



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. The Biden administration has continued using this provision, and over 1.2 million expulsions have been carried out since the pandemic began, even though ports of entry remain open with nearly 11 million people crossing the southern border every month and thousands flying into the United States every day.

Despite the Centers for Disease Control and Prevention’s (CDC) 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 the U.S. Department of Homeland Security (DHS) and the Trump White House.¹ Public reporting indicates that when Title 42 was originally created, CDC scientists expressed opposition to this invocation of Title 42, arguing that there was no public health rationale to support it.² Ever since then, public health experts outside the CDC have continued to agree, 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 Mexico.³ Since taking office, the Biden administration has continued to insist that Title 42 is necessary for public health purposes, despite the widespread availability of rapid tests and vaccination for COVID-19.

Federal courts have also rejected the legal basis for the use of Title 42 to expel individuals who have entered the United States. Multiple federal judges have ruled that the law does not permit expulsions, and instead 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.⁴ Decisions blocking the use of Title 42 against unaccompanied children as well as migrants who arrive in family groups are currently on appeal at the D.C. Circuit Court of Appeals.⁵

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 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.”⁶ 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.⁷

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.”⁸ 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.⁹ This includes 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.¹⁰

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.¹¹ 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.”¹²

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.¹³ 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.¹⁴ This was followed up with a new CDC Order in October 2020, which reinforced the government’s plan to continue expelling people encountered at the southern border.¹⁵

The Title 42 order has been modified three times since the Biden administration took office. On February 2, 2021, the CDC issued a notice formally exempting unaccompanied children from expulsion.¹⁶ Following a “reassessment” of public health protocols, on July 16, 2021, the CDC formalized this exemption for unaccompanied children.¹⁷ On August 2, 2021, the CDC replaced the October 2020 Order with a new order continuing Title 42 expulsions while exempting unaccompanied children.¹⁸ This order remains largely the same as previous orders.

How has Title 42 been implemented 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.¹⁹ Despite this agreement, there has been extensive documentation of individuals expelled to Mexico who do not fit within this category, including Haitian asylum seekers.²⁰ People expelled are usually driven by bus to the nearest port of entry and told to walk back to Mexico, often without their luggage and other belongings.²¹

Since late January 2021, the Mexican state of Tamaulipas (which borders South Texas) has barred CBP from expelling families with children under the age of seven.²² In response, CBP has carried out “lateral” transfers by plane or bus to other locations along the border such as El Paso where Mexican authorities will allow the agency to expel families with young children.²³ However, because the capacity to carry out these “lateral flights” is limited, CBP has been forced to release the majority of families who cross the border in South Texas, despite President Biden’s insistence that he would expel all families if he could.²⁴

Those who are subject to Title 42 are not given any opportunity to contest their expulsion on the grounds that they would face persecution in the country to which they will be expelled. There is an extraordinarily limited exception to Title 42 for people who “spontaneously” inform CBP officers that they fear being tortured in the country to which they will be expelled.²⁵ However, in order to receive an official screening by an asylum officer for exemption under that provision, the CBP officer must first determine that the claim is “reasonably believable.”²⁶ From March 2020 through September 2021, just 3,217 people were screened for torture prior to being expelled, and only 272 people were taken out of Title 42 and permitted to seek asylum.²⁷

Those subject to Title 42 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.²⁸ Since March, thousands of Haitians families seeking asylum have been subjected to this process and summarily returned to Haiti.²⁹ Flights to Haiti were briefly suspended after outcry following President Biden’s inauguration.³⁰ In September 2021, over the objections of United Nations High Commissioner for Refugees,³¹ as well as advocacy groups and many Democratic members of Congress,³² the Biden administration expelled by plane more than 7,000 Haitians who had sought asylum after crossing the border near Del Rio, Texas.³³

