

Protecting Asylum during the COVID-19 Pandemic: A Public Health Primer on the July 9 Trump Administration Proposed Rule on Asylum

Summary

On July 9, 2020, the Trump administration proposed a [rule](#) that would give the Department of Homeland Security (DHS) and the Department of Justice (DOJ) expansive authority to deny asylum and other humanitarian protections¹ and to block and deport asylum seekers under the pretext of public health. The rule has profound implications for access to life-saving refugee protection: for example, under its provisions, asylum seekers who travel through countries where COVID-19 is “prevalent” or who are found by an immigration officer or judge to be at risk of a communicable disease of public health significance, as designated by DOJ/DHS, would be mislabeled as threats to national security and denied asylum. Under the rule, immigration judges and DHS officers would be granted broad powers to make medical/public health determinations about whether an asylum seeker has “symptoms consistent with” a designated disease, “has come into contact with such a disease,” or was recently in an affected area or country. DOJ/DHS would have authority to declare a broad list of [communicable diseases](#) threats to national security and to determine which countries are experiencing outbreaks. The list includes treatable conditions, such as gonorrhea, syphilis, Hansen’s disease (leprosy) and tuberculosis, and diseases which do not present a risk of widespread public transmission. The ban would also apply to diseases declared ongoing public health emergencies, such as the COVID-19 pandemic, and any condition officially deemed an emergency (see full list below) – despite the fact that [leading public health experts](#) have advised evidence-based public health measures that would allow asylum seekers to be safely processed, and declared that a ban is not an appropriate response to people seeking life-saving asylum protection.

In addition, under the proposed rule, asylum seekers with well-founded fears of persecution - the standard for asylum under U.S. law and treaty obligations – who are found by an immigration officer to fall under the rule would be blocked from even applying for U.S. protection and deported to the countries they are fleeing¹.

¹ In immigration court, asylum seekers found by a judge to be covered by the rule would be ineligible for asylum and withholding of removal. The only potentially available recourse – deferral of removal under the Convention against Torture – provides only temporary relief from deportation and protects only people who fear torture. The regulations also significantly and unfairly elevate preliminary screening standards, automatically block people who fear persecution from requesting U.S. protection during a full asylum hearing in immigration court and would also block the vast majority of people with genuine fears of torture from applying for protection against return to torture in immigration court.

What diseases would be included under the proposed rule?

Communicable disease of public health significance. Any of the following diseases:

- (1) Communicable diseases as listed in a Presidential Executive Order, as provided under Section 361(b) of the [Public Health Service Act](#). The current revised list of quarantinable communicable diseases is available at <http://www.cdc.gov> and <http://www.archives.gov/federal-register>.

For example: cholera, diphtheria, plague, small pox, yellow fever, viral hemorrhagic fevers, SARS, pandemic flu.

- (2) Communicable diseases that may pose a public health emergency of international concern if it meets one or more of the factors listed in [§ 34.3\(d\)](#) and for which the [Director](#) has determined a threat exists for importation into the United States, and such disease may potentially affect the health of the American public. The determination will be made consistent with criteria established in Annex 2 of the International Health Regulations (<http://www.who.int/csr/ihr/en/>), as adopted by the Fifty-Eighth World Health Assembly in 2005, and as entered into effect in the United States in July 2007, subject to the U.S. Government's reservation and understandings:

- (i) Any of the communicable diseases for which a single case requires notification to the World Health Organization (WHO) as an event that may constitute a public health emergency of international concern, or

- (ii) Any other communicable disease the occurrence of which requires notification to the WHO as an event that may constitute a public health emergency of international concern. HHS/CDC's determinations will be announced by notice in the FEDERAL REGISTER.

- (3) Gonorrhea.

- (4) Hansen's disease, infectious.

- (5) Syphilis, infectious.

- (6) Tuberculosis, active.

Public Health Arguments

The World Health Organization (WHO) [International Health Regulations \(IHR\)](#) provide that “international points of entry, whether by land, sea or air, provide an opportunity to apply health measures to prevent international spread of disease.” While the WHO acknowledges that screening for communicable diseases may be necessary in certain circumstances, the IHR stresses that countries must treat people with respect and ensure that their basic needs and medical needs are met during any screening or quarantine period. These screenings are intended to apply in a proportionate way to address significant and urgent disease threats. They should not apply to treatable health conditions that pose no or negligible risk to the public. Moreover, such measures need to be applied consistently with the principle of [non-refoulement](#), enshrined in international and US law, including the [1951 Refugee Convention](#), which imposes an absolute prohibition on the return of individuals to places where they

may face persecution or torture. A blanket ban on asylum seekers violates the U.S. government's domestic and international legal obligations to uphold the right to seek asylum. While states may use health measures such as testing or quarantine, as needed, UNHCR has clearly stated in its [legal guidance](#) that "such measures may not result in denying [asylum seekers] an effective opportunity to seek asylum or result in refoulement."

