



Unaccompanied Alien Children and the Crisis at the Border

By Andrew R. Arthur

Summary

The number of unaccompanied alien children (UAC) apprehended entering illegally along the Southwest border, which had bottomed out in April 2017 following the inauguration of Donald Trump, surged almost 685 percent by February 2019. Similarly, the number of UACs deemed inadmissible at the ports of entry along that border surged 385 percent between March 2017 and February 2019.

Those UACs, and migrants from Central America (from which most of the UACs hail) generally, face great dangers in traveling to the United States. In May 2017, Doctors Without Borders (commonly known by its French acronym “MSF”) reported that more than two-thirds of the migrant and refugee populations entering Mexico reported being victims of violence during their transit toward the United States and that almost one-third of women surveyed had been sexually abused during that trip. The United Nations has also reported that the smuggling of aliens is big business for criminal organizations, valued at \$3.7 to \$4.2 billion a year. The processing of those migrants has in addition placed a huge burden on the Border Patrol, both in terms of manpower and in financial costs for humanitarian aid.

Flawed U.S. laws and policies encourage UACs to make that trip to the United States, and encourage the parents and other relatives of those UACs to pay criminal organizations to bring them to this country. In particular, by law, the Department of Homeland Security (DHS) is required to turn all of those UACs from non-contiguous countries (that is every country other than Canada and Mexico) over to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) within 48 hours of the point at which they were identified as UACs, for prompt placement in the least restrictive setting “that is in the best interest of the child”. In FY 2018, the average UAC spent 60 days in an ORR shelter before being released.

Generally, most are released to a parent or other family member in this country, the majority of whom do not have lawful status in the United States. This legal requirement makes the U.S. government a de facto co-conspirator with the smuggling organizations. Not surprisingly, the number of UACs from those non-contiguous countries (especially the Northern Triangle of Central America (NTCA) countries of El Salvador, Guatemala, and Honduras) has surged in recent years as family members in the United States and UACs have exploited this loophole.

Those UACs are supposed to subsequently appear for removal proceedings in immigration court after release, but often failed to do so. In fact, in half of all case completions involving UACs, the alien failed to appear for court, compared to an already high average of 25 percent for aliens generally.

The Changing Demographics of Migrants Entering Illegally

In the past eight years, the demographic makeup of the population of aliens who have been apprehended entering the United States illegally between the ports of entry or who are deemed inadmissible at those ports of entry along the Southwest border has changed dramatically.

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Specifically, as DHS noted in an April 4, 2018, press release, prior to FY 2011, over 90 percent of arriving aliens were single adult males, and 90 percent were Mexican nationals.¹ In the first four months of FY 2019, by comparison, just less than 60 percent of all the aliens apprehended along the Southwest border were unaccompanied alien children (UACs) and aliens traveling in family units (that is, parents or legal guardians traveling with children), as were just less than 48 percent of all aliens deemed inadmissible at the ports of entry along that border.²

Further, the vast majority of those UACs and family units who are now being apprehended are from the Northern Triangle of Central America (NTCA) countries of El Salvador, Guatemala, and Honduras. Specifically, of the 26,937 UACs who were apprehended along the Southwest border in the first five months of FY 2019, 12,576 (almost 47 percent) were from Guatemala, 6,696 (almost 25 percent) were from Honduras, and 3,115 (11.5 percent) were from El Salvador.³ Of the 136,150 family-unit apprehensions along the Southwest border in that time frame, 66,470 (almost 49 percent) were from Guatemala, 51,669 (almost 38 percent) were from Honduras, and 11,957 (almost 9 percent) were from El Salvador.⁴

By contrast, as the Congressional Research Service (CRS) has noted: “In FY2009, Mexican UAC accounted for 82 [percent] of 19,668 UAC apprehensions, while the other three [NTCA] countries accounted for 17” percent.⁵

The percentage of NTCA nationals who were deemed inadmissible along that border is smaller, but still significant. Of the 2,039 UACs who were deemed inadmissible in the first five months of FY 2019, 450 (22 percent) were from Guatemala, 324 (almost 16 percent) were from Honduras, and 67 (three percent) were from El Salvador.⁶ Of the 21,968 aliens traveling in family units who were deemed inadmissible, 3,275 (almost 15 percent) were from Guatemala, 2,733 (12 percent) were from Honduras, and 880 (four percent) were from El Salvador.⁷ Logically, the vast majority of the UACs and family units who were apprehended seeking admission fraudulently or with no documents were Mexican nationals; if deemed inadmissible, they could simply return to Mexico and either seek readmission later or enter illegally.⁸

According to ORR, in FY 2018, 54 percent of all UACs were from Guatemala, 26 percent were from Honduras, and 12 percent were from El Salvador.⁹ Of those UACs, 72 percent were ages 15 and older, with 35 percent being age 17, the cut-off age under the UAC definition.¹⁰

ORR has reported that 49,100 UACs were referred to that office in FY 2018, down from a high of 59,170 in FY 2016, but far above the seven-year low of 13,625 in FY 2012.¹¹ Notably, there were previous surges in the number of UACs apprehended along the Southwest border in both 2014 and 2016.¹²

Responsibility for the Apprehension, Custody, and Placement of UACs

Several different agencies bear responsibility for the apprehension, custody, and placement of UACs, respectively.¹³ As CRS has explained:

*DHS’s Customs and Border Protection (CBP) apprehends and detains unaccompanied children arrested at the border. DHS’s Immigration and Customs Enforcement (ICE) handles custody transfer and repatriation responsibilities, apprehends UAC in the interior of the country, and represents the government in removal proceedings. HHS’s [ORR] coordinates and implements the care and placement of unaccompanied children in appropriate custody.*¹⁴

In addition, the Executive Office for Immigration Review (EOIR), the Department of Justice (DOJ) component with jurisdiction over the immigration courts and the Board of Immigration Appeals (BIA), is responsible for the removal proceedings for those UACs.¹⁵ Further, under section 208(b)(3)(C) of the Immigration and Nationality Act (INA), U.S. Citizenship and Immigration Services (USCIS) within DHS has jurisdiction over asylum applications filed by UACs, even if an initial asylum application is filed while a UAC is in removal proceedings.¹⁶ Normally, only the immigration courts have jurisdiction over such “defensive” asylum applications.¹⁷

The Criminal Cost of Human Smuggling

The trip from the NTCA to the United States is a dangerous one, largely controlled by criminals for whom smuggling is big business. The proceeds of that smuggling go to fund other criminal organizations that are undermining the rule of law in Mexico and the United States.

