act (TVPRA). See Dan Cadman, Brief Analysis of the House Republican Leadership's Secure the Southwest Border Supplemental Appropriations Act and the Secure the Southwest Border Act of 2014, CTR. FOR IMMIGR. STUD. (July 2014), http://cis.org/House-Republican-Secure-Southwest-Border-Supplemental-Appropriations%20Act-and-Secure-Southwest-Border-Act-2014 [https://perma.cc/Q63P-KGCJ]. It proposed to treat arrivals from non-contiguous countries in the same manner as those from contiguous countries, mandating expedited removal proceedings with CBP administering initial asylum screenings and effectuating "voluntary" returns. Id. The first steps UICs take on the path through the immigration system depend on their country of origin. Id. For children from a contiguous country such as Mexico, which in 2014 alone totaled 15,634, CBP employs a processing model appropriately dubbed as a "catch and release" model. Pam Key, Border Patrol Agent: Obama Admin's 'Catch and Release' Causing Influx of Illegals, BRIETBART (Oct. 21, 2015), http://www.breitbart.com/video/2015/10/21/border-patrol-agent-

^{66.} Id.

^{67.} Id.

^{68.} *Id*.

^{69.} See AM. IMMIGRATION COUNCIL, supra note 9.

^{70.} Jayashri Srikantiah & Lisa Weissman-Ward, *The Immigration "Rocket Docket": Understanding the Due Process Implications*, STANFORD LAWYER (Aug. 15, 2014), https://law.stanford.edu/stanford-lawyer/articles/the-immigration-rocket-docket-understanding-the-due-process-implications/

[[]https://perma.cc/F7XV-SYM4]; see also Julie Kay, Miami Immigration Court Adopts 'Rocket Docket' to Handle Unaccompanied Minor Cases, DAILY BUS. REV. (Aug. 4, 2014), http://www.dailybusinessreview.com/id=1202665758127/Miami-Immigration-Court-Adopts-Rocket-Docket-to-Handle-Unaccompanied-Minor-Cases#iyzz3gwl3gvim [https://perma.cc/M765-9PVF] (reporting on the Miami

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proposed in the House of Representatives continually sought to further expedite UIC removals and roll back the procedural protections for UICs by significantly shortening the window UICs had to secure counsel prior to a removal hearing.⁷²

In December 2014, after the immigration system had operated for months under serious fiscal constraints, the "Cromnibus" appropriations bill allocated additional funds to DOJ and HHS.⁷³ The bill provided a \$35 million increase in

obama-admins-catch-and-release-causing-influx-of-illegals

[https://perma.cc/7B2C-KS8R]. In this model, upon apprehension CBP officials perform an initial screening to determine if any form of relief from removal is available to the child. See AM. IMMIGRATION COUNCIL, supra note 9. Typically, screening entails a border patrol official interviewing a child about his or her particular motivations for entry and making an independent decision about whether the child is a victim of human trafficking or has legitimate fears of persecution in his or her home country. Id. A finding of either makes a child eligible to seek asylum under the INA or the TVPRA. Id. Such findings require CBP to transfer custody of the child in order to initiate removal proceedings. Id. However, if it is determined that no relief is available, the child is immediately sent back to his or her country of origin through a process called "voluntary return." Id. Most Mexican UICs are returned after no more than one to two days in CBP custody. See CHILDREN ON THE RUN, supra note 57, at 5. Many have questioned whether CBP officials are qualified to make determinations about a whether a child's trauma, abuse, or persecution warrants relief. See AM. IMMIGRATION COUNCIL, supra note 9. The CBP screening focuses on "producing quick answers rather than substantive ones," and interviews typically "translate into less searching inquiries regarding any danger [children] are in and what legal rights they may have." Ester Yu-His Lee, This Bill Is Dubbed The HUMANE Act, But It Actually Hurts the Migrant Kids It Claims to Protect, THINK PROGRESS (Jul 17, 2014), http://thinkprogress.org/immigration/2014/07/17/ 3460325/corynyncuellar-border-bill/ [https://perma.cc/FDK9-4BJ3].

Second, the disingenuously named Protection of Children Act of 2014 proposed restricting HHS's ability to provide pro bono counsel to unaccompanied children. Protection of Children Act of 2014, H.R. 5143, 113th Cong. § 2(1)(B)(ii) (2014). The Act would mandate that cases be initiated within fourteen days of receipt in the interest of "speedy trials." *Id*.

Lastly, the HUMANE Act would have gone even further to "place children with a fear of return into a new seven-day expedited process, during which the child would be required to prove eligibility for immigration relief to an immigration judge while mandatorily detained, before moving on to a standard removal proceeding in immigration court." See AM. IMMIGRATION COUNCIL, supra note 9.

- 72. See sources cited supra note 64. A study by the United States Commission on International Religious Freedom showed that in expedited removal cases, unrepresented asylum seekers succeeded in only 2% of cases, a significantly lower success rate than represented asylum seekers who obtained relief approximately twenty-five percent of the time. See Charles H. Kuck, Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices, in 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 232, 239–240 (2005).
 - 73. See AM. IMMIGRATION COUNCIL, supra note 9. The "Cromnibus" bill was a

DOJ funding for immigration courts and an \$80 million increase to HHS to care for UICs in detention facilities.⁷⁴ Congress approved no funding to provide UICs with counsel at removal hearings, as was originally requested.⁷⁵ However, Congress did provide a substantial amount of funding, \$260 million, to the State Department to develop "in-country processing" systems in Central America.⁷⁶ These programs have limited impact due to their rigorous requirements. In reality, these systems simply shift the administrative burden to foreign governments and limit the amount of future asylum requests.⁷⁷ These measures do nothing to bolster procedural protections for UICs.⁷⁸

The Due Process Disparity

Without government-appointed counsel to help them navigate the complexities of the immigration system, unrepresented UICs cannot present a sufficient defense to removal or a successful asylum petition and, thus, do not receive the full and fair hearing due process requires. Almost immediately, UICs apprehended at the border are rushed into a complicated, foreign, and adversarial process, with their chances of safety hanging in the balance. Once UICs arrive from non-contiguous countries such as Honduras, Guatemala, and El Salvador, they are transferred by CBP to the Office of

massive federal spending bill that passed the House less than three hours before a midnight deadline that threatened a federal shutdown. Bill Chapel, 'Cromnibus' Spending Bill Passes, Just Hours Before Deadline, NPR (Dec. 12, 2014), http://www.npr.org/sections/thetwo-way/2014/12/11/370132039/house-poised-tovote-on-controversial-cromnibus-spending-bill [https://perma.cc/S3FY-BGW2]. The legislation was nicknamed "Cromnibus" because it "combine[d] the traditional sweeping scope of an omnibus spending bill with a continuing resolution[]. While it would fund most of the government until the next financial year, the Department of Homeland Security would only be funded through February, in a move that seeks to limit President Obama's recent executive actions on immigration." Id.

^{74.} See AM. IMMIGRATION COUNCIL, supra note 9.
75. Department of Homeland Security Appropriations Act of 2015, Pub. L. No. 114-4, 129 Stat. 43 (2015) ("That of the total amount provided, not less than \$3,431,444,000, is for detention, enforcement and removal operations, including transportation of unaccompanied minor aliens ").

^{76.} See Am. IMMIGRATION COUNCIL, supra note 9.

^{77.} *Id*.

^{78.} *Id*.

Refugee Resettlement (ORR) within seventy-two hours.⁷⁹ ORR then places children in "standard removal proceedings" administered by EOIR.⁸⁰ Under the INA, asylum is granted to those who prove a "credible fear of persecution" in their country of origin.⁸¹

Because removal proceedings are categorized as civil proceedings, the INA deems counsel a "privilege" that should come "at no expense to the government," not an affirmative right.⁸² However, the majority of UICs are either unable to pay for private legal counsel or unable to secure pro bono legal assistance.⁸³ Consequently, many UICs are unrepresented at their removal hearing, significantly diminishing their chances of successfully petitioning for asylum.⁸⁴

Unrepresented UICs have the difficult burden of proving they qualify for asylum. The EOIR Immigration Court is an adversarial court that pits asylum-seeking children against the government, which is represented by an Assistant Chief

^{79.} *Id.* For perspective, in 2014, the number of UICs from non-contiguous countries totaled 51,705, with an estimated 58% likely to qualify for asylum. *See* RESPONSE TO INFLUX, *supra* note 11; *see also* CHILDREN ON THE RUN, *supra* note 57, at 6.

^{80.} See AM. IMMIGRATION COUNCIL, supra note 9.

^{81. 8} U.S.C. §1225(b)(1)(B)(v) (2015). In 1980, Congress passed the Refugee Act and scattered the adopted provisions throughout an amended version of the INA. To qualify for asylum under the INA an individual must demonstrate a fear of persecution, prove the fear to be well-founded, prove the persecution is occurring on account of their race, religion, nationality, membership in a particular social group, or political opinion, and prove that they are unwilling or unable to return to their country of origin because the threat of persecution exists country-wide. See 8 U.S.C. § 1158 (2015). Further, under the TVPRA, temporary protected status may be granted in the form of one of three available temporary visas: a Special Immigrant Juvenile Status (SIJS) or "SIJ visa" for children who have been abandoned, abused, or neglected, 8 U.S.C. § 1101(a)(27)(J) (2015); a "Tvisa" for victims of human trafficking, 8 U.S.C. § 1101(a)(15)(T) (2015); or a "Uvisa" for victims of certain crimes, such as sexual abuse, 8 U.S.C. § 1101(a)(15)(U) (2015). See generally Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875–87 (2003); see also Devon A. Corneal, On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?, 109 PENN. St. L. REV. 609, 625 (2004).

