



SCHOOL of LAW

Trump Administration Intentionally Expelled Thousands of Unaccompanied Children to Danger Under Title 42¹

Introduction

Under the auspices of protecting the public from COVID-19, beginning in 2020, the Trump administration expelled thousands of unaccompanied children pursuant to the Centers for Disease Control and Prevention (CDC) Title 42 policy (1944). The appropriation of the obscure statute was used to upend the rule of law, including federal statutes designed to protect unaccompanied migrant children. The public health policy, colloquially referred to as Title 42, was used to summarily expel children beginning in March 2020 until an injunction halted the practice in November 2020. By that time, the U.S. government had expelled nearly 16,000 children under Title 42.² These expulsions were summary in nature, resulted in extreme danger to children, and were carried out without safety plans to provide care for the children.

In an effort to understand how the US government came to expel 16,000 migrant children, the Center for the Human Rights of Children, together with the expertise of the American Immigration Council (Council), pursued transparency around the government's deliberation (or lack thereof) to expel unaccompanied children under Title 42. The Council obtained government records through Freedom of Information Act (FOIA) requests filed in collaboration with the Loyola University Chicago's Center for Human Rights of Children.

The documents, detailed below, demonstrate the Trump administration's reckless, at times intentionally malicious, lack of consideration for the safety and wellbeing of unaccompanied children and for the legal protections afforded to them under federal law. The documents also reveal how ill-organized and chaotic the Trump administration's efforts were in carrying out its Title 42 policy of expelling migrants, including unaccompanied children, back to the countries they had fled. The documents show that the Trump

Administration did not care about the safety of children and, under at least one instance, was motivated to summarily deport as many children as possible despite known dangers to children.

The Trump Administration Exploited the CDC's Title 42 Authority to Effectively Close the Southern Border to Asylum Seekers Under the Guise of Mitigating Spread of the COVID-19 Virus

On March 20, 2020, at the outset of the global COVID-19 pandemic, the CDC issued an order referred to as Title 42 (from the section of the U.S. Code dealing with public health) that prohibited entry into the country of many foreign nationals traveling from Mexico and Canada into the United States.³ This prohibition applied to adults and children attempting to exercise their legal right to request humanitarian protection from the U.S. government.⁴ Dr. Martin Cetron, Director of the CDC's Division of Global Migration and Quarantine, told the U.S. House of Representatives Select Subcommittee that "Trump Administration officials exploited CDC's Title 42 authority to effectively close the southern border under the guise of mitigating spread of the virus."⁵ Dr. Cetron further explained that the Title 42 order "was not drafted by me or my team," but was instead "handed to us [by the Trump administration]."⁶

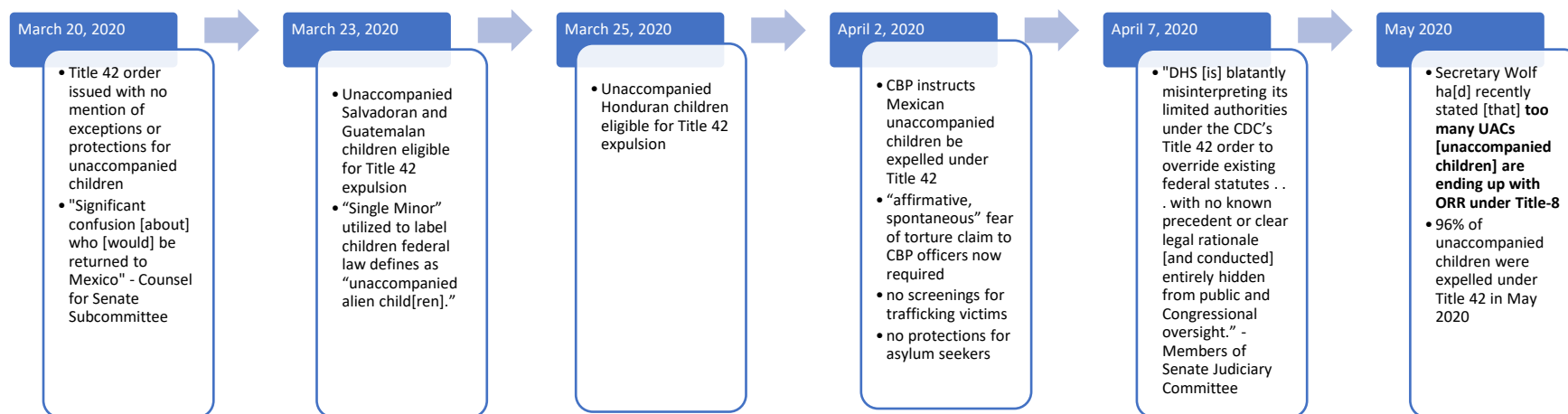
The immediate and lasting effect of the Title 42 policy was the suspension of asylum processing for those arriving at the southern and northern U.S. borders, including unaccompanied children. This resulted in their immediate expulsion to their countries of last transit or to their home countries, regardless of their status as unaccompanied children and their credible fear of persecution in their home countries based on a protected ground.

