Reflections on the History and Future of Title 42

By

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Introduction

Today I'm not going to focus on the very sad circumstances of thousands of asylum-seekers on the southern border, terrible as it is. Their plight and the situation of millions of refugees around the world is tragic evidence of indifference to human suffering.

I'd like instead to focus on the use and mis-use of Title 42 as a case study in the consequences of hijacking fundamentally sound processes of evidence-based policymaking and putting forward distorted politically-expedient reasoning dressed up as responsible science.

I'll start with some of the history then go on to share a few reflections about where things stand after the court decisions by the Louisiana judge (Louisiana et al. vs. CDC et. al.) and the DC court (Huiza Huiza) ended up at the Supreme Court.

What Was The Actual Motivation for The Trump Administration First Invoking Title 42 in March, 2020?

In the conceptual geography of the distorted but astute political vision of White House Advisor, Stephen Miller, the COVID-19 crisis presented an appealing opportunity to equate what he saw as a plague of migrant invaders at the southern border with the actual pandemic, using Title 42 as a tool to both block asylum-seekers and to manipulate public opinion.

A detailed report by the House Select Subcommittee on the Coronavirus Crisis released in October,2022 details of the Trump administration forcing the CDC to issue the Title 42 order:

Dr. Martin Cetron, Director of CDC's Division of Global Migration and Quarantine, told the Select Subcommittee that the idea for the Title 42 order "came from outside the CDC subject matter experts," and that "the proposed order was not drafted by me or my team" but was instead "handed to us." …Although Dr. Redfield said in his transcribed interview that he was not aware of Mr. Miller's involvement in the Title 42 order, Dr. Cetron told the Select Subcommittee that he recalled participating in calls "in which he [Mr. Miller] was speaking."

The report goes on to further quote Dr. Cetron as follows,

… the "argument about the risk of importing" coronavirus at the border "did not jibe" with the data and realities on the ground, particularly given that "there were hot spots in the U.S. that were much more powerfully overwhelming at the moment."[166]

The report includes still more on Dr. Cetron's assessment of the process:

According to a press report, Dr. Cetron told a CDC colleague in March 2020 after receiving the proposed Title 42 order: "I will not be a part of this. It's just morally wrong to use a public authority that has never, ever, ever been used this way. It's to keep Hispanics out of the country. And it's wrong … Dr. Cetron explained that the order also risked creating "an inappropriate epidemic of stigma and misrepresentation of where the problem is," while "creating a false narrative" that the virus was contained outside the United States and Americans could "therefore avoid the kinds of things that we all need to be doing collectively to address the risk."

Dr. Cetron said that he asked to "excuse" himself from working on the Title 42 order given the "potentially significant harms" implicated, after concluding that it was not justified under CDC's public health authorities.[173]

Consequences of Political Hijacking of Agency Decision-Making

Dr. Cetron's decision to remove himself from the political process reminds us of the consequences of political distortion of responsible processes of decision-making within an agency such as CDC that is perceived by at least a large segment of the public as making decisions based on sound scientific evidence did not vanish at the end of the Trump administration. In its 1st day after Speaker McCarthy's election, the Republican majority in the house voted to reinstate the Holman rule that would allow direct political interference in agency decision-making. The Washington Post reports,

Even if an attempt to use the rule is ultimately blocked, though, "It's the potential use that makes it so concerning," said Max Stier, president and CEO of the nonpartisan Partnership for Public Service. "If you're a federal employee, this now becomes a risk that you have to think 'I may get myself in hot water or have my salary dropped to zero or my job could get axed'" when making a professional decision.

Duplicity underlying the Original Title 42 Order

The only scientific evidence included in the original Title 42 order was irrelevant to the key issue of COVID-19 pandemic response and had the result of distorting the public health related

information in the order to actually increase the risk of COVID-19 spread in border communities by ignoring the consequence of migrants expelled under Title 42 congregating in makeshift camps and crowded shelters on the Mexican side of the border.