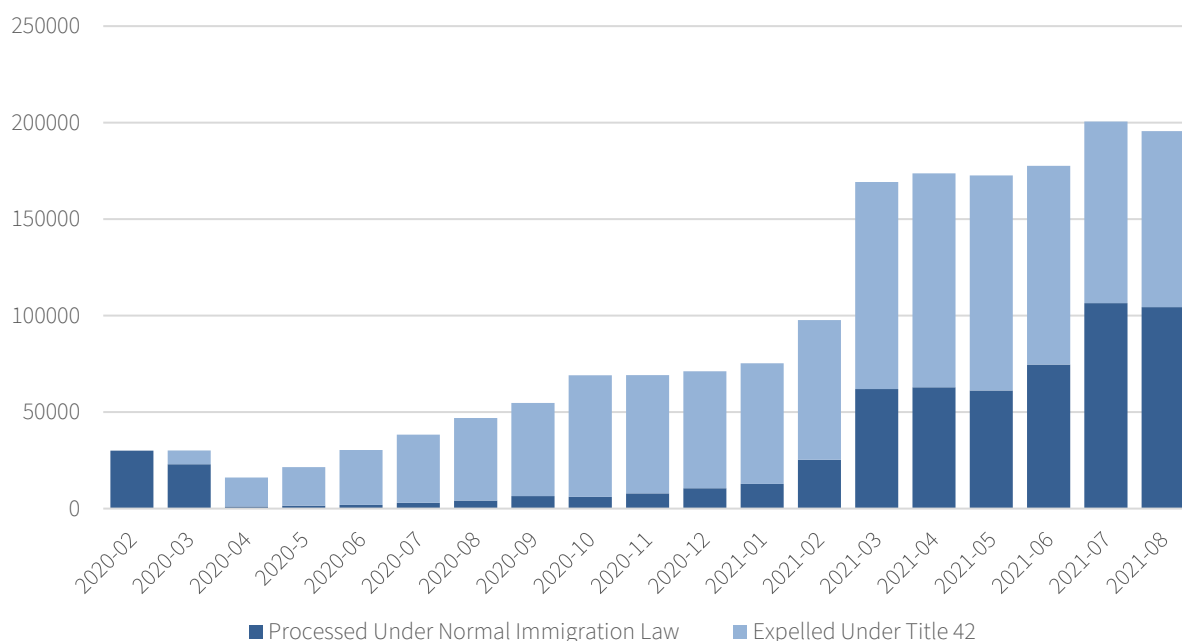
Individuals who are expelled do not receive an order of deportation, but CBP collects their biometrics and records their contact with the agency. It is unclear how this information will be used in the future, or how it may impact an individual’s ability to seek protection in the United States once the COVID-19 pandemic has subsided.

Title 42 also applies to individuals seeking asylum at ports of entry. 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.³⁴ 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.³⁵

Before the practice of expelling unaccompanied children was blocked in court and then later formally ended by the Biden administration, CBP used Title 42 to turn away and expel nearly 16,000 unaccompanied children,³⁶ despite provisions of the Trafficking Victims Protection Reauthorization Act which require the government to protect children who arrive at the border without a parent or legal guardian.³⁷

Through the end of August 2021, the Border Patrol has carried out more than 1.13 million expulsions.³⁸ From April 2020 through August 2021, 60.5% percent of encounters at the U.S.-Mexico border led to an expulsion.