Report from the Select Subcommittee on the Coronavirus Crisis

"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. Martin Cetron, Director of the CDC's Division of Global Migration and Quarantine after receiving the proposed Title 42 order in March 2020

The Implementation of Title 42 Occurred in a Chaotic and Haphazard Manner Without Regard for the Safety of Unaccompanied Children



Emails obtained through the Council's FOIA request revealed that in January 2020, the U.S. Border Patrol (USBP) was communicating internally to reiterate the expectation that the Trafficking Victims Protection Reauthorization Act (TVPRA) requires that all unaccompanied children be transferred to the custody of the Department of Health and Human Services (HHS).⁷ Nevertheless, the initial order instituting the Title 42 policy on March 20, 2020 makes no mention of any exceptions for unaccompanied children.⁸ In fact, the initial order and its subsequent extensions and amendments, in addition to the communications plan from U.S. Customs and Border Protection (CBP) pertaining to the implementation of Title 42 lack any reference whatsoever to unaccompanied children.⁹ Likewise, in CBP's Title 42 internal guidance (the Operation Capiro guidance) that was leaked to the public on April 2, 2020, there was no guidance specific to the treatment of unaccompanied children or children in general.¹⁰

In the earliest days of implementation of Title 42, there appears to have been "significant confusion [about] who [would] be returned to Mexico," according to an email from Counsel from the Subcommittee on Immigration and Citizenship of the House of Representatives Committee on the Judiciary (the Subcommittee Counsel) the day Title 42 was enacted.¹¹ The same day, after receiving a phone briefing on the Title 42 policy, the Subcommittee Counsel directed follow-up questions about essential components of the policy to Department of Homeland Security (DHS) Headquarters.¹² These questions include whether individuals could still present at ports of entry to request asylum, whether individuals with a credible fear of returning to their home country would be placed

into asylum proceedings, and whether the individuals subjected to the policy would have access to counsel.¹³ The following day, on March 21, 2020, the Subcommittee Counsel replied to the same email thread, presumably to the same individuals at DHS Headquarters (the email recipient was entirely redacted) stating, “So from media reporting it appears [Unaccompanied Alien Children] UACs are largely exempted[,] and people without docs cannot present at [Ports of Entry] POEs. Considering DHS/ CBP is literally implementing this order as we speak[,] do we really not have answers to these questions? CBP has issued statements that also do not seem to give much clarity. Have [Office of Field Operations] OFO and [USBP] agents been given guidance on how to implement the order?”¹⁴ A subsequent email that appears to be part of the Subcommittee Counsel’s email thread from an entirely redacted sender to an entirely redacted recipient states that OFO and USBP were issued Title 42 guidance on the night of March 20, 2020,¹⁵ the day Title 42 went into effect.

No ascertainable responses to the remainder of the questions posed by the Subcommittee Counsel were obtained through the FOIA productions. Subsequent emails that appear to be related are so heavily redacted that it is unclear what, if any, relevant information might have been discovered. What is clear is that in the earliest days of the COVID-19 pandemic and the Title 42 policy in the U.S., there was significant confusion about the logistics of the Title 42—confusion that jeopardized the safety of unaccompanied children. In contrary to public perception, unaccompanied children were not exempted from the Title 42 policy and as a result were summarily expelled to Mexico or to their home countries. The FOIA production makes clear, CBP officers understood that children were intended to be protected under the TVPRA and repeatedly sought clarification from superiors to guide how or if it was legal to engage in dangerous expulsions forbidden by U.S. law.

The Trump Administration Exploited Title 42 to Expel Unaccompanied Children Using the Invented Term “Single Minor”

The FOIA productions and public record have never revealed a final memo explaining the legal reasoning used by the Trump administration to initiate the expulsion of unaccompanied children under Title 42 in contravention of federal law. Even so, by March 23, 2020, USBP had communicated that children from El Salvador and Guatemala (who otherwise fit the definition of an unaccompanied minor) were eligible for expulsion under Title 42 but they began to use the term “single minor.” A term with no precedent in immigration law. The documents revealed the language but the government refused to explain where it came from: “[Honduran] [s]ingle minors (*emphasis added*) [would] have to be processed as UACs [unaccompanied alien children] with referral to HHS.”¹⁶ Just two days later, unaccompanied Honduran children were also excluded from federal protections as unaccompanied children and were eligible for expulsion via Title 42.¹⁷ In contrast, at this time, the federally mandated procedures for all unaccompanied children prior to this abrupt, unprecedented departure from existing law still applied to Haitians and Indians.¹⁸ Haitian and Indian unaccompanied children were to “be processed under Title 8,”¹⁹ the only legally permissible way to process

unaccompanied children, while Salvadoran, Guatemalan, and Honduran children, without explanation, categorized as “single minors” and recklessly expelled from the U.S.

