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Emily C. Callan

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# **BRINGING OPERATION PEDRO PAN BACK FROM NEVER NEVER LAND: IS INA 207(B) THE PRESIDENT'S SOLUTION TO THE HUMANITARIAN CRISIS AT THE BORDER?**

EMILY C. CALLAN\*

On June 15, 2012, President Obama surprised the entire nation when he announced the implementation of a new and groundbreaking program that would radically change immigration policy in the United States.<sup>1</sup> In conjunction with the U.S. Department of Homeland Security, the agency tasked with enforcing the country's immigration laws, the President would no longer pursue deportation proceedings against certain undocumented foreign nationals who were brought to the U.S. as children and who remain in the country without authorization. Referred to as "Deferred Action for Childhood Arrivals" or DACA, this program represents a landmark step by the Executive Branch to bypass Congress in order to institute immigration reform without passing new legislation.<sup>2</sup>

President Obama justified this decision, one that opponents criticized as an overstepping of executive branch authority, on the grounds that Congress had yet to take meaningful action towards resolving the issues in the country's immigration system.<sup>3</sup> According to the President, the implementation of DACA is rightfully viewed as a last resort due enacted only on account of the dire immigration-related situation facing him because of Congress's inaction.<sup>4</sup> It seems that the President is currently facing a similar dilemma wherein his only choices are to continue to wait for Congress or to take matters into his own hands with the stroke of the presidential pen.

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\* The author wishes to thank JohnPaul Callan, Jerome Kendall, and Carol Kendall for their invaluable support and assistance with this article.

1. President Barack Obama, Remarks by the President on Immigration at the Rose Garden (June 15, 2012) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>).

2. *Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, U.S. DEP'T. OF HOMELAND SEC. (June 15, 2012), <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

3. Josh Blackman, *Gridlock and Executive Power* (unpublished comment), available at <http://ssrn.com/abstract=2466707>.

4. *Id.* at 41.

The summer of 2014 has borne witness to a veritable flood of news coverage at the southern U.S. border wherein tens of thousands of undocumented and accompanied minor foreign national children are attempting to enter the country from South American nations.<sup>5</sup> Many of these children request asylum upon apprehension at the U.S. border.<sup>6</sup> Dubbed the “humanitarian border crisis” by the media, this tremendous influx of immigrant children is posing significant political, practical, and moral questions that the President and Congress have, at this time, been unable to answer.

While unaccompanied children continue to pour into the country by the hundreds, as of August 2014 the President has taken two actions to cope with this crisis.<sup>7</sup> First, the President has asked Congress to authorize an emergency grant of \$3.7 million to establish new detention centers, hire more immigration judges, and perform heightened aerial surveillance at the border.<sup>8</sup> Second, he has pledged to fast-track the deportation proceedings of the children by accelerating their cases through the already heavily backlogged immigration court dockets.<sup>9</sup>

However, there may be a third option available to the President in his efforts to cope with the ever-growing unaccompanied minor children population and the unique immigration-related problems they have created. This option is found in section 207(b) of the Immigration and Nationality Act (hereinafter referred to as “Section 207(b)”) which empowers the president, without the need for Congressional action or approval, to designate a population as “refugees” if the population is facing emergency circumstances in their home country.<sup>10</sup> By receiving the refugee designation, the children apprehended at the border could lawfully be admitted into the United States without prior immigration authorization,

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5. Charles M. Blow, *The Crisis of Children at the Border*, N.Y. TIMES (July 9, 2014), [http://www.nytimes.com/2014/07/10/opinion/charles-blow-the-crisis-of-children-at-the-border.html?\\_r=0](http://www.nytimes.com/2014/07/10/opinion/charles-blow-the-crisis-of-children-at-the-border.html?_r=0).

6. *Id.*

7. See Michael D. Shear & Jeremy W. Peters, *Obama Asks for \$3.7 Billion to Aid Border*, N.Y. TIMES, (July 8, 2014), <http://www.nytimes.com/2014/07/09/us/obama-seeks-billions-for-children-immigration-crisis.html>; see also Rebecca Elliott & Jon Herskovitz, *Obama Vow to Speed Deportation of Children at Odds with Public Opinion*, REUTERS (Aug. 11, 2014), available at <http://www.reuters.com/article/2014/08/11/us-usa-immigration-children-idUSKBN0GB0AJ20140811> (explaining that many people disagree with Obama’s fast track plan and think children should be allowed to stay in the United States).

8. Shear & Peters, *supra* note 7.

9. Elliott & Herskovitz, *supra* note 7.

10. Immigration and Nationality Act, ch. 477, §207(b), 66 Stat. 163 (1952) (codified as amended at 8. U.S.C. § 1157(b) (2014)).

thereby legally eliminating the need for deportation processing.<sup>11</sup>

The choice to bestow refugee designation on the growing unaccompanied minor children population would no doubt carry far-reaching and long-lasting consequences of its own. Because of these potential important and complex ramifications, a closer examination of the implications of the President utilizing his authority under Section 207(b) must be undertaken. To do so, Part I of this article provides a brief description of the origin of refugee law in general and Section 207(b) in particular.<sup>12</sup> Part II explains the previous instances wherein past presidents exercised their authority to help foreign nationals seek refuge in the United States.<sup>13</sup> Part III further details the humanitarian crisis at the border and provides an overview of the deportation proceedings facing the children if alternative congressional or presidential action is not taken.<sup>14</sup> Finally, Part IV discusses the possible effects of refugee designation under Section 207(b) and posits arguments both for and against looking to this little-known legal provision as a solution to the country's humanitarian crisis at the border.<sup>15</sup>

Although Americans on both sides of the political spectrum remain divided on exactly how to cope with the general undocumented population in the U.S., most citizens agree or acknowledge that undocumented *children* present special considerations and unique challenges for the country and its government. Granting refugee status would essentially use existing immigration law to allow the children to work around that law, effectively creating a loophole through which the children may come to and remain in the country. By examining the practical, legal and moral considerations at odds in this issue, we may begin to decide if Section 207(b) can offer a real refuge for these children.