^{82.} Immigration and Nationality Act, 8 U.S.C. § 1362 (2015).

^{83.} Those UICs who are able to contact and secure private counsel then face the impossible task of paying up to \$6,000 dollars for professional representation. Esther Honig, *Unaccompanied Minors Join Rural Immigrant Communities, Struggle for Security*, HARVEST PUB. MEDIA (Feb. 22, 2016), http://netnebraska.org/article/news/1011199/unaccompanied-minors-join-rural-immigrant-communities-struggle-security [https://perma.cc/H3AT-XDMS].

^{84.} TRAC, supra note 24.

Counsel from the Immigration and Customs Enforcement agency (ICE).85 The ICE Assistant Chief Counsel, who acts like a prosecutor, is well trained in the general procedures of immigration court and the substantive immigration laws, 86 which have been described as being "second only to the Internal Revenue Code in complexity."87 An unrepresented UIC is unfairly expected to present evidence, make complex legal arguments for asylum to an immigration judge, and field antagonistic questioning from ICE Assistant Chief Counsel, who rarely accommodate UICs with age-appropriate language or tone. 88 Even when an immigration judge attempts to "[teach] immigration law"89 to UICs, the added value is uncertain; minors are highly unlikely to obtain a meaningful understanding of the pertinent law and significant time is lost when judges attempt to explain legal concepts that a trained attorney would already know. 90 Without an attorney to guide them through often-hostile proceedings, UICs are seriously disadvantaged when they claim asylum.

The disparity between success rates for UIC asylum claims with and without representation is staggering. Between fiscal years 2012 and 2014, 21,588 UIC removal cases were filed and decided. In 59% of cases, children were forced to navigate proceedings without counsel. Of those children, only 15% were allowed to remain in the United States. The other 85% received orders for removal or voluntary departure.

^{85.} See A TREACHEROUS JOURNEY, supra note 18, at 61.

^{86.} Amended Complaint at 11, J.E.M.F. v. Holder, No. 2:14-cv-01026 (W.D. Wash, Dec. 1, 2014).

^{87.} Castro-O'Ryan v. U.S. Dept. of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1988).

^{88.} See A TREACHEROUS JOURNEY, supra note 18, at 62.

^{89.} Assistant Chief Immigration Judge Jack Weil repeatedly claimed in an October 2014 desposition that he had "taught immigration law literally to three year olds and four year olds." He further stated under oath that "[i]t takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done." Kristin Macleod-Ball, Judge Who Believes Toddlers Can Represent Themselves, Only Part of the Problem in the Battle Over Representation for Kids, Am. IMMIGR. COUNCIL (Mar. 9, 2016), http://immigrationimpact.com/2016/03/09/judge-believes-toddlers-can-represent-part-problem-battle-representation-kids/[https://perma.cc/H9Y6-FR3B].

^{90.} *Id*.

^{91.} See TRAC, supra note 24.

^{92.} *Id*.

^{93.} *Id*.

^{94.} *Id*.

Conversely, when a UIC had counsel, the court allowed the child to remain in the United States in 73% of cases. 95 In fact, an empirical study of the asylum adjudication process conducted by the Georgetown Human Rights Institute found legal representation is "the *single most important factor* affecting the outcome of [a] case." Finding counsel could quite literally be the difference between asylum and removal for children, yet in October 2014, an astounding 43,030 of the 63,721 UICs subject to removal were unable to hire private counsel or to find pro bono representation. 97

Unsurprisingly, the UIC border crisis piqued the attention of immigration lawyers and advocacy groups across the nation. Advocacy groups responded to the crisis by arranging pro bono legal services. For example, in 2014, the organization Kids In Need of Defense (KIND) secured over \$84 million to match unrepresented UICs with attorneys willing to represent them pro bono. 98 The American Bar Association also recognized the vulnerable position of UICs and published a "call to arms" for pro bono attorneys to assist UICs, stating "legal assistance is critical to ensuring that [UICs] are screened adequately for legal relief and receive essential due process protections." Despite substantial efforts by the private sector, advocacy groups, and faith-based organizations to secure representation for UICs, over 70% of UICs remain unrepresented. 100

From this brief picture of the Southwest border crisis, a few essential facts arise. First, Central American children with legitimate fears of gang violence and persecution are risking their lives to make the treacherous journey to the United States in hopes of finding safe haven. Second, the United States immigration system is underfunded and ill-equipped to process the high number of removal and asylum cases. Third,

^{95.} Id.

^{96.} Jaya Ramji-Nogales, Andrew I. Shoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (emphasis added).

^{97.} See TRAC, supra note 24.

^{98.} *Id*

^{99.} Meredith Linsky, A Call for Pro Bono Assistance for Unaccompanied Immigrant Children, AM. BAR ASS'N (June 18, 2015), http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2015-0615-call-for-probono-assistance-unaccompanied-immigrant-children.html [https://perma.cc/NPY7-6AGS].

^{100.} See KIND 2014 Report, supra note 10.

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federal immigration policy prioritizes expediency and judicial economy over procedural due process, leaving many UICs without representation. Further, UICs have little chance of effectively making claims for asylum—however legitimate and are at higher risk of receiving less than full procedural due process in removal proceedings. Finally, even with concerted efforts of immigration advocacy groups and pro bono lawyers to fill the assistance gap, UICs will continue to be removed without receiving adequate due process. Under the status quo. then, many UICs will be returned to countries that are incapable of protecting them from further persecution.

II. UNACCOMPANIED IMMIGRANT CHILDREN HAVE BOTH A CONSTITUTIONAL AND STATUTORY ENTITLEMENT TO FULL DUE PROCESS PROTECTIONS

Due Process is the backbone of the United States legal system. 101 As set forth in the Fifth and Fourteenth Amendments, federal and state governments are prohibited from depriving individuals of their interests in "life, liberty or property without due process of law."102 Stated in the affirmative, the presence of a cognizable liberty interest entitles a person to procedural due process. 103 In addition to protected interests derived from the Constitution, courts have long recognized that "constitutionally protected liberty or property interests may have their source in positive rules of law, enacted by the state or federal government," which then create a substantive entitlement to particular benefits or protections. 104 The Supreme Court has categorized procedural

^{101.} Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224-25 (1953) (Jackson, J., dissenting) ("Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment.... Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on ex parte consideration Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien.").

^{102.} U.S. CONST. amend. V: U.S. CONST. amend. XIV. § 1.

^{103.} See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70 (1972).

^{104.} Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1037–38 (5th Cir. 1982).

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due process as "the primary and indispensable foundation of individual freedom" 105 and the "best instrument for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present." 106 Due process safeguards are quintessential tools for preventing oppressive and arbitrary government action by assuring a uniform application of law. 107

Although due process has been extensively litigated, the Supreme Court has declined to define its "exact boundaries," 108 instead opting to allow the standard to remain flexible. 109 The guiding principle is "fundamental fairness" in light of prior and present circumstances and the interests of the parties. 110 Common factors in determining fundamental fairness are the

^{105.} In re Gault, 387 U.S. 1, 20 (1967). The Court went on to state, "[i]t is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. Procedure is to law what 'scientific method' is to science" Id. (quoting Henry Hubbard, FOSTER, Social Work, the Law, and Social Action, in Social Casework 383, 386 (1964)). 106. Id.

^{107.} See id. at 18-19 ("The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."); see also Dent v. West Virginia, 129 U.S. 114, 124 (1889) ("[T]he [due process] requirement is intended to have a similar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate."); Meachum v. Fano, 427 U.S. 215, 226 (1976) (holding that the minimum procedures appropriate under the circumstances were required by the Due Process Clause "to insure that the statecreated right is not arbitrarily abrogated") (quoting Wolff v. McDonnell, 418 U.S. 539, 557 (1974)).

^{108.} Hannah v. Larche, 363 U.S. 420, 441 (1960) ("Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.").

^{109.} See Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961) ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions")(quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)) (internal quotations omitted); see also Lassiter v. Dep't of Soc. Servs. of Durham, 452 U.S. 18, 24-25 (1981) (stating that the phrase due process expresses the requirement of "fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.").

^{110.} See, e.g., Lassiter, 452 U.S. at 24–25.

"extent to which [the recipient] may be condemned to suffer grievous loss," and the recipient's interest in avoiding that grievous loss balanced against the government's interest in limiting due process. However nebulous the outer limits of due process, it is clear that "the very essence of due process is a meaningful opportunity to be heard." When UICs are denied a right to counsel, it is unlikely that they will receive a meaningful opportunity to be heard; unrepresented UICs are therefore denied the core protection of the Due Process Clause. But because UICs are not U.S. citizens, the government is comfortable denying them the fundamental due process right afforded to citizens in comparable proceedings.

This Part argues that, despite their unauthorized status, UICs are entitled to full due process protections under both the Constitution and the INA. Because of a dangerously strict deference to the federal legislative branch's plenary immigration powers, legislatively created distinctions among foreign entrants have ossified immigration law. These distinctions are fundamentally at odds with constitutional principles and their continued application denies UICs the due process to which they are entitled. 114 Finally, this Part argues that the current bar on government-appointed counsel is inconsistent with precedent limiting the federal plenary power over immigration and with precedent recognizing the special circumstances of children ensnared in the legal system. It ultimately argues that, in light of this precedent, Congress should pass an amendment to the INA providing a categorical exception to the bar on government-appointed counsel for all UICs.

^{111.} Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (quoting *McGrath*, 241 U.S. at 162–63 (Frankfurter, J., concurring)).

