



# POLICY & ADVOCACY REPORT

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# Where We Stand: A 20 Year Retrospective of the Unaccompanied Children's Program in the United States

The U.S. Committee for Refugees and Immigrants (USCRI) presents the following brief on the state of affairs and significant events that led to the inclusion of unaccompanied children's provisions in the Homeland Security Act of 2002 (HSA), section 462. Throughout this report, we will rely on the HSA's definition of "unaccompanied alien child" (UAC). However, in our terminology, we will prefer "unaccompanied children" (UC).

## Prequel to the Homeland Security Act of 2002

"He had post-traumatic stress disorder when he arrived, and his condition has worsened since he has been here. He has been isolated and terrified. He is shackled whenever he is transferred or brought for a meeting," said Cheryl Little, the attorney representing 14-year-old Alfredo Lopez Sanchez [8]. Sanchez fled Guatemala in June 2001 to escape the severe abuse at the hands of his father, who allegedly killed one of his siblings [13]. He was detained by the former Immigration and Naturalization Service (INS) and was repeatedly shackled and transferred eight times to various detention facilities. Alfredo's situation was exacerbated by the fact that he spoke a rare Mayan dialect [2].

Alfredo was one of the thousands of unaccompanied children taken into custody annually by the INS [9]. At the time, the INS took in approximately 5,000 children annually [9]. The children ranged in age from toddlers to teenagers. Many fled their home countries due to human rights abuses, such as forced marriages, child labor, military recruitment, and armed conflicts. Others fled their homes due to neglect, abuse, or abandonment from a parent or guardian. Before 2003, the INS was a Department of Justice (DOJ) agency that handled legal and illegal immigration and naturalization issues [6]. The purpose of the INS was to protect and enforce the laws of naturalization and handle the process of an individual becoming a citizen of the United States [5].

## Immigration and Naturalization Service Detention Policy

In 1984, to manage the influx of minors arriving in California, Harold W. Ezell, Commissioner of the Western Region of the INS, implemented a policy for children. It detained immigrant children and limited their release to a parent or lawful guardian, except in unusual and extraordinary cases, when the child could be released to a responsible individual who agreed to provide care and be responsible for the welfare and well-being of the child. This policy resulted in the lengthy or indefinite detention of immigrant children. Moreover, the detention conditions during this time were poor: children were strip-searched, held with unrelated adults, and denied educational and recreational opportunities.

Various churches and advocacy groups were alerted by this policy because many unaccompanied children who posed no apparent risk to the community ended up in detention. According to Human Rights Watch, the INS placed one-third of unaccompanied children (including those with minor behavior problems) in a secure juvenile detention center. Children were subjected to being shackled or handcuffed when transported to attend court.

I wanted to understand what was happening in the courtroom while the INS had care and custody of unaccompanied children. I sat down virtually with retired immigration Judge John Richardson, who served for nearly 30 years in Phoenix, Arizona. Richardson was known for his candor and humanity when deciding immigration cases.

"The INS was charged with the care and custody of unaccompanied children, and instead of them being motivated to release the children as quickly as possible, there was no such motivation. The INS gave off this attitude of 'well, let's just let the children wait it out until they are ready to accept their order to return to where they came from.' When a child entered my courtroom, I gave them all my attention. I tried to be comical, get to know them, and find out their hobbies and interests. From my conversations with attorneys, it was the first time they felt in the spotlight for most of the children in my courtroom. They felt listened to as if someone cared for what they had to say and how they felt despite all of the trauma they had experienced."

Prior to passage of the HSA, the Women's Refugee Commission (WRC) conducted a report on the treatment that children asylum seekers received in facilities used by the INS. WRC visited over 40 centers, interviewed INS officials, staff, lawyers, and detained children. To understand what conditions children faced in INS custody, I sat down virtually with Wendy Young, previously with WRC and now President of Kids in Need of Defense (KIND).

"During one visit to Liberty, Texas, we saw that the INS defaulted to using juvenile jails by renting space from the local county. On one occasion, the warden of the facility approached me and said, 'Do you know why the INS is dropping off these children here? They are dropped off during all hours of the day and night. I've assumed that they have committed a crime, but I don't know what they're doing here.' He then proceeded to pull out a torn piece of paper from his trashcan that was a child's notice to appear in immigration court. He had no clue what the notice was for and was throwing them away. Children were being swept into this system designed for adults, and there was no one around to help them. The INS acted as the child's jailer, judge, and parent." [14]

The INS was not the appropriate agency to house children. They were housing children indefinitely; the length of custody could be several months or years. As the government entity charged with enforcing federal immigration law, the INS was not in a position to promote the welfare of unaccompanied children in its custody [7].