Despite sustained efforts, CHRC and the Council’s FOIA litigation did not result in the production of any documents detailing the deliberation behind the Trump administration’s policy decision to begin labeling unaccompanied children as “Single Minors”— a term which appears to have been made up to bypass the TVPRA. Nonetheless, the records show that, as early as March 23, 2020, the term “Single Minor” was utilized in internal government communications to label children that federal law would categorize and protect as “unaccompanied alien child[ren].”²⁰

The FOIA request produced a CBP training presentation (without any indication of the date of creation) that defines a “Single Minor”²¹ as “an alien who is 17 years of age or younger and who is not traveling with a related adult,”²² a definition that is broader than the federal statutory definition of an “unaccompanied alien child.”²³ The same presentation also states that “Under Title 42, an e3 Family Group that includes at least one adult relative and minor child(ren) should be treated for detention/ expulsion as if the adult is the guardian of the child(ren).”²⁴ Classifying a non-guardian adult as the guardian of an unaccompanied child directly violates the TVPRA, which requires that the adult must be “a parent or a legal guardian” of the child – using the newly created term “single minor” to grab large numbers of children for expulsion who were otherwise subject to statutory protections under the TVPRA.²⁵

The same presentation provides another scenario involving twelve-year-old and fourteen-year-old brothers traveling without the accompaniment of an adult guardian, instructing that the children should be treated as a family group.²⁶ This also violates the federal statute that classifies these children as “unaccompanied alien children.”²⁷ Moreover, this reclassification also impacts the reporting on the numbers of expelled “single minors,” because it misrepresents expelled groups of related unaccompanied children as family units. Under federal statute, the brothers should have been transferred to the Office of Refugee Resettlement (“ORR”) and given the protections as unaccompanied children, and there is no explanation in the produced documents as to why they would be denied such protection. Another scenario instructed that “a 15[-]year[-]old traveling with unrelated subjects” . . . “should be treated as a Single Minor and processed for expulsion.”²⁸ Here again the government violates the TVPRA, a child traveling with unrelated individuals is defined by federal law as an unaccompanied consequently should not have been expelled but instead been given the protections afforded to unaccompanied children. No documents in any of the government production contain any legal justification for the use of the term “Single Minors” to describe children legally defined as “unaccompanied alien children;” the documents instead reveal that USBP was intent on expelling as many unaccompanied children as possible under Title 42.

USBP's Goal and Default Practice Was to Expel as Many Unaccompanied Children as Possible as Quickly as Possible Under Title 42 Without Regard for Their Safety and Well-Being

The FOIA records reveal USBP's goal to quickly expel unaccompanied children to avoid the children being transferred to HHS custody as an unaccompanied child. In an email produced through CHRC and the Council's FOIA request, USBP stated, "[I]t is difficult to put [Guatemalan and Salvadoran] minors on these [Immigration and Customs Enforcement (ICE) expulsion] flights within the 72[-] hour window needed for minors" but that "USBP [would] continue to coordinate daily and work to adjust schedules to the extent possible to place minors on flights. In the event minors are unable to be scheduled for flights with foreign departures within 72 hours of encounter, they will need to be converted to Title 8 and referred to HHS for placement."²⁹ The same email reveals that "tender aged [Salvadoran] minors, [those under the age of thirteen]³⁰" were also subjected to Title 42 expulsions without receiving the protections they were entitled to under federal law.³¹ By March 31, 2020, the Guatemalan government had agreed to accept

unaccompanied children younger than fourteen arriving on Title 42 ICE expulsion flights who were "of an age where they [were] self-sufficient and [did] not require a chaperone or any special accommodations."³²

**U.S. Customs and Border
Protection Statement**

"What we're trying to do, the best we can, is remove all individuals, regardless of whether they're minors or adults," - Mark Morgan, Acting Commissioner of U.S. Customs and Border Protection, at a press briefing in August 2020.

Joel Rose & Marisa Peñaloza, [Shadow Immigration System: Migrant Children Detained in Hotels By Private Contractors](#), (Aug. 20, 2020)

These communications indicate that USBP was recognizing that children, including single minors, were protected as unaccompanied children under the TVPRA vis-à-vis the 72-hour window in which they could be expelled before they were required to place the children in ORR care. It is hard to draw any conclusion other than USBP's goal at this time was to expel as many unaccompanied children, even those of tender age, as quickly as possible under Title 42, in order to avoid TVPRA protections. That DHS was trying not to hold unaccompanied children beyond seventy-two hours, clearly indicates that the government understood these children to be entitled to legal protections as unaccompanied children.