^{112.} See id.

^{113.} See, e.g., Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (quoting in part Hewitt v. Helms, 459 U.S. 460, 490 (1983) (holding that the INS violated appellant's due process rights by not providing an effective translator during asylum proceedings).

^{114.} The source of entitlements is important, as entitlements stemming from the Constitution would apply to all UICs, while statutory entitlements under the INA would extend only to the estimated 58% of UICs likely to qualify as refugees and are eligible to seek relief in the form of asylum. See CHILDREN ON THE RUN, supra note 57, at 6.

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A. Unaccompanied Alien Children Have Cognizable Liberty Interests that Should Trigger Constitutional Due Process Protections

1. History of the Plenary Power Doctrine

Dating back to the *Chinese Exclusion Case* of 1889 and its progeny, the Supreme Court has recognized that the Legislative and Executive branches have near-exclusive power to regulate the exclusion and admission of aliens into the United States¹¹⁵ based on inherent powers of sovereignty.¹¹⁶ This "plenary power"¹¹⁷ affords the legislature the ability to define the categories of individuals eligible for admission and removal, create systems to regulate entry, and determine the constitutional rights of those seeking entry or relief from removal.¹¹⁸ Moreover, it precludes judicial review of both substantive and procedural matters unless specifically authorized by law.¹¹⁹ The Court and legislators alike view this assignment of exclusive power over immigration law and policy as essential in maintaining the flexibility to respond to unforeseen foreign policy issues.¹²⁰

115. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

116. Ekiu v. United States, 142 U.S. 651, 658 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

117. The "Plenary Power Doctrine" holds that the political branches—the legislative and the executive—have sole power to regulate all aspects of immigration as a basic attribute of sovereignty. See Jon Feere, Plenary Power: Should Judges Control U.S. Immigration Policy?, CTR. FOR IMMIGR. STUD. (Feb. 2009), http://cis.org/sites/cis.org/files/articles/2009/back209.pdf [https://perma.cc/4MA3-3LWF].

118. See generally Tamara J. Conrad, The Constitutional Rights of Excludable Aliens: History Provides a Refuge, 61 WASH. L. REV. 1449 (1986).

119. U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").

120. See Hiroshi Motomura, Immigration Law After a Century of Plenary

One example of the government's plenary immigration power is its creation of a distinction between "removable" (formerly "deportable") and "excludable" (or "inadmissible") aliens—a distinction that severely limits the constitutional protections afforded to UICs. 121 This distinction determines the constitutional rights of foreign entrants to the United States and the due process protections recognized during immigration proceedings. 122 While the Supreme Court has recognized that removable aliens have some constitutional rights, albeit less than full citizens, "excludable aliens [including UICs] have been placed almost entirely at the mercy of Congress and the Executive, without constitutional protection."123

Whether an individual is deemed removable or excludable turns on whether the individual has successfully "entered" 124 the jurisdiction of United States. 125 Entry can be accomplished in one of two ways. First, an alien can formally petition the government and be granted admission and lawful status. 126 Lawfully admitted aliens are deemed removable only upon a violation of substantive immigration law or the conditional terms of their status. 127 Second, entry can be accomplished by means of an unauthorized border crossing. 128 This second method of entry is accomplished by undocumented immigrants who crossed the border without inspection but have since established ties to the United States. 129 The ties these

Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 606 (1990).

- 122. Id.
- See Conrad, supra note 118, at 1450.
- 124. 8 U.S.C. § 1101(a)(13) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.").
- 125. Conrad, supra note 118, at 1452. Further, an alien who enters the United States may subsequently be deemed removable, but not excludable. *Id.*
 - 126. *Id*.
 - 127 See 8 U.S.C. § 1227 (2015).
- Conrad, supra note 118, at 1452. It is also important to note the dual meaning of "removable" in this context, which can be used both as a term in reference to the procedural action in which a person is physically deported or more commonly in reference to someone who is subject to formal removal proceedings by an immigration court. Id. at 1452 n.21.
- 129. Id. at 1453. Curiously, the Court views the position of an unauthorized entrant as within the jurisdiction of the United States. Id. This seemingly

^{121.} Id. Again, please note that the author does not approve of the use of the word "alien" to describe immigrants or non-citizens. However, because the federal government still adheres to this outdated terminology, it will be used here only as needed to further discussion.

immigrants form entitle them to some form of protection from removal. 130

Conversely, excludable immigrants are those who have requested but have not yet been granted admission by authorities. Even though these immigrants are in the United States, they have not made a formal "entry" into the country. ¹³¹ Thus, while excludable aliens are physically within the United States, they remain "constructively stopped at the border" with limited constitutional rights and protections. ¹³²

Under the entry doctrine, excludable aliens are entitled to lesser protection than removable aliens. For example, the government can deny entrance to an excludable alien spouse of a U.S. resident based on secretly held information, without any form of hearing. Moreover, the entry doctrine has been used to justify the extended detention of excludable aliens, even absent allegations of criminal wrongdoing. Thus, Congress has used an arbitrary categorization of immigrants to strip excludables of the fundamental due process rights that are necessary to meaningfully petition the government for relief from deportation. Conversely, the Court has held that both categories of removable aliens—those lawfully residing and those who entered without authorization—have the procedural right to a fair and objective hearing before removal. 135

Congress has traditionally justified the plenary authority to afford different levels of due process to immigrants on three principles: (1) the entry doctrine; (2) on removable aliens' stronger ties to the United States; (3) and on the non-punitive

counterintuitive view creates a peculiarity "with respect to the constitutional positions of excludable and deportable aliens: undocumented aliens, classified as deportable, are entitled to greater constitutional and statutory protections than excludable aliens." *Id.* at 1452 n.24.

131. Id. at 1453.

^{130.} Id.

^{132.} *Id*.

^{133.} See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

^{134.} See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 216 (1953).

^{135.} Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POLY REV. 303, 309 (2000); *see also* United States *ex rel*. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1953) (finding that where statutes and regulations provide for particular procedural safeguards for removal proceedings of lawful resident aliens, those rights should be judicially enforced based on constitutional due process).

nature of removal. 136 First, Congress justifies granting excludable aliens fewer due process protections than removable aliens in the "entry doctrine," which differentiates between formally "entering" the United States and mere physical presence within the United States. 137 Because constitutional rights do not apply extraterritorially and the physical presence of excludable aliens in the United States does not amount to entry, they cannot claim the same procedural due process protections as those who are formally granted admission or who are lawful citizens. 138 Under this rationale, those still seeking formal entry to the United States are not entitled to full due process protections despite their physical presence in the country; until an alien has legally entered the country, due process is a privilege that the government can "grant or deny . . . under any conditions it sees fit to impose." ¹³⁹ A second justification for differentiated due process hinges on the magnitude of the interests at stake and the civil, non-punitive nature of removal proceedings. 140 According justification, because excludable aliens have yet to establish community ties and have no established property or employment interests, they stand to lose less than removable aliens. Finally, because deportation is not considered a punishment, let alone one that results in a physical loss of freedom, those subject to removal proceedings require less due process protection. 141 Ultimately, this different set of rights represents a legislative decision to treat removable aliens more compassionately, as they already stand both legally and

^{136.} Conrad, *supra* note 118, at 1452.

^{137.} *Id*.

^{138.} *Knauff*, 338 U.S. at 543 ("[W]hatever the procedure authorized by Congress is, it is Due Process as far as an alien denied entry is concerned.").

^{139.} See Conrad, supra note 118, at 1457.

^{140.} See Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) ("Deportation" is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken."). Contra id. at 739–40 ("It imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another.") (Brewer, J., dissenting).

^{141.} See Kwong Hai Chew v. Colding, 344 U.S. 590, 599 (1953) ("It thus seems clear that the Attorney General would not have had the authority to deny to petitioner a hearing in opposition to such an order as was here made, provided petitioner had remained within the United States.").

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physically "within U.S. borders." 142

2. Exceptions to the Plenary Power Doctrine that Recognize Liberty Interests of Immigrants

Under current immigration law, UICs are categorized as excludable aliens. 143 This categorization greatly reduces the procedural protections afforded to UICs when they petition for asylum. 144 This specific exercise of Congress's plenary immigration powers has received judicial deference for over a century without significant reexamination. However, as this Section demonstrates, Congress's plenary powers are not absolute. For example, when particular exercises of plenary power are fundamentally at odds with constitutional principles, the Supreme Court may intervene to rectify the conflict. Furthermore, the Court has reviewed plenary determinations that allegedly infringe upon the due process rights of removable aliens. In many cases, the Court found removable aliens deserving of additional constitutional protections. As described below, the same considerations used in such decisions are also present with UICs, and, thus, a similar exception to the plenary power doctrine should be made.

Although early cases recognizing the political branches' plenary power over immigration speak of the power in absolutist language, the Supreme Court has selectively extended judicial review to immigration cases with constitutional implications, temporarily setting aside its strict adherence to the plenary power doctrine. The Court has repeatedly demonstrated that the Congress's plenary power to regulate immigration is subject to constitutional restraint in certain circumstances. In Immigration scholar Hiroshi Motomura asserts that this restraint is the result of an inherent conflict between "phantom norms," the constitutional ideals that underlie the United States legal system that inform

145. See Motomura, supra note 120, at 564.

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^{142.} Coffey, *supra* note 135, at 309; *see infra* Section 3 for an explanation of why these justifications fall flat in the context of UICs.

^{143.} See Conrad, supra note 118, at 1454.

^{144.} See id.

