



## No Child Left Behind

### New Rules for Unaccompanied Minor Illegal Aliens

By Don Barnett

When the old Immigration and Naturalization Service (INS) was reorganized as part of the new Department of Homeland Security (DHS), it lost one of its immigration enforcement functions.

The Office of Refugee Resettlement (ORR), part of the Department of Health and Human Services, is now in charge of custody, identification, and release policy for “unaccompanied minors” caught trying to cross the border or caught in the interior.

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#### New Clientele

Now Congress has given ORR a new client, the “Unaccompanied Alien Child” (UAC in Washingtonspeak), and a new bureaucracy, the Department of Unaccompanied Children Services.<sup>1</sup>

According to recent regulations implementing provisions of the Department of Homeland Security Act, as of August 2, 2004, “ORR will complete and sign all appropriate release documents for the UAC and the sponsor.... [DHS] will no longer prepare or sign release documents, set conditions of release, or set bond on UACs being released by ORR.... [DHS] will no longer perform record checks on proposed sponsors. ORR will perform background checks prior to releasing a UAC to a sponsor.”<sup>2</sup>

In other words, when it comes to certain illegal border crossers under the age of 18, the Department of Homeland Security is no longer responsible for enforcing immigration law.

Roughly 100,000 illegal aliens under the age of 18 are stopped at the border each year. Most of these are Mexicans traveling with relatives or other adults and are simply sent back with a “voluntary return” status. This return status means they may attempt to enter again without penalty. Even repeated attempts and apprehensions do not result in penalties or a bar to entry. For non-Mexican minors who are “unaccompanied” by an adult relative, either by plan or because DHS has placed adult family members in deportation proceedings, there is ORR’s Unaccompanied Alien Children program.

On any given day, approximately 850 minors are in shelters run by ORR contractors such as the U.S. Conference of Catholic Bishops and Lutheran Immigration Services. This is an increase over the estimated daily count of 500-600 in U.S. government care when minors were detained by the

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old INS. The annual number of UACs that pass through federal custody today stands at 8,000, versus 5,000 when INS ran the program.

Since 9/11, with ORR in charge, minors stay in unsecured shelters and have considerably expanded opportunities for release into the community. This is doubtless one of many causes for the increasing numbers. ORR contractors say that numbers are up because more are crossing the border now and more are being caught. They point to worsening conditions in sending countries and increasingly severe measures taken with “street children” in Central America as factors in the increased numbers.

## Joining Relatives

Most minors who are stopped and taken into custody at the border are joining relatives who arrived earlier. In many cases minors are caught with parents or other adult relatives who are placed in deportation proceedings with DHS, while the minor is placed in the custody of ORR. In these cases, the child, perhaps coached by lawyers and his social network in the United States, can remain in the country even if his parent is deported and wishes for his child to go with him. According to Border Patrol agents, even minors with head-to-toe MS-13 gang tattoos are handed over to ORR for eventual release to individuals who are also illegally in the country. Gang affiliation is no bar to entry, according to one contractor I spoke with, though she insisted obvious gang members had been admitted under INS rules as well.

Many, if not most, get to the border with the help of a smuggler. If caught, the UAC essentially waits until picked up by a relative in a shelter like Boystown in Miami or Southwest Key in El Paso and San Diego. These shelters are practically off-limits to DHS agents. Smugglers stopped at the border with children of all ages—even toddlers—know their charges will be conducted safely to the individual who summoned them.

Generally, individuals receiving the UAC must show kinship, but pre-arranging for a “relative” to step forward and claim sponsorship is the least of a smuggler’s concerns. Cousins and great aunts have been used for this purpose. ORR will not consider the legal status of the sponsor and does not even check to see if

the sponsor is a known absconder—i.e., someone who was apprehended as an illegal alien, given a date to appear in immigration court, and never showed up for the court hearing. If no relative is found, the child can be released to family “friends” and if there is no suitable home available, the child goes into the U.S. foster care system.

Relationship and the suitability of the sponsor are crucial. Is the person claiming relationship really a relative? Is the child being handed over to a smuggler who will then demand ransom from relatives? Is the child being handed over to be someone’s domestic servant? Is the relative here legally?

