

Entry Restrictions at the Northern and Southern Borders in Response to COVID-19

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In response to the global [spread of COVID-19](#), the federal government has issued several orders restricting the entry of foreign nationals into the United States. Many of these restrictions were implemented through President Trump’s authority under [Section 212\(f\)](#) of the Immigration and Nationality Act (INA) to suspend the entry of non-U.S. nationals (aliens) whose entry the President “finds ... would be detrimental to the interests of the United States.” One [proclamation issued on January 31, 2020](#), suspends the entry of foreign nationals who have been in mainland China within the prior 14 days. A [second proclamation](#) issued on February 29, 2020, suspends the entry of foreign nationals who have been in Iran in the prior 14 days. [Two more proclamations](#) issued in March 2020 restrict the travel of foreign nationals from countries in the [Schengen Area](#), Ireland, and the United Kingdom within the prior 14 days.

The Trump Administration has taken further action, relying on authority outside INA Section 212(f), to restrict the movement of foreign nationals over land borders into the United States. Two orders restrict non-essential travel by foreign nationals into the United States through ports of entry on the land borders with both [Canada](#) and [Mexico](#). Additionally, the Centers for Disease Control and Prevention (CDC), a component of the Department of Health and Human Services (HHS), has issued an [order](#) (along with [implementing regulations](#)) suspending the “introduction” of foreign nationals from countries with COVID-19. These new orders raise a number of legal issues—most notably their effect on migrants seeking asylum in the United States.

Restrictions on Non-Essential Travel from Canada and Mexico into the United States

U.S., Canadian, and Mexican officials have [mutually determined](#) that non-essential travel between the United States and its respective contiguous countries poses additional risk of the transmission and spread of COVID-19. Accordingly, U.S. Customs and Border Protection (CBP), a component of the Department of Homeland Security (DHS), issued two identical orders ([one](#) applying to U.S.-Mexico travel and the [other](#) applying to U.S.-Canada travel). Both temporarily restrict non-essential travel at land ports of entry from Canada and Mexico into the United States.

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The two orders, effective March 20, 2020, temporarily [restrict non-essential travel](#) at land ports of entry, but contain broad exceptions for U.S. citizens and lawful permanent residents, members of the military, and foreign nationals engaged in certain travel. The rules “suspend normal operations and process” at land ports of entry, except for “essential travel.” “Essential travel” includes (1) travel for medical purposes; (2) travel to attend educational institutions; (3) travel to work (e.g., individuals who work in agriculture who must travel between the United States and Canada); (4) travel for emergency response and public health purposes (e.g., responses to COVID-19); (5) lawful cross-border trade (e.g., commercial truck drivers); (6) official government or diplomatic travel; (7) members of armed forces returning to the United States; and (8) military-related travel or operations. The rules specify that “essential travel” does not include travel for tourism purposes, such as sightseeing, recreation, gambling, or attending cultural events. The rules also clarify that these restrictions will not “interrupt legitimate trade” or interfere with “critical supply chains,” such as food, fuel, and medicine. The restrictions are temporary and are currently scheduled to remain in effect until [April 20, 2020](#).

These rules do not apply to air, freight rail, or sea travel between the United States and the respective country, though apply to passenger rail and ferry travel. The rule also grants the CBP Commissioner discretion to allow the processing of travelers not engaged in essential travel “on an individualized basis and for humanitarian reasons or for other purposes in the national interest.”

Legal Authority

On March 13, 2020, the President [declared](#) the COVID-19 outbreak a “national emergency” under the [National Emergencies Act](#) (NEA), which made available several statutory authorities. Upon a national emergency declaration (or other instances in which there is a “specific threat to human life or national interests”), the Tariff Act of 1930, codified in [19 U.S.C. § 1318](#), authorizes the federal government to eliminate or modify temporarily services and procedures at ports of entry or to take “any other action that may be necessary to respond directly to the national emergency or specific threat.”

The restrictions placed on non-essential travel across the international land borders seem to accord with the [broad authority](#) delegated by Congress to the Executive in times of emergency. While the NEA does not define a “national emergency,” Presidents [have issued](#) national emergency declarations under the statute for matters less threatening to the public health and safety than the COVID-19 pandemic (and, indeed, it seems likely that the President’s determination that the pandemic constitutes a national emergency would be treated by a court as a non-reviewable [political question](#)). The Tariff Act, in turn, gives CBP wide latitude to limit services at ports of entry in response to a declared emergency or a “specific threat to human life or national interests,” as well as “any other action that may be necessary” to respond directly to those threats and emergencies. This broad delegation of authority seems sufficient for CBP to restrict travel temporarily across the U.S. border to deter the spread of COVID-19.

But exercise of this authority to limit services at ports of entry does not resolve legal questions concerning the treatment of persons arriving at the United States border, either at or between ports of entry, who seek asylum or related forms of relief. These subjects are discussed in more detail below.

Public Health-Based Suspension of the Introduction of People Typically Held in CBP Facilities

The Trump Administration has also taken steps that appear to terminate most asylum processing for aliens encountered near the southern border until April 20, 2020. Questions remain, however, about how these measures will work in practice and whether they comply with INA provisions concerning asylum and related protections from persecution or torture.