^{146.} See Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (holding that the plenary power of Congress over immigration laws is "subject to important constitutional limitations").

the Court's decisions, and the "expressly articulated constitutional norm" of unreviewable plenary power. 147 These phantom norms often develop in constitutional doctrines outside of the immigration context, and are subsequently carried over to immigration cases when they help the Court interpret immigration statutes. 148

The Court has made exceptions to the plenary power doctrine in cases where government action towards vulnerable populations of immigrants conflicts with the liberal democratic ideals of the United States legal system. A number of prominent cases emerged in which the Court considered the unique circumstances of aliens and recognized that particular aliens require a heightened degree of constitutional protection. 149 The Court veils many of these phantom norms within opinions, presenting them as secondary considerations rather than controlling doctrine. In doing so, however, the Court aligns immigration law closer to universalist principles of liberal democratic society, prioritizing the protection of individual rights and liberties over the plenary power doctrine. 150 Although these cases involved the rights of removable aliens, the same constitutional restraints should limit the Congress's plenary power in establishing the procedural rights of excludable aliens, including UICs.

The Court first used phantom constitutional norms to influence immigrants' constitutional entitlements in *Yick Wo v. Hopkins.*¹⁵¹ In 1886, Yick Wo, a Chinese laundry operator, challenged the discriminatory enforcement of a San Francisco ordinance regulating laundries against Chinese aliens. ¹⁵² Finding the ordinance had been unconstitutionally applied, the Court declared that the Fourteenth Amendment protects all individuals within the jurisdiction of the United States equally from hostility based on race or national origin, including aliens. ¹⁵³ By applying the protections of the Fourteenth

^{147.} See Motomura, supra note 120, at 564.

^{148.} *Id*.

^{149.} *Id*.

^{150.} Id.

^{151.} Yick Wo v. Hopkins, 118 U.S. 356 (1886).

^{152.} Id. at 368.

^{153.} *Id.* at 369 ("The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in

Amendment universally to all "persons within the territorial jurisdiction" of the United States, the Court established that aliens fall within the reach of the Constitution. 154 The Yick Wo Court recognized that "fundamental human rights . . . protect[] individuals regardless of status," a conception of aliens' rights that was significantly different than Congress's view of those rights. 155 Under an absolutist view of Congress's plenary powers over immigration, the Court should not have been able to override Congress's conception of those rights.

More recently, in cases like Graham v. Richardson and Matthews v. Diaz, the Court recognized that aliens deserve more robust constitutional protections because of their physical presence in the United States. 156 In Graham v. Richardson, the Court again engaged in an equal protection analysis, this time reviewing an Arizona law imposing a residency requirement for removable aliens to qualify for state welfare benefits. 157 The Court subjected the Arizona law to heightened scrutiny and ultimately struck down the law after determining that "aliens as a class are a prime example of a 'discrete and insular' minority... for whom such heightened judicial solicitude is appropriate." 158 The Court explained that aliens are often placed outside of the political community and are, therefore, a particularly vulnerable group. 159 According to the Court, because aliens are a vulnerable class, laws affecting their constitutional rights should be reviewed under a more exacting scrutiny. 160

Similarly, in *Matthews v. Diaz*, a case challenging federal Medicare eligibility requirements for alien residents, the Court held that the Fifth and Fourteenth Amendments protect all aliens within the jurisdiction of the United States from the

their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.").

^{154.} See Coffey, supra note 135 (emphasis in original).

^{155.} T. Alexander Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 CONST. COMMENT. 9, 10 (1990).

^{156.} Graham v. Richardson, 403 U.S. 365 (1971); Matthews v. Diaz, 426 U.S. 67, 77 (1976).

^{157.} Graham, 403 U.S. at 365.

^{158.} Id. at 371-72.

^{159.} See id. ("[T]he Court's decisions have established that classifications based on alienage, like those of nationality or race, are inherently suspect and subject to close judicial scrutiny.") (footnotes omitted).

^{160.} *Id*.

deprivation of life, liberty, or property without due process of law. ¹⁶¹ Moreover, the Court stated that even those whose "presence in [the United States] is unlawful, involuntary, or transitory [are] entitled to that constitutional protection." ¹⁶² Although this signaled a strong concern for immigrants' welfare, the Court retreated to the plenary power doctrine, concluding that Congress has the authority to make "legitimate distinctions between citizens and aliens" for the receipt of statutorily afforded benefits. ¹⁶³ Even though the court ultimately prioritized Congress's authority under the plenary power doctrine to distinguish between citizens and aliens, the Court's recognition that due process rights should apply to aliens is important dicta because it demonstrates a shifting attitude toward immigrants that makes room for providing them with protections regardless of status.

The case in which the recipients of extended constitutional protections most closely resemble unaccompanied immigrant children is *Plyler v. Doe.* 164 The *Plyler* Court struck down a Texas statute charging illegal immigrant children \$1,000 annually to attend public school. 165 The Court held that the statute violated the Equal Protection Clause by denying public education to immigrant children while providing it to nonimmigrant children. 166 Under Plyler, children are entitled to protections certain constitutional regardless immigration status because of the severe harm caused by denying children opportunities that would shape their adult lives. 167 The Court repeatedly stressed that a lack of education imposes a "lifetime hardship" on innocent children that would take "an inestimable toll on [their] social, economic, intellectual, and psychological well-being." ¹⁶⁸ Additionally, the Court noted that the State has an interest in maintaining a well-educated population—immigrants and citizens alike. 169

^{161.} See Diaz, 426 U.S. 67.

^{162.} *Id.* at 77.

^{163.} Id. at 78.

 $^{164. \}quad Plyler \ v. \ Doe, \ 457 \ U.S. \ 202 \ (1982).$

^{165.} Id . The Texas law effectively excluded unauthorized immigrant children from K-12 education. Id .

^{166.} See id.

^{167.} See id.

^{168.} Id. at 203.

^{169.} See id. at 221 ("We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills

Because the State had an interest in educating immigrants and because the Court did not want to force a "disabling status" ¹⁷⁰ upon innocent children, the Court struck down the Texas statute under the Equal Protection Clause. ¹⁷¹

The Chinese Exclusion Cases, 172 Graham, 173 Matthews, 174 and Plyler¹⁷⁵ demonstrate that the federal government's plenary power to regulate admission and exclusion of immigrants is necessarily subject to constitutional restraint in certain circumstances. 176 In each of these cases, the Court, at a minimum, considered limiting federal plenary power over immigration and, in some of the cases, did so in order to extend substantive constitutional the protections immigrants. 177 In so doing, the Court recognized that immigrants deserve to be treated with fundamental fairness, that they have unique vulnerabilities, and that the Court should "appreciat[e] . . . the complexities of human migration" in determining the rights to which aliens are entitled. 178

Although each of these cases discusses constitutional restraints on federal plenary power over the rights of *removable* aliens, the same considerations that led the Court to recognize these limits apply with equal force to excludable aliens, including UICs. Although the Court—still shackled by the plenary power doctrine—has yet to extend constitutional protections to excludable aliens like it has to removable aliens, the same considerations that led to the Court's extension of those protections to removable aliens apply to excludable ones, especially in the context of UICs.

In *Matthews*, for example, the Court confirmed the Constitution's recognition of the rights of removable aliens, even if their presence is "unlawful, involuntary, or transitory." This recognition that the constitutional protections that accompany "physical presence" can be obtained

upon which our social order rests.").

171. Id. at 230

^{170.} *Id.* at 223.

^{172.} Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

^{173.} Graham v. Richardson, 403 U.S. 365 (1971).

^{174.} Matthews v. Diaz, 426 U.S. 67, 77 (1976).

^{175.} Plyler v. Doe, 457 U.S. 202 (1982).

^{176.} See Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

^{177.} *Id*.

^{178.} HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 12 (2014).

^{179.} Matthews, 426 U.S. at 77.

through lawful or surreptitious entry should apply with equal weight to UICs. It is both arbitrary and unjust to deem one group of aliens constitutionally protected on the basis that they entered the U.S. undetected, while an equally vulnerable group is afforded less constitutional protection because after their unauthorized entrance thev presented themselves appropriate government officials in search of refuge. Additionally, in *Plyler*, the Court held that despite their undocumented and unauthorized status, removable alien school children are protected by the Equal Protection Clause of the Fourteenth Amendment on the basis of their innocence in violating immigration law and the likelihood of experiencing extreme hardship without constitutional protection. 180

Both of these considerations apply equally to UICs. The unaccompanied youth of the Northern Triangle who are sent north by their parents to flee gang persecution are just as innocent in their violation of U.S. immigration law as an undocumented youth who accompanies a parent in an unauthorized border crossing. Because the alternatives include living in constant fear, physical harm, or even death, UICs should be considered less than fully culpable for their violation and certainly should not be deemed to have diminished rights because of it. Moreover, the hardship UICs are likely to suffer if not afforded constitutional protection is arguably more severe than that which would be suffered by undocumented children denied public education. Although tragic and debilitating, the economic, and intellectual harm suffered undocumented children nonetheless pales in comparison to the everyday terror and persecution UICs are likely to suffer if returned to their home countries. It is disheartening that the law forces these situations to be weighed against each another at all.

Beyond these shared vulnerabilities, excludable alien children are rendered vulnerable by the high stakes of asylum proceedings where petitioners are unfamiliar with the legal system and face significant dangers if deported. These vulnerabilities should compel government to heed the same constitutional constraints that apply to removable aliens. The following Section explains how the justifications for differentiated rights among removable and

180. Plyler, 457 U.S. at 233, 246.

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excludable aliens are inadequate and asserts that federal plenary power over the due process rights of excludable aliens cannot continue unrestrained.

