

THE LATEST BRICK IN THE WALL
How the Trump Administration Unlawfully ‘Expels’
Asylum Seekers & Unaccompanied Children
In the Name of Public Health

Frequently Asked Questions

April 2020 | Azadeh Erfani

On March 20, 2020, the Trump administration took the unprecedented step of [sealing the U.S. border](#) under the guise of curbing the COVID-19 pandemic. This sweeping executive action has raised many questions related to the intersection between public health and immigration law, particularly as countless asylum seekers and children have been “[expelled](#)” at the U.S. border. NIJC strongly condemns these unlawful expulsions which have already sent countless migrants back to certain harm or death. This FAQ reveals the dubious legal reasoning for the border closure and prevailing obligations under U.S. and international law.

1. What is the legal basis the administration claims for closing the border?

Last month, the Department of Health and Human Services’ (HHS) Centers for Disease Control and Prevention (CDC) issued an order, in coordination with the Department of Homeland Security (DHS), barring entry of all “nonessential” travelers at the Southern and Northern border. The Order suspends the entry of all people arriving at the United States border without valid travel documents; the only exceptions are U.S. citizens, lawful permanent residents, members of the armed forces, and their respective families.

For the first time in U.S. history, the executive branch cited [42 U.S.C. § 265](#) to justify this indefinite closure of the border. Enacted in 1944, this statute preceded the end of World War II, which revealed the global failure to protect the most vulnerable in times of crisis. The statute enables the Surgeon General to impose a partial or complete restriction on the introduction of persons and property into the United States so as to avert the spread of communicable disease. Over the 60+ years that followed its passage, Congress enacted numerous protections for asylum seekers and unaccompanied children, creating a complex legal framework for protection of refugees arriving at U.S. borders. Yet the Order does not even mention these supervening laws and policies.

2. How is the administration implementing the border closure?

Customs and Border Protection (CBP) officers have already [expelled over 7,000](#) people and [400 unaccompanied children](#) in less than two weeks, without any screening for fear of return or trafficking. The exact toll of these policies is unknown, but expelled migrants become easy prey for traffickers

and/or the deadly virus as they relocate to overcrowded, unsafe [encampments](#) near the U.S. border. While the CDC Order does not explicitly permit expulsions, the CDC created a legal vacuum by failing to address the rights of asylum seekers and unaccompanied children at our borders. An internal [memorandum uncovered by an investigative journalist](#) revealed that CBP has interpreted the CDC Order to mean that Title 42 overrides existing U.S. law mandating processing procedures for asylum seekers and children.

As multiple lawmakers and a [former DHS](#) official have pointed out, this extrajudicial expulsion policy [does not pass legal muster](#). In one executive stroke, the administration usurped Congress' legislative authority and struck out decades of binding obligations under domestic and international law.

3. What are our obligations to asylum seekers at the U.S. border?

Nearly 40 years after the enactment of 42 U.S.C. § 265 (the statute used to justify the border closure), Congress enacted the [Refugee Act of 1980](#), enshrining the “historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.” The Refugee Act amended existing law to provide that any noncitizen “who arrives in the United States...may apply for asylum.” The U.S. also signed and ratified the 1967 United Nations (U.N.) Protocol Relating to the Status of Refugees, which incorporates the 1951 U.N. Convention Relating to the Status of Refugees. This means that international principles of *non-refoulement* (included in the U.N. [Refugee Convention](#)) are the law of the land. Under the U.S. asylum system, CBP is thus prohibited from returning individuals to a country where they may face life-threatening harm on the basis of a protected ground. Since the border closure, CBP has engaged in daily [violations](#) of these obligations by summarily expelling asylum seekers.

4. What are our obligations to unaccompanied children at the U.S. border?

Also many years subsequent to the enactment of 42 U.S.C. § 265, Congress [unanimously](#) recognized that immigrant children are children, first and foremost, and required special care when they approach our borders alone. In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), mandating protective [procedures](#) for unaccompanied children, given the high risk that they will be subject to exploitation, trafficking, or violence. These procedures include a [strict 72-hour](#) deadline for CBP officials to turn over unaccompanied children to HHS, HHS' best interest evaluation of the least restrictive setting for the child's care, and children's placement in removal proceedings. The TVPRA *only* permits the return of children to their country of origin after three separate agencies (DHS, HHS, and the Department of State) review and ensure a child's safe repatriation and reintegration with the child's family or an appropriate child welfare agency. By all accounts, CBP is [unilaterally](#) turning away hundreds of unaccompanied children without following any of the TVPRA-mandated procedures.

5. Does the CDC Order address humanitarian concerns at the border?

Barely. The Order does not even reference domestic or international legal obligations to asylum seekers and unaccompanied children. The Order does provide minimal exceptions for humanitarian concerns,

but they fall far short of compliance with existing law. The CDC Order carves out discretionary, case-by-case review of non-essential travel for humanitarian or national interest reasons. There is no data as to how many individuals have been referred for this *ad hoc* review, but publicly available [data](#) suggests that these discretionary reviews are rare, if even occurring. Asylum seekers and children are reportedly not considered for humanitarian or public interest review. This is not surprising given CBP's [hostile track record](#) of processing bona fide asylum seekers [prior to this pandemic](#). Under the CDC Order, CBP has free rein to toss existing legal obligations and procedures—even [changing Congress' definition](#) of unaccompanied children for implementation of the CDC Order.

6. What *are* public health experts recommending with regards to border?

Public health experts have called for [immediate rescission](#) of the border closure policy. While health screenings are advised, there is [no public health rationale](#) to justify [walling off](#) asylum seekers and children will mitigate COVID-19's spread. Importantly, the CDC Order relied on DHS's representation that mass detention of asylum seekers and children is the only alternative to their summary expulsion. Detention centers are in fact [tinderboxes](#) for the virus to spread, and public health experts and [human rights organizations](#) have [called urgently](#) on DHS to utilize the vast spectrum of release and community care options available as alternatives. Specifically, allowing asylum seekers to be processed and paroled into the community to shelter at home safely with their loved ones and promptly reuniting children with their families are safe and viable avenues that will not further strain our public health system. Importantly, public health measures only work [when they include everyone](#)—including migrants fleeing violence and harm lawfully seeking protection at our borders.

7. How long will the border be closed to asylum seekers and unaccompanied children?

Alarming, that is unclear. The initial order was set to expire in one month. However, the CDC recently [extended the order](#) until May 20, 2020, greenlighting thousands more expulsions, affecting vulnerable asylum seekers and unaccompanied children. Unfortunately, the executive branch is likely to continue to [weaponize](#) this public health crisis, worsened by disastrous mismanagement, to dismantle existing humanitarian protections and unlawfully seal the border.

There is no question that COVID-19 has caused a deep crisis in the United States. How we respond in times of crisis defines us as a nation. In lieu of leading a humane response, the administration has engineered a shameful exploitation of this public health crisis to advance its [anti-immigrant](#) agenda. Scapegoating asylum seekers and children will not make us safer. That's why NIJC has [denounced](#) the exploitation of this public health crisis to suspend longstanding humanitarian protections and calls on the administration and lawmakers to:

- **immediately reopen the border to asylum seekers and unaccompanied children;**
- **parole asylum seekers and reunify children with their relatives on a safe and expedited basis;**
- **allow asylum seekers and immigrant children equal access to testing and treatment.**