

THE EFFICACY OF TITLE 42 DURING THE U.S. SOUTHERN
BORDER CRISIS AND COVID-19 PANDEMIC:
ANALYZING THE EFFECTS ON THE MIGRATION OF ASYLUM
SEEKERS

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Abstract

When the pandemic began, the United States invoked 42 U.S.C. § 265 as a means of restricting immigration in the name of national health. This Note explores the consequences of this action for prospective immigrants, the inconsistencies between the United States' immigration actions and their international legal obligations, and steps the United States might take moving forward.

INTRODUCTION355

I. DISCUSSION356

 A. *Definitions: Understanding Distinctions Between Asylum Seekers and Illegal Immigrants*356

 B. *Significance*358

 C. *The Impact of COVID-19*363

 D. *Consequences of Title 42*365

 E. *Remedial Measures the United States Can Take*368

CONCLUSION373

INTRODUCTION

For nearly one hundred years, since the creation of the Border Patrol in 1924, the United States has attempted to formulate laws that limit entry into its jurisdiction through the southern border.¹ While illegal immigration has been subject to political polarization, asylum has generally been recognized as a humanitarian necessity and international obligation. 42 U.S.C. § 265 (Title 42) is a federal health law created in 1944 allowing the suspension of entries from certain places in order to prevent the spread of communicable diseases.²

Prompted by the international crisis posed by COVID-19, the United States, under the Trump Administration, decided to activate the law on

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1. *Timeline*, SMU TEXAS-MEXICO CTR., <https://www.smu.edu/Dedman/Research/Institutes-and-Centers/Texas-Mexico/About/Timeline> [<https://perma.cc/TSN5-NP69>].

2. Suspension of Entries and Imports from Designated Places to Prevent Spread of Communicable Diseases, 42 U.S.C. § 265 (2023).

March 20, 2020.³ This decision immediately restricted movement from Mexico into the United States, regardless of whether an individual sought entry as an immigrant or an asylum seeker, and expelled those seeking refuge back to Mexico.⁴ What may at first have been a prudent public health claim by the Centers for Disease Control and Prevention (CDC) turned out to be a politically-motivated policy created by the U.S. Department of Homeland Security (DHS).⁵

As public concern regarding the pandemic eased, the Biden Administration gave multiple expiration dates to Title 42 but has failed as of yet to take the law out of effect.⁶ The consequence of Title 42's initial and continued implementation includes a violation of international law permitting migrants to seek protection from persecution. The assessment into the illegality, as-applied, of Title 42's expulsions is long overdue, given that COVID-19 in the United States has been constructively considered over for all of 2023, and the urgency to implement Title 42 that existed in March of 2020 has since been extinguished.

I. DISCUSSION

A. *Definitions: Understanding Distinctions Between Asylum Seekers and Illegal Immigrants*

Following World War II, the United Nations 1951 Convention Relating to the Status of Refugees defined the term "refugee" as one who as a result of having a:

fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷

An asylum seeker falls within the above definition but is one who has not yet been granted the legal status of refugee, but rather, is awaiting a

3. *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (2022), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [https://perma.cc/3535-V39H].

4. *Id.*

5. *Id.*

6. *Id.*

7. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

determination of their asylum claim.⁸ In order to apply for asylum, an individual must be in the United States or at a port of entry.⁹ An immigrant who is physically present in the United States can seek asylum protection through the affirmative asylum process, in which the applicant must apply for asylum within one year of their arrival in the United States, with limited exceptions.¹⁰

If an individual is placed in removal proceedings and intends to apply for asylum, or otherwise fears persecution or a return to their country, they will engage in a post-application interview, in which an asylum officer conducts a credible fear screening interview.¹¹ Afterwards, if the officer finds that a credible fear exists, the asylum seeker will participate in an asylum merits interview or appear before an immigration judge to determine whether the individual is eligible for asylum.¹²

Additionally, an individual may request asylum in a defensive application for asylum, in which the individual defends themselves against pending removal proceedings in immigration court, where an immigration judge determines their eligibility for asylum.¹³ Even without Title 42 in place, the process of applying for asylum often took years. For instance, in 2018, approximately 3.5 million people were waiting to hear the results of their asylum application.¹⁴

Although asylum seekers are *per se* immigrants, they are differentiated from illegal immigrants. The designation of illegal immigrant is given to those who enter a country of which they are not a citizen without proof via legal documents that their entry is permissible.¹⁵ While many immigrants enter the country legally and are not subject to criminal sanctions, many become illegal immigrants by overstaying visas or permits, and thereby commit a criminal offense and are often subject to deportation.¹⁶ Further, illegal immigrants are generally those individuals who leave their home solely by choice and for the expectation

8. *Refugees, Asylum Seekers and Migrants*, AMNESTY INT'L (2022), <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> [https://perma.cc/KQA7-YAS4].

9. *Is it legal to cross the U.S. border to seek asylum?*, INT'L RESCUE COMM. (Oct. 6, 2023), <https://www.rescue.org/article/it-legal-cross-us-border-seek-asylum> [https://perma.cc/2M6H-A3UZ].

10. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (2023), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> [https://perma.cc/P3RP-VQ47].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Asylum Seekers, Migrants, Immigrants and Refugees: Who Are They?*, SAVE THE CHILD., <https://www.savethechildren.org/us/charity-stories/child-refugees-migrants-asylum-seekers-immigrants-definition> [https://perma.cc/AEZ9-TNVE].

15. Eugene K. Campbell, *Reflections on Illegal Immigration in Botswana and South Africa*, 21 AFR. POPULATION STUDS. 4 (2013).

16. *Id.*

of abundant opportunities elsewhere.¹⁷ These individuals typically enter a country with the intention of settling there. The process for those seeking to obtain the status of a legal immigrant includes applying for naturalization.