On March 20, 2020, the CDC Director issued an [order](#) that “suspends the introduction” into the United States of aliens “traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol Station at or near the United States borders with Canada and Mexico.” The order [clarifies](#) that this description is intended to cover aliens who cross the border unlawfully between ports of entry or who present themselves at ports of entry without valid entry documents. Under the INA, such aliens are inadmissible to the United States but [may initiate claims](#) for asylum or related protections from persecution or torture. To evaluate such claims, DHS typically must conduct screening interviews or refer the aliens directly to proceedings in immigration court where they may pursue their claims. At the outset of such procedures, CBP typically holds asylum seekers in short-term custody in its facilities near the border. (A CRS Infographic gives an overview of asylum processing at the border under Trump Administration policies that were in effect before the CDC order.)

The CDC order does not expressly direct DHS to suspend asylum processing at the border. But it does [provide](#) that aliens without valid entry documents must be returned “to the country from which they entered the United States, their country of origin, or another location as practicable, as rapidly as possible, with as little time spent in congregate settings as practicable under the circumstances.” DHS, which is responsible for implementing the CDC order, has released information suggesting that it interprets the order to require it to forgo standard asylum processing in most cases so that it may rapidly remove aliens and minimize their time in CBP facilities. Specifically, a DHS [Fact Sheet](#) states that “CBP will no longer detain illegal immigrants in our holding facilities and will immediately return these aliens to the country they entered from – Canada or Mexico. Where such a return is not possible, CBP will return these aliens to their country of origin.” However, the full effect of CBP’s rule of “immediate return” upon asylum processing is not immediately clear. CBP officials have been quoted as saying that the agency will evaluate asylum claims on a “[case-by-case basis](#).” A [news report](#) indicates that CBP is implementing the CDC order by immediately returning most unlawful entrants to Mexico if they are nationals of Mexico, Honduras, Guatemala, or El Salvador, while continuing standard processing procedures for other nationalities. The CDC order references a “CBP operational plan” that might clarify the concrete procedures in place, but the plan does not appear to be publicly available.

The CDC order [does not apply](#) to certain groups, including U.S. citizens, lawful permanent residents, and aliens with “valid travel documents” who present themselves at ports of entry. For example, the CDC order would not apply to a Mexican national arriving at a port of entry with a valid visa, although he or she would be subject to the restrictions on non-essential travel imposed by the DHS measures discussed previously. The CDC order also has a catch-all exception for those who DHS determines “should be excepted based on the totality of the circumstances.” The order does not mention unaccompanied alien children (UACs), and to date no publicly available CDC or DHS document indicates how the order applies to UACs, but at least [one news report](#) suggests that they are not exempt.

Legal Issues

For statutory authority, the CDC order relies primarily on Section 362 of the Public Health Service Act, codified in [42 U.S.C. § 265](#), which authorizes the CDC Director to “to prohibit, in whole or in part, the introduction of persons and property” into the United States to avert the spread of a communicable disease. Until the COVID-19 outbreak, the statute does not appear to have been invoked as the basis for a prohibition on the movement of people into the United States. Before CDC amended its regulations last week to lay the groundwork for the March 20, 2020 order, the regulations implementing the statute [provided only](#) for “the suspension of the introduction of property into the United States and the procedures to quarantine or isolate persons”; the former regulations did not address the suspension of the introduction of persons into the United States.

If DHS implements the CDC order by removing aliens encountered near the border without screening their eligibility for asylum or related protections, one of the primary legal questions that could arise is whether this implementation comports with the INA. A few INA provisions mandate asylum procedures. [INA § 208\(a\)\(1\)](#), the asylum statute, provides that “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum in accordance with this section.” In addition, [INA § 235\(b\)\(1\)\(A\)\(ii\)](#) provides that an alien apprehended at or near the border who is subject to [expedited removal](#)—including one who entered without inspection or who presents at a port of entry without valid documents—must be referred to an asylum officer for a screening interview if “the alien indicates either an intention to apply for asylum . . . or a fear of persecution.” Next, [INA § 241\(b\)\(3\)](#) prohibits the removal of an alien to a country where he or she would face persecution on account of a protected ground. This provision is commonly interpreted as [codifying the non-refoulement obligation](#) in the 1967 Refugee Convention, to which the United States is a party. Finally, if DHS seeks to effectuate the removal of UAC, [8 U.S.C. § 1232](#) provides that the UAC “shall” be placed in removal proceedings and transferred to HHS custody within 72 hours, except in cases where the UAC is a national of a contiguous country and opts to voluntarily return to that country in lieu of being placed in proceedings.

Because the executive branch has not previously sought to suspend asylum processing at the border on the basis of a public health order issued under 42 U.S.C. § 265, courts have not grappled with the legality of such an action. However, a line of recent cases considered a somewhat analogous statutory conflict. A 2018 Trump Administration policy sought to render aliens ineligible for asylum if they entered the country unlawfully. The policy relied on a combination of the President’s authority to suspend the entry of aliens under [INA § 212\(f\)](#) and the authority of DHS and the Attorney General to create some asylum ineligibilities by regulation under the asylum statute. A [federal district court](#) blocked the policy upon reasoning that it likely violated the asylum statute’s “clear[] command[] that immigrants be eligible for asylum regardless of where they enter.” The Supreme Court [declined](#) to grant the government a stay of that order, and the Ninth Circuit [recently affirmed](#) the district court’s decision. Thus, the policy remains blocked while litigation over its legality continues. Whether a reviewing court would reach the same result in a lawsuit challenging DHS’s implementation of the CDC order might depend largely upon whether the court interprets the public health authority with respect to communicable diseases under 42 U.S.C. § 265 to confer broader powers to limit entry than the statutory authorities underlying the 2018 policy for unlawful entrants.

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