By April 2, 2020, the Operation Capiro guidance stated all Mexican nationals, including unaccompanied children, were to be expelled via a port of entry under Title 42.³³ Migrants from Brazil, Colombia, Ecuador, and Haiti were to be referred for detention pending available expulsion flights, though unaccompanied children from those countries were

excluded from Title 42 at that time.³⁴ Individuals from "exotic countries," such as India and Ukraine, were to "be processed under the [standard] Title 8 removal pathways [,] such as Expedited Removal [,] and transferred to the custody of [ICE Enforcement and Removal Operations]."³⁵ By June 2020, the list of countries from which unaccompanied children were referred for expulsion flights under Title 42 expanded to include Brazil, Colombia, Dominican Republic, Ecuador, Haiti, and Nicaragua, in addition to the Northern Triangle countries and Mexico.³⁶

Despite Congressional Scrutiny of the Trump Administration's Illegal Expulsions of Unaccompanied Children, then DHS Acting Secretary Wolf Pushed for More Expulsions of Unaccompanied Children Under Title 42

On April 7, 2020, ten members of the Senate Judiciary Committee demanded information from then-DHS Acting Secretary Wolf and expressed alarm at what they described as “DHS blatantly misinterpreting its limited authorities under the CDC’s Title 42 order to override existing federal statutes . . . with no known precedent or clear legal rationale [and conducted] entirely hidden from public and Congressional oversight.”³⁷

Despite congressional scrutiny, on May 5, 2020, USBP Headquarters’ reminder guidance communicated that “Secretary Wolf ha[d] recently stated [that] **too many UACs [unaccompanied children] are ending up with ORR under Title-8**” (emphasis added) and admitted that “we (USBP as a whole) must be better documenting and accounting for Title-42 [Single Minors].”³⁸ Shortly after, public health experts at the forefront of the COVID-19 pandemic response expressed their grave concern in a letter, due to the Trump administration’s use of the CDC’s authority to “circumvent laws and treaty protections designed to save lives” and claimed Title 42 was “based on specious justifications and fail[ed] to protect public health.”³⁹ Nevertheless, the same day as the public health experts’ letter, the CDC amended and again extended Title 42 until “further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, and continuation of the Order is no longer necessary to protect the public health.”⁴⁰

Title 42 Circumvented Federal Protections, Causing Harm to Vulnerable Unaccompanied Children, Including Those Fleeing Violence

Horrible stories abound detailing the harm the Trump administration’s Title 42 policy inflicted on unaccompanied children, though a lack of documentation of what has happened to all of the unaccompanied children expelled to Mexico or to their home country make it impossible to know the full extent of the harm caused by the expulsion of unaccompanied children under Title 42. But we can be sure that expulsions of unaccompanied children under Title 42 “stripp[ed] children of vital legal safeguards and ultimately any meaningful opportunity to seek humanitarian relief,” leaving children at “a heightened risk of human trafficking, persecution, and other grave harm—precisely the outcomes that the TVPRA was intended to prevent.”⁴¹

The Trump Administration Failed to Protect Unaccompanied Children by Expelling Non-Mexican Children to Mexico

“[I]n the course of expulsions, the Trump Administration incentivized the rapid return of children to Mexico together with unscreened adults who could have posed a danger to them.”⁴² Since then, DHS has acknowledged that there is a lack of stable housing, income, and safety available for migrants who are pushed back into Mexico.⁴³ Moreover, Human Rights First has tracked at least 200 cases of alleged kidnapping or attempted kidnapping of children in Mexico seeking asylum in the U.S. in the year prior to the initiation of Title 42 and tracked more than 800 violent attacks on asylum seekers as a whole, including murder, rape, and kidnapping.⁴⁴ Even so, under Title 42, unaccompanied children have been expelled alone, often at night, when Mexican immigration officials are not present to receive the children. From March 2020 to May 2022, CBP expelled 125,907 children, and about 29% of those expulsions occurred after midnight.⁴⁵

These reckless expulsions of non-Mexican children to Mexico occurred, even though the Trump administration’s June 2020 email obtained via the Council’s FOIA litigation revealed that the Trump administration suspected that unaccompanied children from countries other than Mexico had been expelled to Mexico.⁴⁶ In the email, the Assistant Chief of USBP stated:

“Recently, we have identified several suspected instances where Single Minors (SM) from countries other than Mexico have been expelled via ports of entry rather than referred to ICE Air Operations for expulsion flights [to be expelled to their home countries] (emphasis added). Please note that if not corrected, these actions will place Title 42 operations in significant jeopardy and must be ceased immediately. To reiterate, under no circumstances should a SM from a country other than Mexico be knowingly expelled to Mexico . . . Under Title 42 a SM [Single Minor] is defined as an alien who is 17 years of age or younger and who is not traveling with a related adult.”⁴⁷

