



2008 Trafficking Law Largely Inapplicable to Current Border Crisis

By Jon Feere

The recent influx of Central American illegal immigrants has resulted in a significant debate about how the United States should deal with the newly arrived families and children. Despite the attention it has received, by its own terms, the “William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008” — a law aimed, in part, at “unaccompanied alien children” who are victims of trafficking — may have little applicability to the current situation on the border:

- It appears that a significant majority of children coming across are not “unaccompanied alien children” according to the definition found in federal law. Federal law defines an “unaccompanied alien child” as an illegal alien under the age of 18 who is without “a parent or legal guardian in the United States”. Data from government agencies suggest that the overwhelming majority of minors arriving on the U.S. border have family in the United States.
- There is little evidence to suggest that the recent arrivals are victims of trafficking, which involves coercion. Instead, families and their children are willing participants in smuggling operations, having paid smugglers to bring them into the United States. As ICE explains, “Human trafficking and human smuggling are distinct criminal activities, and the terms are not interchangeable.”
- Even where the 2008 trafficking act is applicable, provisions within the law allow its application to be limited in “exceptional circumstances”, which — as one prominent Democratic senator recently suggested — might include the current border crisis.

It is important to remember that trafficking laws are not responsible for the current illegal immigration surge and any changes that might be made will likely have little impact. Amending them should not become a distraction from addressing the bigger problem of lax enforcement of existing immigration laws, which continue to encourage people to come to the United States illegally.

Defining the Recent Arrivals. Minors who enter the United States illegally arrive primarily from four countries: Mexico, El Salvador, Guatemala, and Honduras. The most recent arrivals are primarily from Central America. In FY 2009, Mexican minors accounted for 82 percent of the 19,668 children apprehended along the U.S. border, while 17 percent were from El Salvador, Guatemala, and Honduras. Within the first eight months of FY 2014, the proportions had nearly reversed. Of the 47,017 minors apprehended at the border, 25 percent were Mexican and 73 percent were Central American.¹

The latest figures from U.S. Customs and Border Protection show a 106 percent increase in the number of minors entering the United States illegally and that 57,525 such minors have been apprehended between October 1, 2013, and June 30, 2014.²

Deportation records show a steady decline in the number of youths (under age 18) removed from 2008 to 2013. The number of Central American minors deported declined despite the increased number of minors arriving

Jon Feere is the Legal Policy Analyst at the Center for Immigration Studies.

over the last several years. The records confirm that very few of the tens of thousands of Central Americans apprehended by the Border Patrol or ICE in recent years have been sent home, suggesting that the aspirations of tens of thousands of Central Americans now surging across the border are based on a realistic assessment of their chances to remain in the United States.³

Data on whether minors are arriving with family has been difficult to come by, but it is critical in crafting an appropriate response to the situation. It would be helpful to know what percentage of immigrant minors are arriving with family, and secondly, for those who arrive without family, what percentage have family inside the United States. These factors determine the applicability of the 2008 trafficking law.

It is unclear how many minors arriving at the U.S. border come with family members. But what happens to those who arrive on their own is more significant to the analysis. According to a leaked ICE memo, over 77 percent of non-Mexican children arriving at the border without a family member were released to family members inside the United States in FY 2013.⁴ According to advocates and media reports, around 90 percent of non-Mexican and non-Canadian children coming across the border are placed with family or guardians in the United States.⁵ Similar percentages have been noted by some policymakers and agency administrators. HHS Secretary Sylvia Burwell recently testified that approximately 55 percent of released alien children are released to parents and another 30 percent are released to other family members, bringing the total to 85 percent of such children being released to family.⁶ Mark Greenberg, acting assistant secretary within HHS, recently testified that, thus far in FY 2014, approximately 95 percent of children released went to a parent, relative, or non-relative sponsor.⁷

While better data would be helpful, what the available data suggest is that the overwhelming majority of minors arriving at the U.S. border are either with families or will be released to family members or guardians already in the United States. As explained below, children who have family or legal guardians in the United States are not “unaccompanied alien children” under federal law.

Trafficking Is Different from Smuggling

The “William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008” was passed by a Democratic Congress and signed into law on December 23, 2008, by former President George W. Bush. As explained in a press release from Immigration and Customs Enforcement (ICE), the law is named after English abolitionist William Wilberforce, who led the parliamentary movement against the British slave trade in the early 19th century. The law supplements the “Trafficking Victims Protection Reauthorization Act of 2005”, which amended the “Trafficking Victims Protection Act of 2000”.⁸ The aim of these laws is to prevent people from becoming victims of human trafficking and to protect women and children who are often the targets of human traffickers.