#### PART I – “O, RECEIVE THE FUGITIVE”:<sup>16</sup> EMPOWERING THE PRESIDENT TO DESIGNATE REFUGEES: THE ORIGIN OF SECTION 207(B)

In the context of U.S. immigration law, a refugee is currently defined

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11. Dan Kowalski, *The Refugee Option Obama Will Ignore*, HUFFINGTON POST, [http://www.huffingtonpost.com/dan-kowalski/the-refugee-option-obama-immigration\\_b\\_5559991.html](http://www.huffingtonpost.com/dan-kowalski/the-refugee-option-obama-immigration_b_5559991.html) (last updated Sept. 4, 2014, 5:59 AM)

12. See discussion *infra* Part I.

13. See discussion *infra* Part II.

14. See discussion *infra* Part III.

15. See discussion *infra* Part IV.

16. Thomas Paine, *Common Sense* (1775), reprinted in COLLECTED WRITINGS 5, 36 (Library of America, 8th ed. 1995).

as either

any person who is outside any country of such person's nationality. . .and who is unable or unwilling to return to. . .that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or. . .any person who is within the country of such person's nationality. . .and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>17</sup>

As this definition forms the basis of the President's decision to designate a population as refugees, it is helpful to outline how this definition came to be ensconced in U.S. immigration law. Therefore, the following sections provide a brief history of refugee law and policy, with a specific focus on the origin, development, and enactment of Section 207(b).<sup>18</sup>

#### A. THE STATUS OF REFUGEE ADMISSIONS BEFORE 1980

In general, there was no comprehensive law that specifically regulated the admission of refugees into the United States before 1980.<sup>19</sup> Rather, in the early 1900s Congress enacted several pieces of immigration-related legislation that included refugee provisions, such as the Immigration and Nationality Act of 1921, which exempted refugees who were fleeing religious persecution from the requirement that all aliens know how to read within one year of their admission into the United States.<sup>20</sup>

At this time, Congress's legislation was largely context-specific and reflected the country's international relations with foreign countries to a large extent.<sup>21</sup> The Displaced Persons Act of 1948 provides a keen example of this reflection.<sup>22</sup> Passed in the wake of the World War II

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17. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101(a)(42) (2014)). See *Asylum-Seekers*, UNHCR, <http://www.unhcr.org/pages/49c3646c137.html> (last visited Feb. 16, 2015); see also Kowalski, *supra* note 11. It is important to note that, although the terms are used interchangeably in common parlance, a refugee is legally distinguishable from an asylum seeker. *Asylum-Seekers*, *supra*. Therefore, this article employs the term refugee in order to maintain legal accuracy even in the event that the historical text employs the term asylum seeker or asylee.

18. See discussion *infra* Part I.A–B.

19. See *Negusie v. Holder*, 555 U.S. 511, 520 (2009).

20. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–78 (repealed 1952).

21. *Negusie*, 555 U.S. at 515.

22. Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, *amended by* Act of June 16, 1950,

tragedies and at the beginning of the Cold War, this Act and its subsequent amendments granted refugee status to foreign nationals fleeing persecution in Soviet and Fascist countries, specifically Nazi Germany, Austria, and Italy, as well as other communist-controlled areas of Europe and the People's Republic of China.<sup>23</sup> Later, the Refugee Relief Act of 1953 included provisions to accelerate refugees' admission into the country if they were fleeing European and Soviet Union-controlled areas,<sup>24</sup> and the amendments to the Immigration and Nationality Act of 1952 specifically expanded the "refugee escapee" definition to include those fleeing communist and communist-dominated countries.<sup>25</sup> Thus, with these amendments, Congress included an ideological qualification in its refugee determination for the first time.<sup>26</sup>

Notably, the Immigration and Nationality Act of 1952 also included a mechanism by which the President could admit refugees.<sup>27</sup> Specifically, section 212(d)(5) of that act enables the Attorney General to parole foreign nationals in the country for emergency reasons.<sup>28</sup> President Eisenhower used this authority to admit 15,000 Hungarian refugees during that nation's crisis in 1965.<sup>29</sup> President Kennedy again utilized this same provision in 1962 to allow the admission of more than 690,000 Cuban refugees between 1962 and 1979.<sup>30</sup> Subsequent administrations went on to admit refugees under the parole provision, including Presidents Ford and Carter who authorized the admission of refugees from the Far East, Soviet Jews, Eastern Europeans, anticommunist Chinese, and others.<sup>31</sup>

Due to Congress's acknowledgement that its "piecemeal approach . . . in reacting to individual refugee crises as they occur is no longer tolerable,"<sup>32</sup> in 1980 the country's legislative body passed the first

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ch. 262, 64 Stat. 219; Act of June 28, 1951, ch. 167, 65 Stat. 96 (repealed 1957).

23. *Id.*; see also Ira J. Kurzban, *Seventh Annual Baron de Hirsch Meyer Lecture Series: A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 868 (1982).

