The Role of Public Health in the Rule of Law: The Cautionary Tale of Title 42 Expulsions

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Abstract

Under the COVID-19 pandemic, the United States government invoked an archaic public health law, referred to as “Title 42,” to thwart the rule of law and further an openly xenophobic political agenda. While public health in the United States has an unfortunate history of exploiting race in the name of medicine, in this particular instance, the pandemic was used to requisition the largest government law enforcement agency and bend it to the will of the President. The lessons from the Trump Administration’s abuse of this public health law present an opportunity for public health officials to revisit their interdisciplinary role in protecting the rule of law.

Introduction

On March 24, 2020, in the midst of a chaotic and decentralized national response to COVID-19, the Trump Administration invoked a little-known federal public health law, the Public Health Service Act of 1944, to authorize the summary expulsion of migrants. The application of this law, referred to as “Title 42 expulsions,” has wreaked havoc on children and families—many of whom were expelled to countries where they had fled imminent danger and credible threats of persecution. Migrants have been repatriated to face torture or simply expelled to Mexico where they face the dangers of cartel violence. To effectuate this process, migrant children were detained in commercial hotels by private security guards unlicensed in child welfare before being expelled to extremely dangerous conditions. Newborns, born in the United States to noncitizen mothers, were swiftly expelled with their mothers but without their legal birth certificates. For a time, the number of summary expulsions matched the number of deaths from COVID-19 in the United States and now stands at a staggering 373,396 and growing.

Pre-Pandemic Rule of Law

Prior to the pandemic, the United States followed its domestic and international law obligations which require governments to permit individuals arriving at a border or port of entry to seek asylum if they have a credible fear of persecution in their home country. These asylum laws were developed in the aftermath of World War II after many Allied powers refused to accept thousands of Jewish refugees who had fled Nazi Germany. Since that time, the obligation not to return an individual to persecution has become sacrosanct. Nonetheless, the Trump Administration endeavored to do away with asylum, and for four years the Administration did everything possible under immigration law to “close asylum loopholes.”

The Administration operated with abject disregard, not only for established asylum laws, but for the special laws designed to protect vulnerable children. The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), a widely supported bipartisan bill, is designed to ensure that the most vulnerable individuals who arrive at our borders are not turned away to danger without regard for their safety. For years, the Trump Administration had openly sought to cripple or outright repeal the TVPRA.

The arrival of the COVID-19 pandemic presented an opportunity for the Administration to achieve its stated objective of eliminating asylum and the TVPRA. To do so, the Administration exploited Title 42 by effectively shutting down the southern border. In the name of public health, the Administration began summarily expelling asylum seekers to persecution and removing migrant children to dangerous conditions.
Abuse of a Public Health Statute Upends the Rule of Law

The Department of Homeland Security (DHS), with a budget of approximately $70 billion dollars, is the largest law enforcement agency in the United States. Tasked with carrying out immigration-related mandates under Title 8 of the U.S. Code, DHS is home to subagencies like Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). These enforcement agencies have no training in public health or child welfare, nor does CBP require its agents to have a degree in higher education. These law enforcement officers are trained in matters of immigration-related arrests, and their prerogatives are detention and deportations.

When the President employed Title 42, he leveraged the power of DHS to exercise a public health law in a manner that had no rational nexus to public health. Suddenly, with no oversight and no basis in law, CBP officers were operating under Title 42 to effectuate COVID-related “expulsions”—a deliberate term given to what amounts to unlawful, extrajudicial deportations. The relevant Title 42 provision relied upon by the Administration in its entirety 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.

Using this terse language, the President directed the CDC to order the expulsion of anyone at the southern border irrespective of whether there was a nexus to the actual presence of or threat of transmitting the COVID-19 virus and ignoring widely accepted COVID-19 testing and safety measures. In its implementation, there is no individualized assessment of whether someone presents “a serious danger of the introduction of [COVID-19].” Instead, the Administration empowered DHS to coopt this public health law for its law enforcement purposes and, in doing so, indicated it no longer needed to follow any other rule of law.

