U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 18, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Department of Justice supports the goals of S. 1301, the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2011. We appreciate this bipartisan effort to provide critical tools in the fight against human trafficking.

For your reference, we have attached previously submitted views from the Departments of Justice[1] and State on the introduced version of S. 1301. We recognize that several of our suggestions have been incorporated into the current draft of the bill, and appreciate your attention to our concerns. We are hopeful, however, that our remaining comments will receive further consideration as the bill moves forward. For example, the State Department reports that some provisions of S. 1301 would adversely impact its ability to conduct diplomacy by mandating additional layers of bureaucracy, creating burdensome and duplicative reporting mechanisms, and changing the TIP Report tier rankings.

The Justice Department also shares the Committee's goal of ensuring strong oversight of Department grants and accountability from our grantees. To that end, our principal concerns relate to provisions included in section 226 of S. 1301, as reported by the Committee on October 13, 2011. In particular, certain provisions of section 226 may make it notably more difficult for Department grantees to carry out their core missions of investigating and prosecuting human traffickers, and providing necessary assistance to human trafficking victims. The Department understands the importance of grant accountability, and we have developed an alternative policy approach, described below, which will ensure strong control over grant management without endangering the critical policy goals of the TVPRA.

Our concerns focus primarily on three provisions of section 226:

- The two-year ban on receiving funds for any grantee with an "unresolved audit finding" lasting beyond six months (see Sec 226(2), 226(6), and 226(9)(A));

[1] Please note that the Department of Justice views have been revised to add discussion of a potential constitutional concern regarding Sections 103 and 108 of S. 1301 as reported.

- Requiring that at least 60 percent of resources to meet the matching requirement be in the form of cash; and
- Requiring explicit, written approval from the Deputy Attorney General for any conference cost accrued by "any individual or organization" receiving TVPRA grants.

Two-Year Ban on Receiving Funds for Any Grantee with an "Unresolved Audit Finding"

In the event of an "unresolved audit finding" as defined in section 226(5), all TVPRA funding would immediately cease and an absolute two-year ban from TVPRA funds would be imposed. This response to an unresolved audit finding appears disproportionate to the triggering event, and may cause significant harm not only to task forces and law enforcement agencies, but also to victim service organizations, and, of course, trafficking victims. An audit finding which is unresolved after six months can stem from a variety of administrative and accounting issues, many of which are entirely benign and not reflective of a grantee's overall competence.

For these reasons, the Department proposes to amend section 226 to replace the absolute two-year ban and immediate cessation of funds with the following set of penalties to be immediately imposed on a grantee: (1) designation of the grantee as "high risk," and (2) imposing all the appropriate restrictions as outlined in 28 C.F.R. § 66.12(b)(1)-(6) including: withholding authority to proceed to the next phase until receipt of evidence of acceptable performance, requiring payment on a reimbursement basis, requiring the grantee to provide adequate documentation (including more detailed financial reports), imposing additional project monitoring requirements, requiring the grantee to undergo training on financial grant administration and grant fraud prevention and detection, and establishing additional prior approvals.

As a matter of general practice in the Department, pursuant to regulatory and administrative requirements, "high risk" grantees face increased scrutiny in several ways, so that aggressive corrective actions are taken which generally lead to the removal of the "high risk" designation, while the critical programs and services continue without interruption. In the event of a "high risk" grantee's failure to make sufficient progress, the Department's options range from termination of the current award to barring the grantee from receiving future Department grant awards and recommending the grantee for Federal government-wide debarment and suspension pursuant to 28 C.F.R. Part 67. Additionally, where the Department grantees fail to pay back funds related to audit or financial monitoring questioned costs in a timely manner, the Department may refer those grantees to the Department of Treasury for collection.

Because of the required due diligence involved in acquiring the necessary documentation to address questioned costs, the Department also recommends replacing the six-month timeframe in subsections (2) and (5) with a 12-month timeframe.

Requiring That At Least 60 Percent of Resources to Meet the Matching Requirement Be Cash and Not In-Kind

In a significant departure from the rules pertaining to other Department grants, section 226 would require nonfederal grantees to provide at least 25 percent of the grant amount in matching funds, with at least 60 percent of that as a cash match. It has been the Department's experience in administering justice grants that an overly stringent match requirement such as this one will severely and unnecessarily diminish the pool of qualified applicants, thus frustrating the very policy objectives that the grant program was created to achieve.

As we noted in the Department's comments on the introduced version of the TVPRA, many of our grantees face difficulty with the current match requirement. The Department's Office of Justice Programs (OJP) had one human trafficking grantee return their unspent funds and terminate the grant prematurely, in part due to the burdensome match requirement.

In light of the current economic landscape where grantees often face significant budget shortfalls, the grantees at issue here – law enforcement agencies and nonprofits – have already been acutely affected and are cutting back their operations significantly. Also, the cash match envisioned here will likely serve as an absolute bar to all Indian tribes applying for TVPRA funds due to their historical difficulty in meeting cash matching requirements.

To ensure that the Department can continue to fund qualified grantees under the TVPRA and comprehensively address the issue of human trafficking, we recommend that the 60 percent cash match requirement be replaced with a 10 percent cash match requirement. In addition, the Attorney General should retain the discretion to waive the match requirement upon a showing that it would create undue financial hardship.