24. Refugee Relief Act of 1953, ch. 336, § 2(b), 67 Stat. 400, *amended by* Act of Aug. 31, 1954, ch. 1169, 68 Stat. 1044; see Kurzban, *supra* note 23.

25. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, *amended by* Pub. L. No. 85-316, § 15(c)(1), 71 Stat. 639, 643 (codified at 8 U.S.C. § 1153(a)(7) (repealed 1976)); see Kurzban, *supra* note 23.

26. See Kurzban, *supra* note 23, at 869.

27. Immigration and Nationality Act of 1952, ch. 477, §212(d)(5), 66 Stat. 163 (codified as amended at 8 U.S.C. §1182(d)(5) (2013)).

28. *Id.*

29. Kurzban, *supra* note 23, at 871.

30. *Id.*

31. *Id.* at 872.

32. Brief for Petitioner at 6, *Negusie*, 555 U.S. at 511(citing S. COMM. ON THE JUDICIARY, 96TH CONG., REFUGEE ACT OF 1980, S. REP. No. 96-256, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 143).

comprehensive refugee-related legislation in the United States – the Refugee Act of 1980.<sup>33</sup>

## B. THE REFUGEE ACT OF 1980

The path to adopting the Act began in 1979 when Senator Ted Kennedy and Congressman Peter Rodino introduced the draft bill into their respective branches.<sup>34</sup> Motivated by the desire to create a systematic process for refugee resettlement and integration into American society, the aim of the bill was also to replace the “patchwork of different programs that had evolved in response to specific crises.”<sup>35</sup> The bill versions passed through their separate committees, the senators and representatives edited and added to the bills in ways that are outside the scope of this discussion, and ultimately, Congress passed the Act in early 1980.<sup>36</sup>

The final and passed version of the Act explicitly delegated authority to the President (as opposed to the Attorney General) to designate special populations as refugees if there were emergency circumstances which warranted the designation.<sup>37</sup> The Act achieved a two-fold purpose.<sup>38</sup> First, it confirmed the U.S.’s own refugee standards with those international standards established in the 1967 United Nations Protocol Relating to the Status of Refugees.<sup>39</sup> Second, the Act provided the U.S. government the legislative flexibility it needed in order to respond to crises involving religious or political dissidents around the world.<sup>40</sup> This flexibility is inherent to the sweeping grant of power given to the President under Section 207(b) which empowers the President to bestow the refugee designation if emergency circumstances are present.<sup>41</sup>

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33. Refugee Act of 1980 § 207(b), 8 U.S.C. § 1157(b) (2005).

34. Laura Murray-Tjan, “*Conditional Admission*” and Other Mysteries: *Setting The Record Straight on the “Admission” Status of Refugees and Asylees*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 37, 53 (2014).

35. *Id.* at 52 (citing *Refugee Act of 1979: Hearing on S. 643 Before the S. Comm. on the Judiciary*, 96th Cong. 9 (1979) (statement of Dick Clark, U.S. Coordinator for Refugee Affairs)).

36. See generally Murray-Tjan, *supra* note 34, at 52–53 (explaining the editing process by the House of Representatives and the Senate).

37. Refugee Act of 1980 § 207(b), 8 U.S.C. § 1157(b) (2005).

38. See Murray-Tjan, *supra* note 34, at 52–53.

39. *Negusie*, 555 U.S. at 517; 19 U.S.T. 6224, T.I.A.S. 6577, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>; see *Immigr. & Naturalization Svc. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (“one of Congress’ primary purposes’ in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the States of Refugees to which the United States acceded in 1968”) (internal citations omitted).

40. Brief for Petitioner at 7, *Negusie*, 555 U.S. 511.

41. Immigration and Nationality Act, ch. 477, §207(b), 66 Stat. 163 (1952) (codified as

The Act also allows the President to establish a numerical ceiling on the number of refugees that may be admitted every fiscal year.<sup>42</sup> This ceiling and the number of actual admissions varies greatly from year to year and largely depends on the country's available resources and the state of global and regional conflicts.<sup>43</sup> For example, in 1980 the U.S. admitted approximately 207,116 refugees;<sup>44</sup> in 1985 that number dropped to 67,704;<sup>45</sup> in 1990 the number ballooned again to 122,066;<sup>46</sup> and in 2012, the U.S. admitted an estimated 58,179 refugees.<sup>47</sup> According to data and statistics released by the Department of Homeland Security, between 1980 and 2012, the U.S. admitted an estimated 2,671,511 foreign nationals as refugees.<sup>48</sup>

Since the passage of the Act, various presidents have utilized its 207(b) provision in order to admit large numbers of foreign nationals into the United States as refugees. The following section provides brief summaries of a number of these instances and also explains how the refugees were resettled into the U.S. and integrated into society.

## PART II – “GIVE ME YOUR TIRED, YOUR POOR”:<sup>49</sup> PREVIOUS REFUGEE DESIGNATIONS MADE BY PAST U.S. PRESIDENTS

The United States has welcomed foreign nationals to its shores as refugees since the country's inception. Dating back to 1794 with the Haitian Revolution, refugees have traveled to the nation's borders and requested admission into the U.S. on the basis of the horrific conditions in their own home countries.<sup>50</sup> Interestingly (and in the author's observation), if a course of action has been taken in the past, its future pursuit is often met with less opposition. Therefore, the following discussion provides past examples of U.S. presidents' designations of refugee status in the effort to demonstrate that the exercise of authority under 207(b) may not be as

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amended at 8 U.S.C. § 1157(b) (2014).

