Center for Immigration Studies

July 2014

# Analyzing Title I of the Helping Unaccompanied Minors and Alleviating National Emergency (HUMANE) Act

By Dan Cadman

There is a tidal surge of human beings, most of them from Central American countries — Guatemala, El Salvador, and Honduras — crossing our borders illegally, primarily in the Rio Grande Valley in Texas.

This surge of aliens crossing the southern border into Texas has formed a major part of the news for several weeks now, and understandably so, as tens of thousands enter illegally, with many (but not all) of them promptly surrendering themselves to harried Border Patrol agents for processing and release. Most disturbing of all is that a significant percentage of these entrants are family units and unaccompanied juveniles coming to join the parents who have paid to have them smuggled into the country.

The administration has been steadily increasing its projections of the number who will cross this year and next, as if either preparing the public, or — an unsettling notion — itself for the deluge yet to come. As is well known, the president declared a humanitarian emergency in order to tap resources from multiple agencies. His administration has also requested $3.7 billion in emergency supplemental funding to handle the crisis.

Confronted with the seeming inability of the administration to get a handle on the problem, Congress has convened hearings at which the secretaries of the departments of Homeland Security (DHS) and Health and Human Services (HHS) and other senior officials have testified as to their plans and strategies, none of which appear to have had any significant ameliorative effect on the flow to date. Many officials, and some members of Congress, have pointed to the Trafficking Victims Protection Reauthorization Act (TVPRA) as at least partly responsible for the problems in efficiently processing and quickly repatriating aliens, which is generally recognized as a necessary deterrent to others considering the journey by showing them that the United States is serious about its border enforcement.

As observed by Jon Feere, legal policy analyst at the Center for Immigration Studies, in his recent *Backgrounder*, "2008 Trafficking Law Largely Inapplicable to Current Border Crisis", the provisions of the TVPRA are in the main, and by their plain language, inapplicable to the phenomenon we are seeing in the Rio Grande Valley.

Nonetheless, the administration has chosen a response to the influx and crafted its emergency supplemental request in ways designed to suggest that the TVPRA is the culprit for tying its officials' hands and precluding large-scale and prompt removals.

Administration officials have also suggested to Congress that they need new, additional statutory authority to exercise discretion. This is a curious assertion from a White House that in the past has not felt in the least fettered by immigration laws when wanting to exercise unbridled discretion.

It is even more curious because the TVPRA specifically provides that "exceptional circumstances" may be invoked to suspend many of its procedural requirements. If the current border surge does not constitute an "exceptional circumstance", one wonders why the president declared a humanitarian emergency and why the administration is seeking nearly $4 billion on an emergency basis.

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Be that as it may, confronted by daily evidence of an out-of-control border involving thousands of smuggled juvenile aliens, some members of both the House of Representatives and the Senate have heeded the administration's call and introduced bills they hope will address the crisis. The legislation, named the Helping Unaccompanied Minors and Alleviating National Emergency (HUMANE) Act, is being considered in parallel by both houses. It was offered by Sen. John Cornyn (R-Texas) and Rep. Henry Cuellar (D-Texas).

An examination of the bill leads us to conclude that it is deeply flawed and, contrary to the legislative sponsors' intentions, will lead to additional (and quite possibly substantial) flows of families and juveniles arriving at our southern border in the future. Following is a brief analysis of the highlights of each section of Title I of the bill. (Title II is not examined because it relates to general border security measures rather than specifically to processing the surge of arrivals.)

## Section 101

This section of the HUMANE Act amends those portions of the Trafficking Victims Protection Reauthorization Act (TVPRA — commonly known as the "William Wilberforce Act") relating to the treatment of unaccompanied alien children (UACs) for purposes of federal immigration law. The affected portion of TVPRA is codified at 8 U.S.C. § 1232(a). The appendix to this analysis reflects the stricken and new language as the section would read were the HUMANE Act to be passed and signed into law. Note, however, that the entire TVPRA is not appended; the attachment reflects *only* the language altered by the HUMANE Act so that one gets a sense of what it would look like, post-passage.

- Most significantly, Section 101 eliminates the distinction in treatment between aliens from contiguous countries (Canada and Mexico) and others in the region. On the surface, this would appear to eliminate the stumbling block claimed by administration officials in removing nationals from Guatemala, El Salvador, and Honduras who constitute a majority of the current flow. But when considered in combination with other language in the bill, it actually creates the conditions for many tens of thousands of aliens (including juveniles from the length and breadth of Mexico) to decide to risk the crossing in the future.

