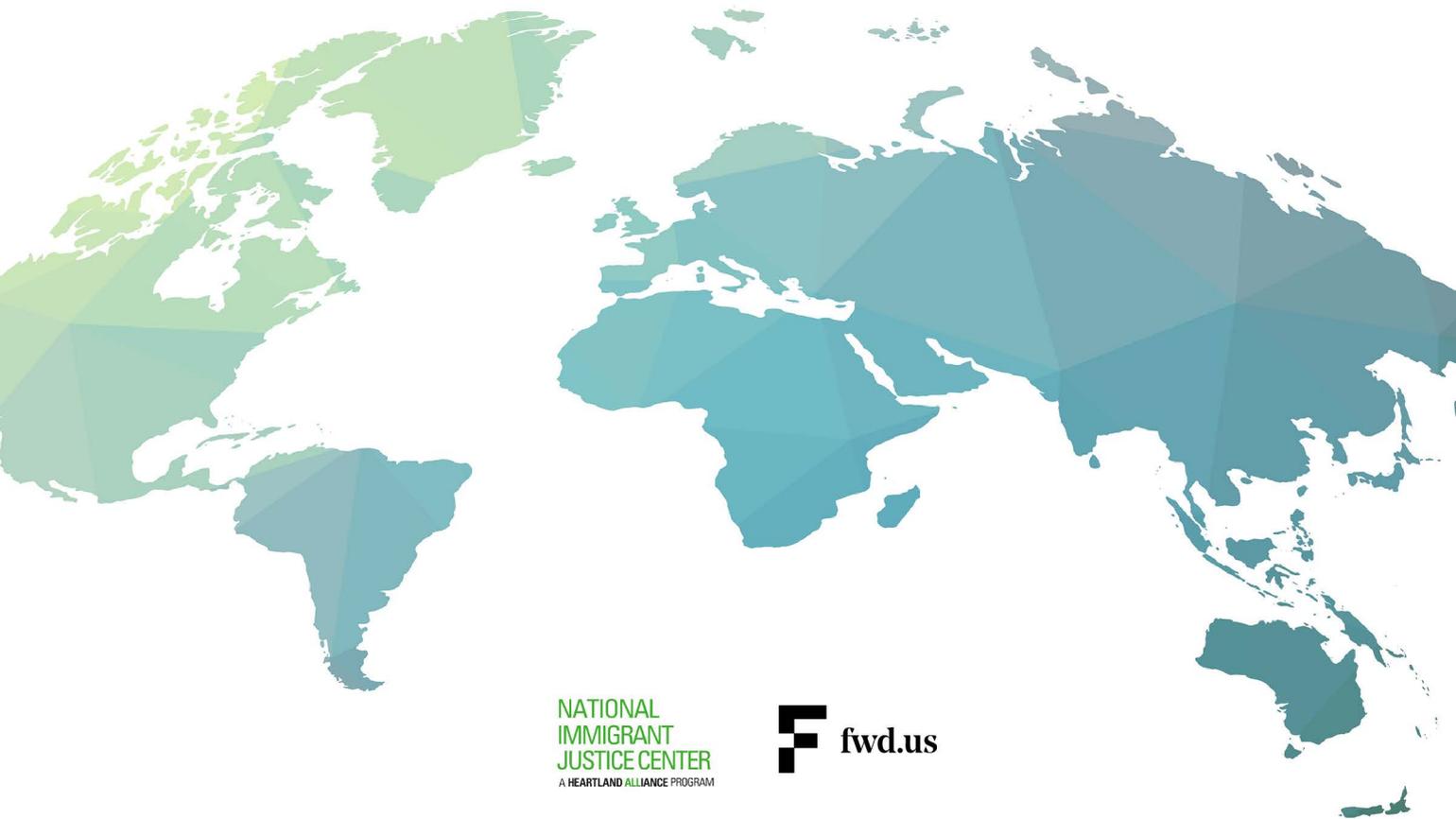


Pushing Back Protection

HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM

CHAPTER 5:
MOVING THE BORDER SOUTH: THE UNITED STATES'
OFFSHORING OF ASYLUM PROCESSING AND IMMIGRATION
ENFORCEMENT TO MEXICO AND CENTRAL AMERICA



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CHAPTER 5

Moving the Border South: the United States' Offshoring of Asylum Processing and Immigration Enforcement to Mexico and Central America

“It was Haitians then, but tomorrow it could be any other group.”