42. Refugee Act of 1980 § 207(b), 8 U.S.C. § 1157(b) (2005).

43. See Murray-Tjan, *supra* note 34, at 53.

44. Office of Immigration Statistics, *2012 Yearbook of Immigration Statistics*, U.S. DEP'T HOMELAND SEC., July 2013, at 39, available at [https://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2012.pdf](https://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Emma Lazarus, *The New Colossus* (1883), available at <http://xroads.virginia.edu/~cap/liberty/lazaruspoem.html>.

50. See generally 4 ANNALS OF CONG. 170 (1794).



radical as some pundits may propound.<sup>51</sup>

#### A. OPERATION PIED PIPER – RESCUING CHILDREN FROM THE WW II BOMBINGS

During World War II, the Nazis continuously bombed strategically located cities in the United Kingdom, most notably England's major metropolitan city of London.<sup>52</sup> Between September 7, 1940, and May 12, 1941, the Nazis engaged in several major aerial attacks which resulted in the destruction of more than two million homes and approximately 60,000 deaths.<sup>53</sup>

In the effort to remove children from harm's way during the bombings, the British government conceived and implemented "Operation Pied Piper" to relocate children living in the cities away from the danger zones.<sup>54</sup> Operation Pied Piper was a concerted effort organized among Great Britain, the United States, Canada, South Africa, New Zealand, and Australia.<sup>55</sup> Due to the countries' efforts, the British government evacuated nearly three million people (mostly children) during the first four days of the Operation's implementation.<sup>56</sup> In the United States, businesses and private organizations worked to place the refugee children in homes around the nation. In fact, many employees from U.S. companies that maintained subsidiaries in Great Britain volunteered to take care of children of the subsidiaries' employees.<sup>57</sup>

#### B. OPERATION PEDRO PAN – RESCUING CHILDREN FROM COMMUNIST CUBA

The U.S. has long maintained a difficult and frosty relationship with Cuba.<sup>58</sup> Due to the human rights violations attributed to Cuba's leader

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51. See discussion *infra* Part II A–D.

52. See Thomas Michael McDonnell, *Cluster Bombs Over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 62 (2002).

53. See Ian Ockey, *Effects of the Blitz*, Triumph and Tragedy During the Blitz: "Blood, Toil, Tears, And Sweat," available at [https://crfntserver1.crf-usa.org/crf/crfddata/hdww2007/1724/index\\_files/page0003.html](https://crfntserver1.crf-usa.org/crf/crfddata/hdww2007/1724/index_files/page0003.html) (last updated July 4, 2013).

54. Dwight Jon Zimmerman, *Operation Pied Piper: The Evacuation of English Children During World War II*, DEFENSE MEDIA NETWORK (Dec. 31, 2011), <http://www.defensemedianetwork.com/stories/operation-pied-piper-the-evacuation-of-english-children-during-world-war-ii/>.

55. Zimmerman, *supra* note 54.

56. *Id.*

57. *Id.*

58. See Brianna Lee, *U.S.-Cuba Relations*, COUNCIL ON FOREIGN AFFAIRS,

Fidel Castro, the U.S. government adopted multiple programs to facilitate Cubans' flight to the United States in order to escape political persecution.<sup>59</sup> One such program, nicknamed "Operation Pedro Pan," was a collaborative effort between the U.S. government and the Catholic Church in the effort to admit approximately 14,000 Cuban children as refugees.<sup>60</sup>

The creation of Operation Pedro Pan is credited to Father Bryan O. Walsh who functioned as the Director of the now defunct Catholic Welfare Bureau (which became the Catholic Charities organization).<sup>61</sup> Fearing that their children would grow up subject to state compelled Marxist-Leninist indoctrination, Cuban parents requested the Catholic Welfare Bureau to allow them to send their children to the U.S., specifically to Miami where many of them had relatives.<sup>62</sup> Once the U.S. announced its break in diplomatic ties with Cuba on January 3, 1961,<sup>63</sup> the U.S. Department of State authorized the Catholic Welfare Bureau to inform the parents in Cuba that the government waived the visa requirements for their children, thereby enabling the children to come to Miami via U.S. commercial flights.<sup>64</sup> Once the operation of commercial flights between Cuba and the U.S. ended in October 1962, the children would be sent to Spain or Mexico and then re-routed to Miami.<sup>65</sup>

It estimated that approximately 50% of the Cuban children met with their U.S. relatives at the Miami airport family members at the airport immediately upon arrival, with the remaining children placed with the Catholic Welfare Bureau while the Bureau located their U.S. families.<sup>66</sup> The Bureau did not place any of the children in adoption center as the purpose of Operation Pedro Pan was to reunite the children specifically with U.S. relatives.<sup>67</sup>

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<http://www.cfr.org/cuba/us-cuba-relations/p11113> (last updated January 20, 2015).

59. See Note, *The Cuban Adjustment Act of 1966: Mirando Por Los Ojos de Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 910 n.63 (2001)(explaining how The Cuban Children's Program was created to assist smuggled Cuban children upon arrival in the United States, and how the program utilized a nationwide foster care system to care for those children). *Id.*

60. *Id.*; see *The Cuban Adjustment Act of 1966*, *supra* note 59 at 910.

61. *The History of Operation Pedro Pan*, PEDROPAN.ORG, <http://www.pedropan.org/content/history-operation-pedro-pan> (last visited February 16, 2015).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *The History of Operation Pedro Pan*, *supra* note 61.