Requiring Approval of the Deputy Attorney General for any Conference Cost Accrued by "Any Individual or Organization" Receiving TVPRA Grants

OJP currently reviews the logistical arrangements and contract costs of every planned OJP-sponsored conference and meeting and in accordance with current policies must obtain Department level approval as appropriate. As an example of controls currently in place for new contracts/agreements, OJP funding may not be used to purchase food and/or beverages for any meeting, conference, training, or other event. Exceptions, such as expenditures for meetings, conferences, trainings, or other events in extremely remote areas where sustenance is not otherwise available, require prior approval from OJP. In addition, OJP is currently developing stringent conference cost policies, which this subsection of section 226 would duplicate and possibly frustrate, including:

- Requiring event planners to justify the need for and obtain approval prior to incurring costs for travel, lodging, and food and beverages related to planning meetings.

- Requiring funding recipients to track and report all costs associated with conference planning.
- Enhancing grant monitoring procedures to ensure that the proper policies and requirements are being followed by grantees.
- Updating OJP's Financial Guide and other guidelines to ensure strongest accountability, improve grantee cost reporting, and achieve even greater cost savings.
- Incorporating training on conference planning and cost policies into the Regional Financial Management Training and the On-line Financial Training (to be launched December 2011), and where feasible, programmatic conferences and seminars.
- Including new OJP policies and protocols in annual internal control review.

We note, in addition, that the anti-lobbying provisions in section 226(10) prohibit activities that are currently prohibited by 18 U.S.C. § 1913, and also duplicate 31 U.S.C. § 1352, with the exception of lobbying state, local or tribal governments.

The Department would be pleased to continue to constructively engage with your staff to address any additional technical and drafting concerns raised by the provisions of section 226 discussed above. Finally, we note that while the concerns we have expressed apply to provisions of S. 1301 as reported, the Department would have the same concerns should the same or similar provisions be considered for incorporation in other legislation to come before you.

Please do not hesitate to contact this office if we may be of additional assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Charles Grassley
Ranking Member

Enclosures:
Department of Justice views on S. 1301
Department of State views on S. 1301

Department of Justice Comments on S. 1301, the Trafficking Victims Protection Reauthorization Act of 2011

General Comments

The bill uses many terms, including "child victims of commercial sexual exploitation," "minor victims of severe forms of trafficking in persons," "severe forms of trafficking in children," "severe forms of trafficking in persons," "severe forms of trafficking in persons, including both sex trafficking and labor trafficking," "trafficking in persons," and "trafficking in persons involving sexual exploitation," only some of which are defined under U.S. or international law. Indeed, only the terms "severe forms of trafficking in persons" and "sex trafficking" are defined in the TVPA. The former term does encompass both trafficking into sexual exploitation and trafficking into labor trafficking, so that the reference to "severe forms of trafficking in persons, including both sex trafficking and labor trafficking" is redundant. The bill defines some of the other terms ("sex trafficking of a minor" and "minor victim of sex trafficking"), but we suggest adding definitions for all of the terms, or, if the terms are already defined elsewhere, adding references to those laws.

It is unclear why "child" and "children" are used at times in the bill while "minor" is used at other times.

(We note that the TVPA affects multiple agencies and these agencies may have additional views regarding the provisions they administer.)

Specific Comments

Sec. 101 (Page 4, lines 3-14): The proposed subsection (f) requires regional bureaus in the State Department to contribute to "a list of anti-trafficking goals and objectives for each country in its geographic area of responsibility" and provides that "[h]ost governments shall be informed of the goals and objectives for their particular country." By directing the members of the executive branch to engage foreign governments, this provision would infringe on the President's exclusive authority with regard to the conduct of diplomacy.

*Sec. 103(Page 6, line 10) and Sec. 108 of S. 1301 as reported by Committee (newly added):

Two provisions could interfere with the President's authority over the conduct of foreign affairs. First, Section 103 of S. 1301 would add a new Section 105A to the Trafficking Victim Protection of 2000. Section 105A(c) provides that "[t]he President shall establish and carry out programs with foreign governments and civil society to enhance anti-trafficking response and capacity, including" four specified forms of assistance to foreign governments.

Second, Section 108 (in S. 1301 as reported by Committee) would amend 22 U.S.C. 7104 by adding a new subsection (k), which provides that "[t]he Secretary of State shall establish and implement a multi-year, multi-sectoral strategy" relating to the prevention of child trafficking through child marriage "that includes diplomatic and programmatic initiatives."

Both provisions require the President to engage with foreign governments and therefore could interfere with the President's "'exclusive authority to determine the time, scope, and objectives of international negotiations or discussions.'" Memorandum for Joan E. Donoghue, Acting Legal Adviser, Department of State, from David J. Barron, Acting AAG/OLC, Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act at 8 (June 1, 2009) (quoting Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 41 (1990)); cf. Earth Island Inst. v. Christopher, 6 F.3d 648, 652-53 (9th Cir. 1993) (Congress may not require the Executive to "initiate discussions with foreign nations"). Accordingly, we recommend that the first provision be made precatory (i.e., "The President should establish"), and that the second either be made precatory or amended to delete the words "diplomatic and" (i.e., "that includes programmatic initiatives").

