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## **“Under the Guise of Public Health:” The Biden Administration and Title 42**

**Casey Plach\***

### **Introduction**

On September 24, 2021, the Secretary of the Department of Homeland Security (“DHS”), Alejandro Mayorkas, announced that a camp in Del Rio, Texas, which at one point housed 15,000 migrants, had been cleared.<sup>1</sup> He explained that, as part of that effort, approximately 2,000 individuals were sent directly to Haiti on seventeen expulsion flights.<sup>2</sup>

Haiti, which just last summer suffered a devastating earthquake and the assassination of its President, is currently overcome by gang violence.<sup>3</sup> As flights grounded in Port Au Prince, several families claimed they were never told they were being returned to Haiti.<sup>4</sup> Many left the country years before, and hoped to seek protection in the United States.<sup>5</sup> Instead, they were expelled to a country the Biden Administration itself admitted was “experiencing serious security concerns, social unrest, an increase in human rights abuses, crippling poverty, and lack of basic resources, which are exacerbated by the COVID-19 pandemic.”<sup>6</sup>

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<sup>1</sup> Press Briefing, White House, Jen Psaki, Press Sec’y, and Alejandro Mayorkas, Sec’y of Homeland Security (Sept. 24, 2021), (transcript available at <https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/24/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas-september-24-2021/>) [hereinafter Press Briefing].

<sup>2</sup> *Id.*

<sup>3</sup> Widlore Merancourt & Anthony Faiola, *Deportees land in Port-au-Prince: ‘Nobody told us we were going back to Haiti,’* WASH. POST (Sept. 19, 2021), <https://www.washingtonpost.com/world/2021/09/19/haiti-deportee-flight-port-au-prince/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Press Release, Dep’t. of Homeland Security, Secretary Mayorkas Designates Haiti for Temporary Protected Status for 18 Months (May 22, 2021),

The legal justification behind these expulsion flights stems from a Trump-era policy, now widely referred to as Title 42.<sup>7</sup> This policy allows DHS officers to immediately turn away migrants, including asylum seekers, citing “danger to the public health” in light of the COVID-19 pandemic.<sup>8</sup> In defending the Biden Administration’s continued use of Title 42, Secretary Mayorkas explained, “We are doing this out of a public health need. It is not an immigration policy.”<sup>9</sup>

Critics argue, however, that Title 42 is very much an immigration policy that not only directly conflicts with asylum laws but is specifically designed to bar entry of asylum seekers in the U.S.<sup>10</sup> At the same time, the Biden Administration has rigorously defended the Trump-era policy, and continues to cite public health concerns.<sup>11</sup> Acknowledging these competing objectives, will the policy continue to stand?

### **The Right to Seek Asylum**

The right to seek asylum is well-established in United States law and international law. The Immigration and Nationality Act (“INA”) provides that “Any alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum.”<sup>12</sup> Asylum seekers must meet the definition of a refugee, which is any person “who is unable or unwilling to return to [his or her country of origin] because of persecution or a well-founded fear of persecution on account of race,

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<https://www.dhs.gov/news/2021/05/22/secretary-mayorkas-designates-haiti-temporary-protected-status-18-months>.

<sup>7</sup> See Press Briefing, *supra* note 1.

<sup>8</sup> Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 26, 2020) [hereinafter CDC order].

<sup>9</sup> Press Briefing, *supra* note 1.

<sup>10</sup> See Ashley Binetti Armstrong, *Co-Opting Coronavirus, Assailing Asylum*, 35 GEO. IMMIGR. L. J. 361, 372 (2021).

<sup>11</sup> See Press Briefing, *supra* note 1.