- The "other language in the bill" mentioned above can be found in Section 103, which would grant immigration judges a new authority to bestow permanent residence on unaccompanied minors, if doing so would not be "manifestly unjust" — a phrase that has no prior meaning or context where immigration laws are concerned.

- Another major concern is that there is language in Section 103 that would require the federal government to retain custody of a child unless he or she is repatriated or becomes the "subject of an order under section 235B(e)(1) of the Immigration and Nationality Act" (a coy way of avoiding saying in straightforward language "given a green card"). While there are many objectionable things about the way the government is presently turning children over to ostensible relatives, many of them also illegally in the United States, there is a kind of "all or none" quality to this provision in the bill. Assuming that such a provision were found constitutional (questionable in the extreme, given the Supreme Court's *Zadvydas* decision, which precludes indefinite detention of adults), it will inevitably drive the government toward granting status rather than risk becoming permanently involved in retaining a large and growing population of juveniles in long-term facilities, with the attendant risks and moral ambiguities such a course would inevitably involve. The provision is the equivalent of a poison pill.

There is a great deal of irony in considering that, even as Congress has declined to consider legislation to grant resident alien status to long-time illegal aliens under the DREAM Act, the HUMANE Act bill would reward last month's, last week's, and indeed yesterday's arrivals, and in doing so establish a shockingly large incentive for future illegal crossers, especially minors who are the most vulnerable to peril and abuse in any smuggling venture.

## Section 102

This section provides avenues for "expedited" due process and screening for unaccompanied alien children by establishing a new Section 235B ("Humane and Expedited Inspection and Screening for Unaccompanied Alien Children") within the Immigration and Nationality Act (INA).

- Although the section heading refers to "expedited" procedures, the language in fact *eliminates* the possibility of using existing INA procedures for expedited removal, even for juveniles who have not been subject to severe forms of trafficking under the TVPRA, and instead requires hearings in front of an immigration judge. What is more, hearings may only be conducted *without* the alien present ("present" defined as in person, by video, or via telephone) by agreement of both parties. What happens if the alien absconds? In any other removal proceeding conducted by immigration judges, if an alien flees, the judge has authority to issue an order of removal in absentia. This requirement would oblige the government to freeze the case in place with no resolution, perhaps for years.

- Section 102's amendment of the INA through creation of the new Section 235B also asserts that the burden of proof is on the alien to establish, by a preponderance of evidence, that he "is likely to be entitled to be lawfully admitted to the United States or eligible for any form of relief from removal under this Act." This sounds tough until one considers that an additional provision in the new INA Section 235B embedded in Section 103 pretty much grants every alien child the right to ask an immigration judge to adjust his status unless doing so would be "manifestly unjust". This phrase adroitly shifts the burden to the government: A judge *must* grant the adjustment unless a prosecuting trial attorney can prove that doing so would be "manifestly unjust". How exactly does one do that?

- Section 102 also requires immigration judges to refer the cases of juveniles in proceedings for interview by asylum officers should they or their representatives assert a fear of return. The language states that the asylum officer must find that there is a credible fear of persecution if there is a "significant possibility that the alien could establish eligibility for asylum under section 208." The phrase "significant possibility" is undefined, and explanatory language of what it means is not to be found anywhere in existing statute or regulation, leading to the pertinent question: What is a "significant possibility" and how is that judged? Even those with limited imagination can envision a whole new arena opening up for attorneys to endlessly litigate cases based on the proper meaning of that phrase, since a denial of credible fear theoretically results in removal without further review.

## Section 103

This section asserts a variety of due process protections for unaccompanied alien children.

- The most disturbing provision of Section 103 — the creation of an entirely new provision giving immigration judges the ability to grant resident alien status to unaccompanied alien children — was discussed already, because of its nexus to the language found in Section 101. This provision would be embedded within the Immigration and Nationality Act (INA) at newly created Section 235B, first established within Section 102 of the HUMANE Act. But it is not the only example of flawed, counterintuitive language in that section.

- Existing law makes clear that an "unaccompanied alien child" is one who has no parents or other relatives in the United States. Thus, even if a child is "unaccompanied" during the actual crossing, once he or she is tendered by federal child-care authorities within HHS to his or her family, he or she ceases to be unaccompanied for purposes of the protections extended by TVPRA. The language in Section 103 subtly alters that by describing a child as entitled to special protections (and grants of resident status) if he or she was "unaccompanied" at the time a Notice to Appear in Immigration Proceedings was issued to the child. It is important to understand that, because the Notice to Appear is one of the first documents prepared by immigration officials before they turn the child over to HHS for ultimate resettlement, virtually *every* child will be "unaccompanied" for purposes of this section of law (in stark contrast to the limited definition of a UAC used in TVPRA), and thus entitled to seek the extraordinarily generous provisions embedded by Section 103 in new INA section 235B.