Smuggling, UACs, and Crime

Alien smuggling undermines the rule of law, both in the United States and abroad.

The Obama administration identified a nexus between human smuggling networks and other transnational crimes. Specifically, on July 25, 2011, the staff of the Obama National Security Council released its “Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security.”¹⁸ A section therein captioned “Transnational Organized Crime: A Growing Threat to National and International Security” stated:¹⁹

Human smuggling is the facilitation, transportation, attempted transportation, or illegal entry of a person or persons across an international border, in violation of one or more countries’ laws, either clandestinely or through deception, whether with the use of fraudulent documents or through the evasion of legitimate border controls. It is a criminal commercial transaction between willing parties who go their separate ways once they have procured illegal entry into a country. The vast majority of people who are assisted in illegally entering the United States and other countries are smuggled, rather than trafficked. International human smuggling networks are linked to other transnational crimes including drug trafficking and the corruption of government officials. They can move criminals, fugitives, terrorists, and trafficking victims, as well as economic migrants. They undermine the sovereignty of nations and often endanger the lives of those being smuggled.

Not surprisingly, as the United Nations Office on Drugs and Crime (UNODC) has reported, human smuggling is a large and profitable criminal enterprise. Specifically, in its 2018 Global Study on Smuggling of Migrants, UNODC estimated the revenue for smugglers along the land route to North America to have been between \$3.7 billion and \$4.2 billion per year from 2014 to 2015.²⁰ Needless to say, as the number of aliens smuggled goes up, this figure can be expected to rise.

A significant amount of that money ends up in the pockets of the Mexican drug cartels, as Univision explained in a December 2016 article that told the story of one smuggler named Ramón.²¹ That article describes Ramón’s “contacts” throughout Central America and southern Mexico who feed his “clients” to him at the border.²² It continues:

Drug cartels that operate along the Mexico-U.S. border are another tentacle in the migrant smuggling business.

“They are our ticket into the United States, because they are the ones who control the border,” the coyote said. In Reynosa and the surrounding state of Tamaulipas, the Gulf Cartel controls the border. Los Zetas control regions to the west.

Ramón said he pays the cartel for each client; more for adults, less for minors. The cartel’s men sometimes show up before the groups cross, to count the migrants and make sure the coyotes pay the right amount.

“If you fail to pay for just one person, you are breaking your word. And your word is the only thing that counts here,” he said.

If he doesn’t pay?

“They will kill us,” he added. “And I’m not just saying that.”²³

A March 2019 article from the *Texas Tribune* states that the Gulf Cartel, which controls areas of the Rio Grande Valley across from McAllen, Texas, in the Mexican city of Reynosa, was charging “a ‘tax’ of \$1,000 to \$1,500 per person to let migrants cross its territory.”²⁴

The Council on Foreign Relations succinctly describes the effect those cartels are having on Mexico:

Mexican authorities have been waging a war against drug trafficking organizations for more than a decade, but with limited success. Thousands of Mexicans, including politicians, students, and journalists, continue to die in the conflict every year. In 2018, homicides hit a new high at more than twenty-eight thousand; many were linked to drug cartels.²⁵

That article goes on to describe the role that those cartels play in trafficking drugs to the United States:

Mexican drug trafficking organizations (DTOs) are the largest foreign suppliers ... of heroin, methamphetamines, and cocaine to the United States, according to the U.S. Drug Enforcement Administration (DEA). Mexican suppliers are responsible for most heroin and methamphetamine production, while cocaine is largely produced in Bolivia, Colombia, and Peru, and then transported through Mexico. Mexican cartels are also leading manufacturers of fentanyl, a synthetic opioid many times more potent than heroin. U.S. seizures of the drug have soared in recent years.²⁶

The U.S. Drug Enforcement Administration, in turn, makes clear the human toll of those drugs on the U.S. population:

Illicit drugs, as well as the transnational and domestic criminal organizations who traffic them, continue to represent significant threats to public health, law enforcement, and national security in the United States. Drug poisoning deaths are the leading cause of injury death in the United States; they are currently at their highest ever recorded level and, every year since 2011, have outnumbered deaths by firearms, motor vehicle crashes, suicide, and homicide. In 2016, approximately 174 people died every day from drug poisoning. ... The opioid threat (controlled prescription drugs, synthetic opioids, and heroin) has reached epidemic levels and currently shows no signs of abating, affecting large portions of the United States. Meanwhile, as the ongoing opioid crisis justly receives national attention, the methamphetamine threat remains prevalent; the cocaine threat has rebounded; new psychoactive substances (NPS) are still challenging; and the domestic marijuana situation continues to evolve.

The cartels also produce and smuggle vast quantities of marijuana into the United States, but legalization of the drug in some U.S. jurisdictions and Canada has pushed DTOs to refocus on harder drugs, such as heroin, whose demand has skyrocketed with the rise of the U.S. opioid epidemic. Mexican heroin production increased by 37 percent between 2016 and 2017 alone.²⁷

To reiterate: the smuggling of migrants the United States is a big business for the criminals who are involved, and the downstream effects of that business have consequences both north and south of the Southwest border.

