



A Guide to Title 42 Expulsions at the Border

The United States has long guaranteed the right to seek asylum to individuals who arrive at our southern border and ask for protection. But since March 20, 2020, that fundamental right has been largely suspended. Since that date, both migrants seeking a better life in the United States and those seeking to apply for asylum have been turned away and “expelled” back to Mexico or their home countries. These border expulsions are carried out under a little-known provision of U.S. health law, section 265 of Title 42, which the former Trump administration invoked to achieve its long-desired goal of shutting the border. Using this provision, hundreds of thousands of people have been subject to expulsions since the pandemic began, even though ports of entry remain open with nearly 9 million people crossing the southern border in December 2020, and thousands of people flying into the United States every day.

What is Title 42 and how did it go into place?

On March 20, 2020, the Department of Health and Human Services (HHS) issued an emergency regulation to implement a specific aspect of U.S. health law. Section 265 of U.S. Code Title 42 permits the Director of the Centers for Disease Control and Prevention (CDC) to “prohibit ... the introduction” into the United States of individuals when the Director believes that “there is serious danger of the introduction of [a communicable] disease into the United States.”¹ The rule allows any customs officers—which includes officers of U.S. Customs and Border Protection (CBP) such as Border Patrol agents—to implement any such order issued by the CDC.²

The same day, Director of the CDC Robert R. Redfield relied on this regulation to issue an order suspending the “introduction” of certain individuals who have been in “Coronavirus Impacted Areas.”³ The order targets individuals who have entered the United States from Canada or Mexico and “who would be introduced into a congregate setting” at a port of entry or in a Border Patrol station.⁴ This included individuals who would normally be detained by CBP after arriving at the border, including asylum seekers, unaccompanied children, and people attempting to enter the United States without inspection. Citing the new CDC order, that same day the Border Patrol began “expelling” individuals who arrive at the U.S.-Mexico border, without giving them the opportunity to seek asylum.⁵

The CDC order does not apply to U.S. citizens, lawful permanent residents, and their spouses and children, nor does it apply to U.S. military personnel or those who arrive at a port of entry with valid travel documents, although the CDC maintains that it has the authority to expel U.S. citizens under Title 42 if it chooses.⁶ The rule also includes an exemption for anyone that the Department of Homeland Security (DHS) determines should be allowed into the United States on “consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.”⁷

Despite the CDC’s claim that this order was necessary to protect the United States from a public health

perspective, reporting has shown that the origin of this policy came from DHS and the Trump White House.⁸ Public reporting indicates that CDC scientists expressed opposition to this invocation of Title 42, arguing that there was no public health rationale to support it.⁹ Public health experts outside the CDC have since largely agreed, arguing that while international borders remain largely open to other travelers, there is no need to turn away refugees and expel them to their home countries or to Mexico.¹⁰

Federal courts have also rejected the legal basis for the use of Title 42 to expel individuals who have entered the United States. At least one federal judge has ruled that the law only gives the government the authority to turn away people who have not yet entered the United States or impose quarantine for those already inside the United States.¹¹

On May 19, 2020, the order was extended indefinitely, with the CDC Director declaring that the order will extend “until I determine that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, and continuation of the Order is no longer necessary to protect the public health.”¹² The May 19 order further extended the suspension on entry to individuals who enter the United States via a coastal border, having previously been limited only to those who enter via a land border.¹³

The order will remain in place indefinitely, with the CDC required to “review the latest information regarding the status of the COVID-19 pandemic” every 30 days.¹⁴

On September 11, 2020, HHS published the final version of the March interim regulation enabling the CDC Director to issue orders suspending the “introduction” of people at the border.¹⁵ In the rule, the CDC acknowledged for the first time that its order is being used to turn away refugees and asylum seekers and declared its belief that doing so was legal.¹⁶

How has Title 42 been implemented at the border?

After the CDC order was issued, the Border Patrol began to expel migrants arriving at the border. Under an agreement reached with the Mexican government in late March 2020, the Border Patrol began sending most Mexican, Guatemalan, Honduran, and Salvadoran families and single adults to Mexico.¹⁷ Despite this agreement, there has been extensive documentation of individuals expelled to Mexico who do not fit within this category, including Haitian asylum seekers.¹⁸

Those who aren’t sent to Mexico are held in U.S. Immigration and Customs Enforcement (ICE) or CBP detention and flown back to their home countries without any opportunity to seek asylum.¹⁹ Since March, thousands of Haitians families seeking asylum have been subjected to this process and summarily returned to Haiti,²⁰ although flights to Haiti were briefly suspended after outcry following President Biden’s inauguration.²¹

Individuals who are expelled do not receive an order of deportation, but CBP collects their biometrics and records their contact with the agency. It is unclear how this information will be used in the future, or how it may impact an individual’s ability to seek protection in the United States once the coronavirus pandemic has subsided.

