

Unaccompanied Children in the United States: Vulnerability, Protection and the Limits of Political Harm

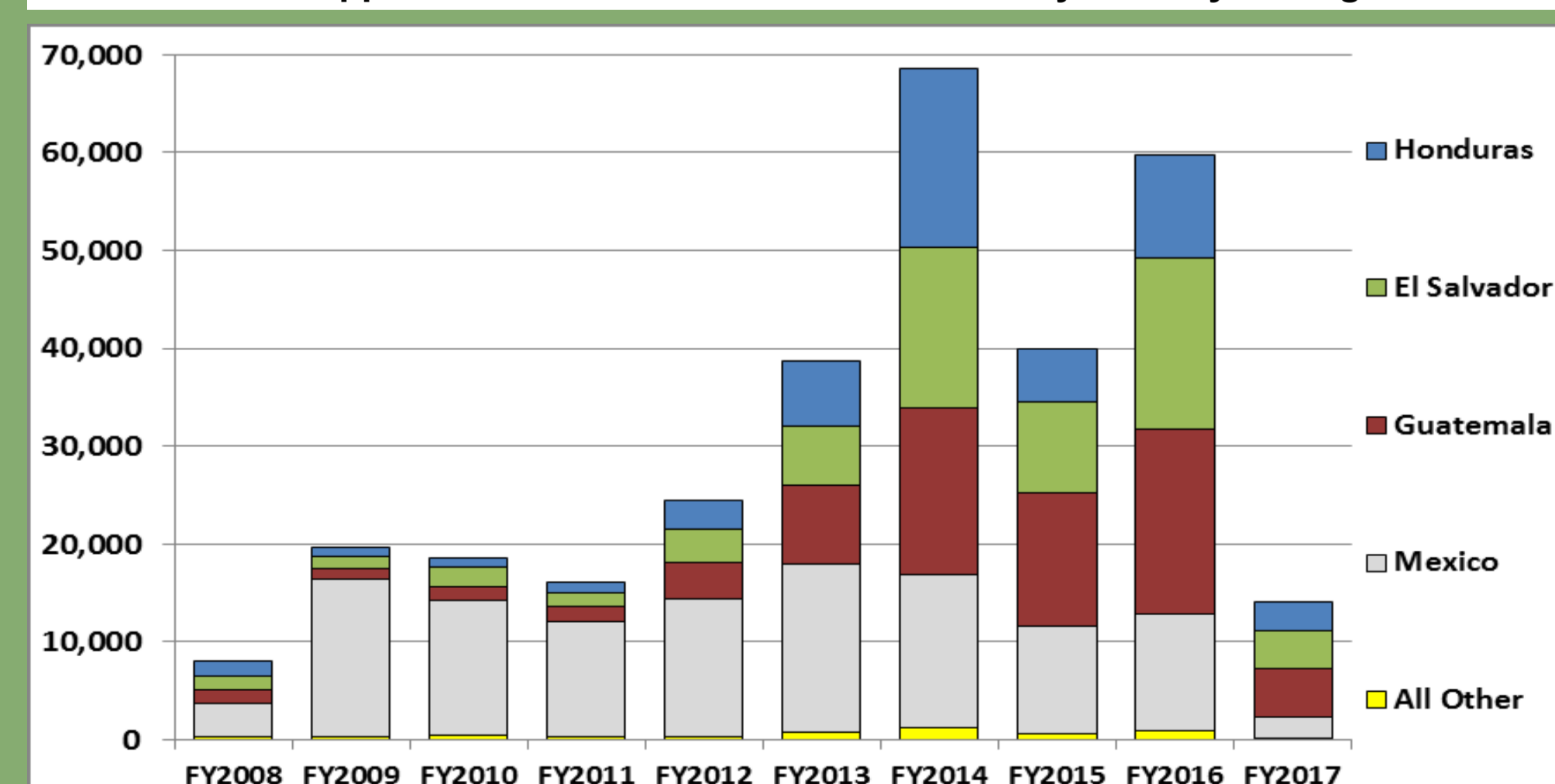
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Who Are Unaccompanied Children?