— Patricia Lespinasse³¹⁰

This is an excerpt of the full report, [Pushing Back Protection: How Offshoring and Externalization Imperil the Right to Asylum](#), co-authored by the National Immigrant Justice Center (NIJC) and FWD.us.

For access to Acknowledgements, Abbreviations, Terminology, other Chapters, and Closing Recommendations please click [here](#). Executive summary is [here](#).

The United States' cruel treatment of migrants and asylum seekers worsened under the Trump administration. In addition to seeking to end Temporary Protected Status (TPS) for Haitians in the U.S., a temporary form of relief granted following Haiti's 2010 earthquake, then-President Trump conveyed his racist disdain for Black and Central American immigrants openly.³¹¹ White House Senior Advisor Stephen Miller and other hardline political appointees recruited government officials from anti-immigrant organizations and relied on externalized enforcement measures and other punitive policies to prevent asylum seekers from arriving at the United States' borders and accessing the asylum system.³¹² Those who did arrive at the United States' borders were criminalized and separated from their children or frequently faced expulsion under the guise of public health.

The Trump administration attempted to keep asylum seekers from non-white majority countries as far away from the U.S. as possible. Some of the most harmful policies the Trump administration implemented included:³¹³

- A “zero-tolerance policy” that separated thousands of families, prosecuted and deported parents for seeking asylum, and inflicted potentially life-long trauma on their children;³¹⁴
- The systematic detention of asylum seekers, forcing them to remain incarcerated indefinitely;³¹⁵

- The push-back of asylum seekers to Mexico through the Migrant Protection Protocols (MPP) or “Remain-in-Mexico” program, where asylum seekers were forced to wait for years in life-threatening conditions while their cases were adjudicated in tent courts along the border;³¹⁶
- Formal Safe Third Country Agreements brokered with El Salvador, Honduras, and Guatemala, whose governments are alleged persecutors or complacent in the harms against many asylum seekers arriving in the U.S.;³¹⁷
- A proposed ban to bar asylum seekers from relief on the basis of travel through a transit country, even where they had no realistic opportunity to seek protection or firmly resettle in those nations;³¹⁸
- The CDC’s March 2020 order during the COVID-19 pandemic appealing to Title 42 of the U.S. Code to close the border to all, including asylum seekers, leading to nearly one million expulsions, claiming that the processing of asylum seekers would be a danger to U.S. public health.³¹⁹

These coercive tactics driven by the punitive playbook³²⁰ of anti-immigrant groups founded and funded by white nationalist and eugenics proponent John Tanton,³²¹ denied hundreds of thousands of people, including children and infants, their legal right to seek asylum. Importantly, not every tool in Trump’s anti-asylum toolkit was new. The Trump administration built on externalization policies of prior Republican and Democratic administrations, expanding the punitive push-back regimes of Haitian interceptions to apply to all asylum seekers, including those who traveled by land through

The Trump administration built on externalization policies of prior Republican and Democratic administrations, expanding the punitive push-back regimes of Haitian interceptions to apply to all asylum seekers, including those who traveled by land through the southern border.

the southern border. These externalization practices are often employed by policymakers in an attempt to avert the potential political fallout of enforcement actions at the U.S. border such as “zero-tolerance” or family separation, which sparked global outrage.

Under Trump, the U.S. government’s anti-asylum strategies fell in two general categories: a hybrid offshoring system that pushed asylum seekers back to Mexico while they awaited their opportunity to seek asylum in the United States, and an attempt to stage safe third country agreements with Central American nations. Neither strategy complied with U.S. obligations under domestic and international law; however, they signaled continued reliance on offshoring as a permanent tool to deter and push back asylum seekers to date.