Nevertheless, with blatant disregard for the risks to children, CBP continued to expel non-Mexican unaccompanied children to Mexico. A seventeen-year-old fled gang violence in his home country of El Salvador was expelled into Mexico alone under Title 42.⁴⁸ In July 2020, a seventeen-year-old who had fled gang violence in his home country of El Salvador was expelled to Mexico by U.S. officials.⁴⁹ In August 2020, an accompanied girl from El Salvador expressed fear of returning to El Salvador and communicated her date of birth and country of origin to USBP.⁵⁰ Notwithstanding this information, she and another unaccompanied child were processed under Title 42 and then were driven four hours away to be expelled to Mexico at a port of entry.⁵¹ An unaccompanied Guatemalan boy communicated to CBP that he was from Guatemala and provided them with his documents, only to be expelled to Mexico under Title 42 in October 2020.⁵²

The Trump Administration Failed to Protect Child Trafficking Victims and Returned Children to Trafficking Situations

The TVPRA⁵³ requires that all unaccompanied children be screened as potential victims of human trafficking, but under Title 42, CBP did not screen for potential child trafficking victims. With the elimination of screenings of unaccompanied children at the border for trafficking concerns under Title 42, “CBP failed to observe and respond to any evidence that children were trafficked into the United States for commercial sex or forced labor or would have faced return into trafficking situations.”⁵⁴

The Trump Administration Summarily Expelled Unaccompanied Children Who Sought Protection from Torture and Other Persecution in the U.S.

Under Title 42 procedures, in order to avoid expulsion, adults and children alike were required to make an “affirmative, spontaneous” claim to CBP officers that they were in fear of being tortured in their country of origin to be exempt from Title 42 expulsion.⁵⁵ For this exception to apply, the CBP agent had to find the torture claim “reasonably believable.”⁵⁶ This is a standard far greater than asylum, and an impossible burden that assumes a child under arrest by law enforcement has the capacity to spontaneously raise a torture claim.

The standard arbitrarily set by the Trump administration failed to protect those who seek protection on the basis of race, religion, nationality, membership in a particular social group, or political opinion. All unaccompanied children have rights under the Immigration and Nationality Act to (1) apply for asylum⁵⁷; (2) contest their removal to a country where their “life or freedom would be threatened . . . because of [their] race, religion, nationality, membership in a particular social group, or political opinion,”⁵⁸; or (3) make a case that “he or she would be tortured if removed to the proposed country of removal.”⁵⁹ Under the International Refugee Convention that the U.S. has ratified, no state can expel or return a refugee to a territory where her life or freedom would be threatened.

The Operation Capiro guidance makes no mention of any exceptions to Title 42 for children seeking protection on the basis of race, religion, nationality, membership in a particular social group, or political opinion.⁶⁰ Thus, children were treated the same as adults under Title 42 and summarily expelled, despite the UN’s central conclusion of its 2016 Children on the Run study that “given the high rate of children who expressed actual or potential needs for protection, all unaccompanied and separated children from [El Salvador, Guatemala, Honduras, and Mexico] must be screened for international protection [including asylum].”⁶¹ Fifty-eight percent of children from these four countries suffered or faced harms that indicated a potential or actual need for international protection.⁶² Almost half of the children indicated that increased organized armed criminal actors, including drug cartels, gangs, and State actors, had personally affected them.⁶³ One in five of the children had survived abuse and violence inflicted by their caretakers in their homes.⁶⁴ Thirty-eight percent of the children from Mexico suffered from recruitment into and exploitation by the criminal industry of smuggling humans into the U.S.⁶⁵ During the same time period, violence forced a larger proportion of unaccompanied children from

Northern Central America to flee, as compared to those fleeing with their families.⁶⁶ Amongst unaccompanied children, 21% reported fleeing death threats, 5% were fleeing gang recruitment, 2% were running from domestic violence, and another 2% were fleeing extortion.⁶⁷

Under federal law, unaccompanied children also must be given access to “counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking”⁶⁸ and can be provided “independent child advocates . . . to effectively advocate for the[ir] best interest.”⁶⁹ Title 42 expulsions of unaccompanied children were conducted entirely outside of the normal legal proceedings. Consequently, unaccompanied children largely did not have access to counsel to represent them, nor were they provided independent child advocates.

Unaccompanied Children Were Detained in Abjectly Dangerous Conditions, Unlicensed Facilities, Often Makeshift Detention Centers in Commercial Hotels

Prior to Title 42, under Title 8 and pursuant to the TVPRA, unaccompanied children who entered the United States and were nationals of countries that do not border the United States, were required to be transferred to the care and custody ORR within seventy-two hours of their encounter with US officials for placement in a “least restrictive setting that is in the best interest of the child.”⁷⁰ Under Title 42, this largely did not occur, as “[m]any of the unaccompanied children who have been expelled were first secreted away to undisclosed and unlicensed commercial hotels”⁷¹ and were placed under guard by security contractors with uncertain training and certification.⁷²

A May 4, 2020 email produced through the Council’s FOIA request revealed that unaccompanied children processed under Title 42 were detained by ICE’s Juvenile and Family Residential Management Unit’s transportation contractor MVM, Inc.⁷³ MVM is the same company responsible for holding children in unsafe facilities under the Trump administration’s 2018 family separation policy.⁷⁴ Just as children were harmed through the callous disregard and intentional cruelty inflicted during the 2018 family separation policy, unaccompanied children who were victims of the Trump administration’s Title 42 policy suffered harm in detention.