- Definition of “unaccompanied alien child” (UAC) found in 6 U.S.C. § 279(g)(2)
- 95% of unaccompanied children entering the US come from Guatemala, Honduras and El Salvador
- Of the other 5%, Mexico accounted for 3% and all other countries accounted for 2% in FY2016.
- Children from contiguous countries (Mexico and Canada) can be voluntarily returned to their country within 48 hours if they meet certain criteria and do not demonstrate a credible fear of return
- 2014 UNCHR study “Children on the Run” identified 58% of unaccompanied children at the US border as having probable international protection needs
- 72% of children from El Salvador were identified as having potential or actual need for international protection
- Approximately 60% of unaccompanied children are coming to join one or both parents in the United States
- The majority of unaccompanied children are 16-17 years old, however children 0-12 accounted for 18% of arrivals in FY2016
- Complex mix of push and pull factors impact children’s and their families’ decisions to come to the United States
- Custody of unaccompanied children crossing the border to the US is transferred from the Department of Homeland Security to the Department of Health and Human Services’ Office of Refugee Resettlement within 72 hours (*Flores v. Reno* 1997, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008)
- Unaccompanied children stay in ORR shelters until they can be reunified with a family member or placed in a foster care setting if no safe family member is available

UAC Apprehensions at the Southwest Border by Country of Origin



(Congressional Research Service, US Department of Homeland Security, 2017)

