

Use of Public Health as Pretext to Ban and Block Refugees

Over objections of senior Centers for Disease Control and Prevention (CDC) experts and following instructions by Trump Administration officials, the CDC issued a highly flawed and roundly-criticized order used by the Department of Homeland Security (DHS) to block and expel asylum seekers and unaccompanied children. The March 20, 2020 order, indefinitely extended on May 19, 2020, and re-issued with minor modifications on October 13, 2020, has led to secret expulsions of thousands of children, families and adults to danger in Mexico or the countries they fled. These expulsions occur without screenings for international protection needs, as required under U.S. refugee and anti-trafficking laws and in violation of U.S. treaty obligations. Among those returned to danger are political dissidents expelled to Nicaragua who are now in hiding and unaccompanied Central American children expelled alone to Mexico.

At the same time, border crossings by U.S. citizens and other border traffic deemed “essential” have continued with more than 40 million pedestrians, car, bus and train passengers entering the United States through the southern border between April 2020 and September 2020, according to data from the Bureau of Transportation Statistics.

Distinguishing the CDC order from reasonable health measures, a Washington Post editorial concluded that “[i]t’s a different thing to impose a systematic, draconian, extralegal regime, one never contemplated by Congress, whose effect is to ignore and override 40 years of asylum and immigration law.” Noting that “it is precisely in times of emergency that any country faces its most severe tests – ones that call into question the nation’s essential character and values,” the editorial board warned that the administration was “betraying this country’s long tradition as a beacon to those fleeing oppression.”

In early November 2020, a Biden campaign spokesperson told CBS News that, if elected, a Biden Administration would “review this policy and make the appropriate changes to ensure that people have the ability to submit their asylum claims while ensuring that we are taking the appropriate COVID-19 safety precautions, as guided by the science and public health experts.” The U.N. Refugee Agency has made clear that “it is possible for a country both to protect the public health of its people and to ensure access to territory for people forced to flee their homes” and, in November 2020, the UNHCR Assistant High Commissioner for Protection urged states to ensure that “measures restricting access to asylum must not be allowed to become entrenched under the guise of public health.” In late November 2020, a federal court issued a preliminary injunction blocking DHS from expelling unaccompanied children under the CDC order and finding that the government was not likely to prevail on its assertion that the U.S. public health laws cited as authority for the CDC order authorize expulsions.

CDC Order Lacks A Public Health Basis

The March 2020 CDC order was issued despite repeated objections of senior CDC medical experts to the Trump Administration’s directive (pushed by White House senior advisor Stephen Miller) to move forward with such an order. The CDC experts warned officials that there was no public health justification for the drastic step, as the Wall Street Journal, Associated Press, and CBS News reported. Despite these objections, Vice President Pence called the CDC Director and instructed the agency to issue the order, which a lawyer for the Department of Health and Human Services (HHS) – who was a Trump administration political appointee - wrote, according to the Associated Press and CBS News. While the CDC order was presented as an urgent response to the pandemic, a New York Times report revealed that it “was in large part repurposed from old draft executive orders and policy discussions that have taken place repeatedly” since the administration came into office, with the idea of invoking public health powers “on a ‘wish list’ of about 50 ideas to curtail immigration” crafted early on by Stephen Miller.

The order, as well as a separate Trump Administration effort to use public health to deny refugees protection, have been described by public health experts as “immigration policy masquerading as a public health policy.”

In May 2020, leading epidemiologists and public health experts wrote to the HHS Secretary and CDC Director urging that the March CDC order be rescinded. Explaining that the nation’s public health laws should not be used as a pretext for overriding humanitarian laws and treaties that provide life-saving protections to refugees seeking asylum and unaccompanied children, the letter expressed the experts’ grave concerns that the administration was using the “imprimatur” of the CDC “to circumvent laws and treaty protections designed to save lives and enable the mass expulsion of asylum seekers and unaccompanied children.” The letter concluded that the CDC order is based on specious justifications and “fails to further public health and disregards alternative measures that can protect public health while preserving access to asylum and other protection.” The experts urged the administration to “use rational, evidence-based public health measures to safeguard both the health of the public and the lives of adults, families, and unaccompanied children seeking asylum and other protection,” and recommended, among other measures, that U.S border officials:

facilitate social distancing through demarcations and the use of outdoor and other areas for processing; require wearing of masks or similar cloth coverings over the face and nose for both officers and persons crossing into the United States; use plexiglass barriers and/or face shields for officers during interviews and identity-checks; provide hand-sanitizer and other handwashing for both officers and other persons; and provide requisite distance, as well as masks and other measures, in transport.

Proposed Regulations Would Needlessly Ban Asylum and Other Humanitarian Protections

On July 9, 2020, the Trump Administration issued a proposed regulation that would, if published as a final rule, bar refugees from asylum and other humanitarian protection by labeling them as national security threats – again using public health concerns as a pretext to deny refugees U.S. protection. This proposed rule would enable DHS and the Department of Justice (DOJ) to designate a broad range of diseases as threats to public health and categorically deport and block asylum seekers regardless of whether they currently have or have *ever* been infected with a listed disease, and regardless of whether the disease is treatable or poses any risk of widespread transmission. The ban would apply to any asylum seeker who has symptoms consistent with a designated disease, has come into contact with such a disease, including people who were exposed to it in the United States, or traveled through a country where such a disease is prevalent.

