



The Federal Government Abandons its Obligations to Unaccompanied Minors at the Borders Under the Guise of COVID-19

The current Administration is using the Coronavirus as an excuse to severely limit immigration. The expulsion of unaccompanied minors and the President's temporary suspension of new work visas are two recent examples of how the Administration is using this pandemic to execute their long-sought after goals of broadly reducing legal immigration policies.¹ However, legal protections currently exist for immigrants by which the Federal Government must abide. Especially in regard to unaccompanied minors at the borders, the Federal Government is legally obliged to follow specific protocol to protect these innocent children. But, the Administration disregards this protocol by expelling unaccompanied minors at the border.

The Federal Government's Shameful Treatment of Unaccompanied Minors at the Borders

The Administration's expulsions of unaccompanied minors at the Northern and Southern borders leave children in extremely perilous positions, as the minors are left with no choice but to return to the dangerous situations from which they originally fled. The expulsions need to stop; the Federal Government must assume its legal responsibility to take care of unaccompanied minors who enter the United States.

The Administration's blanket expulsion, along with the measures used for its implementation, likely violate the Homeland Security Act of 2002 (P.L. 107-296), the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457), and other procedural rights. By unjustifiably labeling immigrants traveling from Mexico and Canada to the United States as risks to public health, the Administration is simply using the global pandemic as an opportunity to take action

* This summer CDF-NY interns worked with staff on the 2020 CDF-NY Summer Policy Series. Sarah Greisman is the primary author of this paper.

¹Michael D. Shear and Miriam Jordan. 2020. "Trump Suspends Visas Allowing Hundreds of Thousands of Foreigners to Work in the U.S." *The New York Times*. <https://www.nytimes.com/2020/06/22/us/politics/trump-h1b-work-visas.html>.

against a group President Trump unjustly and consistently targets: immigrants. Consequently, the most dependent among us – immigrant children – are left to suffer at the forefront of the violence, disease, and hate that currently plagues our world.

The CDC’s Order Misinterprets the Authority Upon Which it Relies

On March 20, 2020, the Department of Health and Human Services’ (HHS) Centers for Disease Control and Prevention (CDC) issued an Order “. . . that suspends the introduction of certain persons from countries where an outbreak of a communicable disease exists.”² On its own, this Order does not confer valid legal authority to the Administration to expel noncitizens without documentation at the borders. The Order untenably interprets its authority, the 1944 Public Health Act, to mean an expulsion power granted to the executive to only expel noncitizens. The 1944 Act’s language, though, grants the executive the power to “. . . prohibit. . . the introduction of persons and property. . . ” which strongly suggests that the Act was intended to apply to both noncitizens and citizens alike.³⁴ Therefore, according to the authority that the CDC’s Order invokes, the Order does not authorize President Trump to target immigrants and to prevent only them from entering the United States.

Pre-existing Protections for Unaccompanied Minors at the Border

A variety of statutes and procedures exist to protect unaccompanied alien children (UAC) who present themselves at the border. The Homeland Security Act of 2002 (HSA) assigned responsibilities for the processing and treatment of UAC.⁵ One provision of the HSA assigns responsibility to the Office of Refugee Resettlement (ORR), a division of HHS, “. . . for coordinating and implementing the care and placement of UAC in appropriate custody, [and] reunifying UAC with their parents abroad if appropriate. . . .”⁶

The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) was enacted in 2008 to implement special protections for UAC from contiguous countries.⁷ One provision requires that “[UAC] be screened for evidence of human trafficking within 48 hours of apprehension. . . .

² Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 FR 31503-02

³ July 1, 1944, ch. 373, title III, §362, 58 Stat. 704.

⁴ Lucas Guttentag. 2020. “Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors.” Stamford Law School Blogs. <https://law.stanford.edu/2020/04/15/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

⁵ Congressional Research Service. 2019. “Unaccompanied Alien Children: An Overview.” <https://fas.org/sgp/crs/homesecc/R43599.pdf>.

⁶ *Id.*

⁷ *Id.*

” and that the Secretary of State “negotiate agreements with Mexico and Canada to manage the UAC repatriation process.”⁸

The United States Immigration and Customs Enforcement (ICE) established its own policies for repatriating UAC, including

- Returning UAC only during daylight hours;
- recording transfers by ensuring that receiving government officials or designees sign for custody;
- returning UAC through a port designated for repatriation;
- providing UAC the opportunity to communicate with a consular official prior to departure for the home country; and
- preserving the unity of families during removal.⁹

Finally, the UAC Program, managed by the ORR, has guidelines for the care and custody of UAC. Among others, the UAC Program is responsible for