In July 2020, the Associated Press reported that under the Title 42 policy, the Trump administration was “detaining immigrant children as young as one year old in hotels, sometimes for weeks” under the care of contractors with unclear credentials.⁷⁵ Two teenage brothers who had fled Honduras on their own were denied the normal processes and procedures required under the TVPRA and instead were held in a hotel for six days while being threatened by the untrained ICE contractors responsible for their care and with no access to an attorney.⁷⁶ Additionally, while the teenagers were allowed to call their relatives, they were allowed to tell them where they were being held.⁷⁷ One of the brothers described what they suffered while detained by ICE at the hotel, “We were forced

to say that we were OK . . . I wanted to tell him [my father] that we weren't getting enough food, that we were not allowed to go out or even to the bathroom.”⁷⁸

The detention of children in unlicensed facilities continued, even though ORR, the entity responsible for sheltering unaccompanied children, was providing shelter for less than 1,000 migrant children at the time, though it had the capacity to house more than 13,600.⁷⁹ Between April and July of 2020, fewer than 350 children were referred to ORR shelters.⁸⁰ In comparison, during the same time period in 2019, more than 30,000 children were referred to ORR shelters.⁸¹

The Trump Administration was forced to end its use of detaining unaccompanied children in unlicensed facilities when a federal judge ruled on September 4, 2020 that ICE had violated the two-decades-old Flores Settlement Agreement (FSA)⁸² by detaining unaccompanied children in hotels for extended periods of time.⁸³ The judge found that the Trump administration “may not exploit Title 42 to send children in their legal custody ‘off into the night.’”⁸⁴

The Trump Administration Expelled Unaccompanied Children Who Were Migrating with Their Own Children

A seventeen-year-old Guatemalan girl traveling with her one-year-old daughter had fled Guatemala due to death threats and violence following a rape and experienced an attempted assault by one of the guides. She crossed the border from Mexico to Arizona and was apprehended by CBP on June 1, 2020. Though she shared her real age, the officers accused her of lying, saying she looked to be twenty years old. The teenager had reported “her entire situation” to CBP, but she was not put into asylum proceedings, as is required by federal law. She was also not given the opportunity to communicate with her parents, though CBP had communicated with her dad who was living in the U.S. Instead, the girl and her baby were held in a hotel under ICE custody without being allowed to talk to her parents. She and the baby were later expelled to Guatemala where she and the baby tested positive for COVID-19 — the first time they had been tested for COVID.⁸⁵

Unaccompanied Children Presenting at the Border with Visible Injuries Have Also Been Expelled Under Title 42.

In June 2020, two Mexican brothers, ages fourteen and sixteen at the time, presented themselves at the U.S. border after being brutally attacked in March 2020 by cartel members in Mexico. The attack resulted in prolonged hospitalization due to head injuries, face lacerations, and broken bones. When they presented themselves at the U.S. border, CBP expelled them to Mexico the following day, even though they expressed fear of returning to Mexico and had multiple visible injuries; the younger brother was walking with crutches from a surgery completed after the attack to repair his broken fibula and tibia and had scarring from second degree burns on his face and neck and scars on his head from beatings. The older brother had head injuries and rib and head contusions caused by a beating received from a pistol.⁸⁶

Despite the Harm Inflicted on Unaccompanied Children, the Trump Administration Doubled Down Until It Was Enjoined from Expelling Unaccompanied Children

In reckless disregard of the harm inflicted on unaccompanied children, the Trump Administration doubled down on its efforts to expel them under Title 42. On September 11, 2020, HHS published the final version of the March interim regulation enabling the CDC Director to issue orders suspending the introduction of people at the border.⁸⁷ In this final version of the regulation, the U.S. government publicly acknowledged for the first time that its order was being used to turn away refugees and asylum seekers, but defended the legality of these actions.⁸⁸ In the order, the U.S. government acknowledged the validity of both the TVPRA and FSA but stated “the requirements of the TVPRA and FSA do not generally apply to situations where the Director has determined that a suspension of the right to introduce persons is required in the interest of public health” and that “the CDC has prohibited the introduction of aliens . . . for public health reasons without regard to the age of the alien (or the persons accompanying him).”⁸⁹ On October 16, 2020, the initial Title 42 order was replaced with an order that was “substantially the same as the amended and extended March 20, 2020 Order.”⁹⁰

In November 2020, a federal district court judge found that Title 42 violated the TVPRA and other laws governing the processing of unaccompanied children,⁹¹ thus halting the expulsion of unaccompanied children under Title 42. On January 29, 2021, a federal circuit court judge stayed the November 2020 injunction,⁹² which would have allowed the Biden Administration to continue the policy of expulsion of unaccompanied children under Title 42. The Biden Administration, however, did not continue the expulsion of unaccompanied children, and in February 2021, the Administration formally exempted unaccompanied children from Title 42 expulsions,⁹³ requiring that they be processed under Title 8 and put into formal immigration proceedings.

