



May 26, 2020

The Honorable Patrick Leahy  
United States Senate  
Washington, DC 20510

Dear Senator Leahy:

Thank you for your letter dated April 7, 2020 concerning the U.S. Department of Homeland Security's (DHS or the Department) assisting the Centers for Disease Control and Prevention's (CDC) in implementing its *Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists* (March 20, 2020), 85 Fed. Reg. 16567 (Mar. 24, 2020). The Acting Secretary has asked that I respond on his behalf.

Enclosed are DHS's responses to your questions. Please note that your co-signatories will receive a copy of the same response.

I appreciate your interest in this issue. Should you need additional assistance, please have your staff contact the Office of Legislative Affairs at (202) 819-2612.

Sincerely,

A handwritten signature in blue ink that reads "Beth Spivey". The signature is written in a cursive style with a large initial "B".

Beth Spivey  
Assistant Secretary for Legislative Affairs

Enclosure

## Response Enclosure to April 7, 2020 Letter

1. Provide the accompanying Department of Justice Office of Legal Counsel (OLC) opinion, or any other memorandum from the Executive Branch, explaining the theory, rationale, and legal support for Title 42 preempting, in whole or in part, all existing statutes, or any statutes, including under Titles 6 and 8 of the U.S. Code.

**RESPONSE:** Any and all internal legal opinions or memoranda are protected by numerous privileges, including the attorney-client privilege and the deliberative process privilege. Accordingly, and consistent with long-standing precedent from numerous administrations, these documents are not typically shared outside of the Executive Branch.

2. If no such opinion or memorandum exists, describe in detail why no such legal analysis was solicited or provided given this dramatic expansion of Executive Branch authority and the simultaneous preemption of federal law.

**RESPONSE:** See response to #1.

3. Congress has already provided statutory authority and guidance covering how DHS should process, or deny entry to, non-U.S. citizens who may pose public health challenges. Specifically, the Immigration and Nationality Act (INA) gives the Executive Branch the authority to find certain individuals inadmissible on public health grounds. Further, courts have interpreted section 212(f) of the INA as giving the Executive Branch extraordinary authority to deny entry to specific classes of individuals. Given the current law:

- a. Is the Executive Branch's position that existing legal authority under the INA is insufficient to address this crisis, and if so, why?

**RESPONSE:** There are many aspects to the Administration's response to the COVID-19 crisis. With respect to the specific problem identified in the CDC Order, namely the threat of the introduction of COVID-19 into DHS facilities at or near U.S. land borders, DHS believes that 42 U.S.C. § 265 provides sufficient authority to address this problem.

- b. If existing authority under the INA is insufficient to address the crisis, did the Executive Branch, at any point, request substantive changes to the INA to address the perceived gap in authority?

**RESPONSE:** At this time, DHS believes that 42 U.S.C. § 265 provides sufficient authority to address this problem.

- c. Please describe why the Trump administration's immigration procedures and legal rationale in response to COVID-19 are different from the immigration procedures and their legal justifications that prior administrations relied upon during prior global public health crisis' including, but, not limited to: Ebola, H1N1 and Severe Acute Respiratory Syndrome.

**RESPONSE:** The current crisis is not comparable to those other contagious disease outbreaks. Section 265 in Title 42 has been in force since 1944 and provides an alternative legal framework to Title 8 that concerns the public-health threat presented by the current pandemic. This separate and additional source of authority provides for protection of the public health through the prevention of the introduction of persons into the United States whose presence would increase the serious danger of the introduction of communicable disease into the United States.

d. Please provide an example of any other administration utilizing Title 42, § 265 to preempt existing federal law.

**RESPONSE:** See response to #3(c).

4. Where has the public been given notice, and an opportunity to comment, about the depth and breadth of these new immigration procedures occurring at the borders, and possibly, the interior?

