

New Asylum Ban, Recycled Pretext: Proposed Rule Would Illegally, Unjustly Bar Many Asylum Seekers on Public Health Grounds

Asserting specious public health justifications, a sweeping new rule proposed by the Trump administration on July 9, 2020 would expand and make permanent the administration's illegal, discriminatory, and xenophobic restrictions on asylum and other humanitarian protections. For the past four months the administration has exploited COVID-19 as a pretext to effectively evade and eliminate protections for refugees and unaccompanied children at the border - despite public health experts' conclusions that the March 2020 order used to block and expel asylum seekers and children fails to protect public health and despite U.S. laws that require U.S. authorities to provide key protections to adults and children seeking refuge.

Now, the administration is proposing to label asylum seekers as threats to national security on specious and expansive public health grounds, automatically block them from asylum and other humanitarian protections in the United States, summarily deport many without asylum hearings, and illegally send them to persecution and torture. The proposed rule is yet another attempt by the administration to achieve its long-held goal of exploiting baseless public health justifications to prevent refugees from seeking and receiving humanitarian protection in the United States. By once again banning asylum seekers on spurious public health grounds while uncontrolled community spread of COVID-19 within the United States poses the real threat, the administration makes transparent the xenophobic aims behind the rule. Legal guidance issued by UNHCR, the U.N. Refugee Agency, on asylum protections in the COVID-19 pandemic makes clear that states may not put in place measures that categorically deny people seeking protection an effective opportunity to seek asylum.

While the administration cites the spread of COVID-19 (and the potential for other communicable disease threats) as justification for the rule, this unprecedented public health asylum ban applies irrespective of whether an individual asylum seeker presents any public health risk. This new mandatory bar to refugee protection would ban asylum seekers merely for having recently transited through a country where COVID-19 is prevalent, "c[o]m[ing] into contact" with the coronavirus, including in U.S. immigration detention centers that medical experts have noted create conditions for contagion, and/or exhibiting "symptoms" possibly linked to COVID-19, like a cough or fever. The rule would also give the Department of Homeland Security (DHS) and the Department of Justice (DOJ) expansive authority to declare a potentially vast array of other treatable diseases as national security threats to deny asylum to refugees even after the coronavirus threat abates. The rule, if codified, would be used to significantly elevate the credible fear standard set by Congress making it virtually impossible for asylum seekers to pass preliminary screenings and blocking them from even requesting protection in the United States before an immigration judge.

This cruel rule does not further public health. The United States can respond to this pandemic and future potential public health concerns with policies that preserve the right to seek asylum and also protect public health through non-discriminatory screening, isolation, treatment, and other measures. Procedures are already in place to address communicable diseases that do not baselessly target asylum seekers, and leading experts have recommended other evidence-based measures that the administration has chosen not to implement that would safeguard the processing of asylum seekers while the coronavirus circulates in the United States and elsewhere.

Unprecedented public health ban on asylum

Not only does the proposed rule illegally and unjustly impose a ban on impacted refugees, but it does so based on specious contentions with no real basis in public health.

The proposed regulation would mislabel asylum seekers as threats to public health under the baseless pretext of preventing the spread of communicable diseases and, in an unprecedented (and illegal) move, attempt to ban refugees from asylum and other humanitarian protection as a threat to national security on this spurious basis. Under the sweeping public health authority granted to DHS/DOJ by the rule, immigration judges and DHS officers would be directed to make medical/public health determinations about, and deny U.S. protection to, asylum seekers:

- with “symptoms consistent with” COVID-19 (or another communicable disease covered by the rule),
- who have “come into contact with” such disease, or
- who have recently passed through an affected country or area.

This extraordinarily broad ban would not, therefore, even require a positive diagnosis. It would cover diseases declared public health emergencies, but would also give DOJ/DHS authority to declare a broad list of other communicable diseases (including gonorrhea, syphilis, Hansen’s disease, and tuberculosis, among others) as threats to national security—even though many of these diseases are not subject to quarantine under U.S. law, are treatable, and/or do not present a risk of widespread transmission to the public—and direct DHS/DOJ to block asylum seekers from countries the agencies decide are experiencing outbreaks. The proposed rule indicates that the Department of Health and Human Services (HHS) will be consulted, but that limited engagement will not safeguard this authority from abuse and politicization. Indeed, the Trump administration was able to pressure the CDC to issue the March 2020 order that DHS has used to improperly block and expel children and asylum seekers.