Given the lack of evidence that using Title 42 to block asylum-seekers from entering the U.S. would be an appropriate or effective use of CDC's public health authority, the Trump-mandated order misappropriated some legitimate science to argue correctly that crowding in CBP processing facilities and in detention would lead to greatly increased transmission of COVID-19 in those facilities since, as a respiratory disease, it was known to be transmitted by close physical contact (although CDC's and WHO's acceptance of the scientific research about aerosol transmission as well as transmission by coughing, sneezing—spreading by droplets lagged).

Migrants and asylum seekers, then, were argued to be a risk to US public health because of the way they were treated by CBP and ICE while being detained. The initial Title 42 order says (on page 1)

Many of those persons (typically aliens who lack valid travel documents and are therefore inadmissible) are held in the common areas of the facilities, in close proximity to one another, for hours or days, as they undergo immigration processing. The common areas of such facilities were not designed for, and are not equipped to, quarantine, isolate, or enable social distancing by persons who are or may be infected with COVID-19. The introduction into congregate settings in land POEs and Border Patrol stations of persons from Canada or Mexico increases the already serious danger to the public health to the point of requiring a temporary suspension of the introduction of such persons into the United States.

This duplicitous argument highlighting migrants as the risk but absolving CBP processing facilities and ICE detention facilities from responsibility then led, and was surely understood to lead, to migrants turned back under Title 42 concentrating in *albergues* and makeshift camps in Mexican border communities.

Carve-Outs Making Title 42 Arbitrary and Capricious Even If One Incorrectly Believed in Blocking Introduction of Transmissible Diseases

It was understood from the beginning that carve-outs in the Title 42 order would be needed to allow US citizens and legal residents from crossing the border and that it would only be possible to apply Title 42 to certain "covered" individuals—not those who Mexico refused to accept, eventually, due to litigation, not unaccompanied minors, and vulnerable individuals.

The final Trump CDC extension of Title 42, probably correctly notes that about 40% of CBP encounters were covered aliens (154K of 345K from March to August 2020). Would there have

been any reason to believe that Guatemalans, Salvadorans, and Mexicans had different incidence of COVID-19 infection than Nicaraguans or Cubans, for example? Not much, vaccination was not available anywhere at that point.

Camilo Montoya-Galvez of CBS News, who has done a remarkably good job of covering Title 42 and the southern border, reports in a recent article (January 2, 2023) that

Record border arrivals of migrants who are not subject to Title 42 have increasingly reduced the use of the policy. In November, for example, only 29% of migrant encounters along the southern border resulted in Title 42 expulsions, and two-thirds of them involved Mexican migrants.

The Struggle Over CDC's Authority to Terminate Title 42

The ongoing, yet-undecided struggle over CDC's authority to terminate Title 42 is so contentious legally that I can't really say much about the multitude of legal issues about precedent and whether the CDC needs to comply with provisions of the Administrative Procedures Act. What is clear is how flawed the legal process has been and what an unsatisfactory route it has provided for sound public health policy. Some observations may be useful:

- The original complaint from Arizona and other anti-immigrant states filed to block the Biden administration from terminating Title 42 in April, 2022 had nothing in it about the public health rationale for Title 42 but consisted almost exclusively of states' complaints about the costs they incurred in providing services to undocumented immigrants.

- Alleged "evidence" in the original anti-immigrant states' complaint includes remarkably vacuous statements by both Republican and Democratic Congressional representatives about why it would be necessary to keep Title 42 in place. For example, Congressman Cassidy from Louisiana stated, *"Removing Title 42 is a mistake that will encourage another wave of illegal migration and drug trafficking to overwhelm the Southern border.* Removal of Title 42 probably would lead to a surge of migrants at the border, but could not reasonably be expected to affect well-established, narco-managed drug trafficking.

- The anti-immigrant states' complaint about CDC terminating Title 42 as having blatantly failed to comply with the Administrative Procedures Act although the initial Trump March 2020 administration order was also summary. The Trump administration did eventually conduct rule-making but review of the final rule shows the original language to be mostly unchanged and also lacks any substantive discussion of public health pros and cons. In contrast, the CDC's termination order did discuss, albeit incompletely, a

number of issues (mostly trajectory of community levels of SARS-CoV-2 incidence) from March, 2020 through April, 2022.