## **The Flores Settlement Agreement of 1997**

These poor conditions and policy were challenged by Jenny Lisette Flores, a 15-year-old child who fled to the United States due to the civil war in El Salvador in hopes of reuniting with her aunt. Jenny was arrested near San Ysidro, California, and detained in Pasadena, California, for months. In 1985, the Center for Human Rights and Constitutional Law filed a class-action lawsuit on behalf of Jenny Flores and four other minors detained by the INS challenging procedures regarding children's detention, treatment, and release. The Flores Settlement Agreement is the name of a 1997 court settlement, specifically a consent decree. It is the result of years of litigation. After many years of litigation, including an appeal to the U.S. Supreme Court, the parties settled in 1997.

The *Flores* Settlement Agreement was built on the notion that the INS must treat children in its custody with dignity, respect, and particular concern for their vulnerability as minors. The *Flores* Settlement Agreement aimed to apply child welfare protections to vulnerable immigrant children. The settlement set national standards for the detention and humane treatment, and prompt release of all children detained in the federal government's custody and must still be followed by ORR.

The *Flores* Settlement Agreement imposed several obligations on the immigration authorities, which fall into three broad categories:

1. The government is required to release children from immigration detention without unnecessary delay in order of preference, beginning with parents and including other adult relatives as well as licensed programs willing to accept custody.
2. Concerning children for whom a suitable placement is not immediately available, the government is obligated to place children in the “least restrictive” setting appropriate to their age and any special needs.
3. The government is required to implement standards relating to the care and treatment of children in immigration detention. [10]

*Flores* also laid out minimum standards that licensed programs must comply with, along with any state child welfare laws and regulations.

### **The Unaccompanied Alien Child Protection Act of 2001**

A young unaccompanied Chinese teenager appeared in immigration court in San Francisco and was handcuffed and crying while attending her hearing. The media captured a photograph of the young teen and grabbed the attention of Senator Dianne Feinstein (D-CA). Several advocacy organizations began conversations with Senator Feinstein’s counsel on possible legislation for unaccompanied children and what that would look like. After several months of writing, the Unaccompanied Alien Child Protection Act of 2001 (UACPA) was born.

UACPA was introduced by Senator Feinstein (D-CA) in the Senate and Representative Zoe Lofgren (D-CA) in the House; the bill would have reformed U.S. policy governing unaccompanied children [11]. It would ensure that children were provided appropriate child welfare services and placed in an appropriate setting. A new office within DOJ would have been created and staffed by child welfare professionals. It would have required the appointment of a guardian ad litem to look after the child’s best interest, and it would have provided attorney representation of these children in any immigration proceeding.

Senator Feinstein (D-CA) and Senator Kennedy (D-MA) were the driving forces behind this bill. Once Senator Brownback (R-KA) co-sponsored the UACPA, the bill became bipartisan and received overwhelming support from coalitions. Advocacy groups played a tremendous role in pushing for legislative reform for unaccompanied children. Wendy explained to me that:

"The UACPA was a very comprehensive bill that codified parts of the Flores agreement, addressed care and custody of kids, mandated counselors, and mandated the appointment of a child advocate for children. I would view it as the gold standard of how we should be treating children."

## The Homeland Security Act of 2002

On September 11, 2001, the focus in Congress shifted to national security, and suddenly the UACPA and several other bills stalled. The events of 9/11 led to the introduction of H.R.5005, also known as the HSA [3]. When Congress passed the HSA, it consolidated 22 federal agencies and bureaus into the newly created Department of Homeland Security (DHS) [3]. The passage of HSA permanently abolished the INS. With the abolishment of the INS, I asked Wendy what happened to the Unaccompanied Children's Program? According to Wendy, the night before the HSA introduction:

"I received a call from Senator Kennedy, Senator Brownback, and Senator Hatch's counsel informing me that HSA is being put on the floor. Even though the UACPA was stalled, they wanted to do something with the unaccompanied children's program. That is the moment that we decided to transfer the unaccompanied children's program out of INS and into the hands of the director at ORR."

In the original UACPA bill, the Unaccompanied Children's Program would have been transferred to community relations services in DOJ, but with the HSA, the program was transferred to Office of Refugee Resettlement (ORR). ORR had no stake or interest in the outcome of a child's immigration proceeding, and they had experience working with unaccompanied refugee minors resettled from overseas. Therefore, ORR was given the primary care and custody function. The HSA was such a massive piece of legislation that addressed the critical issue of the moment that section 462, Children's Affairs, was slipped in with zero pushback coming from either side of the aisle because HSA passed with overwhelming support. HSA was the vehicle needed to transfer the Unaccompanied Children's Program out of the hands of the INS. The HSA is the first of two laws and a court settlement that directly guides the treatment and processing of unaccompanied children today.