The proposed rule is not based on public health evidence or best practice and is likely to be detrimental to public health and the health of those seeking asylum.

The rule:

- 1. Is sweeping in scope and would apply to people who present no – or negligible – risk to public health.** This includes individuals who have never been infected with any of the targeted diseases but have "symptoms consistent with" a designated disease, have "come into contact with such a disease," or were recently in an affected area; and individuals who may have had an infection in the past but been subsequently treated or cured. Perversely, it would apply to individuals who have been present in the United States and who are exposed to or infected by a disease such as COVID-19 while awaiting asylum proceedings in the United States, even if this was due to state negligence, maltreatment or conditions of detention. It could even apply to asylum-seeker health workers who are exposed to COVID-19 or other designated diseases in the course of their professional duties.
- 2. The rule discriminates against asylum seekers on the basis of immigration status, countries in which the person has lived or traveled and other attributes, rather than actual disease status.** The rule does not require confirmation that an asylum seeker has a disease covered by the rule for that individual to be denied asylum and deported. It is notable that the rule does not apply to tourists, students, or business travelers from the United States even if they were infected by a disease covered by the regulation. In 2017, CDC/HHS recognized the principle of non-discrimination and explicitly rejected suggestions that quarantine provisions be applied based on immigration status, stating that public health officials should "apply communicable disease control and prevention measures uniformly to all individuals in the United States, regardless of citizenship . . . or country of residency." (82 FR 6894 (2017)).
- 3. Disregards the availability of effective, evidence-based public health measures and treatments that can mitigate communicable disease risks while preserving access to asylum.** As previously stated, [leading U.S. public health experts](#) have recommended evidence-based public health measures that can be used to safely process asylum seekers during the COVID-19 pandemic. Over 20 countries in Europe have explicitly exempted asylum seekers from COVID-19 related entry bans and border closures and several states have adopted enhanced health measures and quarantine requirements while continuing to admit asylum seekers, as described in [UNHCR's practical recommendations and good practice](#) guidance. In addition, the proposed rule disregards the availability of effective treatments for many of the listed diseases, including tuberculosis, gonorrhea, syphilis and Hansen's disease (leprosy). Communicable diseases of public health importance are often designated as such because they require timely diagnosis, treatment, follow-up and contact tracing to limit their spread. However, the rule does not include provisions for an appropriate public health response (such as testing, treatment, and contact tracing where

appropriate) when a communicable disease is suspected, instead using this information solely as justification to deny an asylum claim.

4. **Authorizes personnel who lack public health or medical expertise to make health determinations with profound implications for access to asylum and humanitarian protections.** Identifying communicable diseases requires careful diagnosis, appropriate investigations and consideration of differential diagnoses. For example, syphilis, which often presents with non-specific symptoms and can resemble many other diseases, is often called “the great pretender”; gonorrhea similarly presents with non-specific symptoms. Immigration judges and DHS officers do not have the public health or medical expertise to make these health assessments, which have life-or-death implications for people fearing persecution and torture.
5. **Fails to differentiate between different modes and risks of transmission and the need to adjust the response proportionally.** Diseases that cause pandemics or have pandemic potential, such as COVID-19, require a different public health response to communicable diseases that do not present a risk of widespread public transmission, such as syphilis or gonorrhea.
6. **Uses public health as a pretext for denying asylum, setting a precedent for the politicization of public health and undermining the credibility of public health practitioners and science.** The rule would give DHS and DOJ expansive authority to declare diseases, including treatable diseases, to be national security threats and deny asylum as a result. This authority opens the door for further use of public health as a pretext for denying the rights of asylum-seekers and sidelines public health authorities, including the Centers for Disease Control and Prevention (CDC), and scientifically sound policies and practices. We must not repeat past mistakes by adopting discriminatory and ineffective bans falsely premised on public health. For example, in 2010, an immigration ban on individuals with HIV was finally [lifted](#) by the CDC, which acknowledged that the restrictions were not an effective or necessary public health measure.
7. **Is likely be detrimental to individual and public health.** Trust and willingness to seek care are cornerstones of public health. By explicitly linking health concerns to immigration enforcement the proposed regulation is likely to erode trust and undermine public health goals. [UNHCR](#) has also noted that eliminating asylum protections at borders may be counter-productive as it pushes asylum seekers to cross away from official border posts potentially complicating efforts to control communicable disease outbreaks.

Finally, with respect to the current COVID 19 pandemic, leading public health experts from across the country have underscored that it is possible for the US to honor its asylum obligations while protecting [public health](#) through measures such as social distancing, appropriate masks, sanitation measures , as well as the use of parole to family and friends rather than detention in congregate settings; and through the use of quarantine and self isolation where necessary. Honoring the right to seek asylum whilst at the same time protecting public health is not only feasible, but imperative.