- The contentious question of Biden administration preparedness to control the southern border if Title 42 is terminated has been confused by its apparently contradictory positions it has taken in alleging it was prepared in April 2022 while subsequently seeking a stay of the DC district court order. Its efforts to address the substantive public health issues it faces in CBP processing and ICE detention facilities probably deserve only a C-minus and Secretary Mayorkas was only lukewarm in saying that DHS was doing the best it could. Moreover, a detailed DHS update of its border management plans disseminated on December 13, 2022 in anticipation of Title 42 being terminated included the statement that its "six pillars" of the plan could not be effectively implemented without an additional $3.4 billion in funding in FY '23. It is very unlikely such funding will be forthcoming.

- Whether or not DHS is well prepared to confront the specific public health issues in ICE detention facilities is unclear. Its medical guidelines are reasonable but my tracking of ICE reports of COVID-19 in detention facilities show levels of COVID-19 in detention facilities to vary from facility to facility and fluctuate tremendously—as might be expected. An excellent review by the California Attorney-General's office provides useful insights about why that might be. Most of the facilities are managed by private contractors and compliance with DHS guidelines varies. However, recent reports from ICE (as of January, 2023) suggest it has substantially reduced the number of immigrants held in detention facilities—a welcome step forward to decrease transmission due to crowded congregate living conditions.

- The original complaint from Arizona and other anti-immigrant states filed to block the Biden administration from terminating Title 42 in April, 2022 had nothing in it about the public health rationale for Title 42 but consisted mostly of states' complaints about the costs they incurred in providing services to undocumented immigrants. This is relevant because the Supreme Court's order to block the DC court's order to terminate Title 42 is based on the question as to whether the anti-immigrant states have standing to sue.

The Basis for Justice Gorsuch's Dissent and Its Importance for the Future

Gorsuch (goes straight to the issues I've been talking about, the remarkable lack of attention to actual public health considerations in the Title 42 legal dueling:

The D. C. Circuit's intervention ruling takes on whatever salience it has only because of its presence in a larger underlying dispute about the Title 42 orders. And on that score, it is un-

clear what we might accomplish. The States may question whether the government followed the right administrative steps before issuing this decision (an issue on which I express no view). But they do not seriously dispute that the public-health justification undergirding the Title 42 orders has lapsed. And it is hardly obvious why we should rush in to review a ruling on a motion to intervene in a case concerning emergency decrees that have outlived their shelf life.

…the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency. We are a court of law, not policymakers of last resort.

The points Gorsuch made in his dissent seem to make a valuable contribution to getting legal discussion of continuation of Title 42 back on the rails again after its careening course forward. Presumably, the two Justices who opposed reviewing the DC district court's termination order (Sotomayor and Kagan), along with Ketanji-Brown and Gorsuch might uphold CDC's termination of the order. If the court were to require continuation of Title 42 the decision would be driven primarily by political considerations and sidestep the genuine underlying questions as to what authority the CDC might have to carry out its mission of protecting public health and whether pro forma procedures to satisfy APA public comment requirements actually contribute to wise decision-making by federal government agencies.

In the near term, there is some slight hope that the battlefield might shift away from wrangling about CDC's authority to issue COVID-19-related public health agency decisions (both Title 42 and relating to vaccine authorization and, in principle, use of masks in public transportation).

However, it is also possible that the ultra-right wing narrative and the efforts of the **House Select Subcommittee on the Weaponization of the Federal Government,** chaired by Congressman Jordan of the Freedom Caucus might change that, given the MAGA Republicans' efforts to weaponize the fact that the public is "tired of COVID" to strip CDC of even its' current very limited authority regarding COVID vaccination.

The impact of Republican opposition to COVID vaccination and mask mandates dwarfs any considerations about the impact of public health strategy at the southern border. For example, the impact we are seeing as a centerpiece of Governor De Santis' adoption of anti-vaccination rhetoric and unfortunately somewhat successful efforts to counter vaccination of children (less than 1% of vaccine eligible children 5-11 years of age up to date with vaccination, about 2% of children of children 12-17 years old—1/4 the uptake in California).

The politically-driven relationship between vaccine refusal and mortality (Pew Research Center March 2022) once vaccine was available is the primary threat to COVID-19 public health efforts.

