

Title 42's Precedent: The Migrant Protection Protocols

The Title 42 expulsion policy is the latest development in the United States' increasingly restrictive immigration policies.ⁱⁱⁱ Prior to Title 42's implementation, immigration at the southern border was regulated by the Migrant Protection Protocols (MPP), a Trump-era policy enacted in early 2019.^{iv} Under the MPP, also known as the "Remain in Mexico" program, asylum-seekers entering the United States from Mexico were sent back across the border to wait for a hearing in a U.S. immigration court.^v

In the first year of the MPP's implementation, over 70,000 people were turned back at the discretion of Customs and Border Patrol (CBP) agents.^{vi} Many of these people, including asylum-seekers from Central American countries who did not have contacts in Mexico,^{vii} were left with no choice but to live in migrant camps near the border until their court dates.^{viii} The camps present a new type of danger for those feeling political or religious persecution, as they often have no electricity, running water, or adequate shelter.^{ix} Medical resources are also scarce, provided by nonprofit organizations that set up "sidewalk clinics" to provide basic health care.^x

As the ACLU has alleged in its legal challenges to the MPP, the practice of returning asylum-seekers to such dangerous conditions violates both domestic law and the United States' obligation under international law to comply with the principle of non-refoulement.^{xi} The 1951 Convention Relating to the Status of Refugees provides that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."^{xii} The U.S. Refugee Act of 1980 further guarantees that anyone "who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum."^{xiii}

The COVID-19 Pandemic and the Implementation of Title 42

In March 2020, MPP hearings were suspended indefinitely in response to the COVID-19 pandemic.^{xiv} In its place, the Centers for Disease Control (CDC) and the Department of Health and Human Services (HHS) issued an emergency regulation under 42 U.S.C. § 265,^{xv} a provision of the Public Health Service Act enacted in 1944 that permits the Surgeon General to restrict the entry of “persons and property . . . in the interest of the public health.”^{xvi} The regulation authorized the CDC to “suspend the introduction of persons who would otherwise pose a serious danger of introduction of COVID-19 into the United States,”^{xvii} and was quickly followed by a CDC order that granted CBP the authority to enforce such restrictions at the borders.^{xviii}

Under Title 42, as this policy is colloquially known, there is no process to apply for asylum; migrants are simply turned away, or “expelled,” at the border.^{xix} After being briefly detained by CBP, many of these individuals and families are flown either to Mexico or back to their home countries, where they are forced to return to the conditions from which they were seeking asylum.^{xx} By February 2021, over 520,000 people had been expelled from the United States under this policy.^{xxi}

Even under such extreme circumstances, the U.S. immigration system usually includes protections for the most vulnerable people entering the country, particularly asylum-seekers and unaccompanied children.^{xxii} However, the CDC order that implemented Title 42 offered no such protections.^{xxiii} Although it did explicitly exempt U.S. citizens, lawful permanent residents, U.S. military personnel, and certain foreign citizens, the order did not acknowledge especially vulnerable groups except for a single mention of “humanitarian interests.”^{xxiv}

While the U.S. government has maintained that Title 42 is “not an immigration authority, but a public health authority,”^{xxv} the policy has been widely criticized as a political tool in the

Trump administration's aggressive plan of closing the southern border.^{xxvi} However, the Biden administration has only strengthened the program in 2021, announcing that it will be resuming expulsion flights to southern Mexico.^{xxvii} Despite the ongoing efforts of human rights organizations to challenge the legality of Title 42, the administration has continued to defend the policy in court.^{xxviii} On September 30, a federal appeals court granted the administration's request to stay an earlier ruling that would have blocked the government from expelling asylum-seeking families under the policy, opening the door for expulsions to continue or even increase.^{xxix}

International Law Implications of Title 42

Like the Migrant Protection Protocols, Title 42 expulsions are inconsistent with the United States' obligations to those seeking asylum at the border. By requiring—and through the expulsion flight program, forcing—at-risk migrants to return to the very place from which they are seeking asylum, the United States is failing to comply with the principle of non-refoulement as required by the 1951 Refugee Convention.^{xxx} Rather than protecting the universal right to seek asylum, the policy contributes to “chain refoulement,” in which migrants are expelled from multiple countries as they try to seek asylum.^{xxxi} As the United States expels people to Mexico, Mexico is sending them to its southern border to “expedite their departure,” a process that inevitably forces many into dangerous situations.^{xxxii}

In response to the increasingly prevalent problem of chain refoulement, the UNHCR issued a warning against “externalization initiatives that forcibly transfer asylum seekers to other countries.”^{xxxiii} Although countries may agree to share the responsibilities of granting asylum, the UNHCR expressed concern that such agreements are difficult to implement in a way that

meets the standards of both countries' obligations under international law.^{xxxiv} If the results of the Title 42 expulsions are any indication, that is unfortunately proving to be true.

Conclusion

By implementing the Title 42 expulsion policy in place of the Migrant Protection Protocols, the United States has taken a step backwards in upholding its obligations to asylum-seekers under the 1951 Refugee Convention.