Cartels and their numerous illicit operations are not the only criminal dangers that lax American laws relating to UACs pose to the United States.

As CRS has reported:

There is also a current debate about the relationship between gangs such as MS-13 and unaccompanied alien children (UAC) arriving in the United States. Some have suggested that MS-13's presence in Central America could continue to drive unauthorized migration into the United States by those seeking to escape the gang and its violence. There are also concerns that MS-13 may exploit the U.S. Southwest border by bringing young gang members from Central America to the United States as UAC or may recruit some of the vulnerable UAC to join the gang's ranks once in the United States.²⁸

The danger posed by MS-13 in the NTCA has been well documented, and many asylum claims from that region are based on threats from the gang. Those threats do not end at the border. CRS has described some of the criminal activities of that gang in this country:

In the United States, MS-13 gang members have been involved in local crimes including extortion, drug distribution, prostitution, robbery, and murder, as well as in more transnational illicit activity such as drug trafficking and human smuggling and trafficking. While some of the illegal activities help support the gang's criminal finances, others facilitate the maintenance of territory as well as gang brand and unity.

MS-13 has a reputation for particularly violent criminal activity. Some experts see this violence as serving both internal and external purposes. Internally, violence may help recruit — it serves a brand-identifying purpose — in addition to providing discipline and cohesion. Externally, it can help establish territory as well as social and political control.

In recent years, this violence has been demonstrated in a reported wave of violent homicides and other criminality attributed to MS-13 in certain locales. For example, authorities have been investigating a spate of killings and other violent activities on Long Island, NY, attributed to MS-13. In May 2017 testimony before the Senate Judiciary Committee, the Suffolk County (NY) police commissioner estimated that since 2016, 38% of murders in the county were attributable to MS-13. In a series of five superseding indictments, federal prosecutors with the Eastern District of New York have indict-

ed two dozen MS-13 members with crimes including at least 15 murders, as well as assaults, arson, and drug distribution. The series of indictments includes charges in the high-profile killings of teenagers Nisa Mickens and Kayla Cuevas.

Illustrating a potential increase in MS-13 activity in the Washington, DC, metro area, some suburban jurisdictions have seen an increase in the number of MS-13 members in their county jails. As of February 2018, the Montgomery County, MD, jail reported a 20% increase in the MS13 population over the previous year. During that same time, the number of MS-13 members in jail increased by 32% in the Prince William County, VA, jail and doubled in the Fairfax County, VA, jail.²⁹

My colleague Jessica Vaughan has explained that MS-13 has exploited UAC loopholes to both bring gang members to the United States, and to recruit other UACs who had already entered:

ICE and other law enforcement agencies moved aggressively against MS-13 beginning in 2005, seeking to disrupt activities, arrest, prosecute and deport gang members and associates where possible, and dismantle individual cliques and criminal enterprises. The gang's strength was significantly diminished and soon ICE shifted focus to other gangs it considered to be a greater threat.

Today, a smaller percentage of MS-13 members is believed to be here illegally. Some are U.S.-born, others have obtained green cards or have Temporary Protected Status; some have Deferred Action For Childhood Arrivals (DACA). But when the gang leadership decided to launch a more concerted effort to enlarge in the United States, it was able to take advantage of the Obama administration's catch-and-release policies for unaccompanied minors apprehended at the border to move in younger members from Central America. For example, one MS-13 clique leader in Frederick, Md., who had received a DACA work permit and was employed as a custodian at a middle school in Frederick, Md., and who was recently incarcerated for various gang-related crimes, reportedly was told by gang leaders in El Salvador to take advantage of the lenient policies on UACs to bring in new recruits, knowing that they would be allowed to resettle in the area with few questions asked. Several of these unaccompanied minors now have been arrested and incarcerated for various crimes, including a vicious random attack on a sheriff's deputy in 2015.

In addition, the influx of tens of thousands of teenagers, mostly male, into areas where the gang already had a presence, provided a large pool of youths from which to recruit new members. According to local gang investigators, these gangs have been aggressively recruiting recently arrived Central American children as young as 10 years old.³⁰

Further, as DHS has noted, “a June 2017 review of UACs in the custody of [ORR] found that 39 of 138 UACs (28%) were involved with gangs, with the vast majority of those involved voluntarily.”³¹

The proceeds from MS-13 criminal activities in the United States get funneled back to the gang in the NTCA, as the Obama Treasury Department explained when it designated the gang as a “significant Transnational Criminal Organization (TCO)”:

Local MS-13 cliques take direction from the group's foreign leadership for strategic decisions involving moves into new territories and efforts to recruit new members. Money generated by local MS-13 cliques in the U.S. is consolidated and funneled to the group's leadership in El Salvador.³²

Again, to reiterate: Many foreign nationals from the NTCA (including many if not most UACs) claim in applying for asylum that they fear harm of the hands of criminal gangs, and in particular MS-13, in their home countries. At the same time, the lax immigration policies that encourage those aliens to enter the United States are exploited by that gang to both bring in new members and to recruit UACs who have already entered to assist it in its violent criminal activities in the United States. The proceeds from those activities, in turn, are funneled back to the NTCA to support MS-13's violent criminal activities there.