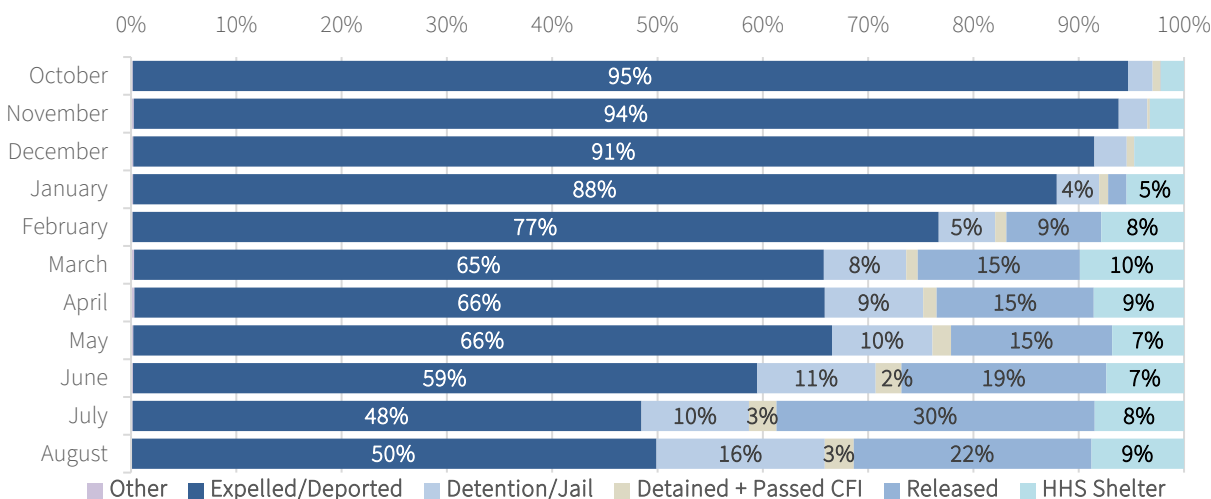
Figure 1: Outcomes of Border Patrol Apprehensions, February 2020 – August 2021



Source: U.S. Customs and Border Protection, Southwest Border Encounters, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

Importantly, just because a person is processed under normal immigration law and not expelled does not mean that they are released into the country. Thousands are subject to “expedited removal” or have a prior order of deportation reinstated.³⁹ Many people who are not expelled are instead sent to ICE detention, where they will be able to seek asylum through the credible fear process (CFI). Similarly, roughly 1 in 10 people encountered after crossing the border are unaccompanied children who are sent to federal shelters. At no point have more than a third of people apprehended after crossing been directly released at the border (see Figure 2).

Figure 2: Estimated Outcomes of Border Apprehensions, FY 2021 through August



Source: U.S. Customs and Border Protection, “Southwest Land Border Encounters,” <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>; U.S. Customs and Border Protection, “Custody and Transfer Statistics FY2021,” <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>; U.S. Citizenship and Immigration Services, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions,” <https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions>.

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. Starting as early as May 2020, and continuing to this date, public health leaders have called on the CDC to lift the order.⁴⁰ 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.⁴¹

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 11,000,000 people in June 2021 alone.⁴² In a letter to the Biden administration in September 2021, public health experts noted that the risk of infection from the Delta variant could be mitigated at the border with “social distancing, providing appropriate personal protective equipment (PPE), ensuring frequent testing, and offering vaccination” to migrants.⁴³ The experts continued to assert that Title 42 expulsions themselves could pose a public health threat, as people are detained together “for days to weeks prior to transporting them” for expulsions, which “heighten the risk of COVID-19 transmission across national borders.”⁴⁴

How has Title 42 affected asylum seekers?

Title 42 has led to the mass expulsion of thousands of asylum seekers, including those in desperate straits. Many individuals have been sent back to persecution in their home countries or forced to wait in Mexico for a time when the border will reopen to those seeking asylum. Over 130,000 families and children have been expelled since the restrictions went into place.⁴⁵

After the Biden administration took office, Mexican officials in the state of Tamaulipas, which borders South Texas, began refusing to permit CBP to expel families with children under the age of seven, citing a new law relating to the treatment of migrant children.⁴⁶ 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.⁴⁷

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.⁴⁸ In March 2021, DHS Secretary Alejandro Mayorkas declared that asylum seekers “need to wait,” adding 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.”⁴⁹ The Biden administration has continued to deliver this message throughout 2021, with White House officials repeatedly declaring that asylum seekers would be turned away if they cross the border.⁵⁰