Sec. 103 (Page 6, lines 1-12): Section 103(1) appears to duplicate Section 101(2).

Sec. 103 (Page 6, line 19): We recommend inserting "the foreign" before "governments" to clarify that the bill authorizes the State Department to build partnerships to address enforcement efforts to combat human trafficking in foreign countries.

Sec. 103 (Page 6, line 22): We recommend inserting "concerning their activities in foreign countries" after "actors" to clarify that the bill authorizes the State Department to promote cooperation between foreign governments and civil society actors concerning their activities in foreign countries.

Sec. 103 (Page 6, line 24): We recommend inserting "concerning their activities in foreign countries" after "entities" to clarify that the bill authorizes the State Department to promote cooperation between the U.S. Government and private sector entities concerning their activities in foreign countries.

Sec. 103 (Pages 8, line 23 – 9, line 2): This provision encourages the State Department to provide "assistance to foreign governments to register vulnerable populations as citizens or nationals of the country to reduce the ability of traffickers to exploit such populations." We suggest adding "where possible under domestic law" after "populations" to clarify that there may be prohibitions against registering some vulnerable populations, such as undocumented workers.

Sec. 103 (Page 9, lines 10-22): This provision addresses "child protection compacts." We recommend that the Department of Justice's (DOJ) and the Department of Labor (DOL) roles in this undertaking be clarified.

Sec. 104 (Page 13, lines 11-18): This provision directs the U.S. Government to advertise a specific, individual hotline number. We view this provision as overly specific for a statute, crossing into the executive branch's area of enforcement discretion and limiting the executive branch's flexibility to enforce the laws in the most effective ways as circumstances change.

Sec. 104 (Page 13, lines 11-18): These provisions assign responsibilities to the PITF to distribute information to enable all – and note just relevant - federal agencies to publicize the National Human Trafficking Resource Center Hotline on their respective websites , as well as headquarters and field offices, and to make an annual report to Congress on such efforts. For the same reasons the bill should not reference the specific hotline number, it should not reference the specific name of the hotline, as, in its discretion, the executive branch may change the name of the hotline to improve its effectiveness. Additionally, in an era of decreasing federal budgets, such increased efforts to distribute information—given that there are thousands of federal government websites and hundreds of headquarters and field offices — as well as increased reporting requirements may be difficult for the U.S. Government to meet. Similarly, in Section 225, the Government Accountability Office (GAO) will be required to provide a report on "the use of foreign labor contractors" in the U.S.; in Section 231 (amending Section 202 of the TVPRA 2005), at page 43, lines 6-13, DOJ is required to evaluate each grant made; and at page 45, lines 7-13, GAO is required to evaluate the impact of the grant program 30 months after the date of enactment of this bill. While the GAO report might be substantively useful, it should be kept in mind that such reporting requirements use ever-more-limited resources.

Sec. 106 (Page 16, lines 9-10): DOJ requests that the text "the United States and foreign governments" be stricken and replaced with "countries". As drafted, the bill would codify the State Department's recent practice of evaluating *domestic* USG anti-trafficking efforts, as opposed to only foreign countries' anti-trafficking efforts. Senior Policy Operating Group agencies are in the process of developing procedures for interagency input, collaboration, and review to ensure that all agencies' activities are accurately reflected and represented in the report and to ensure consistency between State's reporting and the TVPA-mandated AG reporting on USG efforts. In deference to this ongoing interagency process, DOJ recommends against any legislation codifying any aspect of State's reporting on domestic U.S. anti-trafficking practices at this juncture.

Sec. 201 (Page 20, line 9): Regarding the title of the section, "Criminal Offenses Against Traffickers," we recommend that it be amended to read "Criminal Offenses By Traffickers" to clarify that the traffickers commit the offenses.

Sec. 201 (Page 20, lines 14-18): This provision appears intended to provide a basis independent from travel in foreign commerce for criminalizing specified extraterritorial sexual conduct. If enacted, defendants may argue that the provision exceeds Congress's powers under the Foreign Commerce Clause. The existing version of the statute has been subject to numerous, albeit unsuccessful, challenges, underscoring that the even broader language in the provision under consideration is likely to give rise to as-applied challenges. Although little judicial precedent addressing the scope of Congress's foreign commerce power exists, the Supreme Court has stated that there "is evidence that the Founders intended the scope of the foreign commerce

power to be . . . greater" as compared with interstate commerce. *Japan Line, Ltd. v. Cty. of Los Angeles*, 441 U.S. 434, 448 (1979). Moreover, the Supreme Court has never invalidated an act on the ground that it exceeded Congress's foreign commerce power. Nonetheless, defendants may claim that authorizing criminal liability based solely on residence in a foreign country may well extend beyond Congress's admittedly broad foreign commerce power, given that the mere fact of such residence does not necessarily imply travel in or connection to foreign commerce. Whether or not courts would view Section 201 as a proper exercise of Congress's power over foreign commerce, we think it is possible that courts will find an alternative basis to uphold it. One such basis might be Congress's power to implement treaties. See United States v. Frank, 486 F. Supp. 2d 1353, 1355 (S.D. Fla.2007) (concluding that Congress had "the authority to enact § 2423(c) under the Necessary and Proper Clause to implement a treaty which the Senate had ratified," namely the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, S. Treaty Doc. No. 106-37). To the extent that Congress wishes to rely on this basis in enacting S. 1301 (in addition to any other bases of constitutional authority), and to have courts consider its constitutionality on that basis, it may wish to refer to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution an child pornography (or another treaty) in the bill or its legislative history.