<sup>12</sup> 8 U.S.C. § 1158(a)(1).

religion, nationality, membership in a particular social group, or political opinion.”<sup>13</sup>

In addition, there are two other forms of protection for individuals who fear persecution in their country of origin: (1) withholding of removal, which prohibits the removal of non-citizens if their “life or freedom would be threatened,”<sup>14</sup> and (2) the Convention Against Torture, which prohibits the U.S. from “expel[ling] . . . any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.”<sup>15</sup>

These policies reflect the United States’ international obligations regarding asylum seekers, including the fundamental obligation of non-refoulement, which prohibits the return of refugees to territory where they fear persecution or torture.<sup>16</sup>

Taken together, this legal framework provides asylum seekers with two paramount rights: (1) the right to seek asylum and (2) the right not to be returned to a place where they fear persecution.<sup>17</sup> Title 42, critics argue, conflicts with both these rights.<sup>18</sup>

## **Title 42**

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<sup>13</sup> 8 U.S.C. § 1101(a)(42)(A).

<sup>14</sup> 8 U.S.C. § 1231(b)(3)(A).

<sup>15</sup> 8 U.S.C. § 1231 note (United States Policy With Respect to Involuntary Return of Persons in Danger of Subjection to Torture).

<sup>16</sup> See Memorandum from Harold Hongju Koh, Re: Ending Title 42 return flights to countries of origin, particularly Haiti (Oct. 2, 2021) (available at: <https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddb3ae0000>) [hereinafter Koh Memo] (noting that the U.S. must abide by non-refoulement obligations found in the Convention against Torture, the 1967 Protocol relating to the Status of Refugees, and the 1951 Convention relating to the Status of Refugees). See also Binetti Armstrong, *supra* note 10, at 387–95 (discussing Title 42 as a violation of international law).

<sup>17</sup> Binetti Armstrong, *supra* note 10, at 388.

<sup>18</sup> *Id.* at 392.

Title 42, Section 265 is a “little-known provision”<sup>19</sup> of the U.S. Code that gives the Surgeon General “the power to prohibit . . . the introduction of persons” into the United States 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.”<sup>20</sup> This law, though on the books since 1944, had never been applied in the immigration context.<sup>21</sup>

This all changed on March, 26, 2020, when the Centers for Disease Control and Prevention (“CDC”), under the direction of the Trump Administration, issued an Order bolstered by this provision.<sup>22</sup> The CDC Order, now known as Title 42, provides DHS with the authority to “suspend the introduction of persons into the United States” and “use repatriation flights” to return migrants to their country of origin.<sup>23</sup>

In effect, Title 42 closes the border and permits DHS officer to quickly expel migrants.<sup>24</sup> There is an exception for U.S. citizens, lawful permanent residents, and members of the armed forces,<sup>25</sup> but, as critics were quick to point out, “an exception related to asylum-seekers . . . is notably missing from the Rule.”<sup>26</sup>

### **The Impact of Title 42 on Asylum Seekers**

With the implementation of Title 42, the two paramount rights afforded to asylum seekers immediately came to a halt.<sup>27</sup> First, the right to seek asylum was disrupted as closed borders prevented individuals from submitting claims.<sup>28</sup> Second, as DHS expelled migrants without properly

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<sup>19</sup> *Id.* at 369.

<sup>20</sup> 42 U.S.C. § 265.

<sup>21</sup> Binetti Armstrong, *supra* note 10, at 370.

<sup>22</sup> See CDC Order, *supra* note 8 at 17,061.

<sup>23</sup> *Id.* at 17,061, 17,067.

<sup>24</sup> *Id.* at 17,061.

<sup>25</sup> *Id.* at 17,061.

<sup>26</sup> Binetti Armstrong, *supra* note 10, at 369.

<sup>27</sup> *Id.* at 392.

<sup>28</sup> *Id.*

screening for fear of persecution, many individuals were returned to dangerous or even life-threatening territories.<sup>29</sup>

When the Biden Administration assumed control of the White House, advocates hoped for change, but instead, the Administration embraced Title 42<sup>30</sup> and actually increased the number of Title 42 expulsions.<sup>31</sup> The numbers are staggering: since October 2020, over 1 million individuals have been expelled under Title 42.<sup>32</sup> Further, it is estimated that, due to this policy, only one in three people at the border could access the asylum process in the last year.<sup>33</sup>

### **The Public Health Justification**

The CDC cites “danger to the public health” as “the touchstone” of the Order,<sup>34</sup> but this notion has been questioned since the beginning. Even at the onset of the pandemic, health experts called on the Trump Administration to withdraw the policy, claiming that “[d]espite its public health pretext, the CDC order fails to further public health” and instead is “. . . being used to target certain classes of noncitizens.”<sup>35</sup> Recently, a top

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<sup>29</sup> *Id.*

<sup>30</sup> Jonathan Blitzer, *How Biden Came to Own Trump’s Policy at the Border*, NEW YORKER (Oct. 6, 2021), <https://www.newyorker.com/news/daily-comment/how-biden-came-to-own-trumps-policy-at-the-border>.