5.1. Metering and Migrant Protection Protocols: Stranding Asylum Seekers in Dangerous Border Territories

After decades of interceptions of Haitians, the U.S. government explored new avenues to push back asylum seekers directed to its southern border. Like its Democratic predecessors, the Obama administration viewed the increase³²² of Haitians requesting asylum at the U.S. border as a problem to solve with increased border control. In 2016, they piloted the metering policy on Haitian migrants along the southern border.³²³ Under Trump, the metering policy expanded exponentially. Foreshadowing the implementation of MPP, metering turns back asylum seekers at the border before they are allowed to request asylum, placing their name on informal lists or queues and stranding them in dangerous conditions in Mexican border towns, where they are subjected to extreme violence. As of May 2021, there were at least 18,680 asylum seekers on metering lists waiting in Mexican border cities.³²⁴ This harmful policy set the stage for the Remain in Mexico program.

Importantly, the Trump administration turned to metering as a step toward its larger externalization plan. According to a leaked DHS and Department of Justice (DOJ) memo, the Trump administration acknowledged that it could take years to enter into a safe third country agreement with Mexico because of its lack of capacity and ability to process asylum claims and protect human rights.³²⁵ First through metering and next with MPP, the Trump administration successfully pushed back tens of thousands of asylum seekers into Mexico, as a backdoor alternative to creating a bilateral agreement.

The U.S. first proposed the “Remain in Mexico” policy as a bilateral deal.³²⁶ After some resistance, Mexico allowed a pilot program of the policy to move ahead. The Mexican government initially tried to push back against President Trump and his administration’s coercive tactics³²⁷ and repeatedly refused to enter into a bilateral safe third country agreement with the U.S.³²⁸ Shortly thereafter, in the face of continued public attacks, tariff threats, and other economic pressure,³²⁹ Mexican President Andrés Manuel López Obrador returned to the militarization tactics of his predecessor. The following month, the head of the National Institute for Migration,³³⁰ resigned and was replaced with Mexico’s head of its Prisoner Reentry Commission,³³¹ demonstrating the country’s move to expand punitive migration policies.

In a joint declaration between the two countries on June 7, 2019,³³² Mexico agreed to expand MPP to additional ports of entry and to deploy the National Guard throughout Mexico, including 6,000 troops to its southern border with Guatemala.³³³ According to the Washington Post, Mexico reportedly described its plan put forth to the U.S. to stave off tariff threats as “the first time in recent history that Mexico has decided to take operational control of its southern border as a priority.”³³⁴ Additionally, the joint declaration contained a supplementary agreement between the two countries to begin discussions on third country processing of asylum seekers. The United States and Mexico would “immediately begin discussions to establish definitive terms for a binding bilateral agreement to further address burden-sharing and the assignment of responsibility for processing refugee status claims of migrants.”³³⁵

**Children
at a migrant
camp in
Matamoros,
Mexico.**



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Despite this history, the Mexican government has referred to MPP as an unilateral policy by the United States, and as the UNHCR has pointed out, MPP is not a legally binding and enforceable bilateral agreement.³³⁶ Further, UNHCR has concluded that the policy “is not consistent with United States’ non-refoulement obligation.”³³⁷ The failure of the United States to comply with its federal laws and international obligations has put tens of thousands of asylum seekers at risk of refoulement. MPP forced more than 71,021³³⁸ vulnerable people, including thousands of children, to languish in dangerous conditions in Mexican border towns for the duration of their immigration court proceedings. There are at least 1,300 documented cases of asylum seekers in MPP subjected to violence including kidnapping, extortion, torture, rape, and murder.³³⁹ As a result, many children were forced to leave their parents and travel to the border on their own as unaccompanied minors. Rather than release these vulnerable children into the custody of family members, the Trump administration rushed to deport them.³⁴⁰

MPP amplified a larger problem endemic to U.S. border control; though many of the policies introduced purport to curb trafficking, they have enriched and expanded trafficking networks profiting from the U.S.’ offshoring and border externalization measures. By refusing to process asylum seekers at its borders and cutting nearly all other avenues for people seeking protection to come to the United States, the U.S. actually forces vulnerable people into the hands of traffickers. According to an April 2021 VICE World News investigation, kidnapping migrants over the last ten years generated nearly \$800 million in ransom payments for trafficking networks in Mexico.³⁴¹ The U.S.’ policy of pressuring Mexico and countries in Central America to prevent people from arriving at its borders not only enriches these networks but it pushes asylum seekers to take more dangerous routes.