Dangers Faced by Migrants from the NTCA

Human smuggling also imposes a significant human cost on those who are smuggled, even voluntarily, as again the Obama administration admitted. In an August 2014 press release, for example, the White House spoke of “the criminal organizations and smuggling rings that are exploiting” illegal entrants, and described the journey of children and adults “from Central America — at the hands of smugglers” as “unbelievably dangerous.”³³

Among the initiatives described therein was the:

*Dangers Awareness Campaign, an aggressive Spanish-language outreach effort and an urgent call to action to community groups, the media, parents and relatives in the U.S. and Central America to not put the lives of children at risk by attempting to illegally cross the southwest border.*³⁴

Specific instances of danger to those migrants as they traveled through the United States were detailed in August 2014 by *National Geographic* reporter Scott Johnson.³⁵ The perils of the journey were also earlier described in a March 2014 broadcast of “All Things Considered” on NPR captioned “The Rarely Told Stories of Sexual Assault against Female Migrants.”³⁶ The transcript includes descriptions of sex trafficking and sexual assault of migrants on the journey north through Mexico and into the United States.³⁷

It tells of a pharmacy in the northern Mexican city of Altar where female migrants go for birth control to prevent pregnancies in case they are raped, as well as a story of a mother who “was confused why a coyote at the start of the trip would offer her and other women birth control.”³⁸ The reason became apparent when she could not keep up with the group, and one of the coyotes agreed to wait for her in exchange for sex with her daughter. She refused, and the pair “only survived because they found Border Patrol.”³⁹

More recent reports tell a similar story. In May 2017, MSF issued a report captioned “Forced to Flee Central America’s Northern Triangle, A Neglected Humanitarian Crisis.”⁴⁰ Among the findings in that report was the fact that “68.3 percent of the migrant and refugee populations entering Mexico reported being victims of violence during their transit toward the United States” and that almost “one-third of the women surveyed had been sexually abused during their journey.”⁴¹ MSF patients cited therein “reported that the perpetrators of violence included members of gangs and other criminal organizations, as well as members of the Mexican security forces responsible for their protection.”⁴²

That MSF report also describes some of the physical hazards that those migrants face during their journey: “Migrants and refugees walk for hours in high temperatures, on unsafe and insecure routes to evade authorities, ... risk falling from the cargo trains that transport them along the route, or ride on overcrowded trucks without food, water or ventilation for hours.”

Each of these are dangers that the Trump administration (as the Obama administration before it, as I have noted previously) has attempted to prevent through its border policies. At the present time, however, due to the aforementioned loopholes, those policies have been unsuccessful.

Additional Costs to Process the Changing Migrant Flow

The processing of aliens apprehended by the Border Patrol is a costly and complex endeavor. As then-Acting Border Patrol Chief Ronald Vitiello told Congress in May 2016:

*All individuals apprehended by [U.S. Border Patrol (USBP)] are subject to an immigration inspection, which includes interviewing the subject to establish identification, capturing biometric information (e.g. photograph and fingerprints), entering information into a DHS case tracking and processing system, and checking biographic and biometric records against multiple databases for previous immigration encounters and removals. USBP also checks multiple crime and terrorist databases, including the National Crime Information Center (NCIC) for wants/warrants and criminal history, and the TECS database for possible lookouts. If derogatory information is discovered, the records are reviewed by Border Patrol agents and evaluated to determine if a criminal or administrative proceeding, or enforcement action, should be pursued. If there is a want or criminal warrant in the NCIC, the corresponding Federal, state, tribal, or local agency is contacted.*⁴³

Needless to say, this is not quick work in the best of circumstances. The processing of aliens traveling in family units and UACs (particularly those who are “other than Mexican” or “OTMs”), however, is much more complex and time consuming for the Border Patrol than the processing of single, adult, male Mexican nationals, as I detailed in a February 10, 2019 post.⁴⁴

When the agents have a medical situation involving a child in a family unit, they have to stop the processing of the entire family as long as the child is sick and in medical care. It is no wonder that the so-called “time in processing” [TIP] for aliens apprehended in the Yuma Sector has increased from eight hours in 2005, when the majority of aliens who were

apprehended were Mexican nationals who could be quickly returned across the border, to 78 hours today, when the majority of aliens who are apprehended are ... OTM ... family groups.

These OTMs also require additional processing because of the added paperwork associated with their cases: determining their route of travel to the United States, taking biometrics, processing those who will be placed into removal proceedings, and planning for the return of those who will not be.

...

In any event, that additional processing time also comes at a cost, another one that saps resources away from the Border Patrol's vital national security mission.

The changing demographics of the aliens who are entering illegally, and the increase in the TIP for those migrants, has also caused logistical issues for the Border Patrol. The processing facilities the Border Patrol uses were built to handle single, adult males, not large numbers of families and UACs. Nonetheless, I have been told, Border Patrol has attempted to keep family units together while they are being processed, but this is not always possible. In no circumstances, however, can UACs be kept with unrelated adults.

Further, as the Government Accountability Office (GAO) has noted, “DHS has historically separated a small number of children from accompanying adults at the border and transferred them to ORR custody for various reasons.”⁴⁵ Such reasons include an inability to confirm a parental relationship, “reason to believe the adult was participating in human trafficking or otherwise a threat to the safety of the child”, or where “the child crossed the border with other family members such as grandparents without proof of legal guardianship”.⁴⁶ As GAO explained: “ORR has traditionally treated these children the same as other UAC.”⁴⁷

The needs for additional manpower and infrastructure are not the only added costs imposed by the changing demographics of the flow of aliens entering the United States along the Southwest border illegally, a fact that I detailed in my February 10, 2019 post:⁴⁸

In FY 2018, the Yuma sector, which has jurisdiction over 126 miles of the border, spent \$350,000 for humanitarian support, according to Justin Kallinger, operations officer for the sector. That money paid for more than \$150,000 in meals, \$15,000 for baby formula and diapers, and \$27,000 for blankets. Already in FY 2019, the sector has spent \$400,000 to cover humanitarian costs, including more than \$240,000 in meals, \$45,000 in baby formula and diapers, and \$33,000 in blankets. All told, the Border Patrol expects to pay \$1.2 billion in humanitarian costs border-wide.