3. Substantive Rights and Liberty Interests of UICs

The Court should recognize that excludable aliens share the same—and in the case of UICs in asylum proceedings, face enhanced—vulnerabilities as do removable aliens and should thus afford the same protections to both kinds of immigrants. Moreover, the Court should reexamine the historical reasons for distinguishing between removable and excludable aliens and recognize that the distinction between the categories is unjustifiable, at least as applied to UICs.

One of the main justifications for the distinction between removable and excludable aliens is that constitutional protections extend only to those "physically present" in the United States and thus fall within its jurisdiction. ¹⁸¹ As the persistent legal fiction goes, because excludable aliens have not yet been granted admission to the United States, they somehow remain "legally positioned outside [its] borders" and beyond the full protections of the Constitution. ¹⁸²

While establishing admission criteria serves both as an exercise of territorial control and a means to further national values, ¹⁸³ this fiction becomes extremely fraught when considering the demanding legal structures that excludable aliens, such as UICs, face while seeking admission. ¹⁸⁴ Upon physical apprehension, aliens are immediately transported, processed into an immigration database, and often detained indefinitely pending a hearing. ¹⁸⁵ To say that these actions somehow keep them "outside" the jurisdiction of the United States is contradictory at best. Moreover, maintaining the United States' interests in national sovereignty does not necessarily require denying additional procedural protections, such as the right to counsel, to those seeking entrance; in fact, the very magnitude of government power over admission and

^{181.} See Conrad, supra note 118, at 1453.

^{182.} Id. at 1457.

^{183.} MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 61-62 (1983).

¹⁸⁴ *Id*

^{185.} See AM. IMMIGRATION COUNCIL, supra note 9.

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exclusion should warrant *heightened* protection, akin to the protections afforded to criminal defendants. Without this additional procedural protection, aliens may be subject to a "particularly egregious misuse of government power in this area." ¹⁸⁷

The second justification for the distinction between removable and excludable aliens is the source of the government's plenary power. This federal power is not one specifically enumerated by the Constitution but is considered an inherent power that accompanies sovereignty. 188 But this doctrine is outdated. Many scholars have criticized the doctrine as a "relic from a different era." 189 When the Chinese Exclusion Case¹⁹⁰ was heard, immigration law was shaped around concerns about the threat posed by different racial groups, meaning that distinctions like the one drawn between removable and excludable aliens developed in a highlyracialized context that does not comport with modern antidiscrimination sensibilities. 191 These racialized laws survived review because "the Bill of Rights had not yet become our national hallmark and the principal justification and preoccupation of judicial review."192 The distinction between excludable and removable aliens is rooted in an era "before the United States commitment to international human rights"

^{186.} In the criminal law context, the right to appointed counsel is grounded in the scope of the government's coercive power over defendants. Because the government has similar coercive powers in removal proceedings, aliens should have a right to government-appointed counsel. *See infra* Section III.B—C.

^{187.} LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 51 (2006).

^{188.} Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) ("The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare"). See also Chae Chan Ping v. United States, 130 U.S. 581, 604 ("The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.").

^{189.} Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusions and its Progeny, 100 HARV. L. REV. 853, 862 (1987).

^{190.} See Chae Chan Ping, 130 U.S. at 581; see also Ekiu v. United States, 142 U.S. 651 (1892).

^{191.} T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 195 $(7th\ ed.\ 2012)$.

^{192.} See Henkin, supra note 189.

developed—an era that has no place in modern immigration law. 193

Because the justifications for categorizing aliens as removable or excludable aliens no longer support the entry doctrine, the government should stop distinguishing between the two categories. Substantive and procedural constitutional rights can and should instead be afforded based on an alien's personhood and physical presence. 194 The Court has already recognized that these justifications cannot support denying removable aliens constitutional protections in cases like the Chinese Exclusion Cases, Graham, Matthews, and Plyler. The Court should go further and recognize and extend these protections to excludable aliens with similar vulnerabilities.

Under this framework, all UICs would have a cognizable liberty interest¹⁹⁵ that triggers additional procedural due process protections. This break from the belief that the political branches have unbridled and unreviewable authority to determine the constitutional rights owed to non-citizens would open the door for a more fundamentally fair and individualized assessment of the required constitutional protections. This assessment should recognize that the interests of UICs in receiving full due process outweigh the benefits of adhering to an antiquated doctrine, entrenched with unjustified, arbitrary distinctions among classes of aliens. The plenary power used to create the "entry doctrine" 196 should not preclude the protected liberty interests of UICs in immigration proceedings, especially where the consequences of such a deprivation of liberty are so severe.

^{194.} See BOSNIAK, supra note 187, at 54.

^{195.} See Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987) ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.") (emphasis added); see also Medina v. O'Neil, 589 F. Supp. 1028, 1040 (S.D. Tex. 1984) ("The right of a pretrial detainee to be free from punishment is well settled.") (emphasis added).

^{196.} Ethan A. Klinsberg, Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Proceedings, 98 YALE L.J. 639, 645 (1989).

B. Protected Liberty Interests Under the Immigration and Naturalization Act and Refugee Act of 1980

Even if the Court fails to recognize a constitutional right to due process for all UICs, the smaller subcategory of UICs that likely qualifies for asylum are nonetheless entitled to full due process protections under the INA. Constitutionally protected rights can be created through a statute that establishes a liberty interest with which the government cannot interfere. In such cases, the federal statute that creates the liberty interest also sets the floor on the procedural rights and protections needed to preserve the individual liberty interest in question. ¹⁹⁷

As this Section explains, Congress created a protected liberty interest among aliens to temporarily stay removal and apply for asylum in a meaningful manner in the Refugee Act of 1980. First, Section 1 discusses the congressional intent behind incorporating the Refugee Act of 1980 into the INA. Section 2 then reviews the parameters of the liberty interest created by the Refugee Act of 1980: an alien's right to meaningfully petition for asylum. It then considers how this liberty interest affects the level of procedural due process that different subsets of UICs must be afforded during removal proceedings.

1. Aims of the Refugee Act of 1980 and its Adoption into the Immigration and Naturalization Act

As explained above, UICs possess a claim to heightened due process rights based on the judicial recognition of particular constitutional protections for aliens. Additionally, UICs can claim a protected interest in receiving full due process from the INA's guarantee of "full and fair procedure" in

^{197.} As expressed in *Board of Regents v. Roth*, liberty interests that require protection by due process are not derived exclusively from the Constitution, but may also be created and defined by "independent sources." 408 U.S. 564, 577 (1972); *see also* Goss v. Lopez, 419 U.S. 565, 572–73 (1975). In order for a legislature to create a liberty interest, it must clearly convey intent to do so within the language of a statute. *See* Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 12 (1979) ("[Whether a] statute provides a protectable entitlement must be decided on a case-by-case basis. We therefore turn to an examination of the statutory procedures to determine whether they provide the process that is due in these circumstances.").

asylum claim adjudications. ¹⁹⁸ The Refugee Act of 1980 was passed amidst concerns that the United States had failed to fully implement the humanitarian commitments it made as a party to the 1967 Protocol Relating to the Status of Refugees, including the "non-refoulement" provision of Article 33 of the Protocol. ¹⁹⁹ Article 33's "non-refoulement" provision forbade any recipient country of asylum-seeking refugees to "expel or return... a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened..." ²⁰⁰ Under this provision, refugees' rights are based on their substantive claim for relief, rather than on their immigration status or on the rights recognized under the domestic law of the recipient country. ²⁰¹

The language of the Refugee Act directly mirrored that of the Protocol and thus provided two criteria that together created a statutory entitlement to apply for asylum: a definition of "refugees" and a standard for granting asylum. 202 The Act defines a refugee as any person fleeing his or her native country "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution"²⁰³ Additionally, it states that the Attorney General shall "establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum"²⁰⁴

This language reflects two important developments within the INA with respect to asylum-seeking aliens. First, the definition of refugee recognizes the vulnerability of "uprooted alien[s], unable to claim the protections of another state," ²⁰⁵

^{198. 8} U.S.C. § 1158 (a)(2)(A) (2012).

^{199.} UNITED NATIONS HIGH COMM'N FOR REFUGEES, 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 30 (1967), http://www.unhcr.org/3b66c2aa10.html [https://perma.cc/WEB6-SV93] [hereinafter PROTOCOL]. The Protocol is an international treaty promulgated by the United Nations High Commission for Refugees that is a mainstay in international refugee law. *Id. See* Elizabeth Glazer, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157, 1165–66 (1985) (discussing the Protocol in-depth).

^{200.} PROTOCOL, supra note 199, at 30.

^{201.} Glazer, *supra* note 199, at 1166.

^{202.} Id.

^{203. 8} U.S.C. § 1101(a)(42) (2012).

^{204.} Marincas v. Lewis, 97 F.3d 733,733 (3d Cir. 1996).

^{205.} Glazer, *supra* note 199, at 1166.

and obligates the United States to afford them with certain protections. Second, the order for the Attorney General to establish asylum procedures for all aliens *irrespective of status* precludes the federal government's plenary power to differentiate levels of procedural rights among removable and excludable aliens.²⁰⁶

2. Judicial Recognition of the Protected Interests of Asylum Seekers

Since the adoption of the Refugee Act of 1980 and its incorporation into the INA, lower courts have recognized that aliens have a statutorily created liberty interest in petitioning for asylum that triggers a right to adequate due process protections.²⁰⁷ In Haitian Refugee Center v. Smith, the Fifth Circuit reviewed allegations of due process violations against the INS, which had summarily adjudicated the asylum claims of a number of Haitian refugees.²⁰⁸ The court found that the INA expressed a "clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum"209 and that it would contravene fundamental fairness for the government to create "a right to petition [for asylum] and then make the exercise of that right utterly impossible."210 Importantly, the Fifth Circuit did not rely on "traditional distinctions elevating the status of [removable] aliens over [excludable ones]"211 in finding that the INA creates a substantive right to present an asylum claim. In fact, the court cited to Matthews v. Diaz in support of its holding that the Constitution and due process had universal application to all persons within the United States, despite any unlawful status.²¹² Under this ruling, full due process cannot be confined only to removable aliens.