Families and other asylum seekers expelled back to Mexico are often targeted by criminal cartels for violence and extortion. Advocates have documented through surveys and public media over 6,300 reports of violence against migrants expelled back to Mexico under Title 42.⁵¹ Hundreds of parents, fearing for the lives of their children, have chosen to self-separate and send their children across the border alone, knowing they'll be safer in the United States than in northern Mexico.⁵²

Some asylum seekers are expelled back to their home countries, the very same places they fled persecution, including over 7,000 Haitians expelled after arriving at the border in September.⁵³ Others have been expelled to southern Mexico, where the Mexican government then expels them to Guatemala in a process of “chain expulsions.”⁵⁴ The United Nations has expressed concerns that this practice is a violation of international law.⁵⁵

However, not all migrants seeking asylum are expelled. Rising numbers of people from countries other than Mexico, Guatemala, Honduras, or El Salvador have been permitted to seek asylum in the United States—because like families with children under the age of seven, Mexico will not allow the Biden administration to expel them back to Mexico.⁵⁶ Many of these individuals are sent to ICE detention centers, and during the initial months of the Biden administration the number of people sent to detention from the border rose significantly.⁵⁷

As a result, the outcome for asylum seekers crossing the border can vary wildly and depends more on their nationality and their family status than on any policies or laws inside the United States.

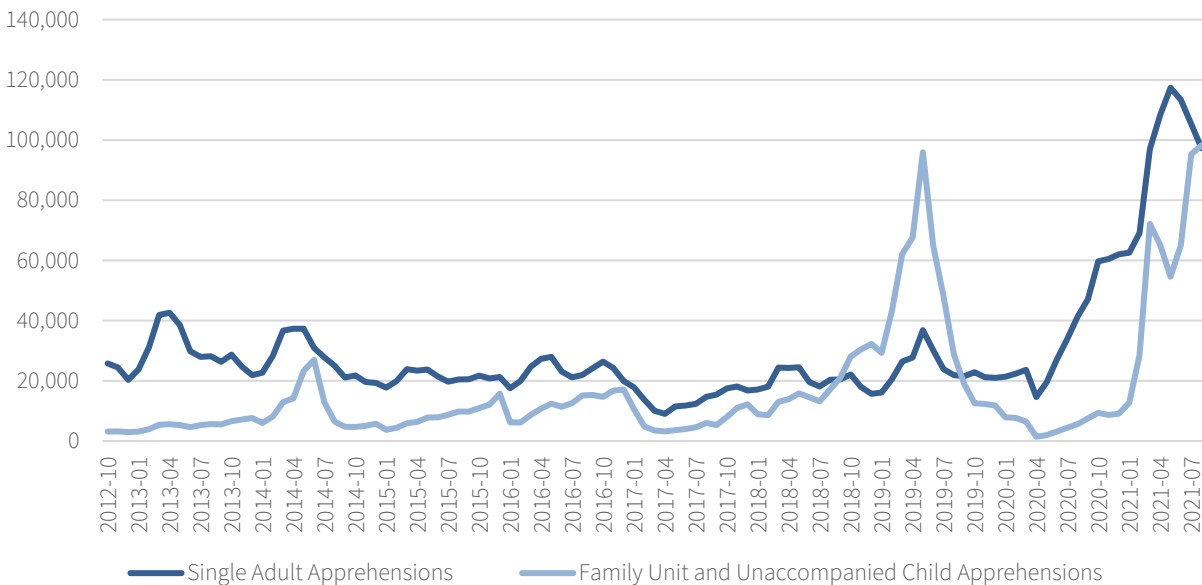
How Has Title 42 Affected Border Crossings?

Despite claims that Title 42 is necessary for immigration deterrence purposes, 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. Some individuals have made dozens of failed attempts to cross the border and been turned back under Title 42 each time.⁵⁸ This increase in apprehensions has been seen most among single adults who are not seeking asylum.⁵⁹

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.⁶⁰ Throughout Fiscal Year 2021, 1 in 3 people apprehended at the border had already crossed the border at least once that year. This has led to a dramatic shift in the demographics of border arrests, with the number of encounters of single adults rising every month from April 2020 through May 2021, reaching levels not seen in over a decade (see Figure 3).