Sec. 201 (Pages 20, line 19 – 22, line 4): This section creates a new misdemeanor offense related to document withholding. Embedding an offense for withholding immigration documents in the trafficking in persons statutes (as opposed to the alien smuggling statutes) raises the concern that it would potentially undercut smuggling and harboring prosecutions without providing a useful enough tool in return to justify the risk. It is unclear how this new offense would enhance the prosecution of trafficking offenses and why a charge filed under 8 USC § 1324 would not suffice. Adding the proposed offense to 8 U.S.C. § 1324, as an alternative approach would be equally undesirable. In almost every case, prosecutors would be charging the more serious felony offense and would not find the proposed misdemeanor useful. Moreover, adding a lesser included offense of withholding could have the undesired effect of conferring upon smuggled aliens a status that is comparable to that of trafficking victims, thereby making them eligible for benefits intended only for trafficked persons. Such benefits would expose our witnesses in smuggling cases to allegations on cross-examination that they have a motivation to lie in order to obtain immigration relief. Existing laws already provide benefits for smuggled persons who become the victims of hostage taking or involuntary servitude. Additionally, the proposed offense might provide sympathetic juries a means of avoiding a conviction on the more serious charge of smuggling. For these reasons, we suggest that the conduct prohibited under the proposed offense would be better addressed as an aggravating circumstance to consider under the Sentencing Guidelines.

Alternatively, if this provision is to be retained, we recommend two changes: (1) in paragraph (a) (Page 21, lines 3-9), the text "or, for a period of more than 48 hours" should be stricken because it would unnecessarily protect those potential offenders who would confiscate documents for 47 hours or less time in the course of a violation of a harboring or visa-fraud crime, or in order to unlawfully maintain someone's services; (b) in paragraph (a)(1) (Page 21, lines 10-12), the text "a violation of" should be stricken and replaced with "violating," because, as written, it would allow the prosecution of a person who is asked to hold on to documents by another person who is

committing the violation of Section 1351, even if the person who is asked to hold the documents has no knowledge of the violation.

Sec. 202 (Pages 22, line 22 – 23, line 5): This provision should simply cross-reference Section 1591(e)(1) as it uses the same definition. The definitions will remain consistent if one is amended.

Sec. 211 (Page 26, lines 3-7): This provision allows the Department of Homeland Security (DHS) to award a T-visa even if the victim does not cooperate with law enforcement, so long as the victim has a "reasonable fear of retaliation posed by the traffickers." Based on our experience of working with thousands of trafficking victims, many victims understandably have such a reasonable fear of retaliation. In fact, the fear of retaliation is often used as evidence to establish the elements of trafficking. Trafficking victims often are the source of the most important evidence in the investigation of a trafficking case. However, if a victim is allowed to simply invoke this provision and be exempted from cooperating with law enforcement, our ability to prosecute traffickers would be seriously hampered. Without information or testimony from the victims, we very well may not be able to compile the necessary evidence to successfully prosecute a trafficker, potentially leaving the trafficker to escape justice. Moreover, it would potentially undermine our ability to obtain critical and potentially life-saving information from the rescued victims that would allow us to rescue the other victims who may still be in harm's way and being abused by the traffickers. Finally, we are unclear why this provision is necessary. We use a "victim-centered" approach when we investigate and prosecute trafficking cases. As such, we take particular care to ensure that the victims are safe, and that they are treated with dignity and respect. For these reasons, we would object to any relaxation of the cooperation requirement and ask that this provision be stricken.

Sec. 221 (Pages 29, line 8 – 31, line 2): This section appears to increase DOJ's reporting requirements on training government and law enforcement officials and on activities undertaken to meet the needs of minor victims of trafficking who are U.S. citizens or Lawful Permanent Residents (LPRs). Although DOJ already reports on these subjects, the language appears to require the AG to report on programs and activities outside of DOJ. We ask that this provision be stricken, as it apparently requires the AG to report on the performance of the Department of Health and Human Services (HHS) and other federal agency programs outside the AG's purview, including the T and U visa process.

Sec. 231 (Page 34, lines 15-16; Page 37, lines 1-7): This section is entitled "Assistance for Domestic Minor Sex Trafficking Victims." We understand the term "Domestic" to reference individuals who are U.S. citizens, U.S. nationals, or LPRs. However, the term "minor victim of sex trafficking" is defined in this section as an individual who is a victim of an offense described in 18 U.S.C. § 1591(a) or a comparable state law. Section 1591 can be applied to both foreign and domestic victims. As such, there is an inconsistency within the provision as to who is meant to be served through this program.

