

CORONAVIRUS

Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law

Citing little-known power given to the CDC to ban entry of people who might spread disease and ignoring the Refugee Act of 1980, an internal memo has ordered Border Patrol agents to push the overwhelming majority of migrants back into Mexico.

by Dara Lind, April 2, 6:30 p.m. EDT



A child's hands are washed on March 20 at an encampment in Matamoros, Mexico, of more than 2,000 migrants seeking asylum in the U.S. as local authorities prepare to respond to the coronavirus outbreak. (Daniel Becerril/Reuters)

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For the first time since the enactment of the Refugee Act in 1980, people who come to the U.S. saying they fear persecution in their home countries are

being turned away by Border Patrol agents with no chance to make a legal case for asylum.

The shift, confirmed in internal Border Patrol guidance obtained by ProPublica, is the upshot of the Trump administration's hasty emergency action to largely shut down the U.S.-Mexico border over coronavirus fears. It's the biggest step the administration has taken to limit humanitarian protection for people entering the U.S. without papers.

The Trump administration has created numerous obstacles over recent years for migrants to claim asylum and stay in the United States. But it had not — until now — allowed Border Patrol agents to simply expel migrants with no process whatsoever for hearing their claims.

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The administration gave the Border Patrol unchallengeable authority over migrants seeking asylum by invoking a little-known power given to the Centers for Disease Control and Prevention, the U.S. public health agency, to ban the entry of people or things that might spread “infectious disease” in the U.S. The CDC on March 20 barred entry of people without proper documentation, on the logic that they could be unexamined carriers of the disease and out of concern about the effects if the novel coronavirus swept through Customs and Border Protection holding facilities.

U.S. immigration law requires the government to allow people expressing a “well-founded” fear of persecution or torture to be allowed to pursue legal status in the United States. The law also requires the government to grant status to anyone who shows they likely face persecution if returned to their homeland.

“The Trump administration’s new rule and CDC order do not trump U.S. laws passed by Congress and U.S. legal obligations under refugee and human rights treaties,” Eleanor Acer, of the legal advocacy group Human Rights First, told ProPublica. “But the Trump administration is wielding them as the ultimate tool to shut the border to people seeking refuge.”

Two weeks ago, the Trump administration hastily put in place a policy, which the internal guidance calls Operation Capiro, to push the overwhelming majority of unauthorized migrants into Mexico within hours of their apprehension in the U.S.

The Trump administration has been publicly vague on what happens under the new policy to migrants expressing a fear of persecution or torture, the grounds for asylum. But the guidance provided to Border Patrol agents makes clear that asylum-seekers are being turned away unless they can persuade both a Border Patrol agent — as well as a higher-ranking Border Patrol official — that they will be tortured if sent home. There is no exception for those who seek protection on the basis of their identities, such as race or religion.

Over 7,000 people have been expelled to Mexico under the order, according to sources briefed by Customs and Border Protection officials.

The guidance, shared with ProPublica by a source within the Border Patrol, instructs agents that any migrant caught entering without documentation must be processed for “expulsion,” citing the CDC order. When possible, migrants are to be driven to the nearest official border crossing and “expelled” into Mexico or Canada. (The Mexican government has agreed to allow the U.S. to push back not only Mexican migrants, but also those from Guatemala, Honduras and El Salvador; the four countries account for about 85% of all unauthorized border crossings.)

Under the Refugee Convention, which the U.S. signed onto in 1968, countries are barred from sending someone back to a country in which they could be persecuted based on their identity (specifically, their race, nationality, religion, political opinion or membership in a “particular social group”).

The Trump administration has taken several steps to restrict the ability of migrants to seek asylum, a form of legal status that allows someone to eventually become a permanent U.S. resident. Until now, however, it has acknowledged that U.S. and international law prevents the U.S. from sending people back to a place where they will be harmed. And it has still allowed people who claim a fear of persecution to seek a less permanent form of legal status in the U.S. (In the last two weeks of February, 2,915 people were screened for humanitarian protection, according to the most recent statistics provided by U.S. Citizenship and Immigration Services.)

The Border Patrol guidance provided to ProPublica shows that the U.S. is acting as if that obligation no longer applies.

Customs and Border Protection, the agency that oversees the Border Patrol, said it would not comment on the document provided to ProPublica. Asked whether any guidance had been provided regarding people who expressed a fear of persecution or torture, an agency spokesperson said in a statement, “The order does not apply where a CBP officer determines, based on consideration of significant law enforcement, officer and public safety, humanitarian, or public health interests, that the order should not be applied to a particular person.”