<sup>31</sup> *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY2021*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021> (last visited Nov. 17, 2021).

<sup>32</sup> *Id.*

<sup>33</sup> Aaron Reichlin-Melnick, *The Border Isn’t Open. Just 1 in 3 People at the Border Last Year Could Access the Asylum Process*, IMMIGRATION IMPACT (Oct. 26, 2021), [https://immigrationimpact.com/2021/10/26/open-borders-trump-biden/?emci=62841db3-ec38-ec11-9820-c896653b26c8&emdi=8e4cbff5-603a-ec11-9820-c896653b26c8&ceid=9820912#.YX7BGi1h3\\_Q](https://immigrationimpact.com/2021/10/26/open-borders-trump-biden/?emci=62841db3-ec38-ec11-9820-c896653b26c8&emdi=8e4cbff5-603a-ec11-9820-c896653b26c8&ceid=9820912#.YX7BGi1h3_Q).

<sup>34</sup> CDC Order, *supra* note 8, at 17,061.

<sup>35</sup> Letter from Joe Amon et al. to Alex Azar, Sec’y, Dep’t of Health and Human Serv. & Robert R. Redfield, Dir., Ctr. for Disease Control and Prevention (May 18, 2020),

CDC Official told Congress that at the time Title 42 was enacted, "[t]he bulk of the evidence" did not support the policy, lending support to the theory that Title 42 was designed as an immigration policy after all.<sup>36</sup>

The same message is being sent to the Biden Administration. In October 2021, over 1,300 medical professionals called on the CDC Director to withdraw Title 42, stating that the Order "lacks epidemiological evidence" and has "no basis in public health best practice."<sup>37</sup> Dr. Anthony Fauci, Chief Medical Advisor to the President, has also said, "Focusing on immigrants, expelling them or what have you, is not the solution to an outbreak."<sup>38</sup>

### Criticism

Title 42 has faced several legal challenges, but so far remains in force. In November 2020, a federal district court certified a class of unaccompanied non-citizen children challenging Title 42, and issued a temporary injunction prohibiting Title 42 expulsions.<sup>39</sup> However, the Court of

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<https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

<sup>36</sup> Camilo Montoya-Galvez, *Top CDC Official Told Congress Migrant Expulsion Policy was Not Needed to Contain COVID*, CBS NEWS (Nov. 12, 2021),

[https://www.cbsnews.com/news/cdc-official-told-congress-migrant-expulsion-policy-not-needed-to-contain-covid/?utm\\_campaign=HubSpot-AILA8-11-152021&utm\\_medium=email&\\_hsmi=183288811&\\_hsenc=p2ANqtz-8\\_7bUjsX17\\_baWj4cNx0KC\\_GXeB7ZfSoHSxIVvxohpOBjoxRjKR-FEkbEvjCF7Tt1tgBEepKMCue0hTr4SPk0Vg2EKDg&utm\\_content=183288811&utm\\_source=hs\\_email](https://www.cbsnews.com/news/cdc-official-told-congress-migrant-expulsion-policy-not-needed-to-contain-covid/?utm_campaign=HubSpot-AILA8-11-152021&utm_medium=email&_hsmi=183288811&_hsenc=p2ANqtz-8_7bUjsX17_baWj4cNx0KC_GXeB7ZfSoHSxIVvxohpOBjoxRjKR-FEkbEvjCF7Tt1tgBEepKMCue0hTr4SPk0Vg2EKDg&utm_content=183288811&utm_source=hs_email).

