
Border Closure Exposing Children to Heightened Risk of Trafficking and Exploitation

Summary

In the midst of the novel coronavirus (COVID-19) pandemic, the Department of Homeland Security (DHS) is turning away unaccompanied children and asylum seekers at its borders, without first conducting trafficking and other humanitarian screenings required under U.S. law. Although Customs and Border Protection (CBP) has provided very little information about these practices, as of April 7, 2020, at least 350 unaccompanied children—and thousands more asylum seekers—have been summarily returned to Mexico or to their home country to face threats of violence, sexual assault, murder, persecution, and trafficking.¹

KIND learned of 12-year-old and 15-year-old Central American minors who presented themselves alone as unaccompanied children at the United States-Mexico border. They provided their biographic information to CBP; instead of being transferred into the custody of the Department of Health and Human Services Office of Refugee Resettlement (ORR) as required by U.S. law², they were expelled back into a dangerous environment in Ciudad Juarez, homeless and on their own until they were connected with child welfare in Juarez.

These actions, which violate laws designed to protect asylum seekers and prevent trafficking—especially of children—are being justified as needed to protect Americans from the spread of COVID-19. But at the border, as everywhere else in the United States, it is the government’s responsibility to both protect people from the spread of disease while continuing to uphold and maintain existing laws and responsibilities. Rather than summarily expelling children from the United States, DHS should be following the best practices identified by public health experts to screen, test, treat, and responsibly quarantine unaccompanied children and asylum seekers, attending to their health and humanitarian needs and legal rights.

How has the government changed its practices at the border in response to COVID-19?

On March 20, 2020, the Department of Health and Human Services (HHS), published an interim regulation³ allowing the Director of the Centers for Disease Control and Prevention (CDC) to issue an

¹ Arelis R. Hernández and Nick Miroff, “Facing coronavirus pandemic, Trump suspends immigration laws and showcases vision for locked-down border” Washington Post (Apr. 3, 2020); https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html; Ted Hesson and Mica Rosenberg, “U.S. deports 400 migrant children under new coronavirus rules” Reuters (Apr. 7, 2020); <https://www.reuters.com/article/us-health-coronavirus-usa-deportations/us-deports-400-migrant-children-under-new-coronavirus-rules-idUSKBN21P354>.

² William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-4573.

³ Centers for Disease Control and Prevention, Control of Communicable Diseases; Foreign Quarantine, Suspension of Introduction of Persons into the United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559 (March 24, 2020).

order⁴ suspending entry of individuals to the United States if they are arriving from a country where a known infectious disease is circulating. The order is based on a provision of the 1944 Public Health Service Act designed to address temporary suspensions of entry, such as quarantining goods or people in situations where they are suspected to carry a contagious disease.⁵ This law has never been used as a substitute for immigration enforcement, nor is there any basis for using it to expel people.⁶ Nonetheless, the CDC issued an order authorizing DHS to prevent the entry of “covered aliens,” which it defines as people seeking admission to the United States who do not have proper paperwork.

Though DHS authorized CBP to designate further categories of essential travel and make exceptions on a case-by-case basis, neither a March 24 DHS order⁷ nor operational CBP guidance⁸ exempts unaccompanied children from the CDC order’s restrictions. In short, unaccompanied children and asylum seekers seeking protection—those most in need of exception to the restrictions—are the only ones subject to them. Media reports that, as of April 8, DHS may already have expelled over 350 unaccompanied children without proper screenings, placement into immigration court proceedings, or referrals to ORR.⁹

How does the border closure violate U.S. law and further place unaccompanied children at risk for trafficking?

Mexico to date has generally agreed to accept expulsions from the United States with few limitations, but has refused to accept unaccompanied children.¹⁰ In response, CBP devised a new category of children to be able to turn back children.¹¹ Under the newly created category, CBP can return a child to Mexico as long as they are accompanied by an adult. Leaked guidance¹² does not provide any instruction to CBP officers or agents on what, if any, screening should be done to verify familial relationship or confirm the adult with the child is a safe person for the child to be with.