In addition to coercing the Mexican government into deploying their National Guard throughout the country, the U.S. moved its enforcement even further south when it engaged in an unauthorized enforcement action with Guatemalan border police in January 2020.³⁴⁶ DHS violated an interagency agreement with the State Department when it secured unmarked vehicles and drivers to carry out a joint operation in which the U.S. and Guatemalan authorities physically moved Honduran asylum seekers across the Guatemala-Honduras border. The U.S. Senate Foreign Relations Committee found that DHS had lied to the State Department about their misuse of International Narcotics Control and Law Enforcement funding, which paid for the enforcement action.³⁴⁷ Under the interagency agreement, U.S. personnel can provide guidance and mentorship but they cannot carry out immigration enforcement operations. Further, DHS did not have proper protocols to screen individuals for protection needs or to prevent the refoulement of asylum seekers, as is mandatory under U.S. and international law.

5.2. Asylum Cooperative Agreements: Deporting Asylum Seekers to Unsafe Third Countries

In another effort to dismantle the U.S. asylum system, the Trump administration used coercive tactics to enter into third country agreements with Northern Triangle countries.³⁴⁸ In March 2019, the State Department announced³⁴⁹ that the U.S. would cut \$450 million in foreign assistance programs for El Salvador, Honduras and Guatemala at the request of President Trump after he claimed that they were not doing enough to curb migration to the U.S.³⁵⁰ Only months later, in July, the United States and Guatemala signed an Asylum Cooperative Agreement (ACA).³⁵¹ The U.S. would go on to sign similar agreements with Honduras and El Salvador thereafter.³⁵² By October 2019, President Trump announced on Twitter that the U.S. would restart targeted aid in all three countries: “Guatemala, Honduras & El Salvador have all signed historic Asylum Cooperation Agreements and are working to end the scourge of human smuggling. To further accelerate this progress, the U.S. will shortly be approving targeted assistance in the areas of law enforcement & security.”³⁵³

Impact of the United States’ Coercive Tactics on Black Asylum Seekers

Mexican President López Obrador’s militarization of Mexico’s borders, particularly its southern border with Guatemala, has been uniquely cruel for asylum seekers who endure transcontinental journeys en route to the United States, especially Black asylum seekers.³⁴² Many Black asylum seekers remain stranded at Mexico’s borders. At Mexico’s southern border in Tapachula, Black migrants face prolonged detention rife with violence and medical neglect, anti-Black racism, and other disparate treatment.³⁴³ Further, because of restrictive visa and entry/exit policies, carrier sanction legislation, and increased enforcement by Mexican authorities, Black immigrants and asylum seekers often face some of the harshest offshoring and externalization measures.³⁴⁴ The deportations of Haitians living in Mexico increased by 2,330 percent from 2018 to 2019 as a result of the increase in harsh enforcement measures.³⁴⁵

Asylum seekers from the continent of Africa protest their entrapment and detention in southern Mexico.



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U.S. domestic law has specific provisions regarding safe third country agreements, which the Trump administration openly flouted. The Immigration and Nationality Act requires that in order for the United States to enter into a compliant safe third country agreement, the Attorney General must determine that the “life or freedom” of an individual subjected to said agreement “would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion,” and where the individual, “would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”³⁵⁴ In a report on the ACAs, the Senate Foreign Relations Committee found that then-Attorney General William Barr and Acting DHS Secretary Kevin McAleenan’s determination that Guatemala provided a full and fair asylum procedure was “based on partial truths and [had] ignored State Department concerns.”³⁵⁵