This proposed rule is an even harsher ban on asylum seekers than other recent administration attempts to ban asylum, as it would bar refugees not only from asylum but also from withholding of removal (a lesser form of refugee protection). The only potentially available relief - deferral of removal under the Convention Against Torture - is an extremely limited form of relief from deportation that protects only people who fear torture, often leads to prolonged detention, and is subject to potential termination at the request of DHS. As a result, refugees with well-founded fears of persecution—the standard for asylum under U.S. law—would be denied protection and deported to the countries they are fleeing, in violation of domestic and international law and treaties.

The proposed rule would also make it nearly impossible for asylum seekers to pass preliminary fear screenings, which were created by Congress to safeguard asylum seekers with genuine protection needs from summary deportation. Under the proposed regulations, asylum seekers determined by a DHS officer during a fear screening to be covered by the ban would be automatically barred from asylum and withholding of removal. At the same time, the rule significantly elevates the standard to show a fear of torture during preliminary screenings to the same very high level of proof (“more likely than not”) required to establish a fear of torture during a full immigration court hearing before a judge. From March through May 2020, under the CDC order currently in effect at the border, only four people managed to pass screenings for torture under the current standard, demonstrating how prohibitively high this new evidentiary bar will be.

Finally, the rule would also give DHS authority to deport to third countries the few asylum seekers who manage to pass these sham screenings (without an opportunity for their request for refugee protection to be heard before an immigration judge) unless they prove that they are “more likely than not” to be tortured in the third country. Under the rule, refugees would be deported to home and third countries even if they have well-founded fears of persecution and could be returned to torture, as a result of the illegally heightened screening requirements created

by the proposal. The former U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Juan E. Méndez, has noted that other administration attempts to elevate the screening standard for torture—that are *less* drastic than this proposed rule—“are inconsistent with the United States’ treaty obligations.” Taken together, the elements of this new rule will eliminate access to asylum for virtually everyone applying for it and allow even those few asylum-seekers who manage to pass a sky-high initial screening standard to be sent to places where their lives may be in danger.

Specious public health justifications

Despite its public health pretext, this highly flawed proposal fails to further public health and disregards evidence-based measures that would protect public health while preserving access to asylum and other humanitarian protections. The rule:

