

COVID-19's Nefarious Toll on Migrant Children: Executive Overreach and a Framework to Prevent Abuse

Malachy Schrobilgen, J.D. Candidate; Sarah J. Diaz, J.D., L.L.M.

Every year, thousands of unaccompanied migrant children seek safety at our borders. These children flee indescribable horrors, including civil war, extreme poverty, abuse and exploitation; they travel alone in search of refuge. In recognition of the unique vulnerabilities of these children, the United States, long ago and with overwhelming bi-partisan support, enacted a narrow set of special protections for these children under a federal law—the Trafficking Victims Protection Reauthorization Act (TVPRA).¹ This lone statute, offering minimal protection to migrant children, has come under attack by the Trump Administration over the last four years. Their stated goal has been to see it repealed.²

In March of 2020—under the guise of a pandemic response—the Trump Administration was finally able to sever the lifeline of the TVPRA.³ As numbers of children in government care dwindled to less than a thousand, it became clear that the Trump Administration was summarily expelling and repatriating children without regard for the conditions to which they would be returned or for the protections to which they were entitled under the TVPRA.⁴ As of September

¹ See William Wilberforce Trafficking Victim Protection Reauthorization Act of 2008, § 235, 8 U.S.C. § 1232 *et seq.* (2018); see also 154 CONG. REC. S10887 (daily ed. Dec. 10, 2008) (Statement of Sen. Feinstein) (noting the bill's broad bipartisan support and endorsements from a wide range of legal, human rights, immigration, and religious organizations).

² See DHS Letter to Congress (Mar. 28, 2019), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/dhs-sends-letter-to-congress-tvpra-flores> (former DHS Secretary Kirsten Nielsen asking Congress to consider changes to the TVPRA which would weaken protections for UAC from non-contiguous countries).

³ See U.S. DEP'T OF HEALTH & HUMAN SERVS., Latest UAC Data – FY2019, (2019), <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2019/index.html>; see also U.S. DEP'T OF HEALTH & HUMAN SERVS., Latest UAC Data – FY2020, (2020), <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html> (indicating that in June of last year, ORR housed over 13, 300 children in care; yet this past June, those numbers dipped below 1,000 – and the numbers continue to fall).

⁴ Caitlin Dickerson, *Migrant Families Were Confused When U.S. Expelled Children into Mexico*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/11/03/us/migrant-children-expulsions.html>.

2020, the Trump Administration is reported to have expelled over 9,000 migrant children—denying them fundamental protections under U.S. and international law.⁵

The Rights of Unaccompanied Children under Domestic and International Law

The TVPRA requires that children under the age of eighteen who enter the United States without a parent or legal guardian be transferred from law enforcement custody under the Department of Homeland Security (DHS) to the Office of Refugee Resettlement (ORR).⁶ From there, consistent with fundamental principles of child welfare, ORR places them in the “least restrictive setting that is in the best interest of the child,”⁷ including reunification of some children with family already in the United States. Under the TVPRA, “to ensure the safe repatriation of children,” children are required to be placed in court proceedings.⁸ They are also required to have access to counsel.⁹

Furthermore, children who have fled persecution in their country of origin have the right, under both international and domestic law, to seek asylum upon arrival in the United States. Under international law, no one, especially children, may be summarily expelled or returned to their

⁵ Camilo Montoya-Galvez, *Nearly 9,000 Migrant Children Have Been Expelled Under Pandemic Border Policy, Court Documents Say*, CBS NEWS (Sept. 11, 2020), <https://www.cbsnews.com/news/8800-migrant-children-have-been-expelled-under-pandemic-border-policy-per-court-documents/>.

⁶ 8 U.S.C. § 1232(b)(3).

⁷ 8 U.S.C. § 1232(c)(2)(A).

⁸ 8 U.S.C. § 1232(a)(5)(D).