As the Senate Foreign Relations Committee noted, the U.S.’s third country agreements or ACAs with Guatemala, El Salvador, and Honduras were reached without regard for U.S. and international law.³⁵⁶ The ACAs include a formal, bilateral commitment to comply with the principle of non-refoulement “as outlined in the 1951 Convention and the 1967 Protocol, as well as the Convention against Torture.”³⁵⁷ **However, not one of these Northern Triangle countries employed a full-time staff member dedicated to asylum as of January 2021.³⁵⁸ Of the 945 asylum seekers transferred to Guatemala under the ACA, not one was granted asylum.³⁵⁹** Despite prompt legal challenges,³⁶⁰ U.S. transfers of asylum seekers to Guatemala resulted in “deportation[s] with a layover” for these asylum seekers, most of whom were women and children.³⁶¹

In addition to lacking capacity to process asylum seekers, Guatemala, Honduras, and El Salvador suffer from widespread violence and human rights abuses with high murder rates, femicide, and violence perpetuated against LGBTQ+ individuals. These conditions have caused hundreds of thousands of asylum seekers to seek refuge in the U.S., and would make it nearly impossible for the non-refoulement principle enshrined in U.S. and international law to be respected in the context of third country agreements with these nations.³⁶²

Ironically, the ACAs are not the first safe third country agreements involving the U.S. that have been called into question in the courts. After years of negotiation and with input from human rights experts, the United States entered into a safe third country agreement with Canada in December 2002.³⁶⁴ In July 2020, the agreement was found invalid by a federal judge in Canada for violating the Canadian Charter of Rights and Freedoms, after asylum seekers whom Canada had returned to the United States alleged that they were not safe there largely due to their heightened risk of detention in alarming conditions.³⁶⁵ However, in April 2021, a Canadian appeals court sided with the Canadian government and overturned the lower court's ruling.³⁶⁶ At the time of this writing, litigators representing the asylum seekers were considering the possibility of appealing to the Supreme Court of Canada.³⁶⁷ Nonetheless, the United States' apparent failure to comply with this agreement domestically raises questions as to its ability to assist other countries, including Mexico and nations in Central America, in the development of their own asylum systems.

Policies such as MPP and the ACAs have set a dangerous precedent of illegal and inhumane offshoring practices for future administrations, and vulnerable people are still waiting for relief. In the early months of the Biden administration, the U.S. State Department³⁶⁸ and the Department of Homeland Security³⁶⁹ announced the suspension and termination of MPP, ACAs, and a review of other harsh immigration measures. As of May 2021, the Biden administration had admitted 10,000 asylum seekers with active MPP cases to the United States to pursue their asylum claims, though a majority of individuals with active cases were still waiting in Mexico.³⁷⁰ The Biden administration later expanded³⁷¹ eligibility to asylum seekers whose cases had been closed by the Trump administration. However, asylum seekers awaiting processing are still languishing in dangerous cities along the U.S.-Mexico border. For 19-year-old Cuban asylum seeker Cristian San Martín Estrada, MPP cost him his life;³⁷² Estrada was tragically shot dead just days before his chance to enter the United States. Undoing the harms of MPP and the ACAs not only requires expeditious processing, but also dismantling the lasting effects of U.S. border externalization in Mexico and Central America.

Sophia Sought Asylum in the U.S. From Honduras, Only to be Sent to Guatemala

After her brother was killed by a gang that subsequently threatened to take her life in Honduras, Sophia traveled more than 2,000 miles on foot to the U.S. Instead of offering Sophia a chance to apply for asylum in the U.S., DHS transferred Sophia to Guatemala, a country with one of the highest murder rates in the world: "They put me on a plane I thought was taking me back to Honduras, but then we landed in Guatemala. I was told I could seek asylum there instead. I was completely lost. [...] Safe in Guatemala? What's safe about that place? It's the same as Honduras. I don't know anyone in Guatemala. I had to come home."³⁶³

U.S Offshoring and Externalization Policies

BY THE NUMBERS (2017-2021)

