



Biden's embrace of Trump-era border policy frustrates Democrats

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The Biden administration's continued practice of expelling migrants at the border has reignited a lawsuit and left Democratic lawmakers confused and advocates frustrated as the White House increasingly adopts the Trump-era policy.

The American Civil Liberties Union (ACLU) this week said negotiations have reached an impasse after it previously hit pause on legal efforts to overturn Title 42, a policy that allows border officials to quickly expel migrants for public health reasons, preventing them from seeking asylum. The lawsuit will now proceed in federal court.

The policy was initiated by the Trump administration at the start of the coronavirus pandemic but has been widely used by the Biden administration. Though Trump used it to expel a greater share of border-crossers, Biden has expelled more migrants under the policy in a shorter amount of time.

Following an influx at the border, the U.S. has expelled nearly 514,000 people under Title 42 since February, a figure that includes repeat crossers. Under former President Trump, nearly 460,000 were expelled from March 2020 through January 2021.

But the Biden administration went a step further Monday night when the Centers for Disease Control and Prevention (CDC) replaced the Trump-era order with a new Title 42 extension, taking a new level of ownership over the controversial policy.

"It's no longer a Trump policy because he's no longer in the White House, so it is a Biden policy, and we should fix it," Rep. Adriano Espaillat (D-N.Y.), who has previously called on the administration to abandon Title 42, told The Hill.

"I think because COVID-19 is still very much present in the U.S. and this new variant is spreading so quickly that there's pressure for the government to take these very strict measures

that are not necessarily reflective of our values as a party or reflective of the values of the administration. I think it's a mistake.”

The Biden administration in February initially asked the ACLU to pause its litigation against Title 42 as officials sought to reverse several Trump immigration actions and transition to a more humane approach at the border.

Since then, both sides have been locked in months of negotiations over possible exemptions that would allow certain populations to seek refuge from persecution in their home country.

But ACLU lawyer Lee Gelernt said the Biden administration repeatedly asked for more time — leaving the plaintiffs unsure the White House would take any actions to unwind the policy after seven months in office.

“We’ve been negotiating with them since the end of February and it’s now clear there is no immediate end to Title 42 in sight,” he told The Hill. “They backed us into a corner and we saw no alternative but to resume the litigation.”

The court case leaves Biden officials to defend a policy drafted by the Trump administration as they otherwise blame their predecessors for the challenges at the border.

It’s a position more than 60 Democratic lawmakers warned the administration to avoid in a [February letter](#) advising the administration “need not and should not leave this to the courts.”

Rep. [Frederica Wilson](#) (D-Fla.), who led the letter, said addressing Trump’s damage at the border “will take time and must be done safely and within the context of a global pandemic” but stressed the Biden administration should not be defending the policy.

“There is no reason why the administration needs to leave this issue to the courts. It can single-handedly repeal the Title 42 order and help craft a more humane asylum system that is consistent with our nation's values and our obligations under international law,” Wilson said in a statement to The Hill this week.

“We can and must adjust policies for international travel to mitigate the spread of COVID-19 and allow for asylum seekers with legitimate claims to reach the United States. I am confident that our immigration system can handle this challenge and is capable of chewing gum and walking at the same time.”

The courtroom route is a bit of a gamble for Biden, who has sought to be stringent on COVID-19 while leading a more compassionate border policy.

“The reality is that the Biden administration likely sees the possibility of Title 42 being resolved in federal court as a benefit. If a federal judge rules against the administration, they will be able to finally do the right thing but deflect some of the political blowback of restarting asylum at the southern border,” said Jorge Loweree, policy director at the American Immigration Council, noting that Biden is just a few months away from having employed Title 42 longer than Trump did.

“So this will soon become a Biden-era policy, and the administration will own Title 42 forever unless things change very soon.”

With the litigation now beyond negotiations, some fear there is little hope for securing any major carveouts to the policy. Currently, the administration only allows unaccompanied children and some families to cross between ports of entry and make asylum claims.

David Bier, an immigration research fellow with the libertarian Cato Institute, said the new CDC order “slams the door shut on any administration changes.”

“The fact that ACLU didn't press forward with the lawsuit since Day 1 and tried to negotiate exceptions and carve out and everything else they could until it got to this point, I believe this was the right decision,” he said, calling the litigation “the longest of long-shots.”

Bier said he does not believe there is a legal basis for the law, but fears courts will be hesitant to wade into the issue.

“It certainly disregards all of the statutes that Congress has passed about the treatment of people seeking asylum here,” he said, adding that “expulsion” was not part of immigration law prior to March 2020.

“The courts are not going to strike this down — I just do not believe that there's any chance of that. I could see a temporary stay of a couple days, but I think that the courts are too scared to touch this. The Supreme Court is way too deferential on COVID issues and immigration, and you combine them together and its discretion to the max,” Bier said.

Gelernt, however, said the courts need to examine what he sees as a misreading of public health laws that have never allowed removal without due process.

Still, he sees some silver linings to the CDC's latest Title 42 order.

While it keeps the policy in place and even extends the time frame Title 42 must be reviewed, from every 30 days to every 60, it also lays blame with the Department of Homeland Security (DHS) for failing to “incorporate appropriate COVID-19 mitigation protocols as recommended by CDC.”

“This is a bad look for CDC,” Gelernt said, “But if you look carefully, even though they should not issue this order, they tried to thread the needle. They're not saying there is no way to take asylum seekers; they're saying you need to adopt mitigation protocols and that's on DHS,” he said.

That could include things like vaccinated border agents processing masked and socially distanced individuals under outdoor tents.

The ACLU case comes at a complicated time in the battle against COVID-19, with the delta variant surging.

And though there was speculation that Biden would evaluate a phased approach to unwinding Title 42 at the end of July, the White House extended a separate but related directive, extending travel restrictions with Mexico until the end of August as DHS determined travel would pose a “specific threat to human life or national interests.”

But lawmakers in February said in their letter to Biden that they see continuing Title 42 as a greater public health risk since “migrants are at high risk of exposure to COVID-19 while being

detained in the United States pending their expulsion or deportation to less-resourced countries with severely strained health systems.”

Espaillet worries that concerns over the politics of immigration could lead to missteps for Democrats.

“We campaigned on having humanitarian standards when it comes to migration and other areas and if we take a harsh stand on this one we could potentially take a harsh stand on others that are not necessarily reflective of our values. And we won on those values,” he said.

“I think that was the reason America gave us the opportunity.”