⁹ 8 U.S.C. § 1232(c)(5) Not to be confused with appointed counsel, the TVPRA provides that, “[t]he Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security... have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”

country of origin if they face persecution or torture.¹⁰ This principle, the *jus cogens* law of non-refoulement, is a universally accepted, inviolable norm.¹¹

The Rise of Title 42 Under COVID-19

On March 26, 2020, without notice or comment, the Centers for Disease Control and Prevention (CDC) issued an Interim Final Rule that prohibited the introduction of people coming from countries with high COVID-19 infection rates into the U.S.¹² Reports indicate that the CDC initially refused to support the rule, and that it was issued only after direct pressure from the Office of the Vice President as the head of the Coronavirus Task Force.¹³ The CDC Order circumvented federal law to summarily expel individuals who are apprehended at the border. Specifically, the “Title 42 Process” has effectively eliminated legal protections under existing immigration law including access to asylum.¹⁴ This has resulted in over 200,000 individuals being expelled, including the return of over 9,000 children to unknown conditions; some of whom have even been turned away to face perils in Mexico which is not their country of origin.¹⁵

¹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988).

¹¹ See generally Refugee Act of 1980 § 208, 8 U.S.C. § 1158, (c)(1)(A) (2018) (“In the case of an alien granted asylum... the Attorney General shall not remove or return the alien to the alien’s country of nationality or, in the case of a person having no nationality, the country of the alien’s last habitual residence); see also Convention Relating to the Status of Refugees, 1951, G.A. Res. 2198 (XXI), art. 33.

¹² Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020).

¹³ Jason Dearen et al., *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>.

¹⁴ Lucas Guttentag, *Coronavirus Border Expulsion: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

¹⁵ Montoya-Galvez, *supra* note 5; see also Caitlin Dickerson, *U.S. Expels Migrant Children From Other Countries to Mexico*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/us/migrant-children-expulsions-mexico.html>.

To effectuate this cruel policy, Customs and Border Protection detained children, many as young as ten years old, for days or weeks in private hotel rooms (unsafe settings, ripe for abuse), in violation of rules and best practices concerning the care and custody of migrant children.¹⁶ The swift and secretive nature of the Title 42 process can be traced back to the vague language of a section of the Public Health Services Act of 1944, which authorizes the Surgeon General to prevent the introduction of disease into the country.¹⁷ Using a questionable and excessively broad interpretation of the law, border patrol agents wield the unprecedented extrajudicial power to expel any migrant—even the most compelling child migrant—whom they deem to be a “serious danger of introduc[ing]” COVID-19 to the interior.¹⁸ This guidance has been used as a blanket power to expel virtually all migrants as there has been no apparent individualized assessment of danger.¹⁹ Moreover, Title 42 has no substantive guidance for determining when it should be wound down,

¹⁶ See “Flores Independent Monitor Interim Report on the Use of Temporary Housing for Minors and Families Under Title 42” at 6-8, *Flores v. Barr*, 2:85-cv-04544-DMG, ECF No. 938 (C.D.Ca. 2020) (noting that “a list of amenities” administered by private security contractors untrained in child protection “is not a standard of care” and creates an environment ripe for child abuse and sexual exploitation); see also “Declaration of Andrew Seaton” at 1, *Flores v. Barr*, 2:85-cv-04544-DMG, ECF No. 920-5 (C.D.Ca. 2020) (stating that parents of children who were kept in hotels frequently did not know that CBP had apprehended their children or that CBP was detaining the children in hotels); see also “Declaration of Maria Odom” at 6, *Flores v. Barr*, 2:85-cv-04544-DMG, ECF No. 920-3 (C.D.Ca. 2020) (detailing how attorneys have struggled to identify children subject to expulsion under Title 42, children detained in hotels, and children who have already been deported).

¹⁷ See Public Health Service Act of 1944 § 362, 42 U.S.C. § 265 (2018) (stating “[w]henver 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.”) This generally has only ever been interpreted to provide the Surgeon General with the power to authorize mandatory quarantine or testing for arriving individuals.

¹⁸ See Memorandum from U.S. Customs and Border Protection to U.S. Border Patrol Officers (March, 2020) available at <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>, [hereinafter “Capiro Memo”]. Pursuant to a leaked memo to CBP officers regarding implementation of the Order, officers are instructed to use their “training and experience” to make determinations about whether to legally classify an apprehended unaccompanied child under Title 8 or Title 42, thereby substituting CBP “training” for legally mandated adjudication in a court of law.