Similarly, the Second Circuit recognized an asylum seeker's protected interest in substantiating an asylum claim

^{206.} Id. at 1167.

^{207.} See Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982); see also Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984).

^{208. 676} F.2d at 1023.

^{209.} Id. at 1038.

^{210.} *Id.* at 1039.

^{211.} See Coffey, supra note 135.

^{212.} See Haitian Refugee Ctr., 676 F.2d at 1036.

in *Augustin v. Sava*.²¹³ The *Augustin* plaintiff alleged that an incompetent translator jeopardized his claim for asylum.²¹⁴ The court held that "the protected right to avoid deportation or return to a country where the alien will be persecuted warrants a hearing where the likelihood of persecution can be fairly evaluated" and that such a hearing is of no value when the alien is not properly understood.²¹⁵ According to the *Augustin* court, while a grant of asylum is discretionary, the right to apply for asylum and receive a fair and meaningful hearing requires adequate procedural safeguards.²¹⁶

Both the Haitian Refugee Center and Augustin courts recognized that aliens have a protected interest in their right to claim asylum and that the stakes of an asylum proceeding entitle asylum claimants to due process protections. This recognition has significant implications for UICs entering the United States from Central America, at least 58% of whom raise international protection needs due to their forced displacement or the harm likely to occur if they are deported.²¹⁷ Under the rights recognized by the *Haitian* Refugee Center and Augustin courts, the majority of UICs would be entitled to full due process protections because they qualify for asylum. Moreover, when this protected liberty interest is viewed through a lens that considers the unique vulnerabilities of immigrant children, it is clear that current procedural protections are far from adequate. The question then becomes, what process is due?

III. CONGRESS MUST PROMULGATE A CATEGORICAL EXCEPTION FOR UICS TO THE INA'S PROHIBITION OF GOVERNMENT-APPOINTED COUNSEL IN REMOVAL PROCEEDINGS

This Part argues that UICs are entitled to have counsel at removal proceedings as a result of their right to a meaningful opportunity to petition for asylum. Section A outlines the Supreme Court's test for determining the level of process due to parties and argues that this test requires the government to provide counsel to UICs. Section B then examines UIC's

^{213. 735} F.2d 32 (1984).

^{214.} Id. at 37.

^{215.} Id.

²¹⁶ *Id*

^{217.} CHILDREN ON THE RUN, supra note 57, at 6.

statutory entitlement to a full and fair procedure under the INA. It concludes that existing procedures are inadequate to fulfill the INA's guarantee of a full and fair opportunity to present a claim for asylum. Section C argues that, absent a mandate for government-appointed counsel, UICs will continue to be denied a fundamentally fair hearing with full consideration of their asylum claims, which contravenes their rights under the INA. Lastly, Section D argues that the governmental interest in conserving resources by prohibiting government funded counsel does not outweigh the individual interests of UICs seeking asylum given the grave consequences that may result from an erroneous deprivation of their protected liberty interests.

A. What Process is Due?: The Matthews v. Eldridge Test

Because the necessary amount of due process in a given case depends on the nature of the interest asserted, the Supreme Court utilizes a case-by-case evaluation of alleged due process violations. The Court adopted the current approach to evaluating due process claims, a three-part balancing test, in *Matthews v. Eldridge*. This test first evaluates the individual interest of the party affected by a government action. Next, the test looks to the functional fit of the protections provided with the nature of the interest. It weighs the risk of an erroneous deprivation of the interest asserted under existing procedures against the probability that protections will be enhanced by additional or substitute safeguards. Pinally, the Court reviews the government's interest in maintaining current procedures as well as the fiscal and administrative

^{218.} Christopher Klepps, What Kind of Process is This?: Solutions to the Case-by-Case Approach in Deportation Hearings for Mentally Incompetent Non-Citizens, 30 QUINNIPIAC L. REV. 545 (2012).

^{219.} Matthews v. Eldridge, 424 U.S. 319 (1976). *Matthews* is the principal case evaluating the necessary level of procedural due process an individual must be afforded during proceedings in which statutorily created liberty interests are at stake. *Id.* Though *Matthews* specifically dealt with individual's liberty interests in securing Social Security benefits, the balancing test promulgated by the Court has subsequently been applied to individual interests in post-termination hearings, fair evaluation of disability termination decisions, and corporal punishment decisions.

^{220.} Id. at 335.

^{221.} *Id*.

^{222.} *Id*.

burdens that may result from additional or substitute procedural safeguards.²²³ Under *Matthews*, the government is required to ensure that UICs have counsel in removal hearings only if UIC's interest in substantiating her asylum claims and the risk of erroneously depriving her of the opportunity to do so outweighs the government's interest in an expedited removal system and in lowered administrative costs of removal hearings.²²⁴

The INA does not distinguish between child and adult aliens; it simply provides that an alien seeking relief from removal has the right to "an evidentiary hearing in which the alien has a right to notice, to counsel (at no expense to the government), to present evidence and cross-examine witnesses, and to a decision based upon substantial evidence."225 Thus, children must qualify under the same refugee definition as an adult and must satisfy the same evidentiary burden of proof to be granted asylum.²²⁶ However, the specific context of UIC asylum claims, combined with the grave consequences of a removal in such cases, warrants an examination of whether the existing procedures are sufficient to ensure the full due process entitled to UICs under the Refugee Act. The following Sections argue that this interest can be fully protected only by providing every UIC seeking asylum with legal counsel in removal hearings.

B. Unaccompanied Immigrant Children's Interest in Government-Appointed Counsel

The heart of the protected interest the INA creates for asylum seekers is a right to a meaningful opportunity to substantiate a claim for asylum. The procedures in place to protect UIC's interest in presenting such a claim must account for the particular vulnerability of UICs during removal proceedings and the potential consequences of a denied claim for asylum.

UICs enter removal proceedings at a disadvantage because those proceedings are conducted in a system with which the

224. See Glazer, supra note 199, at 1179.

^{223.} Id.

^{225.} Perez-Funez v. Immigration & Naturalization Serv., 619 F. Supp. 656, 659 (C.D. Cal. 1985); see also 8 U.S.C. § 1252(b) (2012).

^{226.} See A TREACHEROUS JOURNEY, supra note 18, at 9.

UIC is unfamiliar and, in almost all cases, in a language the UIC does not speak. True, adult aliens face the same obstacles in removal proceedings. But UICs are more vulnerable than other aliens because they are *children*—still within the early stages of cognitive development, UICs are far less likely to be able to comprehend the nature and the possible consequences of the proceedings or how to successfully present their claims for asylum without legal representation.²²⁷

Further, UICs have typically experienced significant trauma at a young age, but when seeking relief they are forced through the same "one-size-fits-all" asylum process as are adults.²²⁸ Little consideration is given to the fact that children inevitably experience and cope with trauma differently than adults and, therefore, will be less likely to overcome the same complex procedural, evidentiary, and legal barriers when seeking asylum.²²⁹ Without the ability to navigate the legal

227. Sana Loue, Issues of Capacity in the Context of Immigration Law Part II: Developing a Strategy, IMMIGR. BRIEFINGS, Aug. 2009, at 3, 7, https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/09-

⁸_IMMIGRBRIEF_1.pdf [https://perma.cc/45CC-2FW3]. Explaining differences between adult and adolescent cognitive abilities, Loue states that adults are more likely to process information through the frontal cortex, an area of the brain that is associated with impulse control and judgment. Id. at 3. The neocortex, located at the top of the brain, mediates information-processing functions such as perception, reasoning, and thinking, while the prefrontal cortex is associated with decision making, risk assessment, deception, and making moral judgments. Id. Adolescents, in comparison, rely more heavily on the amygdala, that area of the brain that is associated with more primitive impulses, such as aggression, anger, and fear; and that regulates protective responses, such as the "fight or flight" response, without conscious participation. Id. Research findings indicate that the brain's frontal lobes remain structurally immature until late adolescence and that the prefrontal cortex is one of the last regions of the brain to mature. Id. During adolescence, increasing connections are developed between the prefrontal cortex and areas of the limbic system, which includes the amygdala. Id. Accordingly, although adults and adolescents may share the same logical competencies, there are vast differences between them in terms of social and emotional factors, specifically because of brain development, Id. Practically, this means that adolescents can be more strongly influenced by both their emotions and their surroundings; strong emotions, such as fear, anxiety, or embarrassment may override their ability to think logically or communicate effectively. Id.

^{228.} WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PROTECTING THE RIGHTS OF CHILDREN: THE NEED FOR U.S. CHILDREN'S ASYLUM GUIDELINES (Dec. 1998), https://womensrefugeecommission.org/programs/migrant-rights/research-and-resources/252-protecting-the-rights-of-children-the-need-for-u-s-children-s-asylum-guidelines [https://perma.cc/2SFX-H9JH].

