

# United States Senate

WASHINGTON, DC 20510

April 7, 2020

Dear Acting Secretary Wolf,

We write to request information about the Department of Homeland Security's (DHS) recent actions implementing the Centers for Disease Control and Prevention's (CDC) March 20, 2020 "Order Suspending Introduction Of Certain Persons From Countries Where A Communicable Disease Exists."<sup>1</sup> This order was issued pursuant to 42 U.S.C. § 265, which grants limited authorities to temporarily suspend the entry of certain categories of persons into the United States "when doing so is required in the interest of the public health." While protecting our borders is critical during this COVID-19 pandemic, we are deeply concerned that DHS is blatantly misinterpreting its limited authorities under the CDC's Title 42 order to override existing federal statutes<sup>2</sup>—a move with no known precedent or clear legal rationale. Making matters worse, this unprecedented expansion of executive power appears to be entirely hidden from public and Congressional oversight.

As we understand from press accounts,<sup>3</sup> DHS has gone far beyond the parameters of CDC's limited order and granted itself sweeping powers to summarily expel large, unknown numbers of individuals arriving at our border. Contrary to existing law, individuals, families, and children are now unable to sufficiently make claims for asylum, seek other forms of humanitarian protection, and, in some instances, are being expelled to countries in which they fear persecution. Therefore, DHS has essentially determined that executive branch officials can all but ignore the requirements of long-standing federal laws pursuant to an executive branch interpretation of a statute enacted in 1944. This amounts to a startling expansion of executive power under the guise of a global pandemic response.

While we agree this COVID-19 crisis requires an extraordinary governmental response, we strongly disagree with any attempt to abuse existing authorities to serve political ends or ignore laws by executive fiat. A public health crisis does not give the Executive Branch a free pass to violate constitutional rights, nor does it give the Executive Branch permission to operate outside

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<sup>1</sup> Order Suspending Introduction of Certain Persons From Countries Where A Communicable Disease Exists, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 20, 2020), *available at* [https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf).

<sup>2</sup> Arelis R. Hernández & Nick Miroff, *Facing Coronavirus Pandemic, Trump Suspends Immigration Laws and Showcases Vision for Locked-Down Border*, THE WASHINGTON POST, (Apr. 3, 2020), [https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3\\_story.html](https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html) ("Citing the emergency declaration from the Centers for Disease Control and Prevention, Homeland Security officials have bypassed court-ordered due process protections for minors, asylum seekers and others as they return border-crossers to Mexico as quickly as possible. The migrants taken into custody now are tallied as "encounters" rather than "apprehensions," and they are "expelled" from the country rather than formally deported.").

<sup>3</sup> Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately – Ignoring Asylum Law*, PROPUBLICA, (Apr. 2, 2020), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

of the law. Responding to crises while upholding our legal obligations is the very hallmark of the rule of law.

Furthermore, it appears these decisions to expel individuals are being made on an ad hoc, arbitrary basis without adherence to any articulated limiting principles. In effect, the administration has given itself unchecked, roving authority to subject individuals to immediate “expulsion” from our country regardless of other federal protections, or rights, to which they otherwise would be entitled. Moreover, the administration has failed to provide any meaningful notice to the public about these vast powers or an opportunity for the public to provide comments about them, as federal law requires. The notices provided in the Federal Register to date are woefully inadequate, and do not sufficiently describe DHS’ current activities at the border.

Lastly, we are not aware of a single statute, or legal precedent, that authorizes the Executive Branch to defy the law and evade all Congressional oversight. Indeed, our democracy fundamentally requires Congress to ensure that the Executive Branch is complying with our laws, especially in times of crisis when the rights and liberties that define our nation are most vulnerable.

To better understand DHS’ recent actions purportedly pursuant to CDC’s Title 42 order and to fulfill our constitutional oversight obligations, we request answers to the following questions by April 15, 2020:

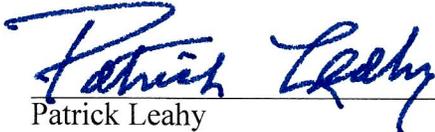
1. Provide the accompanying Department of Justice Office of Legal Counsel (OLC) opinion, or any other memorandum from the Executive Branch, explaining the theory, rationale, and legal support for Title 42 preempting, in whole or in part, all existing statutes, or any statutes, including under Titles 6 and 8 of the U.S. Code.
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.
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?
  - 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?
  - c. Please describe why the Trump administration’s immigration procedures and legal rationale in response to COVID-19 are different from the immigration

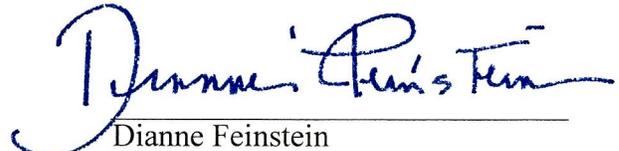
procedures and their legal justifications that prior administrations relied upon during prior global public health crisis' including, but, not limited to: Ebola, H1N1 and Severe Acute Respiratory Syndrome.

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

We appreciate your prompt attention to this urgent matter.

Sincerely,

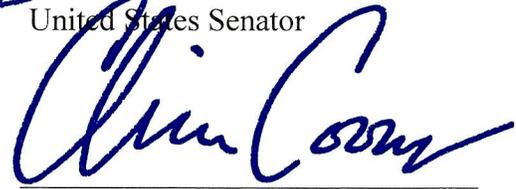
  
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