The Role of Public Health Officials in the Implementation of Title 42

Public health officials were not consulted by the Administration in their efforts to roll out Title 42 expulsions. Reports indicate that the CDC initially refused to support the rule, and that it was issued only after direct pressure from the Secretary of DHS and the Office of the Vice President as the head of the Coronavirus Task Force. The Administration also disregarded a May 18, 2020 letter to Department of Health and Human Services (HHS) Secretary Alex Azar from a number of public health experts who urged the Administration to withdraw Title 42, citing the fact that there was no merit to the stated public health purposes behind the order. Since the Biden Administration has taken over, Title 42 expulsions have continued. In recognizing Title 42’s devastating impact on vulnerable migrant populations, the Biden Administration has halted its application to migrant children appearing alone. Nonetheless, Title 42 remains in place against all other asylum seekers.

An Opportunity for Public Health to Restore the Rule of Law

While the legal advocacy community has challenged the policy via litigation in court, the need to engage robust interdisciplinary discourse on the intersection of immigration law and public health is critical. The field of immigration law has always been ripe for the exploitation of public health to effectuate xenophobic ends. There is a long history of nativist forces castigating immigrant newcomers as diseased threats to public health. Public health grounds of exclusion have long been cornerstones of restrictive immigration policies born of xenophobic public attitudes to keep noncitizens out.

The use of Title 42 has exposed the broader disconnect between public health and the rule of law. There is a strong correlation between the relative durability of the rule of law and public health outcomes. Public health relies on the institutional trust and durability that the rule of law engenders, and the rule of law relies on accurate, objective, and stalwart mobilization of public health responses to protect the population. Yet there is also evidence that respect for the rule of law is eroding around the world, and the rise of authoritarian regimes threatens to supplant it. It is unsurprising then that the countries who have struggled most to contain and stifle transmission of COVID-19 are also the countries experiencing some of the more precipitous declines in respect for the rule of law.

The fact that Title 42 remains in force further demonstrates that the rule of law and respect for objective public health initiatives, once undermined, are not so easily rebuilt. The ushering in of a new Administration creates an opportunity for the public health sector to advance the legal constructs rooted in this pandemic. While some public health officials have spoken out against the ill-conceived practice, the opportunity to create a robust interdisciplinary approach to issues at the intersection of immigration and public health remains a critical need. By building such alliances, we might rebuild trust in our government institutions and reconstruct the rule of law.

2. The authors, faculty and students at the Center for the Human Rights of Children at Loyola University Chicago School of Law (CHRC), are engaged in interdisciplinary advocacy to compel transparency around the use of Title 42 to expel and repatriate unaccompanied migrant children. In August 2020, the CHRC, the American Immigration Council, and the Illinois Chapter of the American Academy of Pediatrics filed a Freedom of Information Act request with the Department of Homeland Security and Customs and Border Protection to disclose records detailing how the rights of unaccompanied migrant children were considered in the implementation of Title 42, data related to the number of unaccompanied migrant children subject to expulsion, and records detailing conditions of detention for youth held in unlicensed commercial hotels pending expulsion.


12. The *jus cogens* norm of non-refoulement is a universal, obligatory, and binding norm of international law which the United States cannot disregard or derogate – including, and especially during, times of national emergency. See, e.g., Article 33 of the U.N. Convention Relating to the Status of the Refugee under which a party nation may not “expel of return (‘refouler’) a refugee in any
manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion”; see also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations Treaty Series, vol. 1465, No. 85, p. 113, under which party nations are obligated not to “expel, return...or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”


24. See Immigration Act of 1891 § 1, Pub. L. No. 51-551, 26 Stat. 1084(a) (“[t]he following classes of aliens shall be excluded...[a]ll idiots, insane persons...persons suffering from loathsome or a dangerous contagious disease.”); see also Immigration and Nationality Act, 8 U.S.C. § 1182(a)(1)(A) (1952) (providing grounds for inadmissibility for arriving noncitizens with “a communicable disease of public health significance”).

26. Id.