## C. OPERATION BABYLIFT – RESCUING CHILDREN FROM SOUTH VIETNAM

At the end of the Vietnam War, U.S. President Gerald Ford authorized “Operation Babylift,” a humanitarian initiative to evacuate orphan children from South Vietnam to the U.S. and other countries.<sup>68</sup> Specifically, on April 3, 1975, President Ford announced that the U.S. would rescue Vietnamese orphans from the city of Saigon over the course of a series of thirty flights.<sup>69</sup> Child rights organizations such as Holt International Children’s Services, Friends of Children of Viet Nam, Friends for All Children, and the Catholic Relief Service, provided assistance in finding homes for the orphans upon their arrival in the United States.<sup>70</sup> It is estimated that approximately 3,500 Vietnamese orphans were brought to the U.S. and adopted pursuant to this program.<sup>71</sup>

## D. OPERATION PROVIDE REFUGE – RESCUING CHILDREN FROM KOSOVO

Due to the ongoing and bloody armed conflict in Kosovo in the 1990s, on April 21, 1999, U.S. President Clinton authorized the implementation of Operation Provide Refuge, a program that facilitated the relocation of Kosovar refugees to the United States.<sup>72</sup> From May 1999 to June 1999, more than 4,000 Kosovar refugees arrived and resettled in this country.<sup>73</sup> Operation Provide Refuge was led by the U.S. Department of Health and Human Services in conjunction with the Defense Department, State Department, Immigration and Naturalization Service, the American Red Cross, and other nongovernment refugee assistance organizations.<sup>74</sup> These groups helped the refugee children enroll in school and receive English language training.<sup>75</sup>

## PART III – THE HUMANITARIAN CRISIS AT THE BORDER: THE MOST TENDER DEMOGRAPHIC OF INCOMING U.S. IMMIGRANTS

In order to come to a better understanding of what action the

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68. See Martin, Allison, *The Legacy of Operation Babylift*, 2 ADOPTION TODAY 4 (March 2000), available at <http://www.adoptvietnam.org/adoption/babylift.htm>.

69. *Id.*

70. *Id.*

71. *Id.*

72. Linda D. Kozaryn, *U.S. Offers Kosovar Albanians Safe Haven*, U.S. DEP’T OF DEFENSE (Jun. 15, 1999), <http://www.defense.gov/news/newsarticle.aspx?id=42933>.

73. *Id.*

74. *Id.*

75. *Id.* (stating that these agencies, through their networks, help the refugees attain sponsors, get their children in school, apply for work, receive language training and other assistance).

President should take to address the border crisis, it is helpful to present a detailed examination of what exactly is transpiring at the U.S.-Mexico border with regards to the unaccompanied children. This examination is provided in the following section.<sup>76</sup>

#### A. HOW MANY UNACCOMPANIED CHILDREN COME TO THE BORDER AND WHY?

In the early weeks of the summer of 2014, the U.S. Border Patrol, Immigration and Customs Enforcement, and Customs and Border Protection agencies reported a significant surge in the number of foreign national children who arrived at the border (or snuck across the border) alone and seeking asylum in the United States.<sup>77</sup> More and more unaccompanied children continue to come to the U.S. and the most recent statistics indicating that approximately 60,000 children will try to cross the country's southern borders by the end of the 2014 fiscal year, a figure that represents nearly triple the amount of unaccompanied children who entered the U.S. in 2013.<sup>78</sup> Border agents, law enforcement personnel, and immigration officials report that the majority of the children are coming from Mexico and Central American countries.<sup>79</sup>

Shortly after these children made headlines, President Obama himself took the media stage, declared the massive influx of unaccompanied children "an urgent humanitarian situation" and instructed a multitude of federal agencies to begin coordinating joint responses to the crisis in the form of providing medical treatment, food, safe housing and other services to the children.<sup>80</sup> According to the officials at the border, upon arriving in the U.S., the children inform the law enforcement or immigration personnel that they are fleeing the rampant drug-related or gang-related violence in their home countries.<sup>81</sup> While these claims form the basis for the arrival for the majority of the children, Cecilia Muñoz, the director of the White House Domestic Policy Council, has stated that there are rumors and

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76. See discussion *infra* Part III(A)-(C) (discussing the number of unaccompanied children coming to the United States border and why; what happens to them once they are here; and what solutions have been proposed to deal with the situation).

77. See Katie Zezima & Ed O'Keefe, *Obama Calls Wave of Children Across the U.S.-Mexican Border 'Urgent Humanitarian Situation,'* WASH. TIMES (June 2, 2014), [http://www.washingtonpost.com/politics/obama-calls-wave-of-children-across-us-mexican-border-urgent-humanitarian-situation/2014/06/02/4d29df5e-ca8f-11e3-93d2-edd4be1f5d9e\\_story.html](http://www.washingtonpost.com/politics/obama-calls-wave-of-children-across-us-mexican-border-urgent-humanitarian-situation/2014/06/02/4d29df5e-ca8f-11e3-93d2-edd4be1f5d9e_story.html).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

suggestions that some of the children's families thought the children would be permitted to stay in the U.S. due to proposed immigration reform – the implication being that these families sent their children to the U.S. to enjoy the benefits of immigration reform and not to protect them from dangerous environments.<sup>82</sup>