Under the “Trafficking Victims Protections Act of 2000” and the acts that amended it, the focus is on “severe forms of trafficking in persons”, which the act defines as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age” or “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁹

The 2000 act explains that, “The term ‘victim of trafficking’ means a person subjected to an act or practice” of the type described above. While it is likely that some of the illegal immigrants who have recently arrived at the U.S. border were subject to difficult, if not horrific, situations, it is incorrect to refer to them as “victims of trafficking” without evidence that they are part of a non-consensual sex trafficking or forced labor ring, for example.

Human smuggling, which is generally consensual and largely what is taking place along the border currently, is different from human trafficking, which generally is done against the will of the person being trafficked. As ICE explains, “Human trafficking and human smuggling are distinct criminal activities, and the terms are not interchangeable.”¹⁰

Children in the 2008 Trafficking Act

The 2008 trafficking act includes a section titled, “Eligibility for interim assistance of children”. The section provides direction to Health and Human Services (HHS) in the instance they come across “credible information that a child ... may have been subjected to a severe form of trafficking in persons”. HHS is tasked with “promptly” determining if the child is eligible for interim assistance, and although an exact definition of “interim assistance” is not given, it likely refers to sheltering and assistance given by non-governmental organizations, for example, as the child waits to be deported or reunited with family in the United States. The assistance can last for a period of up to 90 days and may be extended for an additional 30 days.

The officials who first come into contact with an individual “who is under 18 years of age” and “may be a victim of a severe form of trafficking in persons” have 24 hours to notify the HHS secretary to facilitate the provision of interim assistance.

The phrase “severe form of trafficking” is important because, if an alien meets the definition, it allows for certain benefits. For example, if a federal law enforcement official files an application stating that an alien is “a victim of a severe form of trafficking” and may be a potential witness to such trafficking, the Department of Homeland Security (DHS) secretary can permit the alien to remain in the United States to facilitate the investigation and prosecution of those responsible for the crime. Additionally, law enforcement officials may submit written requests to the DHS secretary to “permit the parole into the United States of certain relatives” of the alien.

Government sources tell the Center for Immigration Studies that, although the Border Patrol and ICE routinely screen minors crossing the border to determine if they are victims of trafficking, there is no provision requiring these agencies to actually certify that a minor is a trafficking victim before the services and legal protections designed specifically for trafficking victims kick in.

All of this is based on the notion that the trafficked alien is a victim of a severe form of trafficking. In the instance where the alien actually hired a human smuggler to bring him across, these benefits likely would not apply.

Defining “Unaccompanied Alien Child”

Even if an illegal immigrant child is determined to be a victim of trafficking, it must also be shown that the child is an “unaccompanied alien child” for the 2008 trafficking act to apply. The act created a section of law titled, “Enhancing Efforts to Combat the Trafficking of Children”.¹¹ The law is aimed at preventing “trafficking in persons” and requires DHS, the State Department, HHS, and the U.S. Attorney General to 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.”

Federal law defines an “unaccompanied alien child” as a person who “has no lawful immigration status in the United States” and “has not attained 18 years of age” and does not have “a parent or legal guardian in the United States”.¹² The last part of this definition is significant in that available data, described earlier, suggest most of the children coming across the border either arrive with family or have a parent or guardian in the United States. In fact, federal officials have been transporting children to these guardians.

Consequently, to the extent the 2008 law applies to “unaccompanied alien children”, it may not apply to a significant majority of minors currently arriving at U.S. borders.

It should be noted that it is unclear what type of paperwork non-familial guardians are being required to sign, if anything, and what type of legal responsibilities attach to the guardian; they may or may not be considered “legal” guardians for the purposes of the 2008 law. It should also be noted that a child coming across may be considered an “unaccompanied alien child” even if he or she does have a parent or guardian in the United States if that person is not “available to provide care and physical custody”, which would include people in convalescent homes or prison, for example.

Canada and Mexico. The 2008 law provides “special rules for children from contiguous countries”, meaning Canada and Mexico. If an immigration officer finds an “unaccompanied alien child” at a land border or port of entry of the United States

and determines that such child is inadmissible, the officer may “permit such child to withdraw” his or her “application for admission” and return the child to the “child’s country of nationality or country of last habitual residence.”

Before doing so, however, the DHS secretary must first determine “on a case-by-case basis” (within 48 hours of apprehension of the child) that the child 1) “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” home; 2) “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” (meaning the alien does not have a valid asylum claim); and 3) “the child is able to make an independent decision to withdraw” his or her application for admission to the United States.¹³

If DHS cannot make this determination within 48 hours, or if the child does not meet the criteria (meaning he or she is a victim of a severe form of trafficking, or fears persecution upon return home, for example) then the child “shall immediately be transferred” to HHS and treated largely the same way as an unaccompanied alien child who is not from either Canada or Mexico.