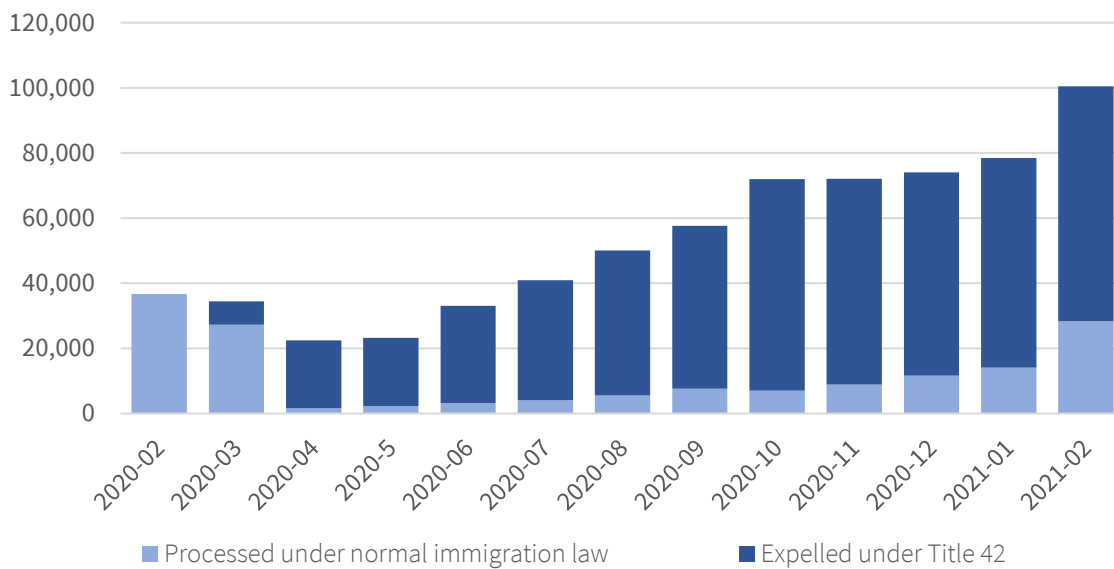
In March 2020, as part of Title 42, CBP also stopped processing all asylum seekers who arrive at ports of entry and ask for humanitarian protection.²² This led to nearly 15,000 people who had been waiting on lists for an opportunity to request asylum at ports of entry (a practice known as “metering”) to be left in limbo, with no ability to seek asylum.²³

In addition to turning away asylum seekers, CBP used this order to turn away and expel nearly 13,000 unaccompanied children,²⁴ despite provisions of the Trafficking Victims Protection Act which require the government to protect children who arrive at the border without a parent or legal guardian.²⁵

On November 18, 2020, the practice of subjecting unaccompanied children to expulsions was halted by a federal judge, who held that it violates the Trafficking Victims Protection Act and other laws.²⁶ After a federal court stayed that order in January 2021, the Biden administration amended the Title 42 order from the CDC to exempt unaccompanied children.²⁷ As a result, unaccompanied children who arrive at the border have not been expelled since November 2020.

By February 2021, CBP had carried out more than 520,000 expulsions (see Figure 1).²⁸

Figure 1: Migrants Processed Under Normal Immigration Law vs. Expelled Under Title 42
February 2020 – February 2021



Source: U.S. Customs and Border Protection

What have public health experts said about Title 42?

Despite the claim that Title 42 is needed to protect against the spread of COVID-19, many public health experts have called for an end to the practice of border expulsions. In May 2020, dozens of public health leaders called on the CDC to lift the order.²⁹ According to the experts, the fundamental problem with Title 42 expulsions is that they are targeted primarily at a small number of people seeking asylum at a time when restrictions placed at ports of entry still allow large numbers of people to cross the border daily.³⁰

In fact, despite the existence of limitations at ports of entry on non-essential travel, hundreds of thousands of people cross the border daily from Mexico into the United States through ports of entry; nearly 9,000,000 people in December 2020 alone.³¹ Thus, the experts recommended that rather than singling out certain cross-border travelers for expulsion, the government should apply “evidence-based public health” measures that include testing, personal protective equipment, and social distancing.³² To address the order’s concern that individuals held in “congregate settings” would pose a risk to the spread of COVID-19, the experts recommended that the government choose not to detain asylum seekers.³³

After the inauguration of President Biden, public health experts renewed their call for lifting the Title 42 restrictions, once again declaring that the expulsion policy has “no scientific basis as a public health measure.”³⁴ Despite these calls to end Title 42, the Biden administration has said that it will not lift the restrictions.³⁵