#### B. WHAT HAPPENS TO THE CHILDREN ONCE THEY ARE IN THE U.S.?

Currently, there are two outcomes that may result from an unaccompanied child entering the United States.<sup>83</sup> First, the child may be placed at one of the many facilities around the country that has been converted from its previous use and function into a housing shelter specifically for the unaccompanied children.<sup>84</sup> For example, more than 1,000 children have been transferred to the Lackland Air Force Base in San Antonio, Texas, and another 600 children will likely be sent to a different base located in Ventura County, California.<sup>85</sup>

Additionally, more than 30,000 children have already been placed with sponsors, typically relatives, who have volunteered to house them.<sup>86</sup> The children have also been spread amongst states that have historically received large immigrant populations such Texas, New York, California and Florida.<sup>87</sup> Maryland, Virginia, Georgia, and Louisiana have also received large numbers of unaccompanied children to house at their own state facilities.<sup>88</sup> Once they arrive at a facility, the children usually stay for 30 to 45 days.<sup>89</sup> Afterwards, they are released to a sponsor for further care and supervision until the immigration authorities decide the children's cases, as the release of the child into a sponsor's custody does not halt the immigration proceedings.<sup>90</sup>

The second outcome is that the children may be turned away from the U.S. border, thereby not entering the country at all.<sup>91</sup> Still others are put into deportation proceedings but these cases are taking several months to

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82. *Id.*

83. *See generally* Zezima & O'Keefe, *supra* note 77.

84. *Id.*

85. *Id.*

86. Haeyoun Park, *Q. and A. Children at the Border*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html>.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. O'Keefe, *supra* note 77.

complete at the already overcrowded immigration courts.<sup>92</sup> Conservatives have roundly criticized the President for the lengthy deportation proceedings, but in a sense the President's hands are tied on this issue due to a 2008 anti-trafficking statute that Congress adopted with bipartisan support.<sup>93</sup> Per the statute, immigration officials cannot immediately deport children entering the U.S. from Central American countries because the children must be given a hearing before an immigration judge before they are removed from the country.<sup>94</sup> However, this statute does not apply to minors from Mexico as a separate U.S. policy allows such children to be deported quickly.<sup>95</sup>

### C. WHAT SOLUTIONS HAVE BEEN PROPOSED TO COPE WITH THE CHILDREN?

The issue of the unaccompanied children truly puts the President squarely in a very tight spot. He angers his own party by deporting the children, he angers his political opponents by housing the children in facilities across the U.S., and he is currently running out of money to do both. Although multiple solutions have been proposed to address the humanitarian crisis, many of the ideas differ only slightly in their details and parameters. Therefore, the following section limits its discussion to the two main proposals that are most likely to be entertained (or have already been entertained) by the President and Congress.<sup>96</sup>

#### 1. President Obama's Request for Emergency Funds

Almost immediately after the unaccompanied children made their debut on the national news, President Obama issued a formal request to Congress for emergency funds that he feels are necessary to quickly process the children already in the U.S. and to stem the future influx as much as possible.<sup>97</sup> Specifically, the President asked for \$3.7 billion in

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92. *Id.*

93. Park, *supra* note 86.

94. *Id.*

95. *Id.*

96. *Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border*, OFFICE OF THE PRESS SEC'Y, WHITE HOUSE (July 8, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/08/fact-sheet-emergency-supplemental-request-address-increase-child-and-adu>.

97. David Nakamura & Wesley Lowery, *White House Requests \$3.7 Billion in Emergency Funds for Border Crisis*, WASH. POST (July 8, 2014), [http://www.washingtonpost.com/politics/white-house-to-seek-38-billion-for-border-control-more-than-previously-signaled/2014/07/08/ac95a56e-06a9-11e4-bbfl-cc51275e7f8f\\_story.html](http://www.washingtonpost.com/politics/white-house-to-seek-38-billion-for-border-control-more-than-previously-signaled/2014/07/08/ac95a56e-06a9-11e4-bbfl-cc51275e7f8f_story.html).

funds to support enhanced border security measures such as increased air surveillance; to offset the expenses incurred relating to transportation and housing costs, and staffing additional immigration judges and immigration prosecutors.<sup>98</sup> As of the date of this article's publication, Congress has not granted the President's request.

## 2. Senator Grassley, et. al's Proposed Legislation Amendment

In response to the President's request, Republican Senator Chuck Grassley and a number of his colleagues proposed their own legislative amendment that would provide the President with emergency funds (though less than the requested amount) and would also implement due process safeguards for the unaccompanied children's immigration proceedings.<sup>99</sup> Some of the specific provisions of the bill, called the Protecting Children and America's Homeland Act, include expedited processing to ensure the children are brought before an immigration judge within seven days of their arrival at the border,<sup>100</sup> the expedited removal (meaning no hearing before an immigration judge) of gang members, criminals, and those who have previously violated U.S. immigration laws,<sup>101</sup> and a requirement that the President certify to Congress that the Guatemalan, Honduran, and El Salvadorian national governments are cooperating with the U.S. in its efforts to return these citizens to their home countries.<sup>102</sup> As of the date of the publication of this article, the bill has not moved further than committee review and remains unpassed.

## PART IV – SUFFER THE CHILDREN OR LET THE CHILDREN SUFFER?

### THE PROS AND CONS OF ADMITTING THE CHILDREN AT THE BORDER AS REFUGEES

The humanitarian crisis at the border has ignited vitriolic exchanges

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98. Letter from President Barack Obama to House Speaker Mr. John Boehner (July 8, 2014), available at <http://mashable.com/2014/07/08/immigration-border-crisis-explained/>.