Low rates of uptake for the bivalent vaccine—much lower in states in the south (including Texas and Florida) provide evidence of where the real problems are.

The Biden Administration's New Proposals to Manage Immigration at the Southern Border now and post Title 42

The new proposals appear to be responsive to some valuable suggestions from advocacy groups but whether they will have more than a rhetorical impact is not yet clear.

The Parole Proposal

1. The proposed enhanced pathway for home-country online access to parole may well turn out to be primarily rhetorical signaling—since, almost inevitably, many victims of torture, persecution, paradigm cases of asylum-seekers will not necessarily have a sponsor/financial supporter in the U.S. committing to provide financial and other support. The commitment to admit up to 30,000 Venezuelans, Nicaraguans, Cuban, and Haitian asylum-seekers per month is attractive—but it is not clear that many would actually meet the stringent admission requirements. And its potential benefits are offset by the new agreement with Mexico to accept up to 30,000 migrants summarily expelled under Title 42 and/or expedited removal.

2. Exclusion of Guatemalans, Salvadorans, and Hondurans and, for that matter, Mexicans from the parole program new pathways of home-country applications for asylum-seekers is obviously motivated by political expediency. Here too, as was the case where Title 42 lacked any adequate linkage to public health strategy, what is remarkable is the inequality in access to applying for asylum based on nationality. The reality, of course, is that the conditions that lead asylum-seekers to flee their home countries have nothing to do with US diplomatic relations with individual countries but rather to those countries' governments' ability and willingness to counter persecutions based on political affiliation, gender, and local de facto rule by gangs and narcos.

Appointments via CBP One

3. The availability of an application for scheduling asylum-seekers' interviews at ports of entry is very welcome and has promise but how much promise depends on how many interviews will be scheduled

This provision, which is, in fact, responsive to suggestions put forward by immigrant advocacy groups such as the National Immigration Forum and the American Immigration Council is welcome. But the devil is in the details that are only sketchily outlined in the White House

announcement and it is believed that DHS might seek to use the scheduling system to decrease the number of interviews granted to asylum-seekers.

To facilitate the safe and orderly arrival of noncitizens seeking an exception from the Title 42 public health order, DHS is expanding use of the free CBP One mobile app for noncitizens to schedule arrival times at ports of entry. Individuals do not need to be at the border to schedule an appointment; expanded access to the app in Central Mexico is designed to discourage noncitizens from congregating near the border in unsafe conditions. Initially, this new scheduling function will allow noncitizens to schedule a time and place to come to a port of entry to seek an exception from the Title 42 public health order for humanitarian reasons based on an individualized assessment of vulnerability. This will replace the current process for individuals seeking exceptions from the Title 42 public health order, which requires noncitizens to submit requests through third party organizations located near the border.

Rebuttable Presumption of Ineligibility Due To Failure To Apply for Asylum In Mexico

4. The provision that failure to apply for asylum in Mexico is grounds for "a rebuttable presumption" of ineligibility for asylum is dead on arrival.

DHS and DOJ intend to issue a proposed rule to provide that individuals who circumvent available, established pathways to lawful migration, and also fail to seek protection in a country through which they traveled on their way to the United States, will be subject to a rebuttable presumption of asylum ineligibility in the United States unless they meet exceptions that will be specified.

That proposal is bizarre, given the stance of the MX government reported by the NYT on Jan 8th:

In an interview before Mr. Biden's departure on Sunday, Mexico's top official for North American relations bluntly rejected a proposal by the Biden administration that would automatically deny asylum to migrants who have traveled through Mexico without seeking refuge in that country first. A version of that idea, known as a "safe third country" policy, was first proposed by Mr. Trump in 2019.

"The safe-third-country idea is a red line for us," said Roberto Velasco, the Mexican Foreign Ministry's chief officer for North America. "It would overwhelm the system."

Setting up Surrogate Southern Borders in Panama and Mexico

One single clause in the new Biden administration proposals is particularly outrageous—excluding asylum-seekers who failed to secure authorization to cross the border of Panama or southern border of Mexico without authorization.