Sec. 231 (Page 35, lines 9-10): This provision defines eligible entities to include States and units of local government that meet certain criteria. We recommend amending this definition to

include Tribal governments. Although few or no tribes may meet these eligibility criteria, we have heard repeatedly from tribal leaders and advocates that trafficking of women and girls is a significant problem on Indian reservations and therefore we recommend the bill open eligibility to any tribe that qualifies. In the alternative, given that the current bill would fund only four entities, we would suggest that at least one of them include a focus on the problem of trafficking on Indian reservations in that jurisdiction. This could be accomplished by adding at the end of proposed Section 202(b)(1)(B) the following (Page 38, line 19): "Not fewer than 1 of the block grants made under subparagraph (A) shall be awarded to an eligible entity that proposes, as one element of its grant program, to address the problem of sex trafficking of minors in Indian country."

Sec. 231 (Pages 35, line 19 – 36, line 20): The proposed Section 202(a)(3)(C) requires a multi-disciplinary plan with a number of elements to address sex trafficking of minors. Because many of these victims have suffered from sexual assaults and because the coercive control exercised by perpetrators and the emotional and practical response of minor victims of sex trafficking are strikingly similar to the dynamics of domestic and dating violence, we would recommend that the plan include a new Section 202(a)(3)(C)(vii) that reads: "cooperation or referral agreements with sexual assault, domestic violence, and dating violence victim service providers". (To effect this change, we also suggest leaving the "and" at the end of the bill's proposed Section 202(a)(3)(C)(vi)—which is otherwise an error—and deleting the "and" at the end of proposed Section 202(a)(3)(C)(v).)

Sec. 231 (Page 37, lines 10-12): Regarding the proposed Section 202(a)(4)(B)(ii), we recommend deletion of the phrase "on the day". The term implies that a person must be described as a victim per subparagraph (a)(4)(A) only on the day before turning 18, as opposed to sometime before he or she turned 18.

Sec. 231 (Page 38, lines 4-7): Regarding the proposed Section 202(a)(6), we recommend adding the phrase "or a comparable State law" after "United States Code". We also recommend that the parentheses in lines 6-7 be deleted.

Sec. 231 (Pages 40, line 15 – 42, line 14): The proposed Section 202(b)(2)(B) sets forth authorized grant-funded activities. All but two of the listed activities—specialized training (vii) and treatment of offenders (ix)—are limited to "sex trafficking of minors" or "minor victims of sex trafficking. We seek clarification as to whether this was intentional. In addition, we question the appropriateness of including "treatment" for those who purchase sex acts—and then specifically (and rightly, we think) excluding "treatment" of offenders who purchase sex acts with a minor. As this does not appear to fit with the overall purposes of the grant program, which would not otherwise address commercial sex acts that do not involve minors, we recommend deleting this provision (Pages 41, line 23 – 42, line 11). Finally, we note that this bill, unlike previous ones that would have created such a grant program, does not permit the use of grant funds for law enforcement and prosecutor salaries. In our experience administering programs that fund a coordinated community response to violence against women, funding for prosecution and law enforcement activities is an important component of many projects.

Sec. 231 (Page 44, lines 7-11): This provision requires the Inspector General of HHS to conduct an audit of the programs in FYs 2014 and 2015. Because DOJ/OJP will implement the program and ordinarily would be responsible for program and oversight, we seek clarification as to whether the provision is in error. We recommending striking the reference to the HHS Inspector General and replacing it with [the Office of the Inspector General of the Department of Justice].

Sec. 231 (Page 44, lines 12-22): This provision provides for annual increases in match requirements for grantees. Grantees under the TVPA have difficulty reaching a 25 percent match requirement. Anything higher than that will be very problematic for grantees; therefore, we recommend that no match requirement be higher than 25 percent. If the match requirement is retained, we recommend including a hardship exception in subsection (g), comparable to that included in the Internet Crimes Against Children task force program. For example, language could be added that reads: "The Attorney General may waive, in whole or in part, the matching requirement if the eligible entity demonstrates good cause or financial hardship."

Sec. 232 (Page 46, lines 13-16): This provision would require the training of local law enforcement personnel to "prioritize the investigations and prosecutions of those cases involving minor victims" in all cases. Because law enforcement officers should prioritize cases based on the facts of each case they see, we object to this provision and ask that it be stricken.

Sec. 401 (Pages 52, line 21 – 54, line 8): The amendments to Section 208 of the INA replace the term "an unaccompanied alien child" with an "applicant" or "alien" "younger than 18 years of age" in regard to initial jurisdiction, safe third country, the one-year rule, and reinstatement of prior removal orders. We are concerned about the impact this provision could have on family unification. If children are not subject to reinstated removal, but their other family members are, this language may have the unintended result of creating more unaccompanied alien children in the U.S.

Sec. 401 (Pages 53, line 17 – 54, line 8): This provision removes the reference to the AG in regard to the AG's review of reinstatement of removal. We note that the proposed change to U.S.C. § 1231(a)(5)—the reinstatement statute (replacing "Attorney General" with "Secretary of Homeland Security")—will substantially reduce the need for footnoting the creation of DHS, without impacting any substantive issues in litigation.