...

Unfortunately, the costs do not end there. In FY 2018, the sector incurred more than \$700,000 in medical care costs to cover 1,700 aliens who were apprehended and who had to be transported to the hospital. Among those who required medical care were a 17-year-old girl, who broke three vertebrae when her smuggler told her to jump from the top of a 30-foot fence, and her 14-year-old sister, who followed after her and fractured her ankle. Other aliens show up sick, particularly children, some of whom are suffering from illnesses not generally seen in modern American society, including mumps, measles, and tuberculosis, as well as others with influenza, scabies, and other skin diseases.

The Care and Custody of UACs

Once UACs have made it to the United States through these perils with the assistance of criminal organizations, they generally go into the care of ORR.

That agency has had jurisdiction over UACs for more than 16 years, beginning with section 462 of the Homeland Security Act of 2002.⁴⁹ That provision is codified at 6 U.S.C. § 279.⁵⁰

Prior to the passage of that bill, responsibility for the detention and release of UACs rested with the former Immigration and Naturalization Service (INS).⁵¹ In exercising that responsibility, since 1997, the INS had been operating under the restrictions set forth in the settlement agreement in *Flores v. Reno*.⁵²

Human Rights First has explained that *Flores* “imposed several obligations on the immigration authorities,” falling into three categories: to release children “without unnecessary delay to, in order of preference, parents, other adult relatives, or licensed programs willing to accept custody”; “to place children in the ‘least restrictive’ setting appropriate to their age and any special needs”; and to “implement standards relating to the care and treatment of children in immigration detention.”⁵³ The Ninth Circuit has made it clear that the *Flores* settlement agreement creates a presumption in favor of the release of alien minors.⁵⁴

It should be noted that *Flores* does not apply only to UACs. In a July 2016 opinion, the Court of Appeals for the Ninth Circuit held that the settlement applies to accompanied *and* unaccompanied alien children.⁵⁵ Under *Flores*, DHS can only detain alien minors for 20 days.⁵⁶

The policies set forth in the *Flores* settlement agreement further encourage UACs to enter the United States illegally, and encourage the parents of UACs to hire smugglers to bring their children to the United States.⁵⁷ Further, they encourage people to bring their own children (or children whom they claim to be their own)⁵⁸ with them when they make the dangerous journey to the United States, thinking they will be released if they are traveling with those children. The agreement has also “incited smugglers to place children into the hands of adult strangers so they can pose as families and be released from immigration custody after crossing the border, creating another safety issue for these children.”⁵⁹

Yet another loophole that encourages the entry of UACs from NTCA countries is the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).⁶⁰ The TVPRA distinguishes between UACs from “contiguous” countries (Canada and Mexico) from aliens who are nationals of “non-contiguous” countries.⁶¹

A UAC from a contiguous country can be returned if the alien has not been trafficked and does not have a credible fear of persecution.⁶² Under the TVPRA, however, OTMs are to be transferred to the care and custody of HHS within 72 hours and placed in formal removal proceedings, even if they have not been “trafficked.”⁶³

Significantly, section 235(c)(2) of the TVPRA requires that each UAC “be promptly placed in the least restrictive setting that is in the best interest of the child.”⁶⁴ That section continues: “A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense,” with a requirement that “placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis ... to determine if such placement remains warranted.”⁶⁵

According to ORR statistics, the average length of time that a UAC remained in that office’s care in FY 2018 was 60 days,⁶⁶ in one of 100 shelters that HHS operates in 17 states.⁶⁷

As CRS has described the placement process, “ORR will arrange to house the child either in one of its shelters or in foster care; or the UAC program reunites the child with a family member.”⁶⁸ Initially, the majority “are cared for ... through a network of state-licensed, ORR-funded care providers that offer classroom education, mental and medical health services, case management, and socialization and recreation.”⁶⁹ That office “oversees different types of shelters to accommodate unaccompanied children with different circumstances, including nonsecure shelter care, secure care, and transitional foster care facilities.”⁷⁰ According to CRS, juveniles may only be held in secure facilities under specific circumstances: if they are “charged with criminal or delinquent actions”; if they “threaten[] or commit[] violence”; they “display[] unacceptably disruptive conduct in a shelter”; they “present[] an escape risk”; are “in danger and ... detained for” their “own safety”; or they are “part of an emergency or influx of minors that results in insufficient bed space at nonsecure facilities.”⁷¹

“The same care providers also facilitate the release of UAC to family members or other sponsors who are able to care for them.”⁷² The Administration for Children and Families (ACF), the HHS component with jurisdiction over ORR, explains that “[t]he overwhelming majority of UACs ‘are released to suitable sponsors who are family members within the United States ... to await immigration hearings.’”⁷³ As of December 2018, ORR had “provided care for and found suitable sponsors for over” a quarter-million UACs.⁷⁴ ACF explains that potential sponsors of UACs must “undergo background checks and complete a sponsor assessment process that identifies risk factors and other potential safety concerns,” including fingerprinting and “a criminal public records check and a sex offender registry check.”⁷⁵ Further, “ORR also conducts background checks on adult household members and individuals identified in a potential sponsor’s care plan.”⁷⁶

A home study is also required by ORR in certain instances before it will release a child.⁷⁷ Home studies are required by law, including for: a child who has been a victim of trafficking; children with disabilities; in instances “where the child has been a

victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened"; as well as "where the child's sponsor clearly presents a risk of abuse, maltreatment, exploitation or trafficking, to the child based on all available objective evidence."⁷⁸ In addition, "per ORR policy, a home study is required for any child to a non-relative sponsor who is seeking to sponsor multiple children, or has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children."⁷⁹ Finally, "ORR requires a home study for children who are 12 years of age and under before releasing to a non-relative sponsor."⁸⁰ In FY 2018, ORR conducted 3,641 home studies.⁸¹