Although the UACPA did not pass, a component of that bill successfully passed through the HSA. The HSA of 2002, section 462, Children's Affairs, transferred responsibilities for the care and placement of unaccompanied children from the Commissioner of the INS to the Director of ORR [3]. Unaccompanied children apprehended by the Department of Homeland Security (DHS) immigration officials are transferred to the care and custody of ORR.

After the passage of the HSA, Judge Richardson noticed a difference in his courtroom.

"Children were released a lot quicker after the UC program was transferred to ORR. Before HSA, many undocumented relatives were scared to reunite with unaccompanied children due to fear of deportation. There was a difference in attitude. ORR was sympathetic and passionate towards unaccompanied children."

HSA divided ORR responsibilities for the processing and treatment of unaccompanied children between the newly created DHS to ORR [12]. To DHS, the law assigned responsibility for the apprehension, transfer, and repatriation of UCs [12]. To ORR, the law assigned responsibility for coordinating and implementing the care and placement of UCs in the appropriate custody, reunifying UCs with their parents abroad when appropriate, maintaining and publishing a list of legal services available to UCs, and collecting statistical information on UCs, among other responsibilities [12]. The HSA established the definition of “unaccompanied alien child” as a child who- has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom- there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody [3]. The HSA is the first legislation that defines unaccompanied children in the United States.

According to AnnaMarie Bena, Vice President of USCRI, who had been working in ORR when the HSA was passed, “[a]t the time of the transfer of the Unaccompanied Children’s Program, ORR was a grant-making agency, many steps removed from refugees or children receiving assistance through federal government funding. And then the UC Program arrived, and the Director of ORR became responsible for the care and custody of children. We had no idea what the program would become and how many children’s lives would be affected.”

The HSA was transformative as it laid the foundation for the Unaccompanied Children's Program. But the HSA provided few details on how children should be treated in care, the requirements for determining whether a child should be released from custody to a parent or sponsor, or the need for legal services and follow-up assistance after release. And it transferred the program to a small office in the Administration for Children and Families at the U.S. Department of Health and Human Services, known mainly to organizations resettling refugees, ORR. With the exception of a handful of INS staff, who were required under the HSA to transfer to ORR, the federal government staff now responsible for unaccompanied children did not have the expertise or a real understanding of the Unaccompanied Children’s Program or what it would become in subsequent years.

The first part of USCRI’s 20-year retrospective on unaccompanied children will look at the period after the HSA and the transfer of the program from INS to ORR. I will interview those in ORR at the time, and those who joined the agency to work on the program. And take a closer look at the HSA and how it was implemented by ORR.

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# United States Issue Updates

## **DHS to Adopt Standard Definition of Statelessness**

On Wednesday, December 15, the Department of Homeland Security (DHS) announced that it would adopt a standardized definition of statelessness for the first time. Around 200,000 individuals in the United States are stateless or at risk of statelessness, and stateless individuals have significant barriers to daily life and to accessing social benefits to which they are entitled. DHS also announced that it would work with the Department of State to identify barriers “to identify and catalogue barriers to legally available immigration relief and benefits faced by stateless persons” and would improve data on stateless persons in the United States. To read the announcement, click [here](#).

## **USCIS Returns to Discretionary Interviews for Family Members of Refugees and Asylees**

On Friday, December 10, U.S. Citizenship and Immigration Services (USCIS) announced that it would return to discretionary in-person interviews for individuals who file Form I-730s. The I-730 is used by refugees and asylees to apply to have their family members join them in the United States. At the end of its term in office, the prior administration issued a policy memorandum requiring that all I-730 applicants have in-person interviews; USCIS has rescinded that memo. To read the announcement, click [here](#).

## **Administration Appears to End Plans to Terminate Flores for Unaccompanied Children**

On Friday, December 10, the Biden Administration opted not to include in its Unified Regulatory Agenda earlier regulations for unaccompanied children’s care that would terminate the Flores Settlement Agreement. Flores sets standards for the care and placement of unaccompanied children in the United States and allows lawyers for the plaintiff firms to inspect facilities where unaccompanied children are housed. The regulations were issued in 2019 but partially set aside by the Ninth Circuit for correctable legal deficiencies pertaining to family detention. To read the fall Regulatory Agenda for the Department of Health and Human Services, click [here](#).