In an August 2020 letter, 170 medical and public health experts at leading public health schools, medical schools, hospitals, and other U.S. institutions urged the DHS and DOJ to withdraw the proposed rule. The experts warned that the rule “ignores and misuses the science and core principles of public health” and would “undermine public health and further endanger people seeking protection in the United States.” The national union that represents U.S. asylum officers opposed the rule because “the measures that the Proposed Rule seeks to implement serve no public health purpose, nor do they advance our country’s national security. Rather, they are draconian and contrary to our country’s moral fabric and longstanding tradition of providing safe haven to the persecuted.”

False Claims by DHS

The CDC order and July 9 proposed asylum ban both rely on inaccurate assertions about DHS detention and alternatives to detaining asylum seekers in immigration jails. In concluding that alternatives to suspending entry of asylum seekers and other migrants were not viable, the CDC order relied on incorrect and insufficient DHS assertions that the (now barred) individuals likely lack homes or places in the United States to self-isolate and that these individuals must necessarily be held in congregate areas in the custody of Customs and Border Protection (CBP) for hours or days. Yet a recent study found that around 92 percent of people returned to Mexico under the Migrant Protection Protocols, for example, have family or close friends who live in the United States. Moreover, the CDC order erroneously pointed to CBP’s own flawed processing and detention choices at the border as justification for expelling asylum seekers and unaccompanied children. Contrary to DHS’s claims, CBP has

adequate space and staff to process asylum seekers and unaccompanied children at ports of entry in compliance with recommended public health measures and can swiftly complete processing of asylum seekers and unaccompanied children in as little as one to two hours. Similarly, DOJ and DHS disingenuously cited the dangers of immigration detention in the United States to attempt to justify the July 9 asylum ban, entirely disregarding DHS's legal authority to release asylum seekers on parole, the proven effectiveness of case management alternatives to detention, and public health recommendations to allow asylum seekers to shelter in place at the homes of family members or friends.

DHS has not only refused to use case management or other alternatives in order to parole in people seeking refuge at the border, but it has refused to release many asylum seekers and immigrants from immigration jails despite the dangers posed by COVID-19. Public health experts and former DHS officials have repeatedly warned since February 2020 that the use of migration detention endangers the health of asylum seekers, immigrants, facility staff and others in surrounding communities, and that asylum seekers and immigrants should be released from immigration jails in the face of the pandemic, with case management used to support appearance at immigration check-ins and hearings. DHS officials continue to hold many in immigration jails and have repeatedly transferred them between facilities despite warnings of public health experts, increasing the spread of COVID-19 and exposing asylum seekers and immigrants to preventable illness and death.

Public Health Measures to Address COVID-19

Both Mexico and the United States are currently experiencing widespread and sustained levels of COVID-19 transmission. Some border communities, particularly along the Texas-Mexico border, are facing serious challenges in containing the spread of COVID-19. Government and non-governmental organizations on both sides of the border are currently undertaking efforts to address the pandemic.

According to the U.S. Embassy in Mexico, "Mexican health authorities have reiterated calls for people to stay home as much as possible and leave home only for work and essential activities according to the color assigned to each state under the national stoplight system, always following social distance measures, frequent hand hygiene, and mask-wearing."

Medical and refugee assistance organizations, shelters and others assisting asylum seekers in these regions report that they have implemented public health measures – such as social distancing, masks, hygiene kits, testing, and the use of "filter" spaces, at hotels and in other locations – to help protect asylum seekers and that these measures have helped minimize the spread of COVID-19 in migrant shelters and the refugee encampment in Matamoros.

The DHS Office of the Inspector General, in a September 2020 report, stated that U.S. Border Patrol stations and ports of entry reported that they have implemented measures to process travelers and detained individuals including use of personal protective equipment, use of disinfectant, risk assessments to determine potential exposure to COVID-19, monitoring for symptoms, distribution of masks, processing in outdoor environments, and consulting with local medical personnel. But DHS has not used public health measures in upholding U.S. refugee and anti-trafficking laws; instead, it is using such measures to circumvent these laws. DHS has been using testing to confirm that unaccompanied children and asylum seekers subject to the CDC order are negative for COVID-19 and then summarily expelling them to the countries they fled. Instead of adhering to U.S. refugee and anti-trafficking laws and despite the tests indicating these unaccompanied children and asylum seekers do not have COVID-19, U.S. agencies continue to expel these individuals purportedly on public health grounds.

In recent months, public health experts have continued to learn more about COVID-19 and strategies to address it, including some measures – such as testing – that continue to advance. As this backgrounder has noted, epidemiologists, doctors and public health experts have repeatedly outlined measures that can be employed to safeguard public health and the lives of the people, including asylum seekers, crossing borders – including updated recommendations issued in December 2020.