But this is important – if individuals from these countries attempt to cross the U.S. border without authorization, or the Mexico or Panama borders, after today, they will not be eligible for

this new legal pathway. So, the message is clear – individuals should stay where they are and apply for these processes from there.

Obviously this is convenient politically—stopping prospective South American migrants before they get to Panama or Central American asylum-seekers before they get to Mexico. Mexico demonstrated its willingness to do just that during the Trump administration and is likely to go along with that yet again—whether or not the persuasion is formal and explicitly stated or simply implied. A DHS update from December 13, issued in anticipation of the court-mandated termination of Title 42 use on December 21 before the Supreme Court took the conflict between the anti-immigrant states and the ACLU case on has a low-profile but worrisome reference to offers to help Panama with border security.

The Trilateral Meeting in Mexico City

It's difficult to know what can be said based on the transcripts of the three presidents' statement to the press—deep collaboration and partnership to implement the kind of development strategies first proposed by the Ascensio Commission more than half a century back, commitments to work together to decrease drug smuggling and human trafficking—worthy objectives but not clear as to what might eventually be done to make these efforts more effective. Similarly, there was an almost-obligatory request from AMLO to legalized undocumented Mexicans in the U.S. That is not likely to amount to much.

Prospects for Congressional Action Are DIm

There is little hope that the 118th Congress will be prepared to enact any sort of immigration reform legislation. There is also the possibility that anti-immigrant forces in Congress will attempt to rollback current legal protections for unaccompanied minors and, once again, broaden the sub-populations of migrants identified as being "covered" by the order, that is, narrow exclusions from Title 42 provisions.

The prospects for implementing the activities needed for DHS to manage the situation at the southern border that has been so incessantly criticized both by anti-immigrant groups and immigrant advocates are terrible because they also require Congressional action—in the form of funding. A DHS "update" on its preparations in anticipation of the December 21 termination of the Title 42 order (prior to the Supreme Court writ of certoriari) details six "pillars" of efforts—all of which require funding:

These elements are directly responsive to calls from members of both parties and are needed to support our frontline personnel working to keep our border secure and will aid in our effort to

responsibly manage the lifting of the Title 42 public health order. DHS also identified for Congress an additional $3.4 billion in resources that are necessary to deliver on these six pillars

An outrageous manifesto—**A Commitment to Secure the Border: A Framework by Texans for Texans—**put forward by Chip Roy and 28 anti-immigrant Congressional representatives, characterized as the "conservative playbook", provides some stunning indicators that the goal of securing reasonable compromises on immigration policy and, specifically, at the southern border will be very difficult to achieve.

So much for evidence-based policy. Among other distortions and lies, the document incorrectly alleges "hundreds of millions of $ in federal grants go to organizations to assist organizations in the journey to cross the border and to further assist individuals once they are released". Referencing Chris Cabrera of the National Border Patrol Council in south Texas, it proposes to defund all the organizations receiving federal assistance to assist migrants and/or asylum seekers.

The Texan manifesto, of course, also seeks completion of the border wall in Texas—presumably a financial boondoggle for favored border wall construction companies. It also seeks to have Texas reimbursed for whatever funds it has spent on anti-immigrant activities, presumably including its bussing of newly-arrived migrants to norther states and DC.

It seeks to get rid of Flores settlement which limits the time unaccompanied minors can remain in detention and to rescind the TVPRA statute due to its requirements to place unaccompanied minors in the least restrictive environments (such as relatives' homes).

From the immigrant advocate side, there have been detailed critiques of the new Biden administrations border plan from the National Immigrant Justice Center (Azadeh Erfani and Jesse Franzblau, "Recycling Trump's Asylum Bans and Expanding Title 42: How Biden's New Policies Threaten to Undermine Asylum Rights for Generations To Come", January 9, 2023) and detailed recommendations from the National Immigration Forum (Danilo Zak, "42 Border Solutions That Are Not Title 42", May 13, 2022).

The detailed recommendations from the National Immigration Forum are substantive and balanced in that they seriously address issues related to asylum-seekers' rights and border management. It would be good to see them updated at this point and subsequently after Congressional wrangling over border policy has proceeded but before the Supreme Court decides the Title 42 case.