Unaccompanied Minors from Other Countries. The 2008 law states that “any unaccompanied alien child sought to be removed” by DHS other than those from Canada and Mexico, shall be “placed in removal proceedings” and is generally eligible for relief and voluntary departure at no cost to the child. By contrast, unaccompanied alien children from Canada and Mexico do not necessarily face a formal removal proceeding.

The law requires “[e]xcept in the case of exceptional circumstances” that any department or agency of the federal government that has an unaccompanied alien child in custody to transfer the custody of such child to the HHS secretary within 72 hours after determining that such child is, in fact, an unaccompanied alien child. It is unclear what would count as “exceptional circumstances,” but perhaps a massive surge in illegal immigration could be taken into account. In fact, Sen. Dianne Feinstein (D-Calif.) recently told DHS Secretary Jeh Johnson at a Senate hearing that the “exceptional circumstances” provision in the 2008 act would allow President Obama discretion in how the law is applied in light of the influx of illegal immigration.¹⁴ The senator suggested that amending the law was unnecessary.

Under the law, a non-Mexican, non-Canadian unaccompanied alien child also must be provided access to counsel “to the greatest extent practicable”. Specifically, the provision on counsel provides that the Secretary of HHS “shall ensure, to the greatest extent practicable ... that all unaccompanied alien children who are or have been in the custody of [DHS]” (other than those described under the provisions related to Canada and Mexico) “have counsel to represent them in legal proceedings or matters”. HHS is also required “[t]o the greatest extent practicable” to make every effort to utilize the services of pro bono counsel “who agree to provide representation to such children without charge.”

Again, these provisions only apply to “unaccompanied alien children” who, by definition under federal law, are individuals who do not have family or legal guardians in the United States.

Solutions

Since there is little evidence to suggest that illegal immigrant children currently arriving at the U.S. border are victims of trafficking, and since few can be described as “unaccompanied alien children” under federal law, the 2008 trafficking law has limited applicability to the current border surge. Accordingly, the Obama administration should be limiting its use of the law where possible. Even where the 2008 act is applicable, provisions within the law allow its enforcement to be limited in “exceptional circumstances”.

If President Obama seeks to discourage the current wave of illegal immigration, there are many things that can be done without the need for new legislation or the amendment of trafficking laws.

First and foremost, the president should cease all public discussions about amnesty and the legalization of illegal aliens and instead send a message to would-be illegal aliens that the United States will defend its sovereignty and will not welcome those who seek to violate it. Unfortunately, in his most recent immigration-related speeches, President Obama has repeatedly

pressed to legalize illegal aliens and has suggested he would do so unilaterally if Congress refuses to act. Such commentary can only encourage more people to attempt to enter the United States illegally.

Secondly, the Obama administration should stop invoking trafficking laws in situations that involve smuggling. It was never the intent of Congress that legislation aimed at helping trafficking victims be used to benefit illegal immigrants who are willingly being smuggled into the United States. Not only does the much-discussed 2008 trafficking act include language that allows for its application to be narrowed in exceptional circumstances; it is largely inapplicable to the problem at hand, anyhow. Not applying it would likely allow for faster processing of aliens from non-contiguous countries.

It is important that the administration go after the smuggling operations in order to stop some of the illegal immigration. It is difficult to determine who the smugglers are, however, unless ICE is able to interview the people who are paying them: the families of illegal alien minors. It might make sense to offer benefits or incentives to those illegal immigrants who give good information about the smuggling rings. But under current policies, illegal immigrant parents are being allowed to walk away and the smuggling operations continue.

Those involved in smuggling should be prosecuted to the fullest extent possible. This would include the “coyotes” as well as families paying for their services. As ICE explains, human smuggling involves a “deliberate evasion of immigration laws”.¹⁵ Tolerating such violations encourages more smuggling. Actual enforcement against those involved could quickly stop some of the operations.

When an illegal immigrant child is turned over to family members in the United States, ICE should interview them to learn about the smuggling activity, make a determination of their immigration status, and apply the appropriate law. Those who are here illegally should be put into deportation proceedings. Until it is clear that the United States does not tolerate illegal immigrants participating in smuggling, there is every reason to believe the dangerous phenomenon will continue.

The Obama administration could make better use of Expedited Removal, an authority created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which allows immigration officers to quickly remove any inadmissible alien who is without a valid claim of asylum. It results in a final order of removal and prohibits the alien from reentering the United States for a period of five years. Most significantly, it circumvents any judicial involvement. As written into law, the policy applies to any illegal alien apprehended anywhere in the United States, provided the alien has not been continuously physically present in the country for longer than two years.¹⁶ Since the Obama administration claims to seek the quick repatriation of recently arrived illegal aliens, it naturally would want to make use of Expedited Removal.