The new order ignores laws that specifically require the U.S. government to screen children for trafficking or other harms, and to screen anyone who expresses a fear of persecution or torture. First, under the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008,¹³ when the U.S. government encounters an unaccompanied child seeking to enter the United States, it must conduct appropriate screening to determine whether the child is at risk of trafficking or fears return to their home country. It also requires that DHS transfer unaccompanied children from non-contiguous

⁴ Centers for Disease Control and Prevention, Notice of Order Under Sections 362 and 365 of the Public Health Service Suspending Introduction of Certain persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (March 26, 2020)

⁵ 42 USC § 265

⁶ Lucas Guttentag, “Corona Virus Border Expulsions: The CDC’s Assault on Asylum Seekers and Unaccompanied Minors,” Just Security (Apr. 13, 2020); <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors>.

⁷ “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico,” 85 FR 16547.

⁸ CBP, “COVID-19 CAPIO”, <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html> (hereinafter “CBP COVID-19 CAPIO”), obtained through via Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law,” ProPublica (Apr. 2, 2020); <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

⁹ Hesson and Rosenberg, *supra*. Additionally, on at least one recent day, CBP failed to refer any unaccompanied children to ORR, the first time in recent memory that has occurred, according to the ORR. See Hernández and Miroff, *supra*.

¹⁰ See Maria Verza and Ben Fox, “US expels thousands to Mexico after largely halting asylum,” Associated Press (Apr. 9, 2020); <https://apnews.com/7e9426532434bdda47f270a57d091c91>.

¹¹ CBP COVID-19 CAPIO, *supra*.

¹² *Id.*

¹³ P.L. 110-457.

countries into the care and custody of ORR, as well as unaccompanied children from contiguous countries who are at risk of trafficking, fear return, or are unable to make an independent decision about withdrawing their application for admission. All of these children must be placed into full immigration court proceedings so they have an opportunity to be screened by a social worker and a lawyer, and have their case heard before an immigration judge.

Second, leaked CBP memos¹⁴ guiding how agents and officers should implement the new protocols indicate that CBP guidance has invented the new term “unaccompanied juvenile,” to bypass the existing definition of an “unaccompanied alien child” in the Homeland Security Act of 2002¹⁵ and its corresponding legal obligations.

By using the newly invented category (which does not appear anywhere else in federal law) “unaccompanied juvenile” CBP is summarily expelling children under the pretext of returning family units. To KIND’s knowledge, at present the U.S. government is not performing any screenings to determine whether adults arriving with these children are their family members. By foregoing TVPRA-mandated screenings and summarily expelling these arriving individuals as a unit, U.S. officials will fail to detect children who are being trafficked and may place children at risk of remaining in their trafficking situation or being exploited.

Third, U.S. law and international treaty obligations require the government to permit anyone in the United States, regardless of status, to apply for asylum. Moreover, the government may not return a person to a country where it is more likely than not that he or she will suffer persecution or torture.¹⁶ The new order allows the government to circumvent all of these requirements in the guise of public health, contravening Congress’s specific intent to protect unaccompanied children from human trafficking, persecution, and torture.¹⁷

Is there a way for the United States to respond to the public health crisis while continuing to protect unaccompanied children?

The United States, like all countries, must do its part based on scientific knowledge, empirical evidence,¹⁸ and effective policies to ensure that its people are protected from the global pandemic, while also abiding by its own existing laws and humanitarian obligations. These are not conflicting or mutually exclusive goals as many existing U.S. and humanitarian laws were created in response to assisting those facing natural disasters, unrest, and strife.

¹⁴ CBP COVID-19 CAPIO, *supra*.

¹⁵ 6 U.S.C. 279(g)(2).

¹⁶ The principle of non-refoulement is articulated in Article 33 of the Convention and Protocol Relating to the Status of Refugees, to which the United States is a signatory and which the U.S. Congress implemented through the 1980 Refugee Act.

¹⁷ See, e.g., Cong. Record (House), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Dec. 10, 2008), at H10902, Statement of Rep. Smith (NJ) (“By protecting the victims and not sending them back to their home country where they are often exploited in a vicious cycle of exploitation, we say to the victims we will make every effort to make you safe and secure.”); *id.* at 10903, Statement of Rep. Loretta Sanchez (CA) (The TVPRA “provides additional protections for trafficking survivors who are threatened by trafficking perpetrators, and for children who are at risk of being repatriated into the hands of traffickers or abusers.”).