That language does not appear in the guidance ProPublica received. Instead, it specifies that any exception must be approved by the chief patrol agent of a given Border Patrol sector. One former senior CBP official, who reviewed the guidance at ProPublica’s request, said that because there are so many levels of hierarchy between a chief patrol agent and a line agent, agents would be unlikely to ask for an exemption to be made.

The guidance offers some details of exceptions that Border Patrol should make on public-safety grounds — people with felony convictions, for example, are to be held in detention rather than being sent back — but none on health grounds.

In fact, the guidance provides no instructions on medical screening or care for migrants, making it impossible to know how such an exception would be made. (One source briefed by CBP on the policy said the agency said migrants would not be expelled if they showed symptoms of illness or claimed a medical issue, but there is no mention of this in the guidance ProPublica received.)

The guidance makes a single humanitarian exception: If a migrant, before expulsion, tells the Border Patrol agent that they fear torture in their home country, they can be kept in the U.S. and referred to U.S. Citizenship and Immigration Services, which evaluates claims for humanitarian protection, to see if they qualify for protection under the Convention Against Torture. But agents are not instructed to ask; the migrant has to volunteer the information “spontaneously.” Then, the Border Patrol agent is instructed to analyze whether the claim is “reasonably believable” — something they haven’t been trained to do.

As recently as last fall, the Trump administration acknowledged in court filings that it’s bound both to protect victims of torture under the Convention Against Torture and to protect victims of persecution under the Refugee Convention.

Even as it has erected bars to asylum — most notably, preventing anyone who crosses through Mexico from receiving asylum in the U.S. — it has continued to allow anyone entering the U.S. to seek a lesser form of legal status called “withholding of removal,” which allows an immigrant to stay in the U.S. but does not allow them to become a permanent resident. (Since the passage of the 1980 Refugee Act, federal law requires the executive branch to grant this status to anyone who can show it’s more likely than not they’ll be persecuted.)

The Operation Capiro guidance does not mention the possibility that someone could be eligible for lesser protections instead of expulsion. Two sources briefed on the new policy confirmed that neither asylum nor withholding of removal is available to anyone subject to the CDC order.

In that briefing, CBP officials claimed that a migrant expressing any sort of fear is referred for screening to the U.S. Citizenship and Immigration Services, but that migrants will only pass that screening if they claim torture. However, the guidance doesn’t instruct Border Patrol agents to refer other types of claims to USCIS (and instructs them only to refer torture claims when they are “reasonably believable”).

In lawsuits challenging the administration’s asylum policies, Department of Justice lawyers have described withholding of removal as a “mandatory” form of protection — something it’s required to provide — while asylum is “discretionary.” In a brief filed last fall with the 9th U.S. Circuit Court of Appeals, the government wrote that “The United States has implemented its non-refoulement obligations” — the obligation not to send people back to danger — “by providing withholding of removal and CAT (Convention Against Torture) protection.”

Now, the U.S. is only providing one of the two — and only at the discretion of Border Patrol.

“If you read between the lines,” one congressional staff member briefed on the operation told ProPublica, “they’re saying that Title 42 (the chapter of the U.S. Code that includes the CDC’s quarantine power) supersedes Title 8 (which covers immigration law).” Title 42 doesn’t clearly state that the administration may suspend its obligations under immigration law, and the Trump administration hasn’t published any legal opinions or memos that make its case.

No legal challenges have yet been filed against the new policy. Lawyers told ProPublica that the secrecy of the policy has made it harder to compile a

case against it.

The administration has argued that the risk of coronavirus spreading through Customs and Border Protection holding facilities — which aren't equipped to deal with medical needs — justifies the mass-expulsion policy. Since putting the policy in place, the number of people crossing into the U.S. has dropped drastically, according to official CBP statistics circulated internally and provided to ProPublica, and there are only 330 people in CBP custody at last count, down from over 1,300 as of March 25.

The new guidance instructs agents to wear personal protective equipment at all times and not to use any Border Patrol vehicle to transport migrants that isn't specifically designated for Operation Capiro.

However, because the Operation Capiro process doesn't include medical screening, it will be impossible to know whether any migrants who are being expelled just in case they have the novel coronavirus are actually infected.

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