B. *Significance*

The right to seek asylum is heavily regarded as an international human right. The foundations for asylum under international law include the 1948 Universal Declaration of Human Rights (UDHR), the 1951 Convention Relating to the Status of Refugees (1951 Convention), and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).¹⁸ International law recognizes the right of asylum seekers to seek protection from persecution and grants them both the right to non-refoulement and to acceptable conditions of stay.¹⁹

Granted that the Public Health Service Act, which embodies Title 42, was last invoked almost a century ago in 1929 when the United States prohibited the entry of ships during a meningitis epidemic, the case of Title 42 being proffered as a justification for closing the southern border is a case of first impression in the federal courts and international law.²⁰ Title 42, codified in 42 U.S.C. § 265, states:

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 Surgeon 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.²¹

17. *Asylum Seekers, Migrants, Immigrants and Refugees: Who Are They?*, *supra* note 14.

18. Sehar Jamal, *International Obligations of Asylum Countries to Protect Refugees*, GW LAW INT'L L. & POL'Y BRIEF (Apr. 29, 2022), <https://studentbriefs.law.gwu.edu/ilpb/2022/04/29/international-obligations-of-asylum-countries-to-protect-refugees> [https://perma.cc/FTY4-C5CJ].

19. *Id.*

20. Azadeh Erfani, *5 Facts About Title 42: Why Congress Should Not Codify The Trump-Era Expulsion Policy*, NAT'L IMMIGRANT JUST. CTR. (July 27, 2022), <https://immigrantjustice.org/staff/blog/5-facts-about-title-42-why-congress-should-not-codify-trump-era-expulsion-policy> [https://perma.cc/XCV2-AUJT].

21. 42 U.S.C. § 265 (2023).

However, the United States is obliged through multiple international laws to protect and grant entry to those seeking asylum, regardless of an allegedly supervening public health emergency. Article 14 of the Universal Declaration of Human Rights (UDHR) states that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”²² Secondly, Article 13 of the UDHR explicitly says that “everyone has the right to freedom of movement and residence within the borders of each state.”²³ The United States, in its reliance on Title 42 to expel asylum seekers and turn a deaf ear to their pleas of entry, has evidently breached international human rights laws in denying the ability to seek asylum and reside within the territorial jurisdiction of the United States.

Furthermore, Article 33(1) of the 1951 Convention prohibits expulsion or return of refugees, and states that member states, including the United States, shall not “expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened”²⁴ Although the subsequent provision holds its benefits inapplicable to an individual who constitutes a danger to the security of the country, it neither states nor implies anything that would include a danger to the health of the country.²⁵ This provision prohibits the refusal of entry at any United States border of asylum seekers who meet the basic requirements under the Convention.

Furthermore, the 1951 Convention states that refugees should not be penalized for illegally entering or remaining in a country, and implicitly assumes that asylum seekers can violate immigration rules.²⁶ However, in relation to Title 42, as a federal health law, the Convention’s assumptions do not necessarily lend credence to the possibility that asylum seekers would find themselves immune from penalties that accompany immigration offenses. Nevertheless, the illegality of enforcing Title 42 may still justify the Convention’s intentions behind preventing the expulsion of asylum seekers. Refusing entry to asylum seeking migrants coming through the southern border is a *prima facie* violation of the Convention and operates in a manner tantamount to nullification of the agreement.

The United States Congress recognized the importance of accepting asylum seekers when it ratified the 1967 Protocol following the Convention, and subsequently passed the Refugee Act of 1980,²⁷ where it established a procedure that asylum seekers must follow in order to

22. G.A. Res. 217(III)A, Universal Declaration of Human Rights (Dec. 10, 1948).

23. *Id.*

24. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

25. *Id.*

26. *Id.*

27. Refugee Act of 1979, Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. §§ 1101, 1158.

apply for asylum.²⁸ The Refugee Act raised the annual ceiling of refugees permitted into the United States and centered its goals on providing a “permanent and systematic procedure for the admission of refugees.”²⁹

The 1967 Protocol had expanded the definition of a refugee from one who faced persecution due to circumstances—typically limited to those in Europe—before January 1, 1951, to now include all eligible individuals regardless of geographic circumstances. Additionally, in 2001, marking the fifty-year anniversary of the Convention, the United States took part in a States Parties meeting to recognize the importance of refugees’ human rights and to reaffirm its commitment to executing its duties under the Convention and Protocol.

The United Nations, in its guide to international refugee law, made clear that the role and responsibility of the United States included providing a framework for refugee protection through creating a national asylum system.³⁰ Yet, in its response to the COVID-19 pandemic, it is clear that the United States has abrogated its commitment of strict adherence to hosting asylum seekers.

Other international human rights laws play a role in assessing the legality of Title 42 at the southern border. The 1966 International Covenant on Civil and Political Rights is a universal human rights treaty which carries the requirement that the United States, among other state parties to the treaty, must ensure the rights in the Covenant to all individuals within its territory, and must not discriminate between citizens and aliens, including asylum seekers.³¹ Moreover, the United Nations High Commissioner for Refugees has as of January 2023 repeatedly stated that seeking asylum is a fundamental human right and the United States “must not preclude people forced to flee from exercising their fundamental human right to seek safety.”³²

In 1948, at the Ninth International Conference of American States, the United States, as a member of the Inter-American Commission on Human

28. YourABA, *ABA Legal Fact Check: Exploration of legalities of asylum amid claims US is “full”*, AM. BAR ASS’N (May 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/may-2019/aba-legal-fact-check--an-exploration-of-asylum-legalities-amid-c/> [<https://perma.cc/G7FH-HS62>].