948,631

expulsions of children and adult migrants and asylum seekers under Title 42³⁷³

71,021

vulnerable migrants and asylum seekers pushed back to Mexico under MPP³⁷⁴

1,300

documented cases of people in MPP subjected to violent acts; murder, kidnapping, torture, rape and extortion³⁷⁵

18,680

asylum seekers on metering lists as of May 2021³⁷⁶

945

asylum seekers transferred to Guatemala under the ACA



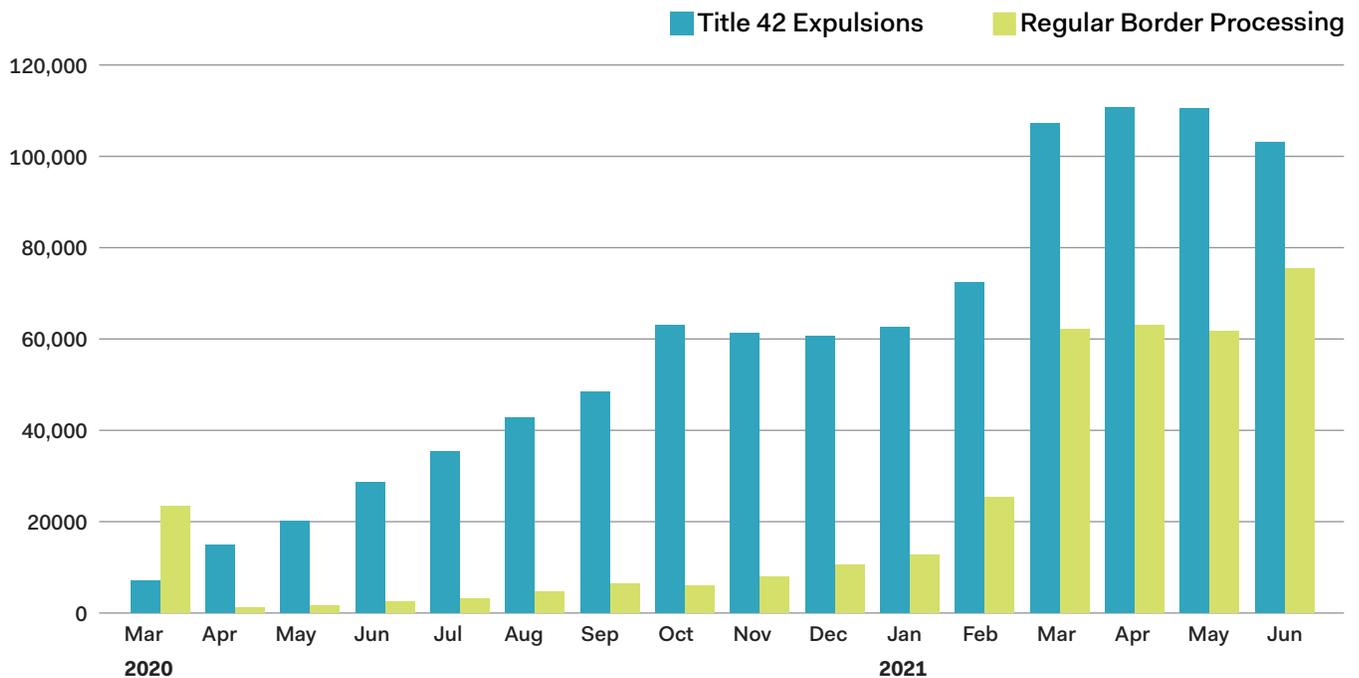
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granted asylum³⁷⁷

5.3. Title 42 Expulsions: a Recycled Pretext For Refoulement Under the Guise of Public Health

In March 2020, the CDC issued an unprecedented order that resulted in the expulsions of asylum seekers and children seeking protection. At the behest of then-Vice President Mike Pence and White House Senior Advisor Stephen Miller, the CDC morphed an obscure quarantine provision of the Public Health Service Act of 1944 under Title 42 of the U.S. code into a near impenetrable tool to prevent migration, steamrolling the subsequent six decades of supervening domestic and international obligations toward asylum-seeking adults and children. Emboldened by the CDC, U.S. Customs and Border Protection proceeded to expel migrants and asylum seekers en masse.³⁷⁸ The Biden administration has since failed to end its use of this policy, and at the time of this report, Title 42 remained in effect despite the change in administration—and has continued amidst resounding opposition from public health experts. As of July 2021, the United States carried out 948,631 expulsions of migrants and asylum seekers under Title 42. This number includes repeated attempts of many individuals, with no other viable means to pursue asylum.