The Trump administration and ORR have been criticized for not placing UACs with sponsors in United States quickly enough, as NPR has reported:

*Advocates for the migrant children say they are being locked up for months when there are family members already living in the United States ready to take them into their homes. Most of the underage migrants are teenagers who trek to the U.S. border from Central America alone or without a parent or legal guardian. They say they're fleeing violent street gangs in their home neighborhoods and most of them ask for asylum. They are allowed to live with sponsors while they await their day in immigration court.*⁸²

Significantly, however, ORR has previously been criticized for not doing sufficient vetting before releasing UACs. For example, in an opinion piece in *USA Today*, E.J. Montini lashed out against ORR for "los[ing] 1,475 migrant children."⁸³ That column includes the following:

The Office of Refugee Resettlement reported at the end of 2017 that of the 7,000-plus children placed with sponsored individuals, the agency did not know where 1,475 of them were.

Sen. Rob Portman, R-Ohio, said, "It's just a system that has so many gaps, so many opportunities for these children to fall between the cracks, that we just don't know what's going on — how much trafficking or abuse or simply immigration law violations are occurring."

A documentary from the PBS program Frontline said that the federal government has actually released some of the minors to human traffickers.

*Imagine that.*⁸⁴

As I explained in a post in response to this issue:

The alien minors who have been released by HHS are the ones that the department has purportedly "lost". But they have not actually been "lost", as HHS explained in a May 28, 2018, press release:

The assertion that unaccompanied alien children (UAC) are 'lost' is completely false. This is a classic example of the adage 'No good deed goes unpunished.' [ORR], which is part of [HHS], began voluntarily making calls in 2016 as a 30-day follow-up on the release of UAC to make sure that UAC and their sponsors did not require additional services. This additional step, which is not required and was not done previously, is now being used to confuse and spread misinformation.

*"These children are not 'lost'; their sponsors — who are usually parents or family members and in all cases have been vetted for criminality and ability to provide for them — simply did not respond or could not be reached when this voluntary call was made. **While there are many possible reasons for this, in many cases sponsors cannot be reached because they themselves are illegal aliens and do not want to be reached by federal authorities. This is the core of this issue: In many cases, HHS has been put in the position of placing illegal aliens with the individuals who helped arrange for them to enter the country illegally. This makes the immediate crisis worse and creates a perverse incentive for further violation of federal immigration law.**"⁸⁵ [Emphasis added.]*

I will return to that final point below. This controversy, however, followed a far more serious, and disturbing case in 2016, that I also discussed in that post:

As the Washington Post reported in January 2016, ... HHS released at least six minors to traffickers who forced them to work on an egg farm in Ohio. A Department of Justice press release explained the scheme:

[Aroldo] Castillo-Serrano recruited the victims, smuggled them into the United States, oversaw money transfers and issued threats to ensure compliance. [Ana Angelica] Pedro-Juan falsely represented herself to government officials as a family friend of the minor victims in order to have them released to her custody. She also oversaw the trailers where the victims were housed and arranged for their wages to be transferred to co-conspirators in Guatemala and elsewhere.⁸⁶

The *Washington Post* article referenced above reported in connection with that matter:

Sponsors are supposed to undergo background checks, fill out a two-page form about their relationship to the child, list the names of others in the household, and check boxes declaring whether anyone in the home has been convicted of a crime or accused of physical or sexual abuse, neglect, or child abandonment. Sponsors who are not parents or guardians are supposed to submit fingerprints.

But that doesn't always happen. In a November letter to Homeland Security Secretary Jeh Johnson and Health and Human Services Secretary Sylvia Mathews Burwell, [Sen. Charles] Grassley complained that background checks are often not thorough, sponsors are not properly vetted and many are not fingerprinted.

Helling said the agency stopped requiring fingerprints for sponsors only briefly, in May 2014. She said the agency still does not require fingerprints from parents who can provide proof of their identity and relationship to the child.⁸⁷

The processing of UACs places ORR in a no-win situation: Take time to adequately vet potential sponsors in the United States, and be accused of (and run the risk of being sued for) using delay tactics to release those UACs to willing sponsors in the United States. Fail to adequately vet potential willing sponsors, however, and be blamed for the inevitable exploitation of, or harm to, at least some portion of that UAC population.

Returning to the vetting process, in assessing the suitability of a potential sponsor, ORR also evaluates that sponsor's ability to ensure that the UAC will appear at all future removal hearings.⁸⁸ Most aliens who are apprehended entering the United States illegally are subject to expedited removal under section 235(b) of the Immigration and Nationality Act (INA).⁸⁹ UACs, however, are not, but rather are placed directly into removal proceedings.⁹⁰ Many fail to appear for those proceedings.

Specifically, according to statistics from the Executive Office for Immigration Review (EOIR), the Department of Justice component with jurisdiction over the immigration courts, the number of UACs who were ordered removed *in absentia*, that is, after failing to appear for immigration court, has skyrocketed from 450 in FY 2010 to 6,662 in FY 2018,⁹¹ an almost 1,500 percent increase during a period of time when the number of UACs apprehended increased about 272 percent (from 18,411 in FY 2010⁹² to 50,036 in FY 2018⁹³). In fact, in FY 2018, half of all case completions involving UACs were *in absentia* orders according to EOIR, compared to an overall *in absentia* average of 25 percent of all case completions.⁹⁴

Further, not all sponsors of UACs are in the United States legally. Between February 2014 and September 2015, for example, 56,000 (80 percent) of UACs were placed with sponsors illegally in the United States and an additional 700 were placed with sponsors in deportation proceedings.⁹⁵ In FY 2014, according to CRS, most of the UACs who were released were placed with parents or legal guardians.⁹⁶