29. Refugee Act of 1979 § 101(b), 8 U.S.C. § 1521.

30. Frances Nicholson & Judith Kumin, *A guide to international refugee protection and building state asylum systems*, U.N. REFUGEE AGENCY 33, 35 (2017), <https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html> [<https://perma.cc/PFW3-XLAD>].

31. *Module 7: Refugees and ESC Rights*, UNIV. OF MINNESOTA HUM. RTS. RES. CTR. (2000), <http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module7.htm> [<https://perma.cc/4MTJ-SM8P>].

32. *New US border measures ‘not in line with international standards’, warns UNHCR*, UN NEWS (Jan. 6, 2023), <https://news.un.org/en/story/2023/01/1132247> [<https://perma.cc/R86P-KWY6>].

Rights (IACHR), declared a right of asylum in the American Declaration of the Rights and Duties of Man.³³ Article XXVII of the American Declaration states that “Every person has the right . . . to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.”³⁴

The American Convention on Human Rights, adopted in 1969, further obligates the United States to grant freedom of movement and residence.³⁵ Article 22 of the Convention requires that individuals have a recognized right to seek and be granted asylum.³⁶

The United States may argue meritoriously that it has not violated the American Declaration or American Convention in enforcing Title 42, since the right to seek asylum is not accordance with the proscriptions of Title 42. However, the existence of preeminent existing international law and treaties, as opposed to regionalized declarations, will likely outweigh any argument that the United States acted appropriately.

However, significantly, Article 22 of the Convention states that:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.³⁷

The language of Article 22 of the American Convention on Human Rights appears to vividly illustrate that the United States must not under any circumstance, including when Title 42 is invoked, neglectfully or intentionally expel asylum seekers. Notably, the United States has been reluctant to bind itself to inter-American human rights, and has thus not yet ratified the American Convention on Human Rights, but rather has only bound itself to the American Declaration of the Rights and Duties of Man.³⁸

Interestingly, although the United States has bound itself to preserving the right to asylum through the American Declaration, the very states it expels the most—Mexico, Guatemala, Honduras, El Salvador, and Venezuela—are all likewise members of the IACHR who must uphold

33. Inter-Am. Comm’n on Hum. Rts. [IACHR], *American Declaration of the Rights and Duties of Man*, May 2, 1948.

34. *Id.*

35. Org. of Am. States [OAS], *American Convention on Human Rights*, Nov. 22, 1969, 1144 U.N.T.S. 123.

36. *Id.*

37. *Id.*

38. *The United States and the Inter-American System of Human Rights: Is There a Way Forward?*, REAL COLEGIO COMPLUTENSE (Mar. 23, 2006), <https://rcc.harvard.edu/event/united-states-and-inter-american-system-human-rights-there-way-forward> [https://perma.cc/3UAT-ZE9N].

the same principles in observing and defending human rights. This feigned presumption on behalf of the United States to uphold the integrity of international laws may give rise to reprobation from our allies.

Despite the United States' history of considering the entry of refugees and asylum seekers, the United States in the last few years has taken a xenophobic approach reminiscent of immigration policies during the Red Scare of the early twentieth century, in which the United States embraced anti-immigration sentiments for political reasons.³⁹ Importantly, individuals being expelled from the United States under Title 42 lack the opportunity to claim asylum status through convincing the government that they are subject to persecution in their home country, or the country they are expelled to.⁴⁰

There exists an infrequently granted exemption for those that claim that they are subject to torture if they do not remain in the United States.⁴¹ However, U.S. Customs and Border Protection must first assess the believability of this claim before proceeding to investigate the claim further.⁴² Unsurprisingly, this policy of minimal recourse offers the faintest of sympathies to those escaping from persecution.

Importantly, the Trump Administration's order suspending the entry of individuals was intended to be temporary. Since putting Title 42 into effect, the CDC had issued a determination in April of 2022 stating that the order suspending the right of individuals to enter through the southern border should be terminated, as Title 42 was no longer necessary due to United States' improved conditions, particularly in regard to vaccination rates.⁴³ Moreover, in November of 2022, a federal judge in the U.S. District Court for the District of Columbia ruled that Title 42 was improperly enacted, and issued an order giving the United States five weeks to stop expelling individuals.⁴⁴ However, the United States Supreme Court shortly thereafter ruled to keep Title 42 in place.⁴⁵

Title 42, as written, applies to all nationalities entering through the northern and southern United States borders, but in effect, it has primarily

39. *Sacco & Vanzetti: The Red Scare of 1919–1920*, MASS.GOV, <https://www.mass.gov/info-details/sacco-vanzetti-the-red-scare-of-1919-1920#causes-of-the-red-scare-> [https://perma.cc/Z8UJ-A2PW]

40. *A Guide to Title 42 Expulsions at the Border*, *supra* note 3.

41. *Id.*

42. *Id.*

43. Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 42 C.F.R. § 71.40 (2022).

44. *Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d 1, 27–28 (D.D.C. 2022); *see* Camilo Montoya-Galvez, *Judge gives U.S. 5 weeks to stop expelling migrants under Title 42 Policy*, CBS NEWS (Nov. 16, 2022), <https://www.cbsnews.com/news/title-42-blocked-immigration-us-mexico-border/> [https://perma.cc/FQF2-Y4ES].