^{229.} *Id.* The now dissolved INS did, in fact, adopt guidelines for handling child asylum claims which cautioned asylum officers that "children may not understand questions and statements about their past because their cognitive and conceptual

process or an attorney who can help them do so, UICs who qualify for asylum are unlikely to succeed in presenting their claims, which is why so few unrepresented UICs succeed in obtaining asylum compared to those who have legal representation. 230

Courts have recognized in other contexts that age and mental capacity²³¹ of children are legitimate considerations when determining the level of due process required and have found that assistance of counsel is necessary to compensate for those limitations.²³² For example, the Gault Court held that juvenile defendants in criminal proceedings require "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."233 In doing so, the Court acknowledged that juveniles have lower cognitive abilities and maturity levels than adults. The same difficulties American children face in criminal juvenile proceedings as a result of their limited capacities, for example, an inability to testify coherently or consistently, are compounded for a UIC because of their recent traumatic experiences and the foreign, authoritative nature of their interrogators.

At least one court has called for increased protection in light of UIC's two independently vulnerable statuses as children and aliens. In *Perez-Funez v. INS*, a California federal district court held that expedited voluntary departure proceedings violated the due process rights of a Salvadorian UIC who had voluntarily departed the United States.²³⁴

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skills are not sufficiently developed" and instructed officers to tailor interview questions to the "child's age, stage of language development, background, and level of sophistication." OFFICE OF INT'L AFFAIRS, IMMIGR. & NATURALIZATION SERV., DOJ, GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS 10 (1998). Unfortunately, these "guidelines are not binding on all adjudicators and are applied inconsistently." A TREACHEROUS JOURNEY, *supra* note 18, at 9.

^{230.} See Feliciano, supra note 52. ("Seventy-three percent of immigrants under 21 with lawyers are allowed to stay in the U.S. That's five times higher than the 15 percent of children without lawyers who are allowed to stay.").

^{231.} The term capacity is used to refer to limitations relating to the ability to make decisions and, in the legal context, to assist in the preparation of one's case. See Loue, supra note 227.

^{232.} See, e.g., In re Gault, 387 U.S. 1, 36 (1967); Perez-Funez v. Dist. Director, INS, 619 F. Supp. 656 (C.D. Cal. 1985).

^{233.} In re Gault, 387 U.S. at 36.

^{234.} See Perez-Funez, 619 F. Supp. at 659.

Although voluntary departure is a waiver of an immigrant's right to a removal hearing, the court held that, in light of the fact that UICs are children, the expedited procedure for executing a waiver fails to ensure that waivers are knowing and voluntary.²³⁵ The court emphasized that because "[c]hildren have a very special place in life which law should reflect,"236 UICs have "substantial constitutional and statutory rights"237 despite their unauthorized status. Additionally, the court highlighted the unique circumstances of UICs that implicate a need for heightened procedural safeguards. Specifically, the court discussed "the tender years [during which UICs encounter a stressful situation in which they are forced to make critical decisions," their new environment and its completely different culture, the foreign and authoritative nature of their interrogators, and the complexity of the law.²³⁸ Even though the Perez-Funez court reviewed a challenge to expedited procedures and did not consider UIC's rights to counsel, the same circumstances that place UIC's due process rights at risk under expedited procedures jeopardize UIC's due process rights when counsel is not provided to guide them through removal proceedings.

UIC's interest in having government-appointed counsel is also grounded in the consequences of a failed claim for asylum. As the Supreme Court has stated, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss." ²³⁹ Although technically never intended to be punitive, removal is a form of penalty akin to criminal punishment. ²⁴⁰

In criminal trials, the government must provide counsel

^{235.} Id.

^{236.} Id.

^{237.} *Id.* ("Unaccompanied alien children possess substantial constitutional and statutory rights. These rights exist in spite of the minors' illegal entry into the country.").

^{238.} Id. at 662.

^{239.} Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (quoting in part Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

^{240.} See Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.").

because the defendant's physical liberty is at stake and the Court recognizes that the loss of that liberty is punitive.²⁴¹ Congress unfairly categorizes typical removal proceedings as civil in nature, largely because removal is improperly considered to be non-punitive.²⁴² This mischaracterization allows the legislature to view removal proceedings as distinct from criminal proceedings and, therefore, to view the immigrants entangled in removal proceedings less deserving than criminal defendants of the procedural protection of appointed counsel.²⁴³ While the argument that the punitive nature of removal warrants heightened due process could be made on behalf of all immigrants in removal proceedings, it is stronger given the consequences faced by child asylum-seekers from Central America. By viewing the issuance of an order for removal as the non-punitive consequence of an unsuccessful claim for asylum, the government relieves itself of any responsibility for what happens to an UIC post-removal.

However, the civil label assigned to removal proceedings does not negate the "grievous loss" that UICs may suffer beyond the borders of the United States.²⁴⁴ By definition, asylum claimants fear bodily harm or persecution if they are returned to the country from which they fled.²⁴⁵ It can hardly

^{241.} See id.

^{242.} Peter L. Markowitz, Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings, 43 HARV. C.R.-C.L. L. REV. 289, 336 (2008).

Removal laws are retributive in purpose to the extent Congress intended to visit hardship upon noncitizens because of their perceived misdeeds. This requires an inquiry into legislative intent. The congressional record contains ample evidence that grounds triggering expulsion have grown increasingly harsh, driven, in part, by a retributive desire to punish noncitizens who engage in criminal activity. For example, various members of Congress have described the purpose of expulsion laws as to "punish those who engage in terrorism," to "punish criminal aliens," "to advance anti-immigrant attitudes," and to "re-punish them" for past crime. The weight of this factor is not diluted because alternative nonpenal purposes or effects also exist.

Id. (citations omitted).

^{243.} See id.

^{244.} Immigration judges have compared removal hearings to "death penalty cases because an order of deportation can, in effect, be a death sentence." Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/ [https://perma.cc/64U3-9YDW].

^{245.} See 8 U.S.C. § 1225(b)(1)(B)(v) (2015).

be said that UICs do not suffer a loss of physical liberty when such a claim is denied. Many UICs are sent back to "some of the most violent towns in some of the most violent countries in the world,"246 the very places from which their fears of torture, persecution, and death originated. Some UICs return to a life of hiding, others to a fate far worse.²⁴⁷ As the story of Edgar Chocoy²⁴⁸ demonstrates, many UIC's claims for asylum are based on legitimate fears of persecution and violence.²⁴⁹ As David A. Martin observes, the stakes are "off the charts—the highest possible. No other adjudication in our legal system potentially subjects the individual to torture or summary execution."250 It is difficult to understand how the same Court that recognizes a "weighty" 251 liberty interest in staying and working in the United States for removable aliens and that has categorized the deprivation of that interest as a "loss . . . of all that makes life worth living"252 can fail to recognize the weighty interest of an excludable alien in avoiding "torture or summary execution."253

C. Risk of Erroneous Deprivation of Unaccompanied Alien Children's Affected Interests

In *Matthews*, the Supreme Court recognized that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner." ²⁵⁴ Accordingly, procedures must minimize the risk that parties will be deprived of the opportunity to present a

^{246.} See Brodzinsky & Pilkington, supra note 5 (reporting that, since 2014, as many as eighty-three deportees have been murdered shortly after their return to El Salvador, Guatemala, or Honduras).

^{247.} Human Rights Watch Report, 'You Don't Have Rights Here': U.S. Border Screening and Returns of Central Americans to Risk of Serious Harm, HUM. RTS. WATCH (Oct. 16, 2014), https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk [https://perma.cc/9T3B-2L67].

^{248.} See De Leon, supra note 2.

^{249.} See Brodzinsky & Pilkington, supra note 5.

^{250.} David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 1986 IMMGR. & NAT'LITY L. REV. 177, 190 (1983).

^{251.} Landon v. Plasencia, 459 U.S. 21, 34 (1982).

^{252.} Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

^{253.} Martin, supra note 250.

^{254.} Matthews v. Eldridge, 424 U.S. 319, 333. (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

meaningful case supporting their protected interests. However, the nature and design of the United States immigration system and laws make presenting asylum claims difficult, even for those well versed in its nuances.²⁵⁵ Therefore, the value of additional procedural safeguards in asylum claims, especially appointed counsel, is significant.

For the same reasons that counsel is deemed essential in criminal proceedings, counsel is necessary in the removal hearings of UICs. Navigating the complex procedures, evidentiary rules, and legal standards to successfully claim asylum is a Herculean burden to place on a child.²⁵⁶ This burden would be substantially lowered by requiring counsel for UICs at removal proceedings. Multiple studies have concluded that the majority of arrivals from the Northern Triangle countries would potentially qualify for some form of relief,²⁵⁷ yet of the 59% of cases in which UICs were unrepresented in removal proceedings, only 15% were granted relief.²⁵⁸ Conversely, where a child had the benefit of counsel, the court granted relief in 73% of cases.²⁵⁹

Having counsel in appropriate proceedings has long been recognized as an essential protection against the deprivation of due process. ²⁶⁰ The Court in *Gagnon v. Scarpelli* discussed the need for counsel in different kinds of cases, distinguishing cases in which issues and arguments "are complex or otherwise difficult to develop or present" ²⁶¹ from those considered to be "sufficiently straightforward." ²⁶² Removal hearings fall under

^{255.} See A TREACHEROUS JOURNEY, supra note 18, at 62.

^{256.} *Id*.

^{257.} Am. Immigration Council, Texas Group Finds Most Unaccompanied Children Could Qualify for Relief, IMMIGR. IMPACT (July 21, 2014), http://immigrationimpact.com/2014/07/21/texas-group-finds-most-unaccompanied-children-could-qualify-for-relief/ [https://perma.cc/J5T6-33RW]. In their review of 925 immigrant children's intake screenings, the Refugee and Immigrant Center for Education and Legal Services (RAICES) determined that 63% could qualify for forms of relief like asylum, "U visas" for victims of serious crimes, and "T" visas for trafficking victims. See id. See also CHILDREN ON THE RUN, supra note 57, at 6 (stating that in 2014, the number of UICs from non-contiguous countries totaled 51,705, with an estimated 58% likely to qualify for asylum).