Judge Andrew Hanen of the U.S. District Court for the Southern District of Texas addressed this issue in *U.S. v. Nava-Martinez*, in which the defendant was convicted of smuggling a Salvadoran minor to the United States.⁹⁷ As he stated in his order in that matter:

This is the fourth case with the same factual situation this Court has had in as many weeks. In all the cases, human traffickers who smuggled minor children were apprehended short of delivering the children to their ultimate destination. In all cases, a parent, if not both parents, of the children was in this country illegally. That parent initiated the conspiracy to smuggle the minors into the country illegally. He or she also funded the conspiracy. In each case, the DHS completed the criminal conspiracy, instead of enforcing the laws of the United States, by delivering the minors into the custody of the parent living illegally in the United States. In response to this Court's inquiry about this policy in the instant case,

the Government responded with a copy of the 1997 Flores v. Reno ... settlement agreement and a copy of a portion of the Homeland Security Act. No other explanation was offered — no doubt because there is no explanation. The DHS has simply chosen not to enforce the United States’ border security laws.

...

There is nothing in that settlement that prohibits DHS from arresting [the adult who initiated the smuggling conspiracy and to whom the child was delivered] — or from at least initiating deportation proceedings. ... [T]he is nothing in [section 462 of the Homeland Security Act] that directs and authorizes the DHS to turn a blind eye to criminal conduct, and certainly nothing that compels it to participate in and complete the mission of a criminal conspiracy or to encourage parents to put their minor children in perilous situations subject to the whims of evil individuals.⁹⁸

As Judge Hanen noted, nothing in the *Flores* settlement agreement or section 462 of the Homeland Security Act (or the TVPRA or the INA) prevents DHS from placing any sponsor of a UAC into removal proceedings. Section 224 of the Consolidated Appropriations Act, 2019,⁹⁹ however, effectively bars DHS from using information obtained from HHS “to place in detention, remove, refer for a decision whether to initiate removal proceedings, or initiate removal proceedings against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of” a UAC, with limited exceptions. As Judge Hanen’s logic suggests, this simply encourages parents to have their children smuggled to the United States by criminals with impunity.

It should also be noted that, in addition to placement, ORR also provided post-release services to 14,088 UACs in FY 2018,¹⁰⁰ and that office also conducts post-release checks, as noted above.¹⁰¹ In particular, an ORR case manager will contact the sponsor 30 days after the UAC is released to confirm that the UAC is still living with the sponsor, is in school, knows about upcoming court appearances, and is safe.¹⁰² If the case manager, or any other ORR grantee or contractor having contact with the UAC, is concerned about the UAC’s well-being, they must report their concerns to any relevant investigative agencies, and notify ORR of immediate dangers to a child’s safety or well-being.¹⁰³ Local law enforcement is notified about such concerns to remove the UAC from an unsafe situation.¹⁰⁴

There is no apparent legal requirement that ORR conduct such post-release checks, or be responsible for the post-release care of UACs, although notably Congress is free to implement such requirements.¹⁰⁵ If it were to do so, however, it would be incumbent on Congress to provide ORR the necessary resources to undertake this task.

Finally, it is questionable that Congress intended that most alien minors who are treated by DHS and HHS as UACs should actually have been accorded that status. Section 462(g)(2) of the Homeland Security Act, 6 U.S.C. § 279(g)(2), defines the term “unaccompanied alien child” as a child who:

- (A) has no lawful immigration status in the United States;*
- (B) has not attained 18 years of age; and*
- (C) with respect to whom—*
 - (i) there is no parent or legal guardian in the United States; or*
 - (ii) no parent or legal guardian in the United States is available to provide care and physical custody.¹⁰⁶*

As noted, most UACs are released to parents or guardians in the United States. Given this fact, those alien minors would not appear to be “UACs” under section 462(g)(2)(C) of the Homeland Security Act, 6 U.S.C. § 279(g)(2)(C).

CRS has noted that: “A juvenile is classified as unaccompanied if neither a parent nor a legal guardian is with the juvenile alien at the time of apprehension, or within a geographical proximity to quickly provide care for the juvenile. 8 CFR §236.3(b)(1).”¹⁰⁷ This is not what the statute says, however, and the regulation cited does not support that proposition.¹⁰⁸

This is a significant issue for two reasons. First, UACs with parents in the United States are being transferred to ORR, rather than being detained by DHS, for no apparent reason. Second, ORR spends a significant amount of money to place those UACs with sponsors, without apparent authorization to do so. As GAO has noted:

The Antideficiency Act prohibits federal employees from:

- *making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).*
- *involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).*
- *accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.*
- *making obligations or expenditures in excess of an apportionment or reappropriation, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).¹⁰⁹*

Without specific authorization to treat alien minors as UACs, both DHS (in transporting to ORR) and ORR (in care and placement) would appear to be in violation of the Antideficiency Act.

Factors Encouraging UACs to Enter Illegally

There has been significant debate concerning the reasons why there has been a recent surge in the number of UACs (and family units) entering the United States illegally in recent months.

Some have argued that violence and insecurity in the NTCA countries are driving those aliens to travel to the United States in an attempt to enter illegally. As my colleague Matthew Sussis, has noted:

One of the most common arguments from advocacy groups with regard to the influx of Central American migrants is that these migrants are fleeing violence. Groups such as the ACLU and SPLC cite “gang brutality”, “gang violence”, and fear of murder as reasons why the number of illegal, border-crossing migrants from the Northern Triangle (Honduras, Guatemala, and El Salvador) has soared in recent years.¹¹⁰

After researching the figures, however, Sussis found “no obvious relationship between Central American homicide rates and the number of Central Americans apprehended illegally crossing our border in a year.”¹¹¹ In particular, he noted:

In Honduras, murder rates have fallen by over half since 2011 — from 86.5 per 100,000 to 42.8 per 100,000 in 2017. During that same time, the annual number of apprehensions of Hondurans at the U.S.-Mexico border quadrupled, albeit with fluctuations.