45. *Arizona v. Mayorkas*, 143 S. Ct. 478, 478 (2022).

been used to turn away millions of individuals at the southern border.⁴⁶ The disparate treatment of who gets turned away at the southern border is alarming, with most expulsions affecting nationals of Mexico, Guatemala, Honduras, El Salvador, and Venezuela.⁴⁷ Meanwhile, expulsions to Cuba and Nicaragua are less frequent, allowing certain migrants to instead be processed under the United States' immigration law, which permits asylum requests, and in some cases, even allows release into particular United States cities.⁴⁸

Adding to the perplexity of Title 42's heterogenous enforcement is that the Biden Administration circumvented Title 42 during 2022 when it allowed entry into the United States of over seventy-one thousand Ukrainian refugees, many of whom came through the El Chaparral border, a main port of entry along the southern border.⁴⁹ This divergent treatment is evidence that Title 42 has been used intentionally as an exploitation of COVID-19 and as a political pawn to pick and choose where the United States is willing to accept migrants from, without the use of due diligence to distinguish those seeking asylum from those portrayed as illegal immigrants.

C. *The Impact of COVID-19*

Although Title 42 was created in 1944, the law, meant to be used in public health emergencies, was never invoked for expulsions until the Trump Administration put it into effect following the rise in COVID-19 transmission at the outset of the pandemic. While implemented under the lens of meeting a public health crisis, Title 42's use in effect served the underlying partisan purpose of limiting immigration into the United States through the southern border.

Prior to COVID-19, the U.S. Customs and Border Protection had a policy in which it limited the amount of asylum seekers processed daily at the southern border.⁵⁰ Due to a rise in asylum requests, the United States forced asylum seekers to remain in Mexico, under a policy labeled "metering," until they could be processed.⁵¹

The COVID-19 pandemic has not been the only obstacle leading to the inordinate flood of migrants, and consequential deflection of asylum

46. *See id.*

47. Montoya-Galvez, *supra* note 44.

48. *Id.*

49. Julia Ainsley, *More than 71,000 Ukrainians have arrived in the U.S. since March*, NBC NEWS (June 24, 2022), <https://www.nbcnews.com/politics/immigration/71000-ukrainians-arrived-us-march-rcna34980> [https://perma.cc/T4DP-6LYP].

50. Hillel R. Smith, *The Department of Homeland Security's "Metering" Policy: Legal Issues*, CONG. RSCH. SERV. 1–2 (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10295> [https://perma.cc/LD26-XY8V].

51. *Id.*

seekers, at the southern border. In 2014, the United States asseverated the fact that a humanitarian crisis was occurring at the U.S.-Mexico border as a result of an influx of unaccompanied children and women primarily entering into Texas.⁵² This crisis has continued before, during, and now after the pandemic, and was undeniably not a product of COVID-19.

However, Title 42's invocation in March of 2020 entirely precluded the processing of asylum seekers, leaving those that sought a position on the asylum-seeking waitlist to find much to their dismay that reservations were no longer being taken.⁵³ The adoption of this policy was influenced by former White House Senior Adviser Stephen Miller, who conducted meetings about immigration policy shortly before the CDC issued a March 2020 order acknowledging that migrants seeking entry through the southern border would be turned back without the opportunity to seek asylum.⁵⁴

The effect of Title 42 during the COVID-19 pandemic was only exaggerated by the United States Supreme Court's 2019 decision to stay a federal court's granting of a preliminary injunction in regard to a Trump Administration policy that forbade most Central Americans to seek asylum in the United States.⁵⁵ This policy provided that an asylum seeker could not enter the United States through the southern border unless they first sought and were denied asylum in Mexico or another country.⁵⁶

At the outset of the COVID-19 pandemic, U.S. Border Control almost exclusively expelled individuals seeking entry to the United States under Title 42.⁵⁷ Through expulsion, individuals are not held in U.S. custody, but rather, are returned to their home country or last country of transit. On the other hand, individuals who are apprehended are taken into U.S. custody to await adjudication under Title 8, an immigration law.⁵⁸ In May of 2020, approximately ninety percent of all migrants at the southern border were expelled under Title 42.⁵⁹ Meanwhile, in November of 2022,

52. *Southern Border Humanitarian Crisis*, CTR. FOR DISASTER PHILANTHROPY (2022), <https://disasterphilanthropy.org/disasters/southern-border-humanitarian-crisis/> [<https://perma.cc/8B5P-LE69>].

53. Smith, *supra* note 50.

54. *Emails Show Stephen Miller Led Efforts to Expel Migrants at Border Under Title 42*, AM. OVERSIGHT (Mar. 21, 2022), <https://www.americanoversight.org/emails-show-stephen-miller-led-efforts-to-expel-migrants-at-the-border-under-title-42> [<https://perma.cc/AM6L-5Y44>].

55. Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 3 (2019).

56. *Id.* at 4 (Sotomayor, J., dissenting).

57. John Gramlich, *Monthly encounters with migrants at U.S.-Mexico border remain near record highs*, PEW RSCH. CTR. (Feb. 14, 2023), <https://www.pewresearch.org/fact-tank/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs/> [<https://perma.cc/U8CT-ZZRC>].

58. *Id.*

59. *Id.*

sixty-eight percent of migrants were apprehended under Title 8, with the rest being expelled through Title 42.

Although implemented for the worthy cause of preventing the spread of COVID-19 in the United States, the fact that Title 42 is still used to turn away individuals at the southern border is concerning, given that the United States has in almost every capacity resumed its normal pre-pandemic operations.

Within the first year of the Biden Administration, epidemiologists, officials at the CDC, and a multitude of public health experts pressed the White House to put an end to Title 42 and jump-start the stalled motors running the processing of asylum seekers.⁶⁰ However, this effort proved to be in vain. Seemingly, it will take until the COVID-19 Emergency Declarations terminate for Title 42 to begin to lose standing as a viable alternative to disallowing the entrance of individuals through the southern border.

D. *Consequences of Title 42*

Due to heated partisan beliefs and a 2022 federal court order, Title 42 is still in effect today. Migrants expelled from the United States under Title 42 have their biometrics collected by the U.S. Customs and Border Protection.⁶¹ There is reason to believe that this information will be used against expelled individuals seeking reentry into the United States—perhaps following the termination of Title 42. Given the United States' ongoing enforcement of Title 42, the fear of future manipulation of the law to perpetuate a quasi-closed border looms.