99. Press Release, Senator Chuck Grassley, Working to Provide Solutions to Unaccompanied Minors Crossing Southern Border (Jul. 31, 2014), available at <http://www.grassley.senate.gov/news/news-releases/working-provide-solutions-unaccompanied-minors-crossing-southern-border>.

100. Senators Cornyn, Grassley, McConnell, & Flake, *The Protecting Children and America's Homeland Act* (2014), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Immigration%2C%2007-31-14%2C%20UAC%20Border%20Alternative%20summary.pdf>.

101. *Id.*

102. *Id.*

across the political aisle, with the President receiving the brunt of the criticism. Similar to the quandary involving the current undocumented population in the U.S., everyone seems to agree that *something* must be done, but that is where the agreements end as both political parties and the American people continue to disagree on exactly *what* should be done. The following section discusses the advantages and disadvantages of admitting the unaccompanied children as refugees in the effort to analyze if doing so is truly an appropriate and viable option.<sup>103</sup>

#### A. WHY THE U.S. SHOULD ADMIT THE UNACCOMPANIED CHILDREN AS REFUGEES

The central reason for admitting the unaccompanied children to the U.S. as refugees is based upon humanitarian concerns. Due to their age and the assumption that most of the children are fleeing drug and gang-fueled violence, supporters contend that admitting the children is the most humane way to help them escape the dangers of their home countries. By allowing the children to seek refuge in the U.S., the immigration authorities are able to locate and place the children with American relatives who in turn can offer the children a safe living environment, access to medical care, enroll them in school, etc.<sup>104</sup> Importantly, it should be highlighted that matching unaccompanied children with their U.S. relatives or other sponsors has already been an affective albeit temporary solution as nearly 3,300 children have been placed in homes in the state of New York alone.<sup>105</sup>

Therefore, if we accept the premise that all children would be put into immediate and serious danger if returned to their home countries, then the humanitarian solution of admitting them is more palatable. It thus follows that admitting them specifically as refugees would be the most appropriate way to implement this solution as the President already has the legal authority to do so pursuant to the 207(b) provision. However, the practical

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103. Press Release, Public Religion Research Institute, Nearly 7-in-10 Americans See Unaccompanied Children at Border as Refugees Not Illegal Immigrants (July 29, 2014) (on file with author), available at <http://www.nnir.org/drupal/node/755> (finding that Americans are not in complete agreement with the idea of offering refuge and protection to those who come to the U.S. because they feel endangered in their home countries).

104. *Unaccompanied Children at the Southwest Border* U.S. DEP'T OF HOMELAND SEC., (Jan. 30, 2015), available at <http://www.dhs.gov/unaccompanied-children-southwest-border>.

105. Diana Villiers Negroponte, *The Surge in Unaccompanied Children from Central America: A Humanitarian Crisis at Our Border*, BROOKINGS (Jul. 2, 2014, 3:15 PM), <http://www.brookings.edu/blogs/up-front/posts/2014/07/02-unaccompanied-children-central-america-negroponte>.



considerations of doing so are trickier to address, as explained the following subsection.<sup>106</sup>

#### B. WHY THE U.S. SHOULD NOT ADMIT THE CHILDREN AS REFUGEES

There are both legal and practical obstacles that may prevent Section 207(b) designation from being a viable solution to the crisis at the border. Briefly putting aside the humanitarian cause, a short discussion of the legitimacy of Section 207(b) is presented. While Congress observed the procedural requirements when it passed Section 207(b), and the President observed similar procedures in signing and enacting the provision, the very legality of the provision itself may be questioned as an overreach of Congress's lawmaking power.

Specifically, should the President attempt to exercise his authority under Section 207(b), conservatives and critics may allege that the Constitution does not empower Congress to make laws granting the President the power to designate refugee populations. While this argument would likely not be successful as a deterrent to presidential action, it is interesting to note that it has been levied before – by a former U.S. president no less.

In 1794, the U.S. welcomed refugees fleeing the civil insurrection in San Domingo, Dominican Republic.<sup>107</sup> In addition to permitting the refugees to resettle in the cities of Baltimore and Philadelphia, Congress also appropriated \$15,000 to provide assistance to the refugees.<sup>108</sup> James Madison disagreed with Congress's appropriations, and reasoned that he "cannot undertake to lay my finger on that article of the Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents."<sup>109</sup>

With this criticism James Madison may be foreshadowing the conservative cry against the President designating the unaccompanied children as refugees and admitting them to the U.S., placing them with sponsor families, and providing other benefits. To Madison, while the cause was certainly humanitarian and benevolent in nature, in law it was not provided for by the Constitution. Given the ease with which the conservatives point to Constitutional interpretation as the means to veto

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106. See *infra* Part IV.B.

107. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 188 (1997).

108. *Id.*

109. 3 *Annals of Cong.* 170 (1794).

President Obama's actions, it is certainly possible that today's conservatives will echo Mr. Madison's past dissension.

