

Texas bill to send undocumented migrants to Mexico might be unconstitutional, experts say

The proposal, which passed the Texas Senate, is likely to pass the House as Republicans control both the chambers of the Legislature.



Migrants who crossed the Rio Grande from Mexico into the U.S. climb a fence with barbed wire and concertina wire, Monday, Aug. 21, 2023, in Eagle Pass, Texas. (AP Photo/Eric Gay) A bill being debated by the Texas legislature would allow for the state to enforce immigration laws. (Eric Gay / ASSOCIATED PRESS)

By [Aarón Torres](#) and [Alfredo Corchado](#)
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AUSTIN — A [sweeping border security bill](#) prioritized by Gov. Greg Abbott would allow for Texas to order undocumented migrants to return to Mexico, but experts, including former federal immigration judges, question whether the legislation would be constitutional.

[Senate Bill 4](#), carried by GOP Lubbock Sen. Charles Perry and GOP Rep. David Spiller, [passed the Senate last week](#) and is being debated in the House on Tuesday. The proposal is likely to pass as Republicans control both chambers of the Legislature.

The legislation creates a new state crime of illegal entry from a foreign nation, making it a Class B misdemeanor, and authorizes state and local police to arrest migrants who are in Texas illegally. It also allows state judges to order migrants back to the foreign nation from which they entered the state — which would presumably be Mexico in most cases.

The bill assumes Mexico will accept the migrants sent back by Texas, said Elissa Steglich, the co-director and clinical professor at the University of Texas School of Law's immigration clinic.

“Immigration from its very beginning was based on not only our sovereignty, but recognizing the sovereignty of other nations,” Steglich said. “We just can't put someone on a plane and send them to a country without the affirmative recognition from the other country.”

In a statement, a spokesperson with the [Department of Homeland Security](#) said the federal government, not individual states, is charged with determining how and when to remove noncitizens for violating immigration laws.

“State actions that conflict with federal law are invalid under the Supremacy Clause of the Constitution,” the statement said.

Legal experts are not the only ones raising concerns. Sen. Brian Birdwell, R-Granbury, who has carried similar border security bills in previous sessions, spoke against the bill last week.

“For present ease of messaging, we are creating a false expectation of a bill as a solution that is decidedly outside the bounds of the constitutional construct,” Birdwell said on the Senate floor.

Joe Whitley, who served as the first General Counsel for the Homeland Security department under President George W. Bush from 2003 to 2005, said in an email that migrants who are being returned “require an accepting country on the other end of things.”

Former immigration judges

Two former federal immigration judges, appointed by Republican and Democratic presidents, raised concerns over state judges being tasked with handling immigration cases.

“It makes no more sense for a state magistrate trained in state law to engage in the interpretation and application of federal immigration law than it does for a federal immigration judge ...trained in federal to engage in an interpretation and application of Texas law,” said Bruce J. Einhorn, a former immigration judge appointed by President George H.W. Bush in 1990.

“It’s hard to comment on something that’s just so plainly unlawful and plainly unconstitutional,” said Rebecca Bowen Jamil, a former federal immigration judge appointed by President Barack Obama in 2016. “The state court judge doesn’t have the training — doesn’t have the expertise — to protect the constitutional rights of that individual before them.”

Einhorn and Jamil were among [dozens of former federal immigration judges](#) who signed a statement saying the proposal violates the law.

Spiller, who is carrying the bill in the House, said he did not speak with Mexican officials to confirm if they would accept migrants Texas wants to send back. He believes the Mexican government would accept them.

If Mexico refuses to cooperate, he said lawmakers would determine what changes need to be made at a future date.

“So I can’t really completely answer that question” about what happens if Mexico refuses. “We still have that criminal offense. You still have the process,” Spiller said in an interview. “I’m optimistic that we’ll be able to continue to work with those [Mexican] border states.”

Last week, Abbott said during a bill signing that Texas is doing more than any state in U.S. history to enforce immigration laws. “It would not surprise me at all to see this legislation also be the target of litigation by the Biden administration,” Abbott said.

The governor's office did not immediately respond to questions Tuesday on whether Abbott had previously spoken to officials in the U.S. or Mexico regarding the bill.

The State Department declined to comment.

‘Know your rights’ workshops

Some immigrant advocacy groups, including [Border Network for Human Rights](#), are planning “know your rights” training workshops across Texas, particularly along the border with Mexico, said Fernando Garcia, the group's executive director.

The workshops will include how to use “your personal cell phone to document human rights abuses,” he said. “The overall idea is to teach people how to know your constitutional rights. We expect an array of human rights violations and we have to train Texans how to defend themselves, how to take testimonials and make them public.”

The proposal also creates a felony offense if a migrant refuses to comply with the state judge's order to return to Mexico.

Kristin Etter, the incoming director of policy for the Texas Immigration Law Council, said that part of the bill could leave migrants between a rock and a hard place if Mexico declines to accept the migrants.

“But in this situation, it's going to be between an armed law enforcement officer and the country of Mexico,” said Etter, who was previously a defense attorney with Texas RioGrande Legal Aid and has represented undocumented migrants. “They're literally just kind of collateral damage in all of this.”