State Department Comments on
S. 1301, Trafficking Victims Protection Act Reauthorization Bill
October 6, 2011

- The State Department appreciates the opportunity to comment on S. 1301. We value the tools that the Trafficking Victims Protection Act of 2000, as amended (TVPA), has provided us to combat human trafficking. The Department supports reauthorization of the TVPA, as most recently amended in 2008, with no substantive changes to the provisions that affect the Trafficking in Persons (TIP) Report. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008) has provided opportunities for innovation, while ensuring that the 3P paradigm and federal definition remain consistent over time, across agencies, and with international norms. Such an approach has helped federal agencies investigate and prosecute these crimes with greater success each year; apply the minimum standards to the community of nations through the TIP Report in a manner that tracks the Palermo Protocol and garners results; and coordinate and partner with each other and with non-governmental organizations and the private sector to leverage resources and multiply forces at home and abroad in a manner and direction that can stand the test of time.

- We note that S. 1301 includes a large number of mandates; thus this bill is likely to be extremely costly and could seriously jeopardize agencies' abilities to implement elements of a TVPA reauthorization, particularly in this era of constrained federal resources.

- Among the most problematic provisions of S. 1301 are mandates or prescriptive measures required by sections 102, 105, and 106. These provisions would mandate additional layers of bureaucracy, create burdensome and duplicative reporting mechanisms, and change the TIP Report tier rankings in such a way as to jeopardize the credibility of the TIP Report and adversely impact our ability to conduct diplomacy. This, in turn, would deprive the Department of the flexibility to ensure that the Secretary can organize and run the Department in the most effective manner.

- The following comments identify the Department's concerns with certain provisions of S. 1301. Note that these comments are limited to S. 1301 and do not include any proposals regarding technical corrections to the TVPRA 2008 or other existing U.S. laws. Furthermore, the Department may, in the future, submit additional comments related to implementation or reauthorization of the TVPA. If additional authorities are crafted, we welcome the opportunity to analyze and comment on them and urge that any such additional provisions be crafted as permissive authorities.

Specific Comments

Section 101

Section 101(4) (Page 3, line 21-Page 4, line 12) – Regional Strategies for Combating Trafficking in Persons: The proposed new TVPA section 105(f) would require each regional bureau in the State Department to "submit a list of anti-trafficking goals and objectives for each country in its geographic area of responsibility," and further that "[h]ost governments shall be informed of the goals and objectives for their particular country."

The second part of this provision should be made precatory by changing "shall" to "should" to avoid suggesting that the executive branch would be required to engage foreign governments. By directing the members of the executive branch to engage foreign governments, this provision would infringe on the President's exclusive authority with regard to the conduct of diplomacy.

In addition, the provision should not require Department bureaus to submit lists of goals and objectives and should not impose specific deadlines for those submissions. Such requirements would be duplicative of the Department's current practice of making specific recommendations for each country in the annual TIP Report and drafting associated Action Plans based on these recommendations, and would needlessly micromanage the interactions of bureaus within the Department. The provision should therefore be made precatory by changing "shall" to "should," and the second sentence should be deleted to avoid setting a statutory deadline for what would be an internal Department process. (We also note that the provision would impose the same deadline for regional bureau submissions of objectives and for informing foreign governments of those objectives.)

Section 101(1) & (2) (Page 3, lines 6-18): This is duplicative with section 103 (pages 5-6; lines 21-24 and 1-8).

Section 102

Section 102(2) (Page 4, line 19 to Page 5, line 18) – Regional Anti-Trafficking Officers: This provision would add a new subsection (e) to TVPA section 106 authorizing the Secretary of State to appoint anti-TIP officers "at United States embassies … who shall collaborate" with foreign countries to eliminate TIP. The proposed section clarifies that the officers are intended to expand G/TIP's anti-trafficking efforts, monitor regional trends, assess compliance with the TVPA and help in the preparation of the TIP Report. These are all functions already carried out effectively by TIP reporting officers at every U.S. embassy, a TIP-designated regional coordination officer in each of the six regional bureaus in Washington, and G/TIP's reporting and political analysis staff. Moreover, this new proposed authority is not accompanied by any additional authorization of funds or increased appropriations for its implementation and such positions would necessarily incur substantial administrative and overhead costs. It is unclear where funding for additional personnel and/or TDY costs would come from.

These positions would create redundancies and bureaucratic overlap, complicating the current reporting process, which already has many layers, and necessitating extra costs and personnel for negligible benefits. The Department not only has significant resources devoted to reporting under the TVPA, but also employs a methodology and process that is effective and well-established. Such an additional layer of oversight of embassy reporting would unnecessarily increase costs at a time when budgets for effective programs are being cut. This proposed authority is therefore unnecessary and would not advance our shared goal of combating TIP.

Section 103

Section 103(2) (Page 6, line 23-Page 7, line 14) – Partnerships: This provision would move current TVPA section 105(e)(2)(A) out of the section addressing the authorities of the Office to Monitor and Combat Trafficking in Persons to a new, separate section – styled as section 105A – that addresses partnerships against significant trafficking in persons. Wherever the term "Director" is intended to refer to the Director of the Office to Monitor and Combat Trafficking in Persons, we recommend that "of the office established pursuant to section 105(e)(1) of this Act" be added after "Director" in new provisions outside current section 105(e) of the TVPA. Note also that both sections 101(2) and 103(1) of the bill strike TVPA section 105(e)(2)(A).