¹⁸ The belief that immigrants, undocumented or otherwise, bring disease into the country has been debunked by multiple studies and is a “centuries-old trope used to heighten anti-immigrant fears and anxieties.” Tom K. Wong, “COVID-19 and the Remaking of U.S. Immigration Policy? Empirically Evaluating the Myth of Immigration and Disease,” US Immigration Policy Center (Apr. 22, 2020); <https://usipc.ucsd.edu/files/usipc-myth-immigration-disease-final.pdf>. See also Jack Herrera, “Studies Show Fears about Migration and Disease are Unfounded,” Pacific Standard (May 15, 2020); <https://psmag.com/news/studies-show-fears-about-migration-and-disease-are-unfounded>.

Public health experts, along with the United Nations Refugees Agency (UNHCR), have urged the Trump Administration to practice appropriate testing, screening, and other measures, such as temporary quarantines, to prevent the spread of COVID-19 while still conducting the legally required measures to protect children and others from trafficking, persecution, and torture. With proper screening and monitoring, unaccompanied children can be safely permitted to enter the United States and reunited with family while their case for humanitarian protection proceeds before a court, minimizing the risk of transmission of illness through the same public health practices recommended for all Americans.

Is the order to turn back unaccompanied children inconsistent with the Trump Administration’s anti-trafficking priorities?

By turning children away, the Trump Administration is also violating its own public determination to end human trafficking.¹⁹ The pandemic is worsening factors that can lead to trafficking, including lack of education, violence, unemployment, and poverty. Those who exploit human misery do not pause in the face of crises, and in fact, experts note that trafficking and other abuses often increase in times when people are most desperate and vulnerable.²⁰ Whether children are summarily turned around at the Mexican border to live in dangerous and substandard conditions or sent back to their home country without a determination if they will be safe, all the reasons they fled will face them again, compounded by the dangers and deprivations brought on by the economic and humanitarian crisis caused by COVID-19.

At the end of the day, the United States response to a global pandemic will be measured in how our country responded and protected the most vulnerable during a difficult time. The United States is a compassionate nation, but the Administration is capitalizing on this terrible event to further its political goals. We cannot let fear and panic eliminate legal obligations that would set a dangerous precedent leaders can exploit for their own political goals. The Trump Administration must respect the protective measures Congress put into law to protect these vulnerable children from human trafficking. We can keep our country—and those in need of our protection—safe and uphold our fundamental principles as Americans.

¹⁹ For example, President Trump has made this statement, “My Administration will focus on ending the absolutely horrific practice of human trafficking. And I am prepared to bring the full force and weight of our government, whatever we can do, in order to solve this horrific problem.” President Trump, “President Donald J. Trump is Working to End Human Trafficking,” (Mar. 13, 2018); <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-end-human-trafficking>. As recent as April 22, 2020, President Donald Trump reiterated his priority to stop human trafficking on Twitter; <https://twitter.com/realDonaldTrump/status/1252915116363874305>.

²⁰ HHS’ Office of Trafficking Persons (OTIP) office has stated, “As in times of disaster response, we recognize that disruptions to local services, housing and economic stability, and social disconnection can further increase risk for victimization and exploitation,” (last retrieved Apr. 23, 2020); <https://www.acf.hhs.gov/otip/news/covid-19-resources-services-support>. See also, e.g., Freedom Network USA, “Supporting Human Trafficking Survivors During the Coronavirus Pandemic: Challenges and Solutions,” (Apr. 17, 2020); <https://freedomnetworkusa.org/app/uploads/2020/04/FNUSAs-Recommendations-on-Supporting-Human-Trafficking-Survivors-Coronavirus-17April2020.pdf>; see also Angharad Smith and Dr. James Cockayne, “This is the impact of COVID-19 on modern slavery,” World Economic Forum (Apr. 7, 2020); <https://www.weforum.org/agenda/2020/04/covid19-modern-slavery>.