¹⁹ *Id.* The memo makes no mention of how a negative COVID-19 test result is supposed to factor into a CBP officer’s determination of whether an individual is amenable to processing under Title 42 or not.

meaning there is no identifiable end to the summary expulsion of vulnerable children.²⁰ Given that Title 42 is being used by the Executive in an abusive overreach of power, it raises the question: what are the legal checks on that power?

Plenary Power and an Executive Branch Out of Control

The U.S. immigration system notoriously places significant—often unbridled—discretionary power in the hands of the Executive when exercising Congressional mandates.²¹ The plenary power doctrine stands for the proposition that the political branches—the legislative and the executive—should “have the sole power to regulate all aspects of immigration as a basic attribute of state sovereignty.”²² Thus, as a general rule, courts have left alone otherwise repugnant immigration policies.²³

The Title 42 process, however, is tied to public health laws. The importation of this purported public health framework into the immigration context subverts the very immigration laws Congress enacted via their plenary power. Even assuming the Executive is imbued with these emergency powers in times of national crisis, there remains the concern that a boundless conception of those powers encourages despotism.²⁴ An act of Executive overreach, such as the

²⁰ See Jason Dearen *et al.*, *supra* note 13.

²¹ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Ekiu v. United States*, 142 U.S. 651 (1892) (holding that it does not violate due process to deny a noncitizen a full evidentiary hearing if Congress has conferred power to the Executive to determine whether or not to admit arriving noncitizens); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”); see also *Trump v. Hawaii*, 138 S.Ct. 2392, 2418 (2018) (citations omitted) (“this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control”).

²² Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?* Center for Immigration Studies (Feb. 2009), <https://cis.org/sites/cis.org/files/articles/2009/back209.pdf>

²³; See *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (stating that “[it] needs no citation of authorities to support the proposition that deportation is punishment” and thus Congress’s sanction of deportation absent due process is violative of protections against cruel and unusual punishment).

²⁴ The U.S. framework for emergency powers is replete with examples of laws that “offer an array of tools that would otherwise be unavailable to the executive branch...[and] are highly potent and subject to abuse.” Brennan

unprecedented Title 42 Process, calls for a new and more robust protective framework to prevent against future harm.

International Law Framework for the Emergency Derogation of Fundamental Rights

We need not look far to find an internationally accepted framework for emergency derogation from individual rights. Under international human rights law, the state's right to derogate from the absolute protection of human rights in times of national emergency has long been recognized as a necessary counterbalance between the state's duty to protect individuals and an individual's rights in times of crisis.²⁵ The goal of the derogation framework is to ensure the extent of the derogation is necessary, proportional and limited in duration.²⁶

The International Covenant on Civil and Political Rights (ICCPR),²⁷ which enjoys near universal ratification,²⁸ permits derogation under the condition that the emergency "threatens the life of the nation" so long as the derogation does not involve discrimination on the basis of "race, color, sex, language, religion, or social origin."²⁹ It is widely accepted as customary in national law systems throughout the world that the derogation of rights may only occur in the most

Center for Justice at NYU School of Law, *A Guide to Emergency Powers and Their Use*, (Sept., 4, 2019) https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf.

²⁵ Office of the U.N. High Comm'r for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, at 817, U.N. Doc. HR/P/PT/9, U.N. Sales No. E.02.XIV.3 (2003) [hereinafter "OHCHR Manual"].

²⁶ OHCHR Manual, *supra* note 25, at 821.

²⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20 [hereinafter "ICCPR"].

²⁸ Office of the U.N. High Comm'r for Human Rights, *Status of Ratification: International Covenant on Civil and Political Rights*, (last visited Nov. 13, 2020) <https://indicators.ohchr.org/> (one hundred and seventy-three states have ratified the ICCPR as of November 11, 2020).