Along with the legal argument against refuge designation, there are multiple and genuine practical concerns and limitations that may also preclude the President from utilizing Section 207(b) simply because doing so is not realistically possible. One of these concerns is the logistics of placing the unaccompanied children in safe locations while they await their reunions with family members or their immigration hearings. The stark reality is that there is simply not enough space to house the sheer number of children pouring across the border at their current rates.<sup>110</sup> Moreover, due to the increasing number of removal proceedings that the immigration courts are faced with, the extant space and human resources to cope with the children are seriously overwhelmed and stretched to capacity.<sup>111</sup>

The Office of Refugee Resettlement, the office within the U.S. Department of Health and Human Services (HHS), is the agency responsible for providing safe lodging and food to the unaccompanied minor children for at least 45 days while the children's relatives or a sponsoring family may be located.<sup>112</sup> However, the HHS centers in Texas, Oklahoma, and California are already operating at capacity.<sup>113</sup> Portions of the emergency funds the President requested earlier in the summer were to be earmarked for expanding the centers but as stated, those funds have not yet been approved by Congress.<sup>114</sup>

Importantly, it's not just the federal resources that are overexerted in the effort to cope with the influx of unaccompanied children. Several of the states are also feeling overwhelmed at the prospect of housing (or housing more) of the children.<sup>115</sup> At least 32 governors have weighed in on their opinions regarding the humanitarian crisis, with many vocalizing fervent opposition to the ORR's placement of children within their states, citing that the states are not equipped with sufficient space, money, or the human resources needed to receive the incoming children and ensure they

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110. Negroponte, *supra* note 105.

111. *See id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See generally* Niraj Chokshi, *At Least 32 Governors Have Weighed in on the Border Crisis. Here's What Each Has Said*, WASH. POST (July 23, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/23/at-least-32-governors-have-weighed-in-on-the-border-crisis-heres-what-each-has-said/> (explaining that many States are concerned about the amount of responsibility and required resources, as well as possible border threats, that come with caring for these undocumented children).

are placed in safe environments.<sup>116</sup>

For example, the governor of Nevada stated that while the children's health and safety is rightfully a top priority, it is still unreasonable for the federal government to make the states absorb the costs and responsibility for housing the children.<sup>117</sup> The Oklahoma governor echoed these sentiments and went on to accuse the President of caring more for the unaccompanied children than for American children, by arguing that the state's public schools are already operating at capacity and that both the school system and the healthcare system require additional funding.<sup>118</sup> In that governor's estimation, the President should be focusing on how to alleviate those problems for Oklahomans as opposed to adding to the financial burden by placing children within the state for an indeterminate amount of time.<sup>119</sup>

Other Republican governors of Utah, Pennsylvania, Wisconsin, North Carolina, Kansas, and Alabama wrote a letter to the President outlining their opinion that the failure to send the children back to their home countries will merely encourage more children to make the dangerous journey to the U.S. by way of human traffickers and smugglers.<sup>120</sup> Their letter also complains that the administration does not investigate the legal status of the relatives or sponsors who eventually accept the children, thereby giving states no assurances that the children are safe or will appear at their immigration hearings.<sup>121</sup>

Additionally, the governor of Mississippi took his criticism a step further and informed the President that he would take every action available to prevent the federal government from temporarily or permanently housing any of the unaccompanied children within Mississippi's state borders.<sup>122</sup> Moreover, the Nebraska and Florida governors complained to the HHS about what they deemed a lack of formal notice to state communities when the children were placed with relatives or sponsors, and the governor of Maine stated his displeasure with the administration for placing eight children in his state without his prior knowledge or consent.<sup>123</sup>

However, while most governors have expressed their opposition to

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Chokshi, *supra* note 115.

122. *Id.*

123. *Id.*

the way the President has thus far handled the humanitarian crisis at the border, there is a small number of Democratic governors who have offered to help the administration in its efforts to house the children.<sup>124</sup> The governor of Massachusetts has already offered two locations within his state as temporary housing centers for the children, and Vermont is looking into offering college dormitories or boarding schools as temporary placement locations as well.<sup>125</sup> The Maryland governor suggested using foster homes or churches as temporary housing facilities, and the Colorado governor stated that the state would support Colorado communities that wanted to provide housing to the children.<sup>126</sup>

It is very possible that many children's rights advocates and support groups will find the opposition lodged by the states appalling. The humanitarian aspect of the plight of the unaccompanied children is undoubtedly real in at least some of the cases, and it is likely not hard for most of the detractors to agree (and many already have) that the entire situation is, simply put, sad and unfortunate. However, the sadness or unfortunate nature of a crisis cannot truly function as a barometer for action as either the nation can pull together sufficient resources to ensure the safety and well-being of the children while they are in the U.S.'s custody or it cannot.

Therefore, the unaccompanied children and their ensuing crises at the border beg the question whether, from a humanitarian perspective, is it in their best interests to remain in the U.S. and placed in homes wherein no background checks are conducted, or would it serve their interests to significantly greater degree if they were returned to their home countries to live with their parents, albeit in assumed dangerous conditions? Faced with difficult question, President Obama has yet to arrive at an acceptable answer. As more and more children continue to enter the border, it is unlikely he will be able to wait much longer before deciding his, and ultimately the country's, course of action.

## PART V – CONCLUSION

Just as the unaccompanied children are stuck between a border and a courthouse, similarly the President has found himself between a rock and a hard place. Criticism over his actions regarding the humanitarian crisis have crossed party lines and every day more and more children come to the U.S. seeking refuge and adding to the growing problem.

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124. *Id.*

125. *Id.*

126. *Id.*

The children's circumstances perfectly exemplify how a nation's resources may be stretched to the breaking point—no matter how much the President and many of the American people may want to help, the reality that the country and its people have finite resources must be faced. It is up to the President and Congress to determine exactly how they will allocate these available resources in the efforts to both prevent a future influx of unaccompanied children and also to help resettle the youths who are already here. If it is in fact, appropriate to implement a new Operation Pedro Pan, hopefully the President can do so quickly and efficiently in order to save the lost boys—and girls.