

ISSUE BRIEF

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Children Illegally Crossing the U.S. Border: Responding Requires Policy Changes

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In the past several months, the issue of immigration has been dominated by the influx of unaccompanied alien children (UAC) and families crossing the border. These unlawful immigrants are primarily from Guatemala, El Salvador, and Honduras. Immigration policies that are selectively enforced and not properly administered—together with high levels of crime and endemic rates of violence in these countries—have led to this current crisis. Additionally, other U.S. laws against human trafficking are inadvertently contributing to this problem by making it more difficult to return unaccompanied children to Central America.

Reforming such policies is beneficial, but Congress should first:

- Understand how UAC are handled under existing law,
- Recognize the role that anti-enforcement policies play in encouraging illegal immigration, and
- Affirm the importance of both protecting the children and sending a clear message that U.S. immigration laws are being enforced.

Unintended Consequences

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) set up special procedures for handling UAC from non-contiguous nations. The result has been that when Central American children enter the U.S., drawn by hopes of amnesty and fleeing violence (or even simply poverty) in their countries, they are entitled to special processing by the Department of Health and Human Services (HHS) that attempts to reunite them with their families in the U.S.—and is successful about 85 percent of the time.¹ While they are put in formal removal proceedings, this policy is overwhelming the ability of the Department of Homeland Security (DHS), Department of Justice, and HHS to screen, house, and adjudicate cases.

Indeed, many immigrants—regardless of age—will disappear into the U.S. and never appear before an immigration judge. For those who do enter the system, an overwhelmed judicial system could take years to finish the process. Many children can request asylum, though most will not qualify.² Many can also request Special Immigrant Juvenile status, which is available to those children whose reunification with one or both parents is impossible due to abuse, abandonment, or neglect and for whom it is determined that “it would not be in the alien’s best interests to be returned to the alien’s or parent’s previous country of nationality.”³ Even if the process does lead to a deportation order, many illegal immigrants are simply never removed. In 2013, 858,779 immigrants were under a final order to be removed but were not in custody.⁴ Needless to say, few unlawful immigrants turn themselves in to be removed.

This paper, in its entirety, can be found at <http://report.heritage.org/ib4248>

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According to the *Los Angeles Times*, only 1,669 children were deported in 2013 despite 26,206 UAC apprehensions at the southwest border—a figure that, according to revised government estimates, may rise to 90,000 this year alone.⁵

Enforcing the Law

While TVPRA has played a role in making it more difficult for the immigration system to deal with this situation, it did not have to be this way. Section 235 of the Immigration and Nationality Act (INA) explicitly allows for the expedited removal of “any or all aliens” who have not been legally “admitted or paroled in the U.S.” and have not been in the U.S. for more than two years. The use of section 235 is up to the “sole and unreviewable discretion of the Attorney General [now granted to the Secretary of Homeland Security] and may be modified at any time.”⁶ President Obama could arguably use it to deal with this growing problem “at any time.”

Rather than use discretion as it is intended—to better administer the U.S. immigration system—the Obama Administration has used its discretion to lessen enforcement of U.S. immigration laws, which creates an incentive for illegal immigration. Most notable is the Administration’s “enforcement priorities” and “prosecutorial discretion” to exempt large groups of illegal immigrants from deportation.

The most specific example of such discretion used to not enforce the law is President Obama’s unilateral Deferred Action for Childhood Arrivals (DACA) program, which provides work authorization and protection from immigration enforcement to individuals who were brought unlawfully as children before June 2007. Essentially a temporary and Administration-dictated amnesty, DACA harms the rule of law by ignoring the clear text and intent of current immigration law.