The last question is not considered by ORR. Answering these questions was once the responsibility of DHS personnel. Some at DHS, admittedly turf warriors from the other side on this issue, describe a reigning “believe the children” mentality at ORR which leads to ill-considered and hasty release of minors before these questions can be answered satisfactorily.

**Summer Camp.** ORR boasts that it has doubled the release rate of the old INS for minors and greatly improved conditions for them while in federal custody. ORR coordinates with legal services providers for help establishing immigration status, contracts out psychological counseling services for troubled UACs, and contracts to shelter providers, which are more like summer camps than detention centers.

In fact, the UAC’s stay in shelter care is something of a teenage idyll, with movies every night at some facilities, one counselor per six children, and even horseback riding at one camp. ORR requires that its contractors “maintain a written plan and periodic schedule for exposure to and participation in appropriate cultural events” calculated to ensure the “preservation of ethnic and religious heritage.”<sup>3</sup>

There have been a few cases where UACs, referred to as “clients” by shelter staff, simply walk out of the unsecured shelter never to be seen again. Client escape statistics are not kept.

ORR’s goal is to release the minor within a month, but it often releases minors within two weeks. If the wait in custody is projected to exceed three months, the minor goes into short-term foster care. The average stay is about 45 days, but this average

includes length-of-stay data from those who remain in custody for longer periods of time because they are considered dangerous.

A small percentage of those apprehended—less than 5 percent—are deemed to have violent criminal backgrounds and enter secure detention centers where the wait may be longer.

Only if there is a known record of a violent crime or if the youth exhibits particularly violent behavior does the UAC enter a secure detention facility. (Disruptive behavior while in custody seems to only warrant counseling sessions.) Some crimes would not pose an obstacle to entry for a UAC or even a guarantee that the UAC will be housed in a secure facility.

ORR seldom has access to criminal records from Central American countries, given the short time frame and the fake identities used by many smuggled entrants. In fact, ORR has no expertise in background research and identity fraud and little institutional interest in pursuing it under its “best interest of the child” mandate.

## “Encouraged” to Appear in Court

UACs are given an immigration court date in the jurisdiction where they will be settling, which could be anywhere in the United States.

ORR’s Notice to Appear in immigration court, handed out as the sponsor leaves with the minor, does not carry much weight. As one contractor said, “we encourage them to appear in court” for their immigration hearing “but we cannot force them to appear.” According to Border Patrol agents, ORR has occasionally even dispensed with a face-to-face hand off of its charges, simply putting the minor, clutching belongings and Notice to Appear, on an airplane unescorted to be collected by a relative in another city.

Wade Horn, Assistant Secretary for the federal Administration for Children and Families (which includes ORR), was quoted by the AP as saying, “Most of the estimated 8,000 children caught this year will be deported.”<sup>4</sup> Actually, relatively few will be deported. Most simply do not show up for their immigration hearing, instead disappearing among the great and growing numbers of illegal immigrants. According to Executive Office for Immigration Review (EOIR)

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spokesperson Greg Gagne, it is not possible to determine the “failure to appear” rate for UACs, as they are not currently categorized separately for tracking and reporting. Others I spoke with from EOIR, ORR, and DHS agreed, unofficially, that the no-show rate is greater than 65 percent.

Most who *do* appear in court lose their cases and are given “voluntary departure” papers. “Voluntary departure,” as opposed to “voluntary return,” carries a five-year bar to legal re-entry. Many of these cases go into the immigration appeals process which offers additional chances to simply disappear into the illegal population. Exact statistics are not available for UACs in legal proceedings.

The leading source of UACs is Honduras, followed by Guatemala, El Salvador, Nicaragua, and Brazil. The reason Mexico doesn’t lead the list, or appear on it at all, is because the United States and Mexico have an agreement whereby Mexican youths stopped at the border are brought to the attention of Mexican consular authorities and immediately sent back with a “voluntary return” order, which allows for a penalty-free retry at crossing the border later. A minor from Mexico can thus try again and again with a virtual guarantee of eventual success as an illegal entrant. According to an ORR contact, this agreement was a concession to Mexico. A senior official from the old INS would only go as far as saying the agreement *may* have been in response to Mexican concerns.