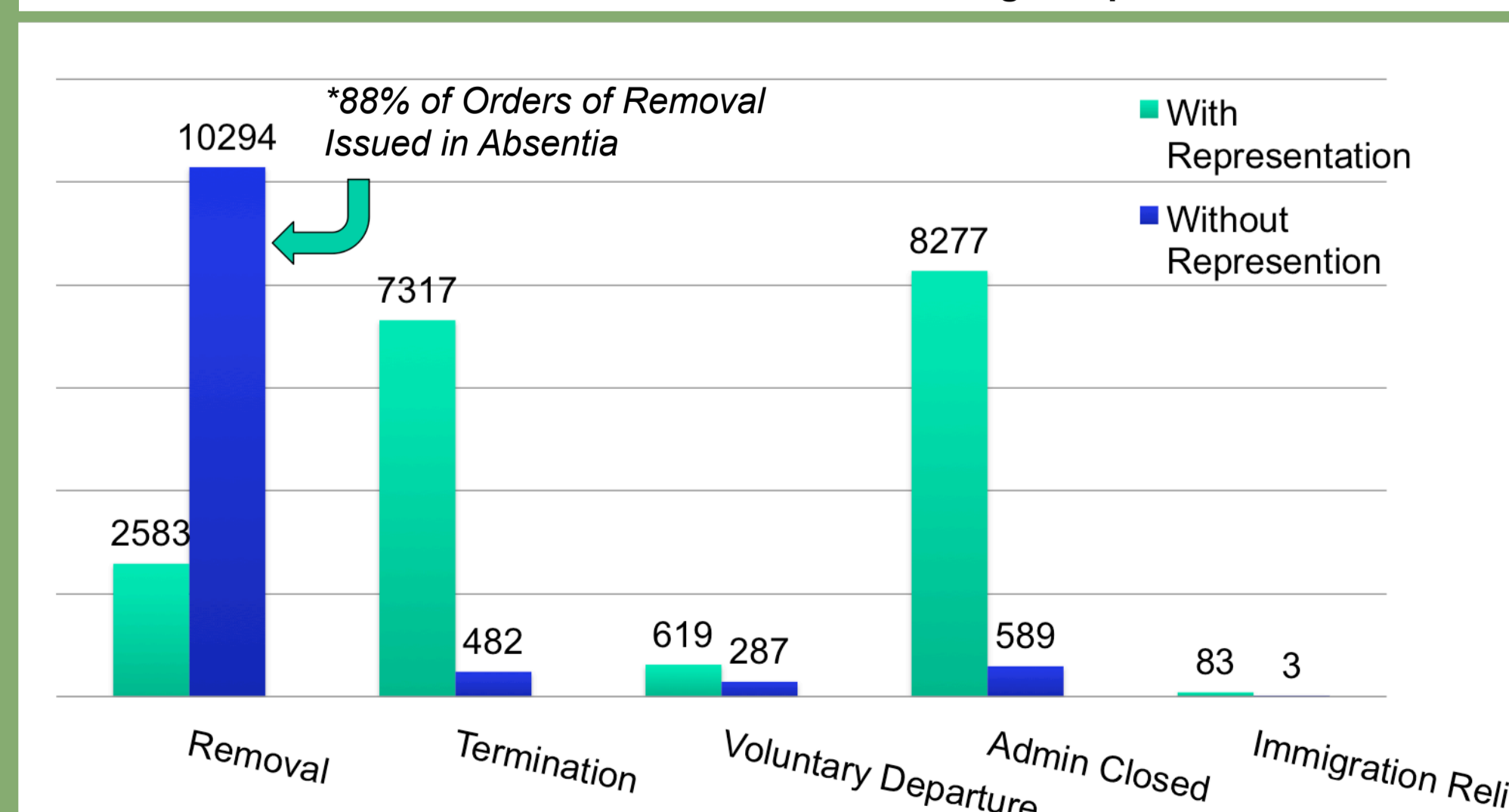
Child Asylum Claims in the US

- Unaccompanied children’s cases are treated in non-adversarial setting before an asylum officer (USCIS jurisdiction) per section 235(d)(7)(B) of the 2008 Trafficking Victims Protection Act, unlike other defensive asylum cases
- If children “age out” (turn 18 while in ORR care) they are transferred to an ICE adult detention facility, however USCIS maintains jurisdiction over their asylum claim unless there was an act to terminate UAC finding
- Similarly, children formerly detained with ORR remain with UAC designation even after reunification with parents in the US unless active claim to terminate designation
- Applicant can request administrative closure for removal proceedings before the immigration court (DOJ) while pursuing asylum with USCIS (DHS)
- Basic US asylum law set out in INA § 208
- UNHCR’s Children’s Guidelines (2009) and USCIS AOBTC Guidelines for Children’s Claims (2009) and EOIR’s OPPM 07-01 offer further guidance
- “Reasonable possibility” of suffering persecution 8 C.F.R. 208.13(b)(2)(i)
- “10% chance” of future persecution substantiates a well-founded fear (*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987))
- An applicant for asylum under section 208 of the Act has established a well-founded fear if a reasonable person in his circumstances would fear persecution (*Matter of Mogharrabi*)
- For particular social group claims in the United States the protected identity must be a) immutable or fundamental (*Matter of Acosta*, BIA 1995) b) socially distinct & c) particular (*Matter of M-E-V-G*, BIA 2014 & *W-G-R*, BIA 2014)
- In cases of mixed nexus for persecution, applicant must show that the protected ground was “at least one central reason” for persecution (INA § 208(b)(1)(B)(i))
- Unaccompanied children can have a political opinion claim based on their own opinion or imputed political opinion due to family members activities or views
- Family (“members of the Doe family”) can be a PSG
- Case law for gang-related claims is negative but can be won proving the unique facts of the case (*Matter of S-E-G*, *Matter of A-E-G*, *INS v. Elias-Zacharias*)
- Domestic violence claims gaining recognition (*Matter of A-R-C-G*)
- Internal relocation generally considered unreasonable for child applicants
- The threshold for “persecution” can be lower for children per US appellate courts and UNHCR guidelines
- After being granted asylum, recipients must wait one year before filing for adjustment of status to lawful permanent resident and can petition for family members to join

Special Immigrant Juvenile Status

- Law set out in § 101(a)(27)(J), codified at 8 USC § 1101(a)(27)(J), statutes implemented by federal regulations set out at 8 CFR § 204.11
- Perez-Olano v. Holder settlement-SIJS status valid if applicant was under 21 and unmarried at the time of application
- Age limit is 18, however, in many state courts
- Child first appears in front of a judge in a “juvenile court”= any court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” 8 C.F.R. § 204.11(a)
- Juvenile court must find that reunification with one or both of the child’s parents is not viable due to abuse, abandonment, neglect or similar basis under state law”
- The court must also find that It is not in the child’s best interests to return to his or his parent’s country of nationality
- SIJS is the only legal status in the US that takes into account the “best interest” of the child; there is no legal definition of “best interest”
- There is differing case law on whether reunification with both parents needs to be unviable, however consensus largely is that a child still qualifies for SIJS when only one parent is unviable
- After court ruling children must then file for a Special Immigrant Juvenile visa with USCIS
- Once granted the visa child then finally applies for residency (green card). Adjustment of status is always discretionary, so positive factors need to be considered alongside negative (criminal activity in the US, suspected drug trafficking, etc.)
- SIJS recipients are not able to petition for either of their parents-ever!
- SIJS protects children who were victims of domestic harm. Lack of State protection is not explicitly implicated. The interpretation of the Law is thus much looser than in DV asylum cases.