Title 42 Expulsions vs. Regular Border Processing



Source: U.S. Customs and Border Protection

President Biden's continued use of Title 42 expulsions imperil the administration's compliance with the principle of non-refoulement. Under the Trump administration, Stephen Miller attacked migrants, asylum seekers, and refugees through a storm of policy changes, including the exploitation of public health as a pretext to prevent migration.³⁷⁹ Between the CDC order and the Biden administration's continued expulsions, Miller's scheme is thriving. The Biden administration has far exceeded Trump's monthly expulsion rate and is rapidly nearing one million expulsions to date. Tragically, this number includes many people who have been previously expelled or turned back;³⁸⁰ Title 42 not only violates asylum seekers' rights; it fails to meet its own goal to deter migration.³⁸¹

Expelled asylum seekers have been subjected to rape, kidnapping, and assault in Mexico;³⁸² LGBTQ+ and Black asylum seekers are particular targets for violence as the Biden administration pushes them back to Mexico.³⁸³ This policy has also been an informal vehicle for family separations, harming children whose parents either lose hope of entering in the U.S. or suffer abductions.³⁸⁴

Meanwhile, three federal judges have determined that Title 42 does not permit the expulsion of unaccompanied children, nor does it supersede domestic asylum law incorporating non-refoulement.³⁸⁵ UNHCR has joined the call to end this harmful policy, citing “[g]uaranteed access to safe territory and the prohibition of pushbacks of asylum-seekers” as core principles of the Refugee Convention.³⁸⁶ A group of 170 public health experts have debunked any scientific rationale for the policy, calling mass expulsions “xenophobia masquerading as a public health measure.”³⁸⁷ While health screenings are advised, there is no evidence that walling off asylum seekers will mitigate the spread of infectious diseases.³⁸⁸ Public health experts and epidemiologists have offered to support the CDC in addressing public health concerns while protecting asylum seekers.³⁸⁹ Yet, the Biden administration has failed to harness this expertise to mitigate the spread of communicable diseases without compromising asylum law.

During the first five months of Biden’s presidency, over 3,250 migrants and asylum seekers have reportedly suffered kidnappings or other violence as U.S. authorities blocked their entry or expelled them to Mexico. This continued use of Title 42, with few exceptions and carve-outs, is a troubling reminder of the health screenings previously used as pretext to push back non-European migrants and Haitian asylum seekers.

President Biden has stated that he is working to achieve a “fair, orderly, humane” immigration system.³⁹⁰ And yet, his administration has doubled down on Title 42, which targets primarily Black, Brown, and Indigenous asylum seekers and presents them as a threat to U.S. public health. Expulsions have disproportionately harmed Haitians again, sending thousands of Haitian families, including small children, back to danger.³⁹¹ During the first five months of Biden’s presidency, over 3,250 migrants and asylum seekers have reportedly suffered kidnappings or other violence as U.S. authorities blocked their entry or expelled them to Mexico.³⁹² This continued use of Title 42, with few exceptions³⁹³ and carve-outs,³⁹⁴ is a troubling reminder of the health screenings previously used as pretext to push back non-European migrants and Haitian asylum seekers.³⁹⁵

These expulsions are not the only vehicle the Biden administration contemplates to halt the arrival of asylum seekers. The U.S. has continued negotiations with Central American nations and Mexico to further militarize and seal these countries’ borders.³⁹⁶ On April 12, 2021, Reuters reported that the United States had reached agreements with Mexico, Honduras, and Guatemala to “place more troops on their borders,”³⁹⁷ while plans to pave the way for new ACAs may lay dormant within proposed partnerships with Central American nations.³⁹⁸

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