In 2022, southern border patrol agents set a record by stopping over two million migrants and expelling over one million of them to Mexico or their home country.⁶² For comparison, in fiscal year 2020 the number of migrant apprehensions along the southern border was approximately 400,000.⁶³ As the figure below shows, although the United States has seen mass migration through the southern border before, there have been more annual migrant encounters since 2022 than in any year since the turn of the millennium.⁶⁴

60. Press Release, Columbia University Mailman School of Public Health, Epidemiologists and Public Health Experts Implore Biden Administration to End Title 42 and Restart Asylum (Sept. 1, 2021) (on file with the Columbia University's Mailman School of Public Health), <https://www.publichealth.columbia.edu/research/programs/program-forced-migration-health/voices/press-release-epidemiologists-public-health-experts-implore-biden-administration-end-title-42-restart-asylum> [https://perma.cc/3L5C-NT3J].

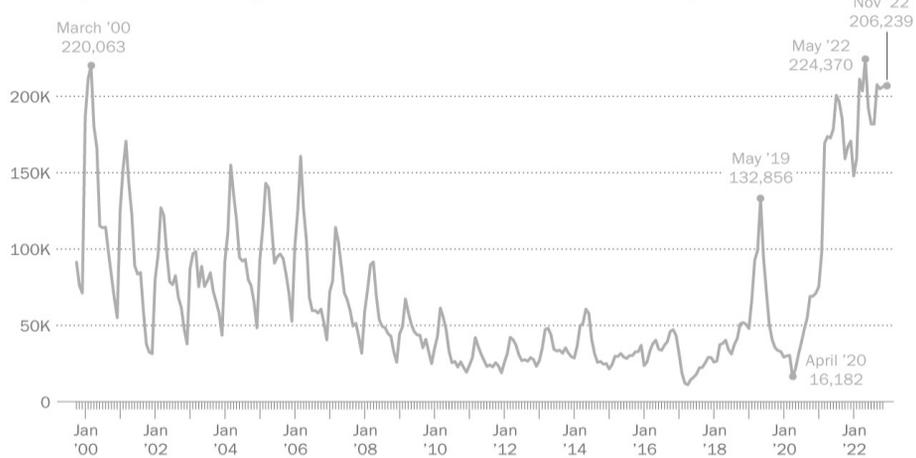
61. *A Guide to Title 42 Expulsions at the Border*, *supra* note 3, at 3.

62. Montoya-Galvez, *supra* note 47.

63. *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector (FY2007 - FY 2020)*, U.S. CUSTOMS & BORDER PROT. (2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF> [https://perma.cc/6E9F-3F6U].

64. Gramlich, *supra* note 57.

Total migrant encounters by the U.S. Border Patrol at U.S.-Mexico border, by month



Note: Beginning in March 2020, monthly totals combine apprehensions and expulsions into a new category known as encounters. Monthly totals before March 2020 include apprehensions only.

Source: U.S. Customs and Border Protection.

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Already seeking to flee persecution, many expelled asylum seekers find themselves in more devastating conditions than they did in their home country. Since the beginning of 2021 through the end of 2022, over thirteen thousand violent attacks occurred against individuals expelled to Mexico, and asylum seekers continuously encounter harrowing conditions, including extreme temperatures, kidnapping and rape.⁶⁵

Further, conditions at migrant detention centers, in the United States and Mexico continue to be execrable, with overpopulated accommodations and deadly fires deteriorating facilities.⁶⁶ This is due in part to the United States expelling migrants back to Mexico in alarming rates under the guise of Title 42's public health necessity and the displacement of vulnerable individuals into jeopardizing situations.⁶⁷ Mexico is bearing the brunt of expulsions from the United States, as it is encountering tens of thousands of migrants who are impatiently waiting to enter the United States.⁶⁸ While shelters fill to the brim, many migrants find themselves sleeping on the street, being nourished by scant provisions provided by the Mexican government.⁶⁹

65. *Supreme Court Keeps Title 42 Policy in Place for Now*, AM. C.L. UNION (Dec. 27, 2022), <https://www.aclu.org/press-releases/supreme-court-keeps-title-42-policy-place-now> [<https://perma.cc/82F9-7AKB>].

66. Gerardo Lemos, Omar Astorga & Karol Suarez, *Blaze kills at least 38 people at migrant detention center near Mexico-US border*, CNN (Mar. 29, 2023), <https://www.cnn.com/2023/03/28/americas/mexico-migrants-fire-intl/index.html> [<https://perma.cc/W6J9-M5N7>].

67. *Id.*

68. *Id.*

69. *Id.*

Deplorable conditions at the southern border have contributed to more than one thousand verifiable deaths between 2021 and 2022.⁷⁰ Unsurprisingly, these conditions, and the likelihood of being turned away at the border, have not rid the United States of asylum seekers, who instead journey back to the border in the hopes of seeking entry. In doing so, asylum seekers go through physical and psychological trauma, particularly given the United States' common intimidation tactics, including threats of family separation and detention.⁷¹ Asylum seekers attempting to enter the United States have in growing numbers found themselves testing positive for post-traumatic stress disorder, depression, and anxiety.⁷²

As a result of Title 42, families have been broken apart. The number of single adults attempting to enter the United States through the southern border has exponentially increased, from less than twenty-five thousand per month in May of 2020 to more than one hundred fifty thousand during certain months in 2022.⁷³ As the pandemic continued, far more single adults than families were encountered at the border, and thousands of unaccompanied minors were stopped each month.⁷⁴

Throughout the COVID-19 pandemic, Title 42 was the mechanism in which the United States dealt with the overlapping, ongoing southern border crisis and public health emergency. However, the United States' response was far from commiserative. As the figure below shows, rather than addressing the needs and wishes of migrants, many of whom were seeking asylum, the United States unceasingly expelled, deported, and detained those encountered at the southern border.⁷⁵

Public health has seemingly been the pretext for a bipartisan effort to restrict immigration, with the rights of asylum seekers caught up in the mix. Although Title 42 was effectuated under the Trump Administration, the Biden Administration planned to expand border security at the southern border in early 2023, calling for expedited removals of asylum

70. Erfani, *supra* note 20.

71. Hajar Habbach, et al., "You Will Never See Your Child Again": *The Persistent Psychological Effects of Family Separation*, PHYSICIANS FOR HUM. RTS. (Feb. 25, 2020), <https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/> [<https://perma.cc/3S3U-QSE7>].