Outcomes of UC Cases With and Without Legal Representation

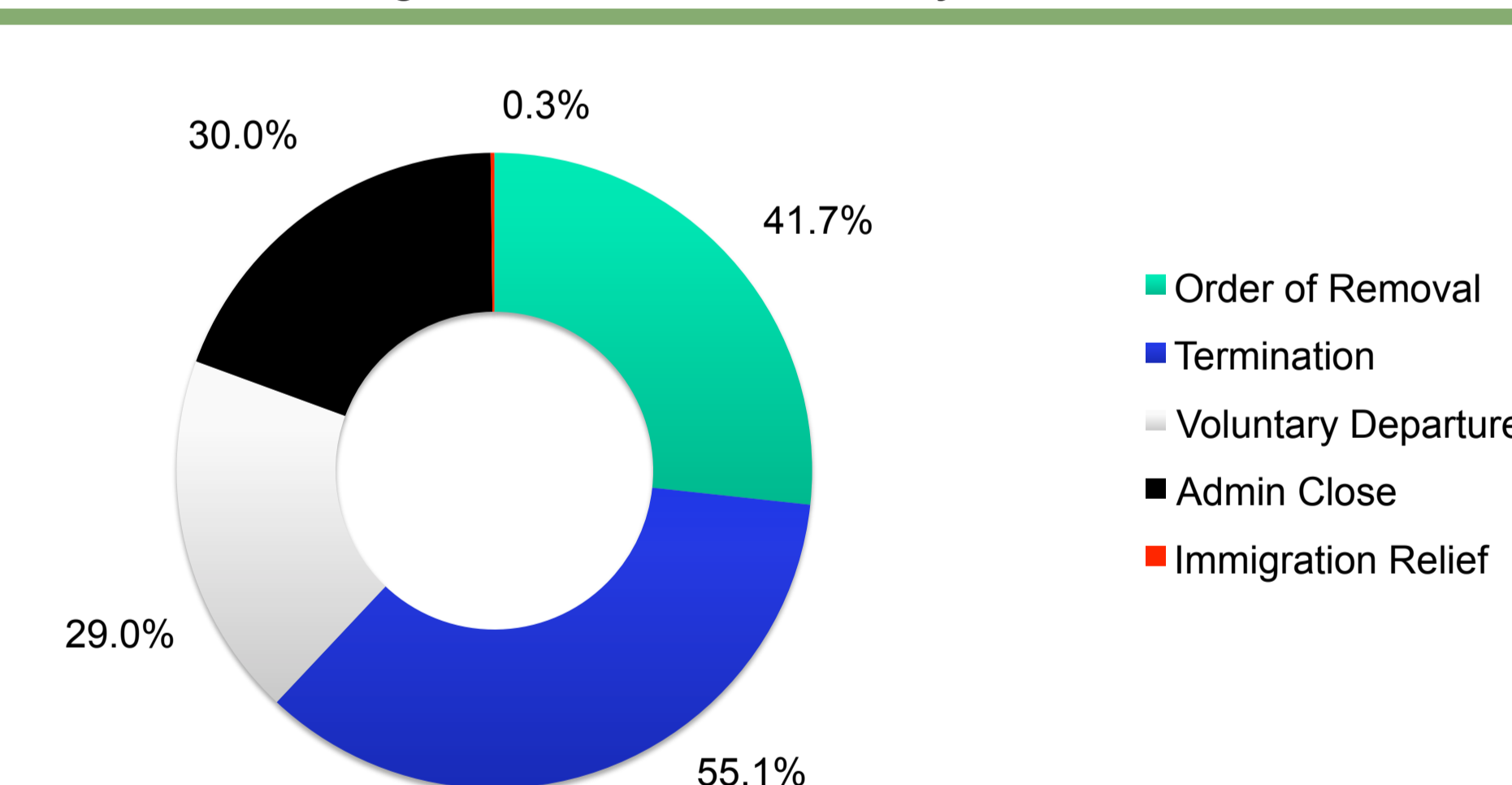


(Executive Office for Immigration Review, Congressional Research Service, 2016)

Alternative Forms of Relief

- T visas (INA 101(a)(15)(T))
- Must be a victim of a « severe form of trafficking in persons » and present in the US as a result of that trafficking
- Must comply with law enforcement in investigation of the crime *this requirement waived if the victim is under 18*
- T visa status is valid for 4 years, but holder can adjust to lawful permanent residence (green card) after 3 years of continuous physical presence in the US
- U Visas (INA 101(a)(15)(U))
- Must have been a victim of a serious crime within the United States. Can adjust to green card holder after 3 years.
- Withholding of Removal and Convention Against Torture (CAT): all asylum applicants should be automatically considered for these if there is a bar to asylum. There is no path to lawful permanent residency or citizenship.

Legal Outcome of UC Cases July 2014-June 2016



(Executive Office for Immigration Review, Congressional Research Service, 2016)

What Constitutes Political Harm?

- Children’s legal relief claims in the US today pose a challenge to “political” harm(v. domestic or “private” harm) much as gender-based and LGBTQ claims did in the 1990s and 2000s
- Domestic violence and child abuse are emerging categories in refugee law and may not always be recognized as occurring outside of the private sphere and implicating the State
- Children are reliant on adults to access State protection. If private actors (parents) were unwilling to do this, it is arguably a protection issue regardless whether asylum or SIJS is ultimately pursued
- Establishing nexus with child applicants can be challenging, as “motive” may be difficult for them to assess and family reunification may be a child’s first conscious priority
- Refugee advocates must be willing to consider children’s experiences as containing a political element