²⁹ ICCPR, *supra* note 27, art. 4(1) ("[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin").

compelling of crises.³⁰ However, even in times of crisis, some rights are non derogable. These include the right to life and protection against torture—both of which are included under the rubric of non-refoulement.³¹

Under international law, the central requirement for emergency derogation is that the measures taken by the state are strictly necessary and proportional to the durational, geographic, and material scope of the emergency.³² Furthermore, the state still must implement safeguards against abuse by the executive, including the right to due process.³³ Lastly, the derogation framework still requires that the disposition of the individual’s case be made publicly known – states can never operate through secret extrajudicial processes.³⁴

Proportional and necessary measures still must be re-evaluated throughout the duration of the crisis.³⁵ That process and its findings (the need to continue derogation) must be made public so that individuals have proper notice of the ways in which their rights may be limited. Taken as a

³⁰ See Emilie M. Hafner-Burton *et al.*, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 64 INT’L ORG. 4, at 674 (2011) (noting that derogation mechanisms in several major human rights agreements are important to the international system of human rights protections).

³¹ Office of the U.N. High Comm’r for Human Rights, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, available at <https://www.unhcr.org/4d9486929.pdf> (“non-refoulement obligations complementing the obligations under the 1951 [Refugee] Convention, which preceded the major human rights treaties, have also been established under international human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life”).

³² See OHCHR Manual, *supra* note 25, at 853-54.

³³ *Id.* at 876 (“every person has the right at all times to be tried by a court or tribunal which is competent, independent and impartial”).

³⁴ *Id.* at 870 (citing the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 as providing the fundamental fair trial guarantee of having one’s judgment pronounced publicly); *see* art. 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; art. 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949; arts. 105-108 of the Geneva Convention Relative to the Treatment of Prisoners of War; articles 71-73 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949; common art. 3 of the four Geneva Conventions; art. 75(4) of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and art. 6 of Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

³⁵ *See Id.* at 881-82 (noting that international notification of derogation measures must be continually renewed and assessed by the derogating party).

whole, a proper derogation framework functions through a well-publicized cycle of implementation, reevaluation, and reimplementation—all while continuing to provide the necessary safeguards against abuse of emergency power.

Pursuant to Title 42, this Administration eviscerates the right of vulnerable migrant children to seek protection from harm, persecution, torture, and death—protections to which they are entitled under domestic and international law and all of which are non derogable. While derogating from these rights, the Title 42 process fails to demonstrate that it is necessary as a public health measure. In fact, “the top Centers for Disease Control and Prevention doctor who oversees these types of orders had refused to comply with a Trump administration directive saying there was no valid public health reason to issue it.”³⁶ Title 42 has not been implemented with an eye toward proportionality. There is no nuance in its application, nor any semblance of precision in its implementation. Instead, it is used as a shield that simply denies children (and adults) a fundamental right.

Preventing Executive Abuse of Power

Title 42 expulsions violate domestic and international law to the detriment of the most vulnerable among us—children seeking protection alone. The Executive overreach of Title 42 subverts the plenary power of Congress by simply ignoring the rule of immigration law. In doing so, the Administration denies children fundamental, inviolable rights in particular the right to life, survival and development vis-à-vis non-refoulement. The mechanism through which these rights are subverted takes place in secret. The measures taken at the border in response to the pandemic

³⁶ Dearen et. al., *supra* note 13.

are not rooted in public health. Rather, these measures are used to exploit a public health crisis and effectively repeal a law they have long wanted to do away with—the TVPRA.

Real, demonstrable checks on executive power, recommitments to international human rights obligations, and accountability for those who subvert the rights of migrant children are all necessary to prevent future abuses of power.³⁷ Implementing a derogation framework's rigorous demand for necessity and proportionality coupled with measures ensuring transparency would limit the Executive's ability to manipulate national emergencies for political gain. Furthermore, ratifying and incorporating the Convention on the Rights of the Child into United States domestic law would bolster the rights of children during future emergencies. Lastly, those who subvert the law, abuse their power, and violate the rights of children must be held to account for their actions. In the absence of accountability, there will be nothing to deter future administrations from committing atrocities.

A derogation framework that provides a meaningful check on the executive's emergency powers reaffirms democratic norms and properly balances the need for responsiveness and human rights protections in the face of crisis. Until then, we are powerless to stop the Trump Administration from using this pandemic as a pretext to extinguish fundamental rights of migrant children under the TVPRA and preemptory norms.

³⁷ See Hafner-Burton *et al.*, *supra* note 30, at 698 (finding that countries which have derogated from rights protections in the past are more likely to do so in the future).