Conclusion

Through government transparency efforts, CHRC and the Council were able to uncover documents that demonstrate the U.S. government knowingly engaged in summary expulsions of children to dangerous situations. The documents paint a dark picture of nefarious conduct including the manipulation of U.S. federal law to harm children. Because the government carried out these actions in secret, the extent of the harm to migrant children will never be known.

¹ This article was written by Meghan Scholnick, 3L & Legal Fellow with the Center for the Human Rights of Children (CHRC), Loyola University Chicago School of Law. The article was edited by Sarah J. Diaz, J.D., LL.M., Associate Director of the CHRC. The article would not be possible without the significant efforts committed to the underlying FOIA developed by Malachy Schrobilgen during his fellowship at the CHRC and Claudia Valenzuela, managing attorney at

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² [A Guide to Title 42 Expulsions at the Border | American Immigration Council](#).

³ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes,” 85 Federal Register 16559, March 24, 2020; and U.S. Department of Health and Human Services, Center for Disease Control and Prevention, “Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists,” 85 Federal Register 17,060, March 26, 2020.

⁴ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes,” 85 Federal Register 16559, March 24, 2020; and U.S. Department of Health and Human Services, Center for Disease Control and Prevention, “Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists,” 85 Federal Register 17,060, March 26, 2020.

⁵ [2022.10.17 The Trump Administration’s Unprecedented Campaign to Control CDC and Politicize Public Health During the Coronavirus Crisis.pdf \(house.gov\)](#), at 3.

⁶ *Id.*

⁷ [March 2022 FOIA Production](#), at 28.

⁸ [CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf](#).

⁹ See Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, [85 FR 17,060](#) (Mar. 26, 2020; eff. Mar. 20, 2020), as extended, [85 FR 22,424](#) (Apr. 22, 2020; eff. Apr. 20, 2020), and as amended and extended, [85 FR 31,503](#) (May 26, 2020; eff. May 21, 2020); [2020-074326 March 2022 Combined - Redacted.pdf \(cbp.gov\)](#).

¹⁰ [Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law — ProPublica](#).

¹¹ [Aug. 2022 FOIA Production](#), at 46.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 45.

¹⁵ *Id.* at 44.

¹⁶ [Jan. 2022 FOIA Production](#), at 1.

¹⁷ [Sept. 2021 FOIA Production](#), at 22.

¹⁸ [Jan. 2022 FOIA Production](#), at 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ [Nov. 2021 FOIA Production](#), at 4-6.

²² *Id.* at 4.

²³ 6 U.S.C. 279 (g)(2).

²⁴ [Nov. 2021 FOIA Production](#), at 4.

²⁵ 6 U.S.C. 279 (g)(2).

²⁶ [Nov. 2021 FOIA Production](#), at 5.

²⁷ 6 U.S.C. 279 (g)(2).

²⁸ *Id.* at 6.