Guatemala saw a very similar trend, with murder rates falling from 38.6 per 100,000 to 19.0 per 100,000 between 2011 and 2017. At the same time, the annual number of Guatemalan apprehensions more than tripled — from approximately 18,000 to 66,000.

El Salvador’s murder rate has seen large annual year-to-year swings, as low as 40 per 100,000 in 2013 and then more than doubling to over 100 per 100,000 in 2015. Meanwhile, the number of Salvadoran border apprehensions has risen dramatically, peaking in 2016.¹¹²

A more logical conclusion for this surge are so-called “pull factors,” that is, “factors in the destination country that attract the individual or group to leave their home.”¹¹³ Anecdotal evidence for this proposition can be found in a series of recent newspaper articles, as I explained in a March 8, 2019 post:

A March 5, 2019 article in the Washington Post captioned “Family migration, already at record levels, rocketed to new high in February” contained the following:

An attractive job market in the United States is prompting more Central Americans to leave the poverty and insecurity of their home countries and head north, typically in groups of one parent and one child. Such pairings all but ensure the family will be processed quickly and released from U.S. custody in a matter of days.

Neither poverty nor insecurity is a basis for immigration relief in the United States, at least for those who enter illegally. The notation in that article that “pairings” consisting “of one parent and one child” will “all but ensure the family will be processed quickly and released from U.S. custody in a matter of days” reflects the flaws in the Flores settlement agreement and TVPRA.

That piece followed an article in the same paper the previous day captioned “Record number of families, cold reality at border” that detailed the entry of families and children along the Southwest border. Included therein was the following:

U.S. court restrictions on the government’s ability to keep children in immigration jails — and the sheer volume of people arriving — have left Homeland Security agencies defaulting increasingly to the overflow model Trump deplores as “catch-and-release.”

Again, the “court restrictions” referenced above is the Flores settlement agreement. That article continues:

It was the first time many of the migrants had been on an airplane. For Dionel Martinez, it was the second.

The 48-year-old Guatemalan came to the United States three decades earlier, working as a landscaper until he was deported — his only other time on a plane.

“We’re going to Pennsylvania,” he said. A friend had arranged a job at a pizzeria there.

With the savings from his first stint in the United States as a young man, Martinez was able to buy some land in his home country and start a family. But a drought this year had left them hungry.

“There was no harvest,” he said. “Not one grain of corn.”

His son Darwin, 13, came with him to the United States this time. The boy fainted during the journey, his father said, when they had to stand for hours in the back of a cattle truck.

Martinez said he paid 30,000 Guatemalan quetzals, about \$2,500, to a “coyote” smuggling guide. It was a cheap rate, but it meant that he and his son traveled through Mexico in trucks, like cargo.

Across rural Guatemala, Martinez said, word has spread that those who travel with a child can expect to be released from U.S. custody. Smugglers were offering two-for-one pricing, knowing they just needed to deliver clients to the border — not across it — for an easy surrender to U.S. agents.

“If this continues, I don’t think there will be anyone left in Guatemala,” Martinez joked. The men from his village near the town of Chiquimula were all leaving, he said, bringing a child with them.

The final six paragraphs above neatly summarize the fact that TVPRA and Flores are driving families with children to undertake the appallingly dangerous trip from Central America to the Southwest border.¹¹⁴

With respect to UACs, Judge Hanen’s logic above, coupled with the fact that most UACs are released to their parents and the fact that Congress has blocked HHS from sharing information about sponsors with DHS for removal purposes would suggest that loopholes in lax immigration laws are encouraging parents of UACs in the United States (including those without status) to pay smugglers to bring their children to this country.

Finally, the presence of those parents in the United States would appear to undermine the claims of fear of their children who remained abroad until being smuggled into the United States. It is difficult to conceive of a scenario in which parents would willfully abandon children in a perilous situation in order to escape to safety themselves. Absent significantly changed circumstances, however, that is the only conclusion that can be drawn if those UACs’ asylum claims are to be believed.

Conclusion

The number of UACs, in particular from the NTCA countries, entering the United States illegally along the Southwest border is large, and growing larger every month.

Nationals of those countries (including UACs) are taking advantage of loopholes in our lax immigration laws to effectuate such entry and to seek economic opportunities in the United States.

This is not to say that violence and corruption are not endemic in the NTCA, or that no asylum claims made by nationals of those countries are valid. If a national of one of those countries, however, (correctly) believed that he or she could enter the United States illegally with a child, and be released shortly thereafter with the ability to remain in this country indefinitely, and thereby make a significantly higher wage, it only makes sense for them to do so.

Similarly, if a foreign national parent in the United States from an NTCA country were to believe (again, correctly) that if he or she paid a smuggler to bring a child to the United States, that the child would be quickly reunited with that parent, it is only logical that the parent would do so. A parent of a UAC who is willing to pay the smuggling fee and risk the safety of that child could offer that child significantly better economic possibilities, educational opportunities, and health care. For many, obviously, that temptation is too great to pass up.

The number of UACs apprehended along the Southwest border will continue to increase until the loopholes that encourage those UACs to enter illegally, and their parents to pay smugglers to bring them, remain, despite the obvious dangers that those UACs face on that journey.

As the number of UACs increases, Border Patrol will be even more overwhelmed by the processing of those UACs (and family units), ICE and the immigration courts will be even more overwhelmed by removal hearings for those foreign nationals, and ORR will be even more overwhelmed by the number of UACs that it must care for and place with sponsors in the United States.

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