

Title 42

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Institutional context

On March 20, 2020, as a response to the pandemic, the United States Department of Health and Human Services (HHS) issued an emergency regulation to implement Section 265 of U.S. Code Title 42. This aspect of U.S. health law grants the Director of the Centers for Disease Control and Prevention (CDC) discretionary power to prohibit individuals from entering into the United States when there is a risk of the introduction of an infectious disease. This law allows any customs officer to implement any such order.

There is an ongoing debate about whether Title 42 is a misapplication of U.S. health law, and whether it violates the U.S. and international law protecting refugees. The American Congress kept any reference to immigrants or immigration out of the health law's text because of concerns that public health authority could be used to discriminate against immigrants. Nevertheless, the order issued by the CDC primarily bars migrants crossing the borders from Mexico or Canada, who arrive without visas.

The Convention against Torture and the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a part of, prohibit expulsions or returns in circumstances where people would face a substantial risk of torture or, in the case of the ICCPR, exposure to other ill-treatment. Also, under US law and the 1967 Protocol Relating to the Status of Refugees, to which the US is a part of, the United States may not return asylum seekers to face threats to their lives or freedom without affording them an opportunity to apply for asylum and conducting a full and fair examination of that claim.

Furthermore, the UN Refugee Agency (UNHCR) released guidance on March 16, 2020 calling for border measures relating to Covid-19 to be non-discriminatory, and limited to those necessary, proportionate, and reasonable to the aim of protecting public health.

Current status of Title 42

On June 1, 2021, Department of Homeland Security (DHS) Secretary Alejandro Mayorkas noted that Title 42 would remain in place due to public health reasons, and that the DHS would address border issues once the order is lifted.