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- ²⁹ [Jan. 2022 FOIA Production](#), at 6.
- ³⁰ CBP, [Yuma Sector sees increased apprehensions of unaccompanied juveniles under 13 | U.S. Customs and Border Protection \(cbp.gov\)](#) (“Tender age” is a term typically used by USBP to describe children under the age of 13)
- ³¹ [Jan. 2022 FOIA Production](#), at 1.
- ³² [Nov. 2021 FOIA Production](#), at 40.
- ³³ [Sept. 2021 FOIA Production](#), at 25.
- ³⁴ *Id.* at 25
- ³⁵ *Id.* at 25.
- ³⁶ *Id.* at 23.
- ³⁷ Dara Lind, Pro Publica, [Democratic Senators Demand Answers on Trump’s Secretive Border Expulsions](#), (April 8, 2020).
- ³⁸ [Jan. 2022 FOIA Production](#), at 12.
- ³⁹ Columbia University, Mailman School of Public Health, [Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers | Columbia Public Health](#) (May 18, 2020).
- ⁴⁰ [Amendment and Extension of Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists \(Print-only\) \(cdc.gov\)](#).
- ⁴¹ [Written-Testimony-Podkul-House-Homeland-4.27.21.pdf \(supportkind.org\)](#), at 3.
- ⁴² *Id.*
- ⁴³ U.S. Department of Homeland Security, [Termination of the Migrant Protection Protocol Program](#) (June 1, 2021), at 4.
- ⁴⁴ [US: ‘Remain in Mexico’ Program Harming Children | Human Rights Watch \(hrw.org\)](#).
- ⁴⁵ [CBP Is Expelling Thousands of Infants and Toddlers to Mexico After Midnight | Cato at Liberty Blog](#).
- ⁴⁶ [Sept. 2021 FOIA Production](#), at 23.
- ⁴⁷ *Id.*
- ⁴⁸ Center for the Human Rights of Children, Loyola University, [UN Input to Special Rapporteur on Human Rights of Migrants](#), at 20.
- ⁴⁹ *Id.* at 22.
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ *Id.* at 23.
- ⁵² *Id.*
- ⁵³ [H.R.7311 - 110th Congress \(2007-2008\): William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 | Congress.gov | Library of Congress](#).
- ⁵⁴ [Written-Testimony-Podkul-House-Homeland-4.27.21.pdf \(supportkind.org\)](#), at 3.
- ⁵⁵ [CBP, COVID 19 Capio](#), at 4.
- ⁵⁶ *Id.*
- ⁵⁷ U.S. Code, 8 U.S.C. § 1158(a)(1).
- ⁵⁸ 8 U.S.C. § 1231(b)(3).
- ⁵⁹ 8 U.S.C. § 1231.
- ⁶⁰ [CBP, COVID 19 Capio](#).
- ⁶¹ [UNHCR - Children on the Run - Full Report](#), at 6.
- ⁶² *Id.*
- ⁶³ *Id.*

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- ⁶⁴ *Id.*
- ⁶⁵ *Id.* at 7.
- ⁶⁶ UNHCR, [Families on the Run](#).
- ⁶⁷ *Id.*
- ⁶⁸ 8 U.S.C. § 1232(c)(5).
- ⁶⁹ 8 U.S.C. § 1232(c)(6).
- ⁷⁰ 8 U.S.C. § 1232(b).
- ⁷¹ Malachy Schrobilgen & Sarah J. Diaz, [Input for the Special Rapporteur’s Report on Pushback Practices and their Impact on the Human Rights of Migrants](#), Ctr. for the Hum. Rts. of Children, (Feb., 2021), citing “Declaration of Marisol Vargas” at 6, 2:85-cv-04544-DMG, ECF No. 920-2, *Flores v. Barr*, 407 F.Supp.3d 909 (C.D. Cal. 2020) (recalling being rebuffed by “[u]nidentified men, who appeared to be contractors of DHS” who denied court-appointed monitors access to speak with children detained at the Hampton Inn Hotel in McAllen, TX).
- ⁷² *Id.* (referencing COVID-19’s Nefarious Toll on Migrant Children: Executive Overreach and a Framework to Prevent Abuse, CTR. FOR THE HUM. RTS. OF CHILDREN, (Nov. 2020) available at <https://www.luc.edu/media/lucedu/chrc/pdfs/Schrobilgen-and-Diaz.pdf>).
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- ⁷⁴ [Defense contractor held migrant children in vacant Phoenix office building: report | The Hill; MVM admits to holding kids overnight at unlicensed facility in Phoenix \(azcentral.com\)](#).
- ⁷⁵ [AP Exclusive: Migrant children held in McAllen hotel before being deported \(krvg.com\)](#).
- ⁷⁶ [UN Input to SR on Human Rights of Migrants - Final .pdf \(luc.edu\)](#), at 19.
- ⁷⁷ Joel Rose & Marisa Penaloza, [Shadow Immigration System: Migrant Children Detained in Hotels By Private Contractors](#), (Aug. 20, 2020).
- ⁷⁸ *Id.*
- ⁷⁹ *Id.*
- ⁸⁰ *Id.*
- ⁸¹ *Id.*
- ⁸² *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997) (“Flores Settlement Agreement”).
- ⁸³ *Flores v. Barr*, No. CV 85-4544-DMG (AGRx), 2020 WL 5491445, at *16 (C.D. Cal. Sept. 04, 2020).
- ⁸⁴ *Id.* (citing *Flores v. Sessions*, 862 F.3d at 878 n.17 (quoting *Reno v. Flores*, 507 U.S. 292 , 295 (1993)).
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- ⁸⁶ *Id.* at 21.
- ⁸⁷ [2020-20036.pdf \(govinfo.gov\)](#).
- ⁸⁸ *Id.*
- ⁸⁹ *Id.* at 56450.
- ⁹⁰ [Federal Register: Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists](#)
- ⁹¹ Suzanne Monyak, “DC Judge Blocks Policy To Expel Migrant Kids From Border,” Law360, November 18, 2020.
- ⁹² *P.J.E.S. v. Pekoske*, No. 20-5357, 2021 WL 9100552 (D.C. Cir. Jan. 29, 2021).
- ⁹³ *Id.*