

Testimony of  
**Mr. Andrew Morton**

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"The juvenile needs 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. The child requires the guiding hand of counsel at every step in the proceedings against him" - Justice Abe Fortas, *In re Gault*

Chairman Kennedy, Senator Brownback, Senator Feinstein, members of the Committee-good afternoon, and thank you for convening this hearing on the conditions of confinement and governing legal standards faced by unaccompanied alien juveniles detained by the Immigration and Naturalization Service (INS). My name is Andrew Morton, and I am an Associate practicing with the Government Relations Group of the law firm of Latham & Watkins ("Latham"), which currently includes over 1,400 attorneys in twenty offices throughout the world. I appreciate the opportunity to testify and share my experiences working on behalf of this vulnerable population of children.

I also strongly encourage your support of S. 121, the "Unaccompanied Alien Child Protection Act"-critical bipartisan legislation that would bring objectivity, efficiency, and accountability to the system of custodial care affecting these children.

#### I. THE NEED FOR COUNSEL IN JUVENILE REMOVAL PROCEEDINGS

My testimony today focuses on a key deficiency in the current system of custodial care for the nearly five thousand unaccompanied alien juveniles apprehended annually by the INS-the critical need for these children to receive the guidance and safeguards of legal counsel while detained through the pendency of an immigration proceeding. Enacting S. 121, the "Unaccompanied Alien Child Protection Act," would remedy this need by fostering a network of pro bono private attorneys, as well as by creating a safety net of court-appointed counsel for the rare instances where pro bono representation is not available.

These unaccompanied alien children detained and taken into legal custody by the INS range in age from toddlers to teens. Most lack even the most basic English skills, to say nothing of understanding the complex legal provisions that govern the standards of detention and various forms of substantive immigration relief. Many are the victims of smuggling and trafficking operations, meaning that they had no involvement and should not be punished for the circumstances that led to their undocumented arrival in the United States. Perhaps for the first time, each unaccompanied juvenile is experiencing separation from family, so quite understandably they become frightened, confused, and depressed. Frequently they are detained in facilities with no one to whom they can speak in their native language-or even are restricted to an "English only" rule in some facilities when fortunate enough to be detained with another native speaker. In any event, the vast majority are without the guidance and support of a responsible

adult to speak on their behalf, let alone competent legal counsel to evaluate their situation and advise them of their rights.

In the seminal case establishing a child's right to counsel in domestic law, Justice Abe Fortas wrote that "[t]he juvenile needs 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. The child requires the guiding hand of counsel at every step in the proceedings against him." His words ring as true today as thirty-five years ago, and as true for undocumented minors as for juveniles in domestic proceedings. Mr. Chairman, they also should ring as true for the members of this Congress as they did for the Justices of the United States Supreme Court.

During the adjudication of every undocumented child's removal proceeding, the government is represented before immigration judges by INS staff attorneys who are trained and experienced in prosecuting violations of immigration law. Of these nearly five thousand unaccompanied juveniles apprehended annually by INS, however, as many as 80% appear in an immigration court without the benefit of a lawyer, a guardian ad litem, or adult assistance of any kind. Often these children are placed in remote contract facilities-great distances from urban centers where willing pro bono attorneys may be located and trained. Without such objective and informed assistance, it is impossible to ensure that a detained child's due process rights are respected. Moreover, it is not feasible to expect a proper determination in their case that truly is based on a full consideration of the individual child's circumstances. This lack of legal assistance is especially troubling given the life altering decisions that are reached in asylum cases and other immigration related adjudication. Alarming, these same children who we do not permit to be unaccompanied in some movie theaters and department stores are left to fend for themselves in a court of immigration law.

In United States legal proceedings apart from the context of immigration, children regularly are appointed attorneys to assist them through the process. In fact, for a wide variety of juvenile state court proceedings-ranging from delinquency charges, to civil suits, to allegations of abuse and neglect-states such as California, Kansas, Massachusetts, Ohio, and Pennsylvania mandate the appointment of counsel to ensure a fair and objective adjudication to the benefit of minors, who invariably are ill-equipped to represent themselves.

Surprisingly under the present system, however, the responsibility to care for the well-being of these juveniles lies with the INS itself-the very agency whose primary mission is to secure the deportation of undocumented aliens-which accepts and maintains the legal custody of each and every one of these children. In essence, the sensitive obligation to ensure decisions in the child's legal interests falls upon a government bureaucracy with absolutely no child welfare expertise, and with an incurable predisposition towards law enforcement motives. Thus, daily assessments affecting custodial care-and more critically the final determinations of appropriate substantive relief-constantly are vulnerable to the agency's inherent conflict of interest, given INS's incompatible yet simultaneous roles as caregiver, prosecutor, and jailer. And most troubling, in the absence of legal counsel to advocate on behalf of a child and safeguard legal interests, each and every INS decision respecting the well-being of a detained and unrepresented child remains completely unchecked.