ⁱ *Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc*, HUM. RTS. FIRST (Aug. 2021) [hereinafter *Human Rights Travesty*], https://www.humanrightsfirst.org/sites/default/files/HumanRightsTravesty_FINAL.pdf [<https://perma.cc/MVZ7-SW7S>].

ⁱⁱ *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Mar. 29, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [<https://perma.cc/D6G6-FEKR>].

ⁱⁱⁱ See Emily J. Johanson, *The Migrant Protection Protocols: A Death Knell for Asylum*, 11 U.C. IRVINE L. REV. 873, 878 (2021).

^{iv} *The "Migrant Protection Protocols"*, AM. IMMIGR. COUNCIL 1 (Jan. 22, 2021), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols> [<https://perma.cc/EY9A-5C8K>].

^v *Id.*

^{vi} *Id.*

^{vii} See Johanson, *supra* note 3, at 876.

^{viii} Nomaan Merchant, *Tents, stench, smoke: Health risks are gripping migrant camp*, AP News (Nov. 14, 2019), <https://apnews.com/article/pneumonia-caribbean-ap-top-news-az-state-wire-immigration-337b139ed4fa4d208b93d491364e04da> [<https://perma.cc/G849-RVX6>].

^{ix} See *id.*

^x See *id.*

^{xi} See *Innovation Law Lab v. Wolf*, ACLU (last updated Aug. 23, 2021), <https://www.aclu.org/cases/innovation-law-lab-v-wolf> [<https://perma.cc/3VYE-D5HQ>].

^{xii} U.N. Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]; see U.N. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

^{xiii} 8 U.S.C. § 1158(a)(1).

^{xiv} Hearings were postponed for thirty days in March 2020, then postponed indefinitely in July 2020. See Press Release, Dept. of Homeland Security, Joint DHS/EOIR Statement on MPP Rescheduling (Mar. 23, 2020), <https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling> [<https://perma.cc/4A7F-BEK4>]; see also Press Release, Dept. of Homeland Security, Department of Homeland Security and Department of Justice Announce Plan to Restart MPP Hearings (July 17, 2020), <https://www.dhs.gov/news/2020/07/17/department-homeland-security-and-department-justice-announce-plan-restart-mpp> [<https://perma.cc/7WDW-NRZG>].

^{xv} Public Health Service Act, 42 U.S.C. § 265.

^{xvi} See Azadeh Erfani, *The Latest Brick In The Wall: How The Trump Administration Unlawfully 'Expels' Asylum Seekers & Unaccompanied Children In The Name Of Public Health*, NAT'L IMMIGRANT JUST. CR. (Apr. 15, 2020), <https://immigrantjustice.org/staff/blog/latest-brick-wall-how-trump-administration-unlawfully-expels-asylum-seekers> [<https://perma.cc/9AGE-QVKL>].

^{xvii} Centers for Disease Control and Prevention & Dept. of Health and Human Services, 42 C.F.R. § 71 (2020).

^{xviii} Centers for Disease Control and Prevention & Dept. of Health and Human Services, 85 Fed. Reg. § 17060 (2020).

^{xix} *Guide to Title 42, supra* note 2.

^{xx} *Id.*

^{xxi} *Id.*

^{xxii} *See* Erfani, *supra* note 16.

^{xxiii} *Id.*

^{xxiv} CDC Order, *supra* note 18, at 17061.

^{xxv} Press Release, Dept. of Homeland Security, DHS Statement on Updated CDC Order (Aug. 2, 2021), <https://www.dhs.gov/news/2021/08/02/dhs-statement-updated-cdc-order#> [<https://perma.cc/5QVW-WQSA>].

^{xxvi} *Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger*, HUM. RTS. FIRST (May 13, 2020), <https://www.humanrightsfirst.org/resource/pandemic-pretext-trump-administration-exploits-covid-19-expels-asylum-seekers-and-children> [<https://perma.cc/ZZ3D-37K4>].

^{xxvii} *Human Rights Travesty, supra* note 1, at 2.

^{xxviii} *See #WelcomeWithDignity: Court Ruling Will Endanger Families Seeking Safety; Biden Must End Title 42*, AMNESTY INT’L (Oct. 1, 2021), <https://www.amnestyusa.org/press-releases/court-ruling-will-endanger-families-seeking-safety-biden-must-end-title-42/> [<https://perma.cc/CVB3-NTEE>].

^{xxix} *See id.*

^{xxx} 1951 Refugee Convention, *supra* note 12, art. 33.

^{xxxi} *Human Rights Travesty, supra* note 1, at 2.

^{xxxii} *Id.* at 22-23.

^{xxxiii} Press Release, UNHCR warns against “exporting” asylum, calls for responsibility sharing for refugees, not burden shifting, U.N. High Commissioner for Refugees (May 19, 2021) [hereinafter U.N. Statement], <https://www.unhcr.org/news/press/2021/5/60a2751813/unhcr-warns-against-exporting-asylum-calls-responsibility-sharing-refugees.html> [<https://perma.cc/ZKS3-KJ8X>].

^{xxxiv} *See id.*