- Making and implementing the best shelter placement decisions for the UAC;
- ensuring that the interests of the child are considered in decisions related to the care and custody of UAC;
- developing procedures for age determinations and conducting these determinations; and
- unifying UAC with qualified sponsors and family members who are determined to be capable of providing for the child's physical and mental well-being as quickly and safely as possible.¹⁰

How the CDC’s Order Neglects Pre-existing Protections for Unaccompanied Minors

The CDC’s order likely violates these pre-existing statutes and procedures. The CDC’s order calls for the immediate suspension and removal of migrants entering the United States to be handled “as rapidly as possible.”¹¹ The Order’s urgency in suspending immigration suggests that, for UAC, supervised

⁸ *Id.*

⁹ *Id.*

¹⁰ U.S. Department of Health & Human Services. 2019. “Unaccompanied Alien Children (UAC) Program Fact Sheet.” <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/program-fact-sheet/index.html>.

¹¹ Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 FR 17060-02.

repatriation during daylight hours, appropriate implementations of care, and the opportunity for familial reunification, for example, are not the priority. As *The New York Times* reports, “Some young migrants have been deported within hours of setting foot on American soil. Others have been rousted from their beds in the middle of the night in U.S. government shelters and put on planes out of the country without any notification to their families.”¹²

Leaked Border Patrol Memo Reveals Government’s Disregard for Unaccompanied Minors’ Protections

Further, a leaked Border Patrol Memo that outlines Border Patrol agents’ expected conduct excludes any procedure for caring for migrant children at the border, and there is minimal reference to pre-existing statutory protections for UAC.¹³ While the Memo includes a Convention Against Torture claim at the document’s end, it sets a very high, discretionary bar to meet for one to invoke the claim. The Memo states that, “Aliens that make an affirmative, spontaneous and reasonably believable claim that they fear being tortured in the country they are being sent back to, will be taken to the designated station and referred to USCIS [United States Citizenship and Immigration Services].”¹⁴ Unaccompanied children may feel uncomfortable making these claims to Border Patrol agents for a multitude of reasons – specifically surrounding fear and highly intimidating power imbalances – and, even if a child successfully brings forth a claim, agents have the authority to simply silence them on the arbitrary basis of disbelief. The absence of explicit acknowledgement of UAC protections in the CDC’s Order and leaked Memo strongly suggests that UAC at the border are not being properly protected.

The Government Disguises the Border Expulsion as a “Public Health Safety Measure”

The Administration justifies its blanket expulsion by claiming that Points of Entries (POEs) and Border Patrol stations are not “. . . designed for, and are not equipped to, quarantine, isolate, or enable social distancing by persons who are or may be infected by COVID-19.”¹⁵ However, many facilities around the world are struggling – and problem-solving – to combat this same issue. As stated in *The New York Times*, “If the concern[s] were truly congregate locations, the administration would address the dangerous conditions at immigration jails and prisons. If supermarkets can space out shoppers, the Border

¹² Caitlin Dickerson. 2020. “10 Years Old, Tearful and Confused After a Sudden Deportation.” *The New York Times*. <https://www.nytimes.com/2020/05/20/us/coronavirus-migrant-children-unaccompanied-minors.html>.

¹³ COVID-19 CAPIO. <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

¹⁴ COVID-19 CAPIO. <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

¹⁵ Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 FR 31503-02.

Patrol can adopt emergency processing measures to ensure sufficient distancing.”¹⁶ Unaccompanied minors should not be burdened by, and suffer from, the CBP’s lack of effort and attention toward transforming POEs and Border Patrol Stations into more accommodating and safe spaces during this unprecedented time.

The Government is Failing Unaccompanied Minors During the Global Pandemic

The Administration continues to use the global pandemic as justification to abandon its responsibilities to these children. The Administration must assume its legal obligations to UAC and care for these children at the border, rather than continuing to send them back to dangerous situations; these border expulsion practices need to stop. As Lucas Guttentag and Setano M. Bertozzi remark in *The New York Times*, “The dangers we face are not limited to the pandemic alone. The risk is also that governments will abuse the emergency to abandon the rule of law and adopt discriminatory measures targeting those they disfavor.”¹⁷ As predicted, it is unaccompanied minors – some of the most innocent and vulnerable among us – who are left to suffer the detrimental consequences of our government’s failure to fulfil its promises during the time of COVID-19.

¹⁶ Lucas Guttentag and Stefano M. Bertozzi. 2020. “Trump Is Using the Pandemic to Flout Immigration Laws.” *The New York Times*. <https://www.nytimes.com/2020/05/11/opinion/trump-coronavirus-immigration.html>.

¹⁷ Lucas Guttentag and Stefano M. Bertozzi. 2020. “Trump Is Using the Pandemic to Flout Immigration Laws.” *The New York Times*. <https://www.nytimes.com/2020/05/11/opinion/trump-coronavirus-immigration.html>.