72. Kevin Short, *U.S. Border Expulsion Policy Results in Family Separations, PTSD, Human Rights Violations: PHR Report*, PHYSICIANS FOR HUM. RTS. (July 28, 2021), <https://phr.org/news/u-s-border-expulsion-policy-results-in-family-separations-ptsd-human-rights-violations-phr-report/> [<https://perma.cc/8FZQ-2GRV>].

73. Gramlich, *supra* note 57.

74. *Id.*

75. *A Guide to Title 42 Expulsions at the Border*, *supra* note 3.

seekers under Title 42.⁷⁶ The continued implementation of the well-intentioned public health policy will doubtlessly lead to the diminished health and rights of asylum seekers. Essentially, safe havens for asylum seekers no longer exist in the United States due to Title 42's enforcement.⁷⁷

The indefensibility of protracting Title 42 stems from the lack of public health reasoning behind its continued implementation. Although Title 42's enforcement was meant in part, at least unofficially, to deter all entry by asylum seekers into the United States, it has only fueled repeated crossings, leading the percentage of people who have repeatedly tried to cross the southern border to triple from pre-pandemic rates.⁷⁸

Instead of acting as a measure to improve public health in the United States or to serve as an antibiotic to block the prospect of using the southern border as a gateway to asylum, Title 42 has merely been a means to ban the lawful seeking of asylum, leaving the most vulnerable people without the safety they desperately need.

The complacency the United States has exhibited with respect to Title 42 has ostensibly led to a heightened callousness for asylum seekers. In March of 2023, the United States entered into an agreement with Canada, in which each country is authorized to expel asylum seekers who cross the northern border.⁷⁹ This pact was purportedly formed to update the Safe Third Country Agreement between the United States and Canada, now requiring migrants crossing the northern border to seek asylum in the country they pass through.⁸⁰ Even so, instead of addressing the merits of why there is a disproportionate amount of asylum seekers attempting to cross the southern and northern borders, the United States is engaged in expanding its contraventions.

E. Remedial Measures the United States Can Take

Given the ongoing politicization of the southern border and the mainstream media's response to it, it is easy to assume that the border conflict is purely between the United States and Mexico. However, the southern border is a barrier to entry for all Central and South American

76. PHR Condemns Biden Administration's Inhumane Plans to Expand Expedited Removals of Asylum Seekers under Title 42, PHYSICIANS FOR HUM. RTS. (Jan. 5, 2023), <https://phr.org/news/phr-condemns-biden-administrations-inhumane-plans-to-expand-expedited-removals-of-asylum-seekers-under-title-42/> [<https://perma.cc/QW9W-CT5Q>].

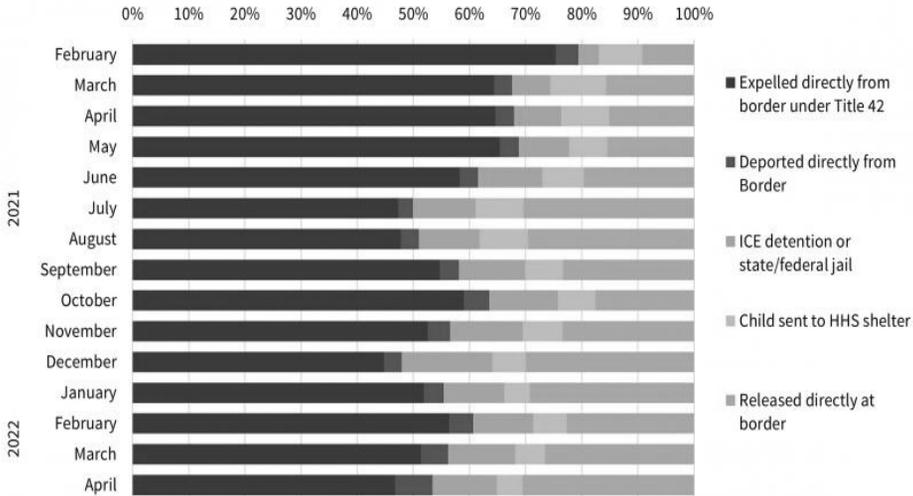
77. J.D. Long-García, *What the end of Title 42 could mean for mothers stuck on the border with their children*, AM. MAG. (Dec. 16, 2022), <https://www.americamagazine.org/politics-society/2022/12/16/title-42-mothers-border-244362> [<https://perma.cc/42KV-QV52>].

78. Erfani, *supra* note 20.

79. Hamed Aleaziz & Erin B. Logan, *U.S. Strikes Deal with Canada over Northern Border Asylum Seekers*, L.A. TIMES (Mar. 23, 2023), <https://www.latimes.com/politics/story/2023-03-23/biden-canada-northern-border-agreement-trudeau> [<https://perma.cc/MRE2-SEVU>].

