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Title 42, asylum, and politicising public health

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President Biden has continued the controversial immigration policy of the Trump era known as Title 42, which has caused harm and suffering to scores of asylum seekers under the guise of public health.1 The Centers for Disease Control and Prevention (CDC) ordered the policy in March 2020 with the stated purpose of limiting the spread of the coronavirus into the U.S.; though, CDC and public health officials have admitted this policy has no scientific basis and there is no evidence it has protected the public.2,3 Instead, the impetus behind the policy appears to be a desire to keep out or expel certain immigrants seeking protection as ports of entry remain open to other travelers.1

Over 1.2 million expulsions have occurred since the beginning of the pandemic, and those expelled are not given the opportunity to have their asylum claims heard.4 As of September 2021, only 272 were permitted to seek asylum under an extraordinarily limited exception.5

In the recent resignations of Daniel Foote, Special Envoy to Haiti, and Harold Koh, Senior Legal Advisor at the State Department, both officials described the policy as inhumane. Mr. Koh explained in his resignation letter his belief that the policy violated international obligations to avoid expelling individuals who fear persecution, death, or torture.6 So, what is Title 42 and why is it being used to prevent asylum seekers from certain countries—largely Mexico, Guatemala, Honduras, El Salvador, and Haiti—in violation of international law?

Title 42 is the Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, passed under the Public Health Service Act and codified at § 264 of Title 42 of the U.S. Code.7 This statute grants the Secretary of Health and Human Services (HHS) the authority to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the U.S.7 But the statute “shall not provide for apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases.”7 The statute clearly does not provide government discretion to exclude individuals without credible evidence that they risk spreading disease.

The policy relies on 42 U.S.C. § 265, which grants authority to “prohibit, in whole or in part” persons posing a danger to introduce communicable disease into the U.S.7 But while allowing prohibitions “in whole” instead of making individual determinations, a cognizable threat of spreading a disease—not simply a theoretical risk—is required. Moreover, the statute also makes plain that this authority “shall be applicable only to individuals coming into a State or possession from a foreign country,” not those already within the U.S. border.7 And the statute may even be limited to the “introduction” of a disease, meaning COVID-19 would not meet the criteria to exclude people.

If the statutory requirements are met, an examination may be conducted and if the individual is found to be infected they may be detained “for such time and in such manner as may be reasonably necessary”.7 Consequently, the statute does not authorize federal interstate quarantine, which is detaining an individual in the country who is not yet confirmed to be infected.8 And when an agency acts beyond the scope of its authorizing statute those actions are invalid,9 meaning Title 42 not only lacks public health justification but is legally-spicious as well.

The U.S. has a history of using public health and contagious diseases to justify oppressing marginalized populations, especially immigrants, the poor, women, and persons of color.9 Orders based on racism and stereotypes—such as quarantining and inoculating only those of Chinese descent for being “more susceptible” to the Bubonic plague—have been struck down by courts for violating the Equal Protection Clause and for their ineffectiveness in protecting the public’s health.9 Public health cannot and should not be used to target populations deemed unwanted or unworthy of protection, such as when over twenty thousand women were quarantined during World War I simply because they were suspected of being sex workers.9 While the administration exempted unaccompanied children during a review of Title 42, the lack of concern for the harm caused to others is

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exemplified by their appeal of a District Court order that would have stopped the policy.

The Trump-Biden Title 42 policy is based on a perversion of science, undermines the health and human rights of immigrants and asylum seekers, and betrays the public’s trust in public health. This deceptive and dangerous policy should be withdrawn immediately.

Declaration of Interests
The authors declare no conflicts of interest.

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