Figure 3: Apprehensions at the U.S.-Mexico Border, October 2012 to August 2021

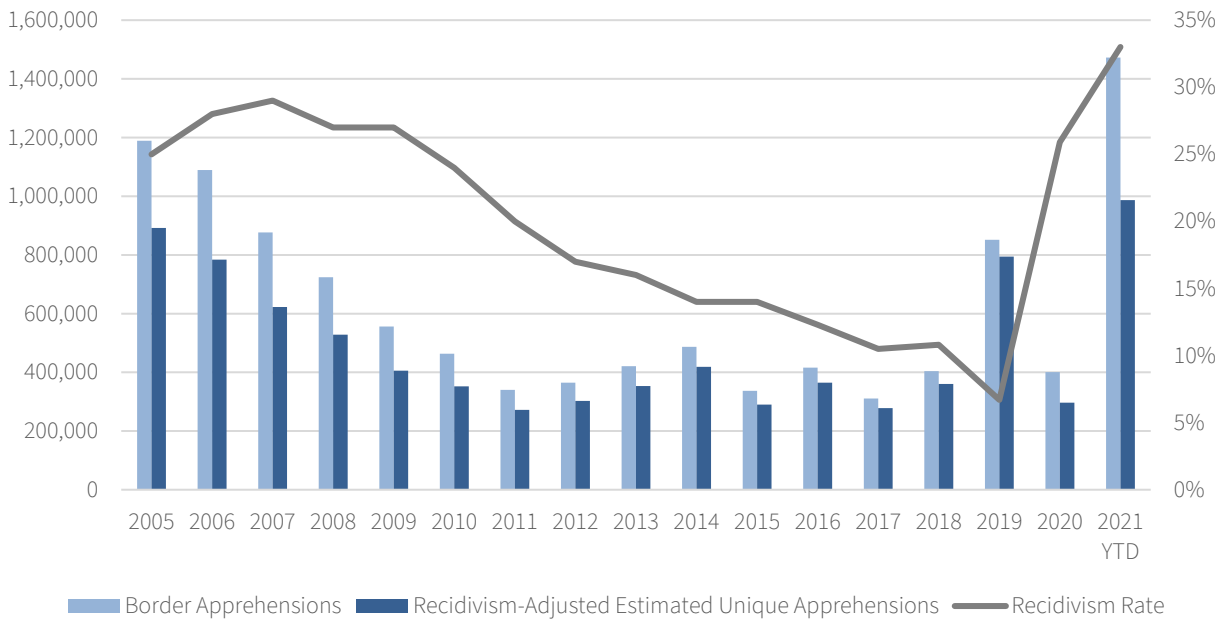
Single adult apprehensions vs. family unit and accompanied child apprehensions



Source: U.S Customs and Border Protection, Stats and Summaries, <https://www.cbp.gov/newsroom/media-resources/stats?title=Border+Patrol>.

Because many people cross the border repeatedly after having been expelled under Title 42, the number of border encounters reported to the public greatly overstates the number of people who are crossing the border.⁶¹ Despite nearly twice as many border apprehensions in Fiscal Year 2021 than in Fiscal Year 2019, the raw number of people apprehended after crossing the border is only 24% higher (see Figure 4).

Figure 4: Estimates of Unique Apprehensions, FY 2005 to FY 2021 through August 2021



Source: U.S. Customs and Border Protection, Congressional Budget Justifications FY 2005-2022; U.S. Customs and Border Protection, Southwest Land Border Encounters, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>; U.S. Customs and Border Protection, “U.S. Border Patrol Total Apprehensions (FY 1925 - FY 2020),” <https://bit.ly/3BNVUlP>.

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