80. *Id.*

countries. In fact, a majority of asylum seekers are fleeing from Haiti and northern Central American countries, including Guatemala, Honduras and El Salvador.⁸¹



One approach to remedying the influx of asylum seekers attempting to enter the United States through the southern border is banning asylum to individuals who endeavor to seek entry at the border but failed to initially seek protection in a nation that they already passed through. This possibility ethically and severely restricts asylum for any nationality except Mexicans, granted that those seeking asylum are pursuing entry to the United States directly from Mexico. However, third country asylum bans are not novel, with one tested in 2019 under the Trump Administration, which failed when a federal district court restricted its implementation.⁸²

Nevertheless, international agreements of this sort have been around for decades. For instance, the U.S.-Canada Safe Third Agreement prevents individuals who initially enter one country from applying for asylum in another country, unless they meet the requirements for limited exceptions.⁸³ Likewise, the European Union's Dublin III Regulation,

81. *Is it legal to cross the U.S. border to seek asylum?*, *supra* note 9.

82. *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 951–56 (N.D. Cal. 2019); see also Rebecca Santana & Elliot Spagat, *Biden administration to limit asylum to migrants who pass through a 3rd nation*, PBS NEWSHOUR (Feb. 21, 2023, 8:12 PM), <https://www.pbs.org/newshour/politics/biden-administration-to-limit-asylum-to-migrants-who-pass-through-a-3rd-nation> [<https://perma.cc/SV7B-KRB2>].

83. *Canada-U.S. Safe Third Country Agreement*, CANADA.CA (Mar. 27, 2023), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html> [<https://perma.cc/S5J6-EEK4>].

adopted in 2013, allows for only one country, not chosen by the asylum seeker, to review an asylum application, with the application processed by the first Dublin country the asylum seeker enters.⁸⁴

The UNHCR's Asylum Procedures Directive, which outlines basic procedural guarantees for asylum seekers, explains in Article 26 the concept of first country of asylum.⁸⁵ A country may be a first country of asylum if the asylum seeker "has been recognized in that country as a refugee and . . . can still avail [themselves] of that protection" or if they "otherwise enjoy sufficient protection in that country, including benefitting from the principle of non-refoulement."⁸⁶ Additionally, the asylum seeker must be permitted readmittance to that country.⁸⁷

As long as asylum seekers at the southern border meet the above requirements, the United States may, without international condemnation, embrace a hardline stance in deeming as inadmissible these asylum applications.⁸⁸ Enforcement of this policy will reflect an effort to quickly deport migrants from the United States even long after Title 42 has expired.⁸⁹

Another approach, although not as conducive to a securitized border, is to allow migrants to literally push through the southern border to demand asylum. Frustrated with the lack of a streamlined asylum process, and with the continued enforcement of Title 42, those genuinely seeking asylum may have to resort to the more barbaric and desperate act of knowingly crossing the border illegally. Unsurprisingly, this approach is becoming a frequent occurrence at the southern border, with migrants, particularly in 2023, flooding the border in frustration with the lack of ability to seek asylum, only to be met with force by U.S. border agents.⁹⁰

84. *Cooperation under the Dublin Regulation*, THE NORWEGIAN DIRECTORATE OF IMMIGR. (UDI), <https://www.udi.no/en/word-definitions/cooperation-under-the-dublin-regulation/> [https://perma.cc/FN9R-SNQM].

85. *The Asylum Procedures Directive*, UNHCR, <https://www.unhcr.org/en-us/protection/operations/4a9d12ef9/asylum-procedures-directive.html> [https://perma.cc/565K-KSSC].

86. U.N. HIGH COMMISSIONER FOR REFUGEES (UNHCR), *IMPROVING ASYLUM PROCEDURES: COMPARATIVE ANALYSIS AND RECOMMENDATIONS FOR LAW AND PRACTICE* (2010), <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?docid=4bab55da2&reldoc=y> [https://perma.cc/5XBY-JSJQ].

87. *Id.*

88. *See id.*

89. Camilo Montoya-Galvez, *Biden expands Title 42 expulsions while opening legal path for some migrants*, CBS NEWS (Jan. 5, 2023), <https://www.cbsnews.com/news/immigration-biden-title-42-expansion-legal-path-migrants/> [https://perma.cc/9TDM-J8EK].

90. *Rumor sends hundreds of migrants rushing for U.S. border at El Paso, but they hit a wall of police*, CBS NEWS (Mar. 13, 2023), <https://www.cbsnews.com/news/migrants-rush-border-el-paso-mexico-texas-us-rumor-asylum-cbp-app/> [https://perma.cc/RQ5U-NYAH].

Federal asylum officers may instead choose to rebel, acknowledging that restricting access to asylum violates federal and international laws.⁹¹ Disobeying federal immigration orders may result in asylum officers permitting the entrance of asylum seekers, choosing human rights, morality, and dignity over an attempt to appease a political agenda.

In November of 2022 alone, more than two hundred thousand individuals attempted to cross the southern border, leading to either apprehensions or expulsions.⁹² When Title 42 eventually ends, predictions estimate an influx of migrants attempting to enter the United States through the southern border, with the Department of Homeland Security expecting between nine and fourteen thousand attempted migrant crossings daily.⁹³

If public health was genuinely the end goal and Title 42 the means in which to control the COVID-19 pandemic, then the United States could have simply required asylum seekers to be vaccinated and test negative for the virus upon arrival at the southern border. In fact, in December of 2021, the Biden Administration resuscitated the “Remain in Mexico” policy that was initiated under the Trump Administration and directed that all migrants, excluding asylum seekers, obtain COVID-19 vaccinations prior to attempting to enter the United States.⁹⁴ However, the United States’ failure to meritoriously consider the merits of this proposal in relation to ending Title 42 expulsions of asylum seekers renders their justification of Title 42’s purpose invalid.