As Americans we would not stand for a system where the district attorney serves as a public defender, or where an arresting officer is appointed the guardian ad litem for a juvenile. For the same reasons, Mr. Chairman, the INS with its primary mission of immigration law enforcement simply cannot be expected to ensure the legal interests of an unrepresented child. The system is to blame for this ineffectual situation, and that system must be fixed.

## II. RESPONSIBILITIES OF COUNSEL FOR UNACCOMPANIED JUVENILES

Effective representation for these vulnerable children includes all aspects of ensuring the legal interests of the child that arise during often complicated and protracted immigration proceedings. Such issues include conferring with the INS to secure that a child is detained in the least restrictive setting appropriate; evaluating the child's ability to access any available forms of immigration relief; filing applications, pleadings, and motions before immigration judges; representing the child during hearings and asylum interviews; safeguarding proper INS compliance with transfer and age determination requirements; and attempting to reunite children with parents or suitable adult relatives living in the United States or abroad.

Because the current system lacks a procedure for ensuring that every child is afforded the opportunity to receive appropriate legal assistance, however, many abused, abandoned, and neglected children with valid claims to asylum or the special immigrant juvenile visa face tremendous obstacles in accessing these legal remedies. By the same token, without counsel to review each child's circumstances, the system is clogged with the inefficiencies of cases for which there is no substantive relief available-often it would be the conclusion of an attorney that no immigration relief is available, and the client properly is advised to accept voluntary departure. But without this objective legal analysis, countless undocumented children in the United States risk being removed and returned to violent situations in a home country where they will be subjected to further human rights abuses. The role of counsel simply cannot be underestimated in these high-stakes proceedings, which necessarily result either in securing appropriate immigration relief, or on the contrary to the potentially uncertain fate of deportation.

Knowing this, immigration judges may be reluctant to issue a final order of removal against an unrepresented child and instead choose to continue the case, necessarily resulting in protracted detention in juvenile jails and institutional INS shelters. Not only does this prolonged confinement inflict an unnecessary and substantial cost on the emotional development of these young children, but at contracted daily rates of up to \$250/day, the consequence of having children appear without representation inflicts a substantial cost on the budget as well-needlessly wasting taxpayer dollars spent on extended detention and repeated court proceedings. Having the assistance of counsel for these juveniles, however, invariably would lead to structural improvements that will speed adjudication, and minimize both the emotional harm of detaining a child and the taxpayer cost of an inefficient system.

Furthermore, apart from the unassailable need for counsel when navigating the various forms of potential substantive immigration relief, the presence of an attorney is critical to secure rigid adherence with the laws and regulations that govern a detained juvenile's conditions of confinement. Over the past year, Latham attorneys have inspected numerous facilities that contract with the INS to house unaccompanied minors, and have conducted interviews with countless detained children. During the course of this review and oversight, our efforts have uncovered widespread and egregious violations of the conditions of confinement mandated by

the Flores v. Reno consent decree, a 1997 settlement agreement that forms the basis of legal standards to which the INS must adhere when taking legal and physical custody of an unaccompanied minor. Many of these findings were confirmed by the Department of Justice Office of the Inspector General's "Report on Unaccompanied Children in INS Custody" ("OIG Report"). Representative examples of violations include the following:

" Children must be placed in the "least restrictive setting appropriate" under the circumstances, however, last year INS detained nearly two thousand children in secure facilities (i.e., juvenile jails), and more than eighty percent of these minors were non-delinquent juveniles. This is the case notwithstanding the INS's continuing obligation to transfer a non-delinquent juvenile from secure confinement into a licensed shelter care program "as expeditiously as possible."

" Non-offender alien juveniles in secure confinement must at all times be provided with sight-and-sound separation from adjudicated delinquents, yet the majority of the secure facilities housing undocumented minors have no such segregation procedures in place. In fact, many of these facilities commingle non-offenders with delinquents as a matter of necessity, lacking the physical structure to separate the two populations. In one instance during a Latham inspection, a non-offender INS detainee was assigned to share a tiny jail cell with a violent juvenile delinquent convicted of felony drug possession and assault with a deadly weapon.

" Flores provides for the prompt release of unaccompanied minors to responsible adults based on an established "order of preference," which includes parents, designated legal guardians, and close relatives. Current INS procedure, however, does not permit an unaccompanied minor's released to appropriate related adults when the agency believes that an undocumented parent is in the United States. Instead, INS may use the minor as bait, requiring the undocumented parent to come forward under a threat of the child's protracted detention, and then placing the parent into removal proceedings on arrival to claim their children.

" INS policy specifically prohibits a contract facility from the use of restraints for non delinquent juveniles. Latham interviews and the OIG Report confirm, however, that standards are not in place to document compliance, more than one half of facilities ignore this procedure, and non delinquent children routinely are shackled during transport, movement within facilities, and appearances in immigration court proceedings.