A child walking off an airplane without documents goes on the ORR track, a fact smugglers are most certainly aware of. According to Russ Knocke, Public Affairs Director at DHS’s Bureau of Immigration and Customs Enforcement, “ICE is not seeing a smuggling or fraud trend in children at airports,” but an ORR contractor who asked to remain unnamed said, though still very small in

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number, Chinese and Indian children are increasingly coming in through airports and winding up in ORR care as UACs.

If *any* minor, including a minor of Mexican origin, is caught in the interior either as part of an enforcement sweep or is turned over to immigration authorities after commission of a crime, the youth goes into the UAC program, not to DHS. An ORR contractor stated that going into ORR's program is "much better" for the minor than being handed over to DHS. In other words, if an individual is caught in a smuggler's drop-house or caught in a round up of illegals in Utah, he or she need merely credibly claim to be under 18 to avoid deportation. (Unlike the old INS, ORR does not use forensic techniques to challenge the claimed age of a UAC, relying instead on affidavits attesting to the minor's age from relatives back home or in the United States, often illegally.)

UACs are not subject to Expedited Removal proceedings, a quick deportation process that is applied unevenly, at best. Also, any minor claiming asylum, even if from Mexico, goes straight to an ORR shelter.

## Even Looser Rules?

Most experts feel that Congress will pass legislation further easing admission of UACs. According to a United Nations publication, "UNHCR [U.N. High Commissioner for Refugees] officials worked with private organizations and Congress to promote specific legislation such as the Unaccompanied Alien Child Protection Act."<sup>5</sup>

The bill, now known simply as the Child Protection Act (introduced as H.R. 3361 and S. 1129 in the 108<sup>th</sup> Congress), would entitle all UACs to free legal counsel and a state-provided Guardian Ad Litem to coordinate the child's sponsorship and legal needs. Today, lawyers assigned to UACs by ORR are paid by advocacy agencies such as the Florence Project and Las Americas. Funding for these agencies comes from foundation grants such as the Ford Foundation,

state bar associations, the federal government, and the U.N.

Declaring a child to be abandoned or abused may soon be the surest means of getting a child to America. The Child Protection Act expands the use of the rarely used Special Immigrant Juvenile Visa (SIJV) for minors who cannot make an asylum case. As explained on Sen. Dianne Feinstein's web site, the new law "Revamps the Special Immigrant Juvenile Visa to make it a useful and flexible means of providing permanent protection for deserving unaccompanied alien children who are deemed a dependent of the State by the courts due to abuse, neglect, or abandonment."<sup>6</sup>

The enactment of such legislation may entail a dramatic increase in SIJV entrants. As one ORR contractor explained to me, the only hope for "street children" in Central America is in coming to America. No one seems to have asked what the impact will be on its own children if the United States becomes the destination for "street children" the world over.

The United States clearly cannot ignore the moral and ethical dilemma presented by a five-year-old being tossed across the border with a note to call a relative. But rather than respond simply by creating a new social-welfare bureaucracy, this phenomenon should point to the need for an examination of the policy decisions which forced the dilemma upon us in the first place by creating an anarchic situation where immigration laws are unenforced.

Moving ORR into border operations is simply another establishment nod of approval for illegal immigration. It will lead to continued increases in numbers of "unaccompanied minors" from all over the world and makes illegal immigration in general a more attractive opportunity.

It requires a paradigm shift to think of the U.S. government as an active participant in human smuggling operations. And yet, looking at our response to the problem of unaccompanied minor children, smugglers themselves could hardly conclude otherwise.

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## End Notes

<sup>1</sup> <http://www.acf.dhhs.gov/programs/orr/mission/ducs.htm>

<sup>2</sup> Memo from Victor Cerda, Acting Director U.S. Immigration and Customs Enforcement, July 29, 2004.

<sup>3</sup> <http://www.acf.dhhs.gov/programs/orr/programs/refrp.htm>

<sup>4</sup> The Associated Press, "Number of Undocumented Children Rises," Chris Roberts, October 18, 2004.

<sup>5</sup> *Refugees*, no. 133, vol. 4, 2003, p. 14.

<sup>6</sup> <http://feinstein.senate.gov/04Releases/r-unaccompanied-minors-comm.htm>

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