The United States perhaps should have, and still can, expand the exemptions available for asylum seekers to circumvent the restrictions of Title 42. Throughout the pandemic, exceptions were permitted on a case-by-case basis but were not efficacious in addressing the urgency of the large mass of asylum seekers at the U.S.-Mexico border.⁹⁵ Over one million individuals—mostly migrants and not asylum seekers—have been granted exemptions under the Biden Administration.⁹⁶ However, a majority of these individuals will inevitably be removed during

91. Hamed Aleaziz, *Biden immigration plan could force asylum officers to break law, union warns*, L.A. TIMES (Mar. 27, 2023), <https://www.latimes.com/world-nation/story/2023-03-27/biden-asylum-plan-break-law> [https://perma.cc/RM7V-JUV8].

92. Gramlich, *supra* note 57.

93. Catherine E. Shoichet, *What is Title 42, why is it ending and what’s happening now at the border?*, CNN (May 11, 2023), <https://www.cnn.com/2022/11/16/politics/title-42-blocked-whats-next-explainer-cec/index.html> [https://perma.cc/VL5Q-9Y2H].

94. *Southern Border Humanitarian Crisis*, *supra* note 52.

95. Eileen Sullivan, *Title 42 Has Allowed Many Migrants to Be Quickly Expelled, and Others to Stay*, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/us/politics/immigration-public-health-rule-mexico.html> [https://perma.cc/LS3F-6X23].

96. *Id.*

immigration proceedings at some later time or will attempt to remain in the United States under the new designation of illegal immigrant.⁹⁷

It is possible for the United States to implement a system in which when Title 42 ends, presumptively at the hands of a federal judge or when the Biden Administration declares an end of the country's public health emergency, the United States will retroactively grant asylum seekers entrance through the southern border. The United States, as of early 2023, has begun to implement a procedure requiring asylum seekers to apply for appointments at ports of entry.⁹⁸ In spite of that, this procedure is administered through the use of an ineffectual mobile app that many asylum seekers do not have access to, leaving even those with access stranded in border towns.⁹⁹

First, the United States would need to address the inadequacy of infrastructure for processing and security at the southern border, a measure that has been advanced with the help of multi-billion-dollar commitments from Mexico.¹⁰⁰ Administering this potential method poses an insurmountable challenge to the Department of Homeland Security, particularly given the ongoing crisis at the southern border, and will in all probability render itself implausible. Besides, the damage that the asylum seekers were seeking refuge in the United States from may very well have materialized by now, eradicating the exigency of returning to the southern border.

The international community nevertheless may choose to take retributive measures in order to punish the United States for breaching international laws. The United States commonly sanctions other countries for allegedly violating international rules, yet selfishly and hypocritically chose to intentionally violate the rights of asylum seekers under the pretext of a public health emergency.¹⁰¹

Consequentially, it would be unsurprising if other nations sanctioned the United States in part by obliging it to accept asylum seekers and to pledge its fidelity to the 1948 Universal Declaration of Human Rights, the 1951 Convention Relating to the Status of Refugees, and the 1967 Protocol Relating to the Status of Refugees. However, historically, when

97. *See id.*

98. Miriam Jordan & Edgar Sandoval, *U.S. Border Policies Have Created a Volatile Logjam in Mexico*, N.Y. TIMES (Mar. 28, 2023), <https://www.nytimes.com/2023/03/28/us/mexico-border-migrants-shelters.html> [<https://perma.cc/NXD5-2VGF>].

99. *See id.*

100. *See* Adam Shaw & Brooke Singman, *Mexico to contribute \$1.5 billion for infrastructure at US southern border*, FOX NEWS (July 12, 2022, 5:47 PM), <https://www.foxnews.com/politics/mexico-contribute-1-5-billion-infrastructure-us-southern-border> [<https://perma.cc/3WQ7-EU8F>].

101. *See* Hua Xia, *Facts on U.S. breaching international rules*, PEOPLE'S DAILY ONLINE (Apr. 21, 2021), <https://en.people.cn/n3/2021/0421/c90000-9841366.html> [<https://perma.cc/E2KN-Y5P4>].

the United States breaches treaties, its superpower status enables it to recuse itself of international obligations without fearing immediate consequences.¹⁰²

CONCLUSION

The COVID-19 pandemic personally impacted each individual across the globe, but perhaps no group was as acutely affected as asylum seekers attempting to enter the United States through the southern border. Although the pandemic has effectively been declared over, the United States' enforcement of Title 42 appears to have no realistic end in sight, even given the recurring proclamations that it will soon terminate. The right to seek asylum is internationally protected, but clearly not universally enforced. Since 2020, the United States has violated a multitude of international and domestic laws in expelling asylum seekers from seeking entry through the U.S.-Mexico border.

The United States has violated international morality in engaging in a game of "rules for thee but not for me" and is currently winning since the international laws it has obligated itself to uphold are seemingly ineffective and unenforceable. Although the United States played a significant role in establishing the United Nations, it lends no credence to the effectuality of the laws the organization made.¹⁰³ Instead, the United States is perpetuating a double standard as it continues to violate basic human rights, including in particular those of asylum seekers. As May 11, the proclaimed date in which Title 42 will terminate, is approaching, time will tell whether the United States will face repercussions from the international community or remedy its insouciance in depriving asylum seekers of internationally protected human rights and legal protection.

102. David A. Koplow, *Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty*, 37 FLETCHER F. WORLD AFF. 53, 70–71 (2013).

103. See Margot Patterson, *How the U.S. violates international law in plain sight*, AM. MAG. (Oct. 12, 2016), <https://www.americamagazine.org/politics-society/2016/10/12/how-us-violates-international-law-plain-sight> [<https://perma.cc/QNW6-8QBL>].

