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Steven Kaufman

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Title 42 and the Haitian Border Crisis: Is the American Asylum System Irreparably Broken?

The images of mounted Border Patrol agents “pushing back Haitian migrants crossing the Rio Grande to try to reach U.S. soil, [has] prompted outrage among Democrats and called into question President Biden’s decision to swiftly deport thousands who had been arriving en masse at a small Texas Border town.”[1] This horrific encounter took place upon the arrival at the U.S. border of thousands of Haitians[2] seeking refuge from a litany of crises. Since its origins as a country, Haiti and its citizens have been saddled with a substantial debt that was not settled until 1947 because of voluntary contributions by Haitian citizens.[3] To this day, Haiti has not economically recovered from this debt and the country has been plagued by, the recent assassination of their President, Jovenel Moise, “[p]olitical instability, the lasting effects of a devastating earthquake and a cholera epidemic, foreign political meddling, and gang violence,”[4] yet Haitian citizens are being denied asylum because of an interpretation of a public health services law that is far beyond the original legislative intent.

What is the legal basis for these shocking deportations? The expulsions are being carried out through “the misapplication of an obscure, 75 year-old public health law.”[5] The statute, §256 of Title 42 of the United States Code, was originally enacted in 1944.[6] The law was originally enacted to “shift quarantine authority from the president to the surgeon general.”[7] However, “Quarantine authority was never meant to be used to determine which noncitizens could or couldn’t be expelled or removed from the U.S.”[8]

However, the law is now being used to circumvent U.S. law which “gives asylum seekers the right to seek asylum upon arrival in the United States, even if they arrive without inspection or prior authorization.”[9] This practice, which began during the Trump Administration, was successfully preserved by the Biden administration

when a federal appeals court ruled on September 28, 2021, that the Title 42 expulsions could continue.[10]

Normally, the U.S. Customs and Border Protection (CBP) “is required to conduct nonrefoulement screenings to ensure they do not expel people who need protection.”[11] The purpose of these screenings is to ensure that asylum seekers do not risk torture or other serious harm after being expelled.[12]

More than 642,700 expulsions have been carried out under the order since March 2020. “Human Rights Watch research shows that the consequences of returning asylum seekers to danger can be catastrophic—resulting in sexual assault, torture, and death.”[13] To make matters worse, a leaked Border Patrol memo shows that agents were instructed to “process migrants for expulsion as quickly as possible.”[14] Furthermore, although there is a small exception for those migrants who can “affirmatively present a claim for protection under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,”[15] Border Patrol agents have unchecked authority to determine whether or not to refer an asylum seeker for an interview with an asylum officer.[16]

Speaking on the recent events at the border Eleanor Acer, Senior Director of Refugee Protection at Human Rights Watch, a human rights advocacy organization, denounced the deportations, saying, “From its horrific treatment of Haitians at the border to its pursuit of a policy that public health experts have confirmed is a xenophobic ploy rooted in racism, the Biden administration continues to wage, not wind down, President Trump’s all-out war on people seeking protection and the U.S. asylum system.”[17]

Title 42 was invoked by the Trump administration “to rapidly expel thousands of migrants . . . without giving them a chance to apply for asylum within the United States.”[18] The clause was invoked in 2019 before the outbreak of the coronavirus, in response to an outbreak of the mumps.[19] It reads:

Whenever the Surgeon General determines that 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 that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the General, in

*accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property 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.***[20]**

Title 42 was invoked in 2019 before the outbreak of the coronavirus, in response to an outbreak of the mumps.**[21]**

Despite the seeming continuity of the expulsion policy, the government has made some concessions to the rights of the asylees. The Biden Administration did create exceptions for unaccompanied migrant children, and “has allowed the majority of parents and children arriving together to ask for asylum.”**[22]** The September 28th ruling came after United States District Court Judge Emmet Sullivan ruled that the Title 42 expulsions could not continue.**[23]** According to Judge Sullivan, “in view of the wide availability of testing, vaccines, and other minimization measures, the Court is not convinced that the transmission of COVID-19 during border processing cannot be significantly mitigated.”**[24]** The most recent ruling staying the September 16th injunction casts a great deal of uncertainty on Title 42’s future as a device for denying refuge to asylum seekers. Although, the September 28th ruling is likely to delay further action for months,**[25]** there is still hope that Title 42 will be successfully challenged by activist groups such as the ACLU, who see Title 42 expulsions as unlawful, far beyond the original legislative intent, and not justified by public health.

[1] Eileen Sullivan and Zolan Kanno-Youngs, *Images of Border Patrol’s Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES, Sept. 21, 2021, <https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html>.

[2] Rosa Flores and Geneva Sands, *12,000 migrants have been waiting in makeshift camps under Del Rio bridge in Texas*, CNN, Sept. 20, 2021, <https://www.cnn.com/2021/09/20/us/us-border-crisis-del-rio-texas/index.html>.

[3] Dan Sperling, *In 1825, Haiti Paid France \$21 Billion to Preserve Its Independence – Time For France To Pay It Back*, FORBES, Dec. 6, 2017, <https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/?sh=62602461312b>.

[4] Laurel Wamsley, *Even Before Jovenel Moïse’s Assassination, Haiti Was In Crisis*, NPR, July 7, 2021, <https://www.npr.org/2021/07/07/1013879000/even-before-jovenel-moises-assassination-haiti-was-in-crisis>.

[5] Q&A: *US Title 42 Policy to Expel Migrants at the Border*, HUMAN RIGHTS WATCH, Apr. 8, 2021, <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border>.

[6] 42 U.S.C. § 265 (1944).

[7] Q&A: *US Title 42 Policy to Expel Migrants at the Border*, HUMAN RIGHTS WATCH, Apr. 8, 2021, <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border>.

[8] *Id.*

[9] *Id.*; See also Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY, Apr. 13, 2020, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>; 8 U.S.C. 1158.

[10] Samuel Chamberlain, *Appeals court keeps Title 42 in place as DHS preps for up to 400,00 migrant surge*, N.Y. POST, <https://nypost.com/2021/09/30/dhs-preps-for-up-to-400k-migrant-surge-if-title-42-lifted-report/>.

[11] Q&A: *US Title 42 Policy to Expel Migrants at the Border*, HUMAN RIGHTS WATCH, Apr. 8, 2021, <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border>.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Human Rights First Calls on Biden Administration to Uphold the Law & End Title 42 Expulsions*, HUM. RTS. FIRST, Sept. 20, 2021, <https://www.humanrightsfirst.org/press-release/human-rights-first-calls-biden-administration-uphold-law-end-title-42-expulsions>.

[18] Armando Garcia, Deena Zaru, Quinn Owen, *What is Title 42?*, ABC NEWS, Sept. 26, 2021, <https://abcnews.go.com/US/title-42-amid-backlash-biden-administration-defends-trump/story?id=80149086>; see also 42 U.S.C. § 265 (1944).

[19] Joel Rose, *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>.

[20] 42 U.S.C. § 265 (1944).

[21] Joel Rose, *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>.

[22] *Id.*

[23] Samuel Chamberlain, *Appeals court keeps Title 42 in place as DHS preps for up to 400,00 migrant surge*, N.Y. POST, <https://nypost.com/2021/09/30/dhs-preps-for-up-to-400k-migrant-surge-if-title-42-lifted-report/>.

[24] *Id.*

[25] Myah Ward, *Federal appeals court preserves administration's ability to use Title 42 to expel migrant families*, POLITICO, Sept. 30, 2021, <https://www.politico.com/news/2021/09/30/dc-circuit-preserves-biden-title-42-migrant-families-514874>.