Section 103(2) (Page 7, line 15-Page 8, line 23) – Additional Measures to Enhance Anti-Trafficking Response and Capacity: The provision would add a new section 105A(c) mandating that the President establish and carry out programs with foreign governments and civil society to enhance anti-trafficking response and capacity. This provision, however, is almost an exact replica of existing TVPA section 106(i), which we would recommend deleting if this provision is added to section 105A. In addition, although already currently mandated, we recommend changing "shall establish" to "is authorized to establish" to avoid constraining the President's ability to manage existing already-limited resources.

Section 103(2) (Page 8, line 25; Page 9, line 1) – Emergency Situations: The TVPA, as amended, uses "the Director" rather than "the Ambassador-at-Large" to describe the head of the Office to Monitor and Combat Trafficking in Persons. We recommend changing the reference to "the Ambassador-at-Large" to "the Director of the office established pursuant to section 105(e)(1) of this Act".

Section 103(2) (Page 9, line 6 et seq.) – Child Protection Compacts: As noted in the general comments above, no additional funds are authorized or appropriated for this proposed subsection. As such, it would be difficult to hold countries accountable to the benchmarks set forth in the provision without diverting scarce resources from other key functions.

Section 103(2) (Page 9, lines 6 et seq.) – Child Protection Compacts: We recommend changing "shall" at page 11, line 8 to "is authorized to" to clarify that the Secretary is not required

to enter into child protection compacts should she deem it inappropriate to do so. In addition we recommend changing the "shall" at page 9, line 25, to "should," and the "shall" at page 10, line 2, to "should," to allow the Secretary the discretion to determine the most appropriate content of such compacts, should she choose to enter into them, depending on the specific circumstances before her. Similarly, we recommend changing "shall" at page 11, lines 11 and 16, to "should" to avoid unhelpfully restricting the Secretary's discretion to determine the criteria used to select countries for such compacts. We also recommend striking "on the basis of" on page 11, line 16, and insert "criteria such as."

In addition, we recommend deleting "acting through the Ambassador-at-Large of the Office to Monitor and Combat Trafficking in Persons and in consultation with the Bureau of Democracy, Human Rights, and Labor" as these entities already act under the direction of the Secretary. A similar change should be made in subsection (d) starting at page 8, line 25, subsection (e)(1) starting at page 9 line 8, and subsection (e)(4) starting at page 11 line 5.

Section 103(2) (Page 9, lines 21-22) – Child Protection Compacts: This provision uses the term "severe forms of trafficking in children," which is not defined in the TVPA.

Section 104

No comments.

Section 105

Section 105 (Pages 13-15) – Minimum Standards: The provisions in section 105 of the bill amend existing TVPA section 108(b), which lists factors that should be considered as indicia of serious and sustained efforts to eliminate severe forms of trafficking in persons for purposes of the fourth minimum standard. In general, the Department of State wishes to emphasize that it is critical for purposes of U.S. diplomacy in this area that the definition of "severe forms of trafficking in persons" and the TVPA Minimum Standards be consistent with the anti-trafficking framework enshrined in the Palermo Protocol. As such, a change in the Minimum Standards could jeopardize the credibility of the TIP Report. We do not think any of the proposed changes create such a lack of conformity with the framework of the Palermo Protocol, although we have some comments on certain parts of section 105. Moreover, we also need to be mindful of the substantial diplomatic effort and credibility built up around the current Minimum Standards. Any significant change to these standards will complicate bilateral diplomacy on TIP and could unintentionally weaken the credibility of the Report by hardening perceptions that the TVPA reauthorizations and TIP Report "change the goalposts."

Section 105(1)(C) and (2) (Page 14, lines 5-17) – Minimum Standards: Aside from being redundant, the addition in two different sub-paragraphs of existing TVPA section 108(b)(3) and (4) of the phrase "bilateral, multilateral, or regional . . . cooperation

arrangements with source, transit, [and/or] destination countries ***in its trafficking route***" reflects a movement/smuggling paradigm that is not consistent with the existing definition of TIP. We suggest reducing this to simply "bilateral, multilateral, or regional . . . cooperation arrangements ***with other countries***."

Section 105(3) (Page 14, lines 23-25; Page 15, lines 1-3): This proposed addition would require the State Department to consider a foreign government's failure to "remediate public allegations" against public officials who "participate or facilitate severe forms of trafficking" or condone such trafficking to be failure to take action under this subcriteria of the fourth minimum standard. It is unclear what is intended by "remediate public allegations." Not all public allegations of potential government complicity in trafficking will, or should, result in prosecutions or convictions. Some may result in investigations that the government chooses not to make public to preserve the integrity of the investigation. Others may result in no investigation, or one that closes quickly, due to a lack of substantiation of the public allegations. Some public allegations may be mere political posturing deserving no response. It would be counterproductive to disregard efforts by a foreign government to address government complicity based on a failure to "remediate" all public allegations, some which may not be meritorious. To clarify, suggest replacing "remediate" with "appropriately address."

In addition, it is unclear whether this new provision is intended to address only officials sent abroad as part of a peacekeeping or diplomatic mission, or all government officials.