### III. THE LATHAM & WATKINS CHILD REFUGEE PROJECT

In March, 2001, after learning of this vast need for representation of unaccompanied alien juveniles, Latham created a firm-wide pro bono effort titled the "Child Refugee Project." The project involves three aspects of legal representation, each benefiting this largely unaided and at risk population of undocumented minors. First, the firm serves as pro bono counsel to the Women's Commission for Refugee Women and Children, a non-profit research and advocacy organization dedicated to protecting refugee women and children around the world. Together, Latham and the Women's Commission-in conjunction with dozens of non-profit advocacy groups-formed a wide-ranging coalition to support S. 121 and H.R. 1904, the "Unaccompanied Alien Child Protection Act." Owing to extensive efforts by the dedicated members of this coalition, the bill enjoys broad bipartisan support in both chambers of Congress.

In addition, Latham became co-counsel with the Center for Human Rights and Constitution Law (CHRCL), the non-profit legal service provider that served as attorneys to the plaintiff class of unaccompanied alien juveniles in the landmark Flores case. Despite the INS's failure over the past five years to promulgate regulations that would codify these requirements, the settlement agreement contained a sunset provision that this month would have resulted in the expiration of these legal standards, leaving unaccompanied children with no basis for a legal challenge to individual conditions of confinement. Through persistent discussions with the INS, however, Latham and CHRCL were able to negotiate the republication of a proposed rule that will codify the agreement into regulations. Further, the negotiations led to a stipulation that modifies the sunset date of the Flores consent decree-extending the required adherence of its provisions until 45-days after the INS publishes those regulations as a final rule.

Finally, through this project, Latham's lawyers around the country provide individual pro bono counsel and services to ensure the appropriate conditions of confinement for otherwise unrepresented alien juveniles in INS custody, as well as to assist these children with navigating the complexity of immigration and asylum proceedings. Latham's individual child refugee clients come from a wide variety of troubling backgrounds, circumstances, and ages, including: Honduran and Guatemalan youth who have fled the documented genocide of street children in those countries; young Chinese and Indian children who have been the victims of trafficking and smuggling operations; and many other victims of unspeakable persecution-including intended victims of forced labor, sexual servitude, parental abuse and neglect, forced marriages as child brides, or female genital mutilation.

Since the project's inception not quite one year ago, Latham lawyers and staff have donated more than six thousand hours in pro bono services on behalf of refugee children. To date, the project has resulted in an equivalent of more than \$1.4 million donated to representation and advocacy on behalf of unaccompanied alien children, helping to ensure that every child's legal interests are protected. Additionally, Latham's lawyers are working in partnership with various child advocacy groups and legal service providers across the country including: the Midwest Immigrant & Human Rights Center, the Florida Immigrant Advocacy Center, the Florence Project, Catholic Legal Immigration Network Incorporated, Hebrew Immigrant Aid Society, the Pennsylvania Immigration Resource Center, Casa Cornelia, and the San Francisco Bar Legal Services Program.

For its commitment to pro bono legal efforts-including these much-needed services to unaccompanied alien juveniles-in 2001, Latham's pro bono program and the Child Refugee Project won numerous awards from many organizations, including: a National Law Journal pro bono recognition; the District of Columbia Bar Association's "Pro Bono Firm of the Year"; the Bar Association of San Francisco's "Outstanding Law Firm in Public Service"; and the Los Angeles Public Counsel's "Law Firm of the Year."

To expand further the universe of dedicated law firms addressing this pressing need for pro bono assistance, the American Bar Association ("ABA") leadership mobilized to address the plight of detained immigrant and refugee children, launching the Detained Immigrant and Refugee Children's Emergency Pro Bono Representation Initiative ("Initiative"). Through the Initiative, the ABA has provided ten grants to major detention sites for comprehensive pro bono legal care

programs for immigrant and refugee children detained in Arizona, California, Florida, Georgia, Illinois, Pennsylvania and Texas, and is developing two additional programs in New York and Washington State. In August, 2000, the ABA sponsored a national summit for pro bono attorneys and grantees in Chicago resulting in the training of more than 115 pro bono attorneys from over twenty-five states. Through the coordination and training of the ABA, participating state and local bar associations, and pro bono legal service agencies, Latham and other private firms thus far have donated over \$3.5 million in billable hours representing detained alien children across the country.

Regrettably, even the admirable and extensive efforts of these concerned private organizations have only scratched the surface of providing representation for unaccompanied alien children. For both institutional and jurisdictional reasons, the INS itself would not and cannot provide counsel to the detained children in its legal custody-rectifying this situation is a problem that requires the congressional action of a legislative solution, and promptly enacting S. 121, the "Unaccompanied Alien Child Protection Act" would do just that.

#### IV. CONCLUSION

Mr. Chairman, the advocacy of an attorney for alien juveniles is essential to secure the bedrock principles of due process and equal justice under law. Moreover, for these vulnerable children, access to counsel is of paramount importance to safeguard against the conflicts of interest and unchecked authority inherent in the current system of INS legal custody. By implementing a system to grant legal representation to unaccompanied alien juveniles, however, the entire immigration process will be resolved in a manner that is more effective, more efficient, and more just.

Therefore, Mr. Chairman, I urge your support of S. 121, the "Unaccompanied Alien Child Protection Act," and I welcome any of your questions. Thank you.