The Obama Administration, with DACA and other adverse uses of “discretion,” is creating a powerful magnet for more illegal immigration, since children and their families have hope that they might receive some sort of amnesty, or at least not be deported, if they make it into the U.S. Such magnets are made even stronger by various proposals for amnesty such as the mass amnesty in S. 744, which passed the Senate in June 2013, and the Encourage New Legalized Immigrants to Start Training (ENLIST) Act, which would provide illegal immigrants with access to near-instant citizenship in exchange for military service.⁷

Return and Protect the Children

The TVPRA was designed to protect children from human trafficking—a noble objective—but has been used in ways not imagined when passed. Congress should:

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1. Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem, “Unaccompanied Alien Children: An Overview,” Congressional Research Service *Report for Congress*, June 23, 2014, <http://fas.org/sgp/crs/homesec/R43599.pdf> (accessed July 12, 2014).
 2. See Brett Schaefer, David Inserra, and Steven Groves, “The U.S. Should Dismiss UNHCR Opinion That the Migrants Are Refugees,” *The Daily Signal*, July 10, 2014, <http://dailysignal.com/2014/07/10/u-s-dismiss-unhcr-opinion-migrants-refugees/>.
 3. Deborah Lee et al, “Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,” Immigrant Legal Resource Center, February 19, 2009, pp. 2-4, http://www.ilrc.org/files/235_tvptra_practice_advisory.infonet.pdf (accessed July 12, 2014).
 4. Jessica Vaughan, “Deportation Numbers Unwrapped,” Center for Immigration Studies, October 2013, <http://cis.org/ICE-Illegal-Immigrant-Deportations> (accessed July 12, 2014).
 5. Brian Bennett, “Deportation Data Won’t Dispel Rumor Drawing Migrant Minors to U.S.,” *Los Angeles Times*, July 5, 2014, <http://www.latimes.com/nation/la-na-deport-children-20140706-story.html> (accessed July 12, 2014). See also U.S. Customs and Border Protection, “Southwest Border Unaccompanied Alien Children,” <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (accessed July 12, 2014), and David Rogers, “Johnson Ramps Up Border Projections,” *Politico*, July 10, 2014, <http://www.politico.com/story/2014/07/jeh-johnson-immigrant-children-how-many-border-crisis-108772.html?hp=l8> (accessed July 12, 2014).
 6. 8 U.S. Code 1225, (b)(1)(A), <http://www.law.cornell.edu/uscode/text/8/1225> (accessed July 14, 2014), and 8 U.S. Code 1103, <http://www.law.cornell.edu/uscode/text/8/1103> (accessed July 14, 2014).
 7. Charles Stimson, “The ENLIST Act: A Back Door to Instant Citizenship,” Heritage Foundation *Legal Memorandum* No. 124, May 27, 2014, <http://www.heritage.org/research/reports/2014/05/the-enlist-act-a-back-door-to-instant-citizenship>, and The Heritage Foundation, “The Senate’s Comprehensive Immigration Bill: Top 10 Concerns,” Heritage Foundation *Backgrounder* No. 2819, June 21, 2013, <http://www.heritage.org/research/reports/2013/06/the-senates-comprehensive-immigration-bill-top-10-concerns>.

- **Allow for the expedited return of UAC.** The TVPRA should be reformed so as to remove the burdensome process that applies to UAC from non-contiguous countries. This would allow the U.S. to enter into agreements with other countries to more rapidly return UAC while maintaining key protections for the safety of trafficked children. While this approach is not a silver bullet, it is an important step to clarifying U.S. law.
- **Defund DACA.** Through the normal and currently ongoing appropriations process, Congress should end DHS's ability to carry out the DACA program. Such action would stop one of the elements that are driving the current surge of unlawful immigrants.

President Obama should:

- **Use his authority to enforce the law.** At any point during this crisis, DHS could revise its regulations on the use of expedited removal in section 235 of the INA. Rather than more anti-enforcement executive actions, President Obama should rescind DACA and use his authority to faithfully administer the U.S. immigration system.

The Right Way Forward

While President Obama asked for \$3.7 billion in funding for immigration, he did not ask for important policy changes. The President already has the authority to quickly remove these children. Congress should send a clear message by amending the TVPRA but maintaining critical anti-human-trafficking policies. These actions, together with stopping amnesty-centric policies and improving partner capacity in Latin America, can help the U.S. deal with the influx of unlawful immigrant children in a responsible manner.

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