Additionally, the Obama administration should negotiate repatriation agreements with countries that are seeing its people attempt to enter the United States illegally so that they can be returned home more quickly and efficiently. This does not require new legislation. Such agreements are critical during an emergency situation.

Ending Temporary Protected Status (TPS) for nearly 300,000 Central Americans, many of whom are here because of natural disasters that occurred nearly 16 years ago, could also discourage more illegal immigration. Honduras and Nicaragua nationals received TPS because of Hurricane Mitch in 1998, while nationals from El Salvador received TPS status because of earthquakes in 2001. Some argue that the presence of Central Americans with on-going TPS status encourages more people to come here illegally to reunite with TPS recipients. Very little discussion occurs when the White House extends this status every 18 months, and the Obama administration has made little effort in explaining its justification for extending the “temporary” status seemingly indefinitely.

Again, all of this assumes that the goal is to stop the current influx of illegal immigration. Those who do not view the current situation as a humanitarian or border “crisis” are likely not so interested in discouraging more people from coming here illegally. The Obama administration appears to be hiding behind the 2008 law and acting like it requires them to allow the current wave of illegal immigration to continue. Yet the trafficking statute has little applicability to the situation at hand. Even without new legislation, the White House has a number of tools at its disposal to discourage the current influx of illegal immigrant families.

End Notes

¹ Lisa Seghetti, Alison Siskin, Ruth Ellen Wasem, “Unaccompanied Alien Children: An Overview”, Congressional Research Service, June 23, 2014. For a detailed demographic analysis of the Central American population in the United States, see Steven Camarota, [“Central American Immigrants in the U.S.”](#), Center for Immigration Studies, July 2014.

² [“Southwest Border Unaccompanied Alien Children”](#), U.S. Customs and Border Protection.

³ Jessica Vaughan, [“Records Reveal Few Central Americans Deported”](#), Center for Immigration Studies, June 2014.

⁴ The 77 percent figure includes mothers, fathers, adult siblings, uncles, aunts, and grandparents. The [memo](#) notes that the remainder were discharged “to more distant relatives, family, or associates”.

⁵ See, e.g., Alan Greenblatt, [“What’s Causing The Latest Immigration Crisis? A Brief Explainer”](#), National Public Radio, July 9, 2014.

⁶ [Testimony of Sylvia Burwell](#), secretary of the U.S. Department of Health and Human Services, before the U.S. Senate Committee on Appropriations, July 10, 2014.

⁷ [Testimony of Mark Greenberg](#), acting assistant secretary, Administration for Children and Families, U.S. Department of Health and Human Services, before the U.S. Senate Committee on Homeland Security and Governmental Affairs, July 9, 2014.

⁸ [“President Bush signs William Wilberforce Trafficking Victims Protection Reauthorization Act to combat Human Trafficking”](#), Press Release, Immigration and Customs Enforcement, December 23, 2008.

⁹ 22 U.S.C. §7102, Definitions. See also, [“Definition of ‘Severe Forms of Trafficking in Persons’”](#), Department of State, (defining terms in the Trafficking Victims Protection Act).

¹⁰ [“Fact Sheet: Human Trafficking and Smuggling”](#), Immigration and Customs Enforcement, January 16, 2013.

¹¹ 8 U.S.C. §1232.

¹² 8 U.S.C. §1232 is the statute in which the “William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008” is located. The statute cites to the definition of “unaccompanied alien child” at §1232(g), and refers to 6 U.S.C. §279(g) (2).

¹³ In 2009, DHS issued a policy that has largely resulted in the three-prong test being applied to all unaccompanied alien children, even though the statute only requires this for children from contiguous countries. See congressional [testimony of Acting Deputy Assistant Secretary Kelly Ryan](#), September 13, 2011: “CBP issued guidance in March 2009, requiring its officers and agents to screen all UAC for these three risk categories at CBP ports of entry and Border Patrol sector stations”.

¹⁴ Congressional hearing, [“President’s Emergency Supplemental Request”](#), Committee on Appropriations, July 10, 2014.

¹⁵ [“Human Smuggling”](#), Immigration and Customs Enforcement (viewed July 14, 2014).

¹⁶ Both the Clinton and G.W. Bush administrations chose to administratively limit the scope of Expedited Removal. The Clinton administration implemented Expedited Removal only at a few ports of entry, while the Bush administration decided not to use the removal process for Mexican or Canadian aliens. After 9/11 the process started being used at more ports of entry, but only for non-Mexican, non-Canadian aliens apprehended within 100 miles of the borders, and only if the alien was apprehended within 14 days of entry.