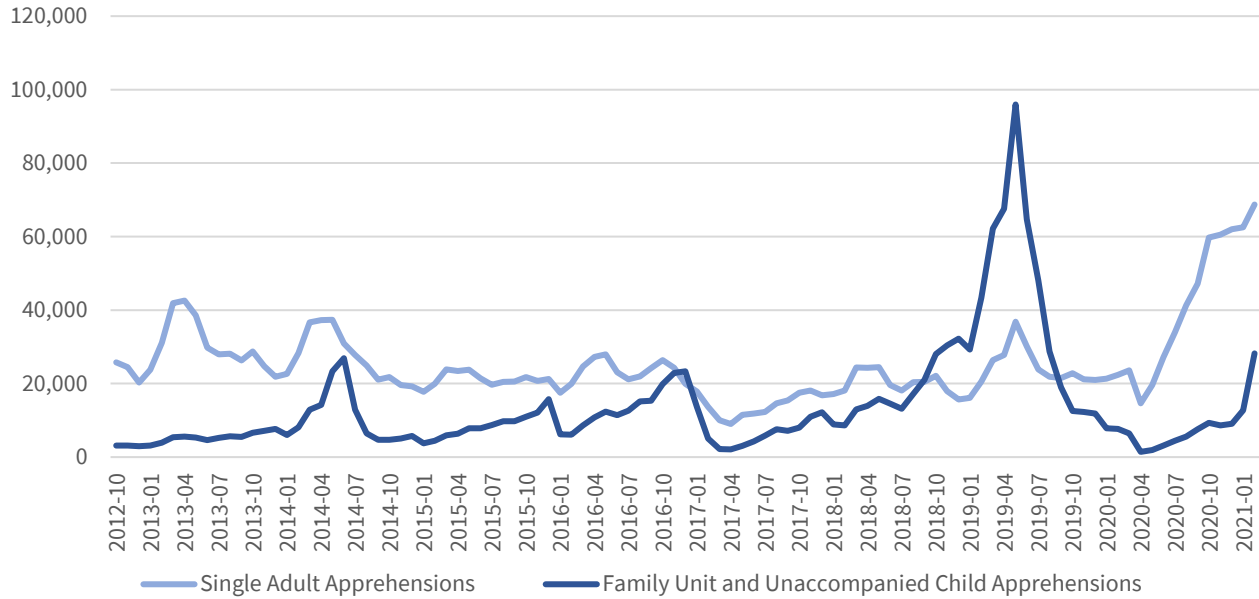
Has Title 42 succeeded in reducing the number of people crossing the border?

Despite claims that Title 42 is necessary to prevent individuals with COVID-19 from crossing into the United States, Title 42 has had the counterproductive effect of significantly increasing the number of arrests at the border. That is because under Title 42, individuals who are expelled to Mexico within hours after apprehension can simply try again a second or third time in hopes of getting through. This increase in apprehensions has been seen most among single adults who are not seeking asylum.³⁶

Before the pandemic began, just 7% of people arrested at the border had crossed the border more than once, but by October 2020, 40% of all people arrested had crossed the border multiple times that year.³⁷ This has led to a dramatic shift in the demographics of border arrests, with the number of encounters of single adults rising to levels not seen in over a decade (see Figure 2).

Figure 2: Apprehensions at the U.S.-Mexico Border, October 2012 to February 2021

Single adult apprehensions vs. family unit and accompanied child apprehensions



Source: U.S Customs and Border Protection

How has Title 42 affected asylum seekers?

Title 42 has also led to the mass expulsion of thousands of asylum seekers, including those in desperate straits. Many individuals have been sent back to persecution or forced to wait in Mexico for a time when the border will reopen to those seeking asylum. Tens of thousands of families and children have been expelled since the restrictions went into place.³⁸

After the Biden administration took office, the administration began allowing some families, especially those with young children, to enter the United States despite Title 42.³⁹ This has occurred most often in the Rio Grande Valley, after Mexican officials—citing a new law relating to the treatment of migrant children—told CBP not to expel some families.⁴⁰ Families who are admitted this way are generally provided with COVID-19 tests and are connected with local nonprofit organizations who help secure transportation to their ultimate destination or a place to quarantine if necessary.⁴¹

In response to the concerns, the Biden administration has said that asylum seekers should continue to wait until the new administration can restore humanitarian processing capacity at the border, citing the destruction to the system carried out under former President Trump.⁴² In March 2021, DHS Secretary Alejandro Mayorkas declared that asylum seekers “need to wait,” declaring further that “We are not saying don't come, we are saying don't come now because we will be able to deliver a safe and orderly process to them as quickly as possible.”⁴³

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