^{258.} A TREACHEROUS JOURNEY, supra note 18, at 62.

^{259.} See TRAC, supra note 24.

^{260.} See Gideon v. Wainwright, 372 U.S. 335 (1963); see also Turner v. Rogers, 564 U.S. 431, 447 (2011) (noting that an "asymmetry of representation" would alter significantly the nature of the proceedings).

^{261. 411} U.S. 778, 790 (1973).

^{262.} See Turner, 564 U.S at 447.

the complex category.²⁶³ Immigration scholar Stephen H. Legomsky describes the size and chaos of the governing immigration law as hundreds of pages of statutes that "conspire with more than one thousand pages of administrative regulations issued by a variety of federal departments, as well as precedent decisions of administrative tribunals, executive officers, and courts, to create a byzantine network of substantive and procedural rules of law."²⁶⁴ The complex compilation of laws governing asylum makes the appointment of experienced counsel the most effective way to make the law and its consequences comprehensible to a child who may otherwise be entirely unaware of the relief available or how to substantiate a claim.

UICs are further disadvantaged in adversarial removal proceedings because success often "depends upon an understanding of the current legal standard and an expectation of practice consistent with that standard"²⁶⁵—something ICE Chief Counsel possess, and UIC do not. Both Immigration Judges and ICE Chief Counsel have been known to use legalese and hostile tones when questioning UICs, leaving them confused and intimidated, unable to provide the same caliber of response that a quality advocate would give on their behalf.²⁶⁶ The approaches commonly used by EOIR explicitly reject the child-sensitive practices now considered commonplace in family, juvenile, and criminal court proceedings.²⁶⁷ Providing UICs with effective counsel is the most effective way to challenge the knowledge and resources of the federal government and ensure UICs a fundamentally fair hearing.

^{263.} See Stephan H. Legomsky, Restructuring Immigration Adjudication, 59 DUKE L.J. 1635 (2010).

^{264.} Id. at 1637.

^{265.} Glazer, *supra* note 199, at 1180.

^{266.} See A TREACHEROUS JOURNEY, supra note 18, at 62; see also Chief Justice Thomas R. Phillips, Texas Supreme Court Update, 60 Tex. B.J. 858, 863 (1997) (announcing the creation of the Family Law 2000 Task Force, which sought "to make the family law process less adversarial... and more child-sensitive" by developing and facilitating "an approach to resolving family law issues that is conciliatory, inclusive, and efficient"); see also Miriam Krinsky, Celebrating 125 Years of Public Service, 26 Mar. L.A. LAW. 10, 15 (2003) (recounting the creation of its Juvenile Justice Committee designed to address "[t]he need for a child-sensitive Children's Court Building to reduce the trauma of the court process on abused and neglected children").

^{267.} See A TREACHEROUS JOURNEY, supra note 18, at 62.

D. Government Interest in Avoiding Fiscal and Administrative Burdens

In Haitian Refugee Center v. Smith, the Fifth Circuit held that the government "violates the fundamental fairness which is the essence of due process when it creates a right to petition makes the exercise of that right utterly impossible."268 Although the government frequently justifies diminished protections for UICs on the basis of fiscal constraints and administrative efficiency, neither concern can justify the diminished level of procedural due process experienced by UICs who are denied government-appointed counsel; without legal counsel it is impossible for UICs to meaningfully exercise their right to petition for asylum. Moreover, as this Section argues, Congress's perception of the increased fiscal and administrative costs that the federal immigration system would incur by providing appointed counsel to all UICs in removal hearings is likely inaccurate or skewed.

The final piece of the *Matthews* analysis focuses on the government's interest in maintaining current procedures to avoid the fiscal and administrative burdens of providing additional or substitute procedural safeguards. ²⁶⁹ Understandably, limited government resources create an interest in choosing less formal procedures under the objectives of increased efficiency and flexibility, as well as reduced administrative costs. However, this interest is slight when weighed against the substantial liberty interests of UICs and the serious risk of deprivation of those interests under the status quo.

Moreover, Congress's concerns about the cost of providing procedural protections are likely overstated. The creation and implementation of a public defender-like system for immigration cases would not be as costly as many believe. ²⁷⁰ A study published by NERA Economic Consulting in 2014

^{268.} See Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1039 (5th Cir. 1982).

^{269.} Matthews v. Eldridge, 424 U.S. 319 (1976).

^{270.} John Montgomery, Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings, NERA ECON. CONSULTANTS (May 28, 2014), http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf [https://perma.cc/8U6K-UUQH].

concluded that a government-funded public defender system capable of providing every indigent immigrant facing removal could be implemented for an estimated \$208 million per year.²⁷¹ The study also showed that the program would effectively pay for itself with a substantial reduction of government expenditures for transportation, detention, and removal of aliens, which total approximately \$204 million annually.²⁷² These costs savings were the projected result of providing aliens with legal counsel upon a case being filed.²⁷³ Providing counsel would significantly diminish other costs because the lawyer would be able to quickly identify forms of relief available to an alien and immediately secure dismissals or the release of an immigrant from detention pending the outcome of a case.²⁷⁴ Additionally, for those aliens unlikely to find any recourse from removal, legal counsel can expeditiously advise an alien to accept removal without objection, thereby reducing the number of days in detention and conserving the administrative resources of the immigration courts.²⁷⁵

The fact that the NERA study describes a public defender system providing counsel to every indigent alien subject to removal proceedings supports the notion that the government's interest is slight, as it would cost much less for the government to provide counsel only to UICs than it would to provide an attorney for all indigent immigrants. Further, the study indicates that such a system would not lead to further strain on the immigration budget but would instead create a more financially and administratively efficient immigration system.²⁷⁶ The majority of UICs detained pending removal are concentrated in only a few facilities, 277 and appointed counsel could be placed near these facilities, allowing them access to

^{271.} Id

^{272.} *Id.* The daily cost to detain a single immigrant averages between \$159 and \$161. Kirk Semple, *Public Defender System for Immigrants Facing Deportation Would Pay for Itself, Study Says*, N.Y. TIMES (May 29, 2014), http://www.nytimes.com/2014/05/30/nyregion/study-favors-free-counsel-to-navigate-deportation.html?_r=0 [https://perma.cc/AQ9W-JX7Y].

^{273.} Semple, supra note 272.

^{274.} Id.

^{275.} Id.

^{276.} Id.

^{277.} See Mark Noferi, Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 MICH. J. RACE & L. 63, 118 (2012).

the greatest number of UICs and maximizing the resource efficiency of such a program.²⁷⁸

Moreover, because appointed counsel would be provided only to asylum-seeking UICs and because there are many similarities between Northern Triangle youth, appointed counsel for UICs could develop specialized knowledge that would foster expedited hearings and increase administrative savings. Hearings would take less time for judges because parties would have better research and would be more organized. Requiring appointed counsel for UICs would also eliminate the need to provide "legal training" to UICs at their hearings. And with counsel to help prepare applications prior to a hearing, judges will likely grant fewer continuances, drastically reducing the number and length of proceedings for UICs. Page 1982.

The enormous caseload that has perpetually burdened the immigration system has made fiscal and administrative efficiency a legitimate consideration. However, providing UICs with counsel is not an obstacle to judicial efficiency or resource conservation—rather, it serves both of those governmental interests simultaneously. ²⁸³ A system of appointed counsel for UICs subject to removal could, in fact, diminish many of the perceived fiscal and administrative burdens that are often used to justify the limited level of procedural due process afforded to UICs.

CONCLUSION

In light of UIC's interest in making successful asylum claims and the risk of the erroneous deprivation of that right when UICs are unrepresented, government-appointed counsel in UIC removal hearings should be mandatory. UIC's interest substantially outweighs the government's interest in an expedited removal system and reduced administrative costs in

^{278.} Id.

^{279.} *Id*.

^{280.} Id.

^{281.} See Marks, supra note 244.

^{282.} Id.

^{283.} See Andrews I. Schoenholts & Hamutal Bernstein, Improving Immigration Adjudications Through Competent Counsel, 21 GEO. J. LEGAL ETHICS 55, 56–57 (2008).

removal hearings. UICs are especially vulnerable because of their history, status, and age; mandatory appointment of counsel is the most effective procedural mechanism to ensure that these vulnerable children have a *meaningful* opportunity to petition for asylum.

Due process is one of the touchstones of the United States judicial system. It serves as a quintessential tool for preventing oppressive and arbitrary government action and ensures the uniform application of law to all under the jurisdiction of the United States. However, the United States has fallen short of its constitutional commitment to fundamental fairness with respect to UICs, who are physically present in the United States but constructively deemed to exist outside its jurisdiction. Youths from the Northern Triangle set out for the United States, seeking refuge from countries rife with violence and abject poverty. They are well aware of the risks of the treacherous border crossing and the possibility of apprehension and removal, but they are willing to attempt the journey because the conditions from which they are escaping are far worse. But those who make it to the United States are still vulnerable, and they are still scared.

Without a right to appointed counsel, an alarming number of these scared children are ensnared in a complex adversarial system that does not consider their unique vulnerabilities. The current system refuses to ensure access to the most effective means to substantiate their asylum claims and ensure that they receive due process of law: a lawyer to represent their interests. Until the federal government stops rationing justice, these children—who have already suffered unspeakable tragedy—will continue to suffer, only now at the hands of the United States government.