<sup>37</sup> Press Release, Physician for Human Rights, *1,300+ Medical Professionals from 49 U.S. States and Territories Call on CDC to End "Junk Science" Border Expulsion Policy* (Oct. 28, 2021), <https://phr.org/our-work/resources/u-s-medical-professionals-demand-cdc-end-title-42/>.

<sup>38</sup> See Jonathan Blitzer, *supra* note 30.

<sup>39</sup> *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492, 520 (D.D.C. 2020). In response to this ruling, the Biden administration later announced "[the] CDC has exercised its discretion to temporarily except from expulsion unaccompanied noncitizen children." Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination, 86 Fed. Reg. 9942 (Feb. 17, 2021).

Appeals granted a stay of injunction, which allowed the policy to go back into effect.<sup>40</sup> Similarly, in September 2021, a class of asylum-seeking families challenged Title 42 and faced the same result: the district court again issued a temporary injunction,<sup>41</sup> which was also stayed by the Court of Appeals.<sup>42</sup> These cases continue to be litigated, and the Biden Administration shows no sign of backing down.<sup>43</sup>

The Biden Administration has also faced criticism from its own staff over Title 42. In October 2021—shortly after the expulsion flights to Haiti—Harold Koh, a top legal advisor for the Department of State, resigned.<sup>44</sup> In doing so, he sent an internal memo in which he called Title 42 expulsions “illegal” and “inhumane.”<sup>45</sup> He emphasized that the policy violates U.S. non-refoulement obligations under international law, and that the Biden Administration’s recent use of the policy to expel Haitian immigrants is “particularly unjustifiable.”<sup>46</sup>

The international community has likewise joined the conversation, emphasizing that the public health justification is no more than a facade.<sup>47</sup> In September 2021, seventy-one human rights organizations signed a joint letter calling upon the Biden Administration to end the policy.<sup>48</sup> Notably, the UN Refugee Agency (“UNHCR”) has called for the end of the policy, warning that “measures restricting access to asylum must not be allowed to become entrenched under the guise of public health.”<sup>49</sup>

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<sup>40</sup> P.J.E.S. v. Wolf, 502 F. Supp. 3d 492 (D.C. Cir. 2020) (order granting motion for stay).

<sup>41</sup> Huisha-Huisha v. Mayorkas, No. 21-100(EGS), 2021 U.S. Dist. LEXIS 175980, at \*52 (D.D.C. Sept. 16, 2021).

<sup>42</sup> Huisha-Huisha v. Mayorkas, No. 21-5200, 2021 U.S. Dist. LEXIS 175980 (D.C. Cir. Sept. 30, 2021) (order granting motion for stay).

<sup>43</sup> See Jonathan Blitzer, *supra* note 30.

<sup>44</sup> Koh Memo, *supra* note 16.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



## Looking Ahead

Title 42 has been attacked by the legal community, the international community, and public health experts, but despite the criticism, the Biden Administration shows no sign of withdrawing this Trump-era policy.<sup>50</sup> How can this be? With record numbers of migrants at the border,<sup>51</sup> Title 42 is a convenient way to respond. It seems that as long as the Administration can justify the policy on public health grounds—however faulty—it will continue to do so. In the meantime, advocates will keep fighting for change until the U.S. complies with its legal obligations toward asylum seekers, and the Biden Administration lives up to its promise to “. . . reckon[] with the prior Administration’s cruel and reckless immigration policies” and create a more “humane immigration system” that meets international standards.<sup>52</sup>

Edited by Alex Beezley

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<sup>50</sup> Joel Rose & Scott Neuman, *The Biden Administration is Fighting in Court To Keep a Trump-Era Immigration Policy*, NPR (Sept. 20, 2021), <https://www.npr.org/2021/09/20/1038918197/the-biden-administration-is-fighting-in-court-to-keep-a-trump-era-immigration-po>.

<sup>51</sup> Eileen Sullivan & Miriam Jordan, *Illegal Border Crossings Soar to Highest Number Since 1960, Data Shows*, N.Y. TIMES (Oct. 23, 2021), <https://www.nytimes.com/2021/10/22/us/politics/border-crossings-immigration-record-high.html>.

<sup>52</sup> Fact Sheet: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System, WHITE HOUSE (July 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system/>.