- What is more, Section 103 provides that any child who arrived as a part of *this* surge and who receives an order of removal, can ask that the order of removal be "expunged" in order to seek resident alien status under INA Section 235B. Thus, this act would conclusively prove to the satisfaction of virtually any undecided individual in the multiple countries to our south that we have absolutely no intention of removing any of those who came before him. Why, then, would he hesitate to follow the same course of action?

- Finally, we can expect that fraud (which by some estimates already plagues 30-40 percent of all benefit applications in the immigration system) will rise dramatically as 18-, 19-, or 20-year old aliens purchase bogus documents to falsely prove that they are 17 and thus entitled to adjustment to resident alien status under the new INA Section 235B established by Section 103 of the HUMANE Act.

## Section 104

This provision authorizes the Attorney General to hire and specially train up to 40 immigration judges to administer the new Section 235B of the INA.

- We doubt that 40 judges will be anywhere near a sufficient number — particularly once word gets out that there is a new avenue to obtain green cards for anyone from a country south of the border. It can be expected that additional judges will be diverted from other already overburdened dockets to handle the load, leading to an even longer backlogs for aliens in those other dockets and crippling administration of the immigration courts even further. It can also be expected that, as a result, the number of absconders from the neglected dockets will rise beyond the already staggering 840,000-plus fugitives from the immigration system.

## Section 105

This section would require criminal background and biometric checks to be performed against FBI and individual state databases to prevent children from being placed by HHS in the homes of sexual offenders or human traffickers.

- The intent of the provision is laudable, but will by nature be only partially effective. Many of these children will go into the homes of illegal alien "relatives" about whom little if anything is known — including their very identities. Nor are there at present effective means of checking criminal histories or other databases in the home countries of receiving relatives and sponsors.

## Conclusion

Confronted by daily evidence of an out-of-control border involving tens of thousands of smuggled juvenile aliens, Congress feels a strong imperative to act, and to be *seen* to act by the American public. Unfortunately, Congress is at its best when acting as a deliberative body, not when reacting reflexively to crises or simply trying to show that it can react out of concern for public perceptions.

This latter point is exemplified by the Senate's passage last June of the huge, poorly crafted, and highly deceptive Senate Gang-of-Eight bill. That bill, S. 744, was a Frankenstein of badly stitched-together legislative parts that often canceled each other out — which leads us to ask whether a senator or representative will cynically attempt to use the HUMANE Act as a vehicle to once again attempt to lead that bill toward passage in the House and force it into conference.

We strongly fear that the temptation will be almost irresistible, doubling the amount of harm done to an already tottering immigration system so badly damaged by this administration, all in favor of another bill — this bill — which shows signs of the same kinds of deceptive language that marred the Senate bill: tough up front, eviscerated in the fine print by a form of amnesty to virtually all juveniles from the nations south of us who dare to put themselves into the hands of transnational gangs and immoral border smugglers.

In sum, the HUMANE Act is a well-intended, but deeply flawed, attempt to deal with the crisis. It will almost certainly follow the rule of unintended consequences by expanding the flow of minors and family units from our southern neighbors toward our borders, at great risk to themselves.

We have to ask ourselves: is this truly what we want? Do we wish to become the Pied Piper of Hamelin, luring the youth of Mexico and Central America northward in uncounted numbers?

# Appendix

(Old text is ~~struck through~~. New text is in **red**.)

~~TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT (8 USC 1232(a)), AS AMENDED BY SEC. 101 OF THE "HUMANE ACT" BILL~~ **WILBERFORCE ACT (8 USC 1232(a)), AS AMENDED BY SEC. 101 OF THE "HUMANE ACT" BILL**

**(a) Combating child trafficking at the border and ports of entry of the United States**

**(1) Policies and procedures**

In order to enhance the efforts of the United States to prevent trafficking in persons, the Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to their country of nationality or of last habitual residence.