**RESPONSE:** The Interim Final Rule, which was published in the Federal Register, provides ample notice to the public about this policy and explains why notice and comment was not required, consistent with the Administrative Procedure Act. Moreover, as the CDC Order by Director Dr. Robert R. Redfield stated, 85 Fed. Reg. 17060, 17067–68 (emphasis added) (alteration in original):

This order is not a rule within the meaning of the Administrative Procedure Act (APA). In the event this order qualifies as a rule under the APA, notice and comment and a delay in effective date are not required because *there is good cause to dispense with prior public notice and the opportunity to comment on this order and a delay in effective date*. Given the public health emergency caused by COVID-19, it would be impracticable and contrary to the public health—and, by extension, the public interest—to delay the issuing and effective date of this order. In addition, because this order concerns the ongoing discussions with Canada and Mexico on how best to control COVID-19 transmission over our shared border, it directly “involve[s] . . . a . . . foreign affairs function of the United States.” 5 U.S.C. § 553(a)(1). Notice and comment and a delay in effective date would not be required for that reason as well.

5. Does the Executive Branch take the position that its recent actions pursuant to Title 42 comply with the 1951 Refugee Convention, the Convention Against Torture, and all other relevant treaties to which the United States is a signatory? If so, please provide any legal opinion or memorandum supporting this position. If not, please provide all legal precedents or opinions (OLC opinions acceptable) which support the theory that the Executive Branch can, by proclamation or other agency action, nullify or preempt, either partially or in whole, an international treaty to which the U.S. was already a party, remains a signatory, and where

Congress has approved the ratification of that treaty, absent the formal withdrawal from the treaty?

**RESPONSE:** Stopping the introduction of people and articles from COVID-19-risky locations is indispensable to protecting our public health and the national security of the United States. Those Administration policies comport with both our domestic-law obligations under federal statutes and our international obligations under the 1951 Refugee Convention and the Convention Against Torture. Those policies ensure the protection of the public health and national security of the United States as well as the protection of aliens illegally seeking to enter the United States during the present health emergency.

Any and all internal legal opinions or memoranda are protected by numerous privileges, including the attorney-client privilege and the deliberative process privilege. Accordingly, and consistent with long-standing precedent from numerous Administrations, these documents are not typically shared outside of the Executive Branch.

6. If the Executive Branch concludes that it can, by proclamation (or any other agency or administrative action it has taken pursuant to Title 42), preempt existing federal law, please articulate the scope of that authority. Which laws are the Executive Branch prohibited from preempting or refusing to enforce by proclamation ( or agency or administrative action)? Further, which state or local laws are the Executive Branch prohibited from preempting or refusing to enforce by proclamation (or agency or administrative action)?

**RESPONSE:** DHS is taking appropriate action to comply with all federal law, including the relevant Title 8 and Title 42 authorities. Title 42 U.S.C. section 265 provides that:

[When] by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and . . . this danger is so increased by the introduction of persons . . . from such country that a suspension of the right to introduce such persons . . . is required in the interest of the public health, [the CDC Director and Secretary of HHS], in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons . . . from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

If the Secretary of HHS, or as his authority has been delegated, the Director of the CDC, issues an order under 42 U.S.C. section 265, CBP and other customs officials have a duty to aid in the enforcement of that order. *See* 42 U.S.C. § 268(b). Title 42 provides an alternative legal framework to Title 8 that concerns the public-health threat presented by the current pandemic. Neither section 265 or 268 contain any carve-out based on an individual's immigration status.

7. Does DHS believe it can expel a foreign national who is encountered by DHS personnel in the interior of the United States? If so, state, and provide the accompanying guidance, for any DHS component with so-called, "Title 42 authority."

**RESPONSE:** The CDC Order applies to certain aliens traveling from Mexico and Canada who would otherwise be introduced into a congregate setting in a land port of entry or Border Patrol station at or near the border with Mexico or Canada. Separate from the CDC Order, DHS can place aliens in removal proceedings, generally before immigration judges under section 240 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229a, and Congress gave DHS the authority to remove certain aliens in an expedited manner, most often under section 235 of the INA, 8 U.S.C. § 1225(b)(1).

8. Further, we request weekly reports until the termination of the alleged authority under Title 42, detailing the total number of persons expelled by DHS, including any persons expelled by personnel from other agencies assisting DHS in implementing its alleged authorities. In such reports, please provide a breakdown of total expulsions by port of entry and/or U.S. Border Patrol station, and by categories including family units, unaccompanied children, and single adults. We request the data indicate the age and nationality of expelled persons as well.

**RESPONSE:** We appreciate your interest in those numbers. DHS does not regularly provide those kinds of reports, but will review the request to determine what if any data can be provided.