Section 105(5) (Page 15, Lines 7-18) – Minimum Standards: This new factor includes for consideration in the TIP Report rankings whether a foreign government has concluded any arrangements or agreements with the United States "toward agreed goals and objectives" to combat TIP. This language should not be linked to bilateral agreements or arrangements with the United States, as countries' obligations to criminalize human trafficking and protect victims are based on international law and are owed to the international community – not exclusively to the United States. In our diplomatic efforts to fight trafficking, we have much to lose by changing the dynamics from an approach rooted in multilateral consensus (implementing the principles of the Palermo Protocol) to an approach that is U.S.-centric.

Section 106

Section 106(1)(B) (Page 16, lines 9-20) – Best Practices; Tier 2 Plus: This provision would create a sub-tier within Tier 2 – e.g., a "Tier 2 Plus" – by requiring the TIP report to identify and mention governments that either have made "exemplary progress" in their efforts to meet the Minimum Standards or "entered into a commitment with the Secretary" in an attempt to reach full compliance with such standards before the next year's Report. As the TVPA now reads, we are assisted in determining "serious and sustained efforts to eliminate severe forms of trafficking in persons" (the fourth Minimum Standard) by section 108(b) criteria. This proposal would offer new guidance on what constitutes "exemplary progress," which some could argue is on par with "serious and sustained efforts," or use as a short-cut around the 4th Minimum Standard.

This vague notion of "exemplary progress" would create burdens by requiring additional granularity and unnecessary changes in TIP Report methodology without any countervailing benefits. Adding granularity to standards that took years to finalize and have already been communicated to foreign governments thus creates room for debate and could harm foreign relations. For example, the ramifications of labeling certain countries as exemplary and not others would create a significant new level of political challenges and tensions internally within the Department, as well as bilaterally with foreign governments.

Furthermore, diplomatic efforts would be set back by encouraging foreign governments to enter into bilateral agreements with the State Department and commit to take certain actions, as opposed to focusing foreign governments' attention on their obligations to their own citizens and to the international community to respect human rights and combat trafficking. Such an approach would move away from the current goal of universal standards and best practices, and create reporting and ranking pressures based on what is negotiable with each country, resulting in a lack of a uniform and standard methodology.

Finally, such language could also create unhelpful ambiguity over the level of credit a written plan should receive: countries on the Tier 2 Watch List facing a potential statutory downgrade to Tier 3 may submit a written plan that, if implemented, would constitute significant efforts to comply with the Minimum Standards (earning them a waiver under the current system). It could then be argued, however, that such a written plan constitutes "entering into a commitment with the Secretary" deserving of the new "Tier 2 Plus" category. There is not sufficient analytical distance between these two standards that would coexist in an amended TVPA. The Department's success in urging foreign governments to improve their efforts lies largely in arguments based on international norms and the Palermo Protocol standards, rather than on U.S. law or USG oversight. The Department supports the TVPA's current Tier system, which is widely understood globally, with transparent and clear benchmarks for success based on the Minimum Standards and the international framework they reflect.

Section 106(1) (Page 16, line 8): Change "shall" to "should."

Section 106(1) (Page 16, lines 9-20): It is unclear what is intended by "agreement" in line 16. Since a formal agreement is not necessary to accomplish the purpose of the provision, we suggest changing "entered into an agreement with the Secretary" to "committed."

Section 106(2) (Page 17, line 13) – Interim Reports: If existing TVPA section 110(b)(2) is deleted, need to make existing paragraph 3 into new paragraph 2.

Section 106(3) (Page 17, lines 14-24) – Public Notice: Based on the section-by-section summary of the bill, this proposed provision was intended to add a new TVPA section 110(b)(3)(E) that would require the Secretary, not later than thirty days after notifying Congress of a determination to waive the automatic downgrade of any country from the Special Watch List to Tier 3, to "provide a detailed description of the credible evidence supporting such a determination" and to make it public available on a "website maintained by the

Department of State." There appears to by a typographical error in the bill, because the provision cross-references subparagraph (A)(iii) of existing TVPA section 110(b)(3) – the Special Watch List provision – rather than subparagraph (D)(ii) – the automatic downgrade waiver authority. In any event, the Department already provides such a detailed description when it justifies exercises of the waiver authority found at (D)(ii), including a report on the credible evidence, in its reports to Congress, which are made public by the Department via the Internet. This provision would therefore duplicate that existing reporting mechanism.

Section 107

Section 107(1)-(4) (Pages 18-19) – Video for Consular Waiting Rooms: While we appreciate the intent of this provision to build on the successful practice of disseminating Information Pamphlets at Embassies and Consulates, this mandate, which is unfunded, would be burdensome and require additional resources for overseas posts, many of which do not have the production and translation capacity or the equipment installed to display such a presentation. Such videos are expensive to produce, translate, and keep updated. Moreover, it would not be effective to produce one video and simply translate it into multiple languages; at each new post, the cultural background of the audience would have to be considered in formulating content. In addition, this provision could potentially harm other U.S. interests. For example, if such a video were to play in busy consular waiting rooms continuously, or even frequently, it could potentially harm tourism because the video will reach other types of consular visitors not necessarily vulnerable to human trafficking.