## **Florida Issues Emergency Rule to Disrupt UC Care in the State**

On Friday, December 10, Florida Governor Ron De Santis announced a new Emergency Rule in the state that would impede the care of unaccompanied children in the state. Florida will deny the issuance of new licenses or license renewals for independent shelters to care for unaccompanied children unless there is a cooperative agreement between Florida and the federal government. The Rule follows a September 28 Executive Order. The Rule also forbids existing providers from filling open beds with unaccompanied children from outside the state, such as those newly arrived in the country. To read the Emergency Rule, click [here](#).

# United States Issue Updates (cont.)

## **Fifth Circuit Rules Against Termination of MPP**

On Monday, December 13, the Fifth Circuit Court of Appeals upheld a lower court ruling that prevents the Biden Administration from terminating the so-called Migrant Protection Protocols (MPP), also known as the “Remain in Mexico” program. MPP requires that asylum applicants be returned to Mexico while their cases are processed and adjudicated, putting them in significant risk of harm. The Fifth Circuit held that the memo to end MPP violated provisions of the Administrative Procedure Act and the Immigration and Nationality Act. To read the decision, click [here](#).

## **Mass Denials of Refugee Status for Iranian Religious Minorities to be Re-Adjudicated**

On Tuesday, December 14, the District Court for the Northern District of California approved a settlement in the case Doe et al. v. Mayorkas, which concerns the mass denial of refugee admissions to Iranian religious minorities. The affected Iranians were seeking to enter the United States in the Lautenberg Program for persecuted religious minorities. Under the settlement, class members will have their legal cases automatically reopened and re-processed by the U.S. government. View the Class Notice [here](#).

# Around the World in International Migration

## Water Clashes in Cameroon Result in Forcible Displacement of more than 100,000

Intercommunal clashes in the Cameroon's northern most region have driven at least 100,000 people from their homes, though the number may in fact be higher, according to UNHCR. More than 85,000 of those displaced have fled across the border to neighboring Chad and sought refuge both in its capital city N'Djamena, as well as along Chad's bank of the Logone river. The movement occurred with shocking rapidity, the total number of displaced having tripled over the past week. Violence initially began in Cameroon the first week of December following a dispute among herders, fisherman, and farmers over dwindling water resources. Tensions have been rising over the significant reduction of Lake Chad's surface area for some time, but this recent conflict is the most acute yet. UNHCR, MSF (Doctors Without Borders), and other humanitarian organizations have been delivering aid to the populations in need, but more support from the international community is critical at this time.

## Refugees and Migrants Lack COVID Vaccine Access Amid Drugmakers' Legal Concerns

Millions of migrants around the globe may be denied COVID-19 vaccines through the international COVAX program because of drugmakers' concerns about potential legal battles resulting from harmful side effects. Most of the globe's vaccine disseminations have been facilitated by a country's national government, making that particular government liable for any side effects that may occur. However, for populations where a national government does not have control, for example conflict states like Ethiopia, Myanmar, and Afghanistan, or some illegal migrants outside of government purview, NGOs and humanitarian organizations have been deemed responsible for vaccinations. In fact, a 'Humanitarian Buffer' was created through COVAX which is a last-resort reserve of shots administered by humanitarian groups. Unfortunately, vaccinations cannot be added to that stockpile without the humanitarian organizations and NGOs administering them being able to bear legal risks, something most of them are not able to do. Drugmakers Pfizer Inc, AstraZenica PLC, and Moderna Inc have not yet agreed to accept legal liability.

## UK Set to Renege on Fundamental Protections for Asylum Seekers

On December 8th, the United Kingdom's House of Commons passed the Nationality and Borders Bill, which critics have dubbed the "anti-refugee bill". The bill undoes many principles of the 1951 Refugee Convention, such as non-discrimination, non-penalization, and non-refoulement, and allows the UK Government to send asylum seekers to a third country for offshore asylum processing, and pushback boats at sea. The bill comes as a surge of asylum seekers from multiple countries have made dangerous migration journeys across the English Channel. UNHCR has expressed concern that it amounts to a rejection of the UK's legal responsibilities to asylum seekers. The bill will now go to the House of Lords, and it is hoped that the back and forth between Houses will result in enough amendments that would increase compliance with international law.



## USCRI's Action and Resources on Afghanistan

For more information about the crisis in Afghanistan, resources for Afghan allies, and updates, please check out the links below:

[Resources for Afghan Allies](#)

[Human Faces of the Crisis in Afghanistan](#)

[USCRI Statement Calling for Extension of Evacuations](#)

[USCRI Snapshot: Humanitarian Parole for Afghan Evacuees](#)

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