**(2) ~~Special rules for children from contiguous countries~~ Rules for unaccompanied alien children**

**(A) Determinations**

Any unaccompanied alien child ~~who is a national or habitual resident of a country that is contiguous with the United States~~ shall be treated in accordance with subparagraph (B), if the Secretary of Homeland Security determines, on a case-by-case basis, that—

**(i)** such child has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality or of last habitual residence;

**(ii)** such child does not have a fear of returning to the child's country of nationality or of last habitual residence owing to a credible fear of persecution; and

**(iii)** the child is able to make an independent decision to withdraw the child's application for admission to the United States.

**(B) Return**

An immigration officer who finds an unaccompanied alien child described in subparagraph (A) at a land border or port of entry of the United States and determines that such child is inadmissible under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) may—

**(i)** permit such child to withdraw the child's application for admission pursuant to section 235(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1225 (a)(4)); and

**(ii)** return such child to the child's country of nationality or country of last habitual residence.

**(C) ~~Contiguous country agreements~~ Agreements with foreign countries**

The Secretary of State shall negotiate agreements between the United States and ~~countries contiguous to the United States~~ Canada, El Salvador, Guatemala, Honduras, Mexico, and any other foreign country that the Secretary determines appropriate with respect to the repatriation of children. Such agreements shall be designed to protect children from severe forms of trafficking in persons, and shall, at a minimum, provide that—

**(i)** no child shall be returned to the child's country of nationality or of last habitual residence unless returned to appropriate employees or officials, including child welfare officials where available, of the accepting country's government;

**(ii)** no child shall be returned to the child's country of nationality or of last habitual residence outside of reasonable business hours; and

**(iii)** border personnel of the countries that are parties to such agreements are trained in the terms of such agreements.

**(3) Rule for other children**

The custody of unaccompanied alien children not described in paragraph (2)(A) who are apprehended at the border of the United States or at a United States port of entry shall be treated in accordance with subsection (b).

**(4) Screening**

Within 48 hours of the apprehension of a child who is believed to be described in paragraph (2)(A), but in any event prior to returning such child to the child's country of nationality or of last habitual residence, the child shall be screened to determine whether the child meets the criteria listed in paragraph (2)(A). If the child does not meet such criteria, or if no determination can be made within 48 hours of apprehension, the child shall immediately be transferred to the Secretary of Health and Human Services and treated in accordance with subsection (b). Nothing in this paragraph may be construed to preclude an earlier transfer of the child.

**(5) Ensuring the safe repatriation of children**

**(A) Repatriation pilot program**

To protect children from trafficking and exploitation, the Secretary of State shall create a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security, nongovernmental organizations, and other national and international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.

**(B) Assessment of country conditions**

The Secretary of Homeland Security shall consult the Department of State's Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.

**(C) Report on repatriation of unaccompanied alien children**

Not later than 18 months after December 23, 2008, and annually thereafter, the Secretary of State and the Secretary of Health and Human Services, with assistance from the Secretary of Homeland Security, shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on efforts to improve repatriation programs for unaccompanied alien children. Such report shall include—

**(i)** the number of unaccompanied alien children ordered removed and the number of such children actually removed from the United States;

**(ii)** a statement of the nationalities, ages, and gender of such children;

**(iii)** a description of the policies and procedures used to effect the removal of such children from the United States and the steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual residence, including a description of the repatriation pilot program created pursuant to subparagraph (A);

**(iv)** a description of the type of immigration relief sought and denied to such children;

**(v)** any information gathered in assessments of country and local conditions pursuant to paragraph (2); and

**(vi)** statistical information and other data on unaccompanied alien children as provided for in section 279 (b)(1)(J) of title 6.

**(D) ~~Placement in removal proceedings~~ Expedited due process and screening for unaccompanied alien children**

Any unaccompanied alien child sought to be removed by the Department of Homeland Security, who does not meet the criteria listed in paragraph (2)(A)— ~~except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2),~~

~~**(i)** shall be placed in a proceeding in accordance with section 235B of the Immigration and Nationality Act, which shall commence not later than 7 days after the screening of an unaccompanied alien child described in paragraph (4);~~

**(i)** shall be placed in a proceeding in accordance with section 235B of the Immigration and Nationality Act, which shall commence not later than 7 days after the screening of an unaccompanied alien child described in paragraph (4); ~~placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a);~~

**(ii)** may not be placed in the custody of a nongovernmental sponsor or otherwise released from the custody of the United States Government until the child is repatriated unless the child is the subject of an order under section 235B(e)(1) of the Immigration and Nationality Act;

**(iii)** is eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and

**(iv~~ii~~)** shall be provided access to counsel in accordance with subsection (c)(5).