- **Ignores measures already in place and recommendations for best practices to promote the safe processing of asylum seekers.** U.S. immigration authorities have existing legal authority to process and release asylum seekers expeditiously when they make requests for asylum at ports of entry or after crossing the border. Asylum seekers need not, and should not, be held in congregate settings in border holding cells or immigration detention centers. In response to the coronavirus, rather than impose a ban on people seeking asylum, U.S. authorities should adopt measures grounded in the best available public health guidance. For instance, with respect to measures to control COVID-19 during border processing, DHS should facilitate social distancing; require wearing of masks or similar cloth coverings 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. In addition, medical screenings for communicable diseases (conducted by a doctor certified by the federal government) and immunizations, are already required for refugees who have been granted asylum in the United States who wish to apply for permanent U.S. residence.
 - **Would arbitrarily deny refugee protections to asylum seekers regardless of whether they present any public health risk whatsoever.** The rule’s extraordinarily expansive scope would empower the administration to categorically deny humanitarian protections to asylum seekers based on their travel route to the United States without regard to whether an individual was actually infected or exposed to a disease covered by the rule. Thus, an asylum seeker who transits briefly through a country with an outbreak—even for an airport layover—would be mandatorily denied asylum. Yet, at the same time, tourists, students, or business travelers from or passing through that same country would not be banned from entering the United States under this rule. The proposed rule could also seemingly apply where an asylum seeker “has come into contact” with a covered disease at any point in the past, as the rule does not explicitly limit its application to recent infection or exposure and provides no guidelines to the immigration judges and DHS officers making these determinations. Further, because the rule would deny asylum to individuals exposed to a covered disease while *in* the United States, asylum-seeking doctors, nurses, and other essential personnel exposed to a covered disease in the course of their vital work would be denied asylum.
 - **Baselessly singles out refugees seeking humanitarian protection in the United States as a threat to public health.** As public health experts have recognized, categorical and discriminatory bans that target individuals based on their immigration status, including asylum seekers, do not prevent the introduction of infectious diseases. Nor are bans based solely on immigration legal status (as opposed to actual risk of exposure) effective at preventing outbreaks. Further, measures to deny asylum to individuals exposed to communicable diseases while in the United States, including in U.S. immigration detention, cannot be justified as measures to prevent the introduction or spread of communicable diseases, and would punish
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asylum seekers for the negligence of U.S. authorities in failing to take early action to prevent and contain these outbreaks by releasing asylum seekers from detention facilities. The United States should not repeat past mistakes by adopting discriminatory and ineffective bans purportedly premised on public health. In the 19th and early 20th centuries, false perceptions that certain immigrants—Chinese, Irish, Italians, Jews, Mexicans and others—were carriers of disease contributed to the adoption of nativist U.S. immigration laws and policies. In 2010, an immigration ban on individuals living with HIV, first adopted in the 1980s when there were more known cases of HIV/AIDS in the United States than anywhere else in the world, was finally lifted by the CDC, which acknowledged that the restrictions were not an effective or necessary public health measure. Barring asylum seekers based on COVID-19 while the United States experiences the worst outbreak in the world would be similarly absurd.

- **Delegates extraordinary medical/public health authority to agencies and government officers who lack this expertise.** DHS and DOJ, the agencies who would implement the rule, lack public health expertise and are not qualified to make medical/public health assessments such as the risk posed by a particular communicable disease or its prevalence in another country. The consultations with HHS indicated in the rule underline the fact that these agencies should not be making determinations of this nature. In addition, immigration judges and DHS officers lack the medical/public health technical expertise necessary to make the determinations required under the proposed regulation. Indeed, because the rule does not require a positive diagnosis to mandatorily bar an individual from asylum, denials of protection could result where an asylum seeker coughs or has a fever unrelated to COVID-19 during a hearing or interview. This delegation of public health authority is particularly troubling at the credible fear stage when nearly all asylum seekers are detained and unrepresented, and very few would have access to independent medical assessments.

Violates U.S. asylum law and treaty obligations

The proposed rule violates both U.S. asylum law and treaty obligations. Legal guidance issued by UNHCR makes clear that states may not put in place measures that categorically deny people seeking protection, even during a pandemic, an effective opportunity to seek asylum: “[I]mposing a blanket measure to preclude the admission of . . . asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk . . . would be discriminatory and mm not meet international standards.”

Public health is not a ground to label an asylum seeker or groups of asylum seekers as threats to national security and to deny them refugee protection. When Congress enacted the Refugee Act of 1980, it explicitly incorporated the very limited exception from the Refugee Convention and its Protocol that precludes refugees from protection who pose a danger to the security of the United States. During the Senate ratification process of the Protocol, the United States explicitly rejected the idea that refugees could be barred from protection on health-related grounds, and the Secretary of State at the time wrote in transmitting the Protocol to the President for signature that, “[a]s refugees are by definition without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health.”

The rule raises particularly grave concerns because it would foreclose asylum seekers from receiving withholding of removal, which courts have recognized is a mandatory form of relief for asylum seekers who demonstrate that they are more likely than not to face persecution upon removal. While the withholding statute carves out an exception on “national security” grounds, that exception is meant to be an individualized, case-by-case determination, applied in exceptional circumstances and not used as a blanket bar against broad swaths of asylum-seekers, as this proposed rule seeks to do. Sending refugees to places where their lives or freedom are threatened is a fundamental violation of the United States’ domestic and international treaty obligations to refrain from returning refugees to persecution.
