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DC Circuit Issues Mixed Decision in Title 42 "Public Health" Expulsion Case

The court ruled the CDC can continue to use its public health power to expel migrants, but not to countries where they are likely to face persecution or torture.

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Last week, the US Court of Appeals for the DC Circuit issued its decision in *Huisha-Huisha v. Mayorkas*, the Title 42 public health expulsion case. As I explained in previous posts about the case, in March 2020, the Centers for Disease Control (CDC) issued an order mandating immediate expulsion of most migrants entering from Canada or Mexico, including many who would otherwise have the legal right to apply for asylum in the US. The DC Circuit in large part upheld the policy, but imposed significant limits on where migrants can be expelled to. It also pointed out that the expulsions likely serve no useful purpose, even as they subject expelled migrants to "death, torture, and rape."

The Trump Administration claimed the expulsion order was necessary to prevent the spread of the Covid-19 virus into the US. The Biden administration has so far maintained this Trump policy, though they have exempted unaccompanied minors.

A group of immigrants' rights organizations, led by the ACLU filed a lawsuit on behalf of migrants subject to expulsion under the order, arguing that the CDC exceeded its authority. In September, a federal district court ruled in the plaintiffs' favor. The case is enormously important because of the vast number of migrants expelled under the CDC order (over 1 million and counting), and because of the broader implications for the power of the executive branch over immigration policy. As I explained in an amicus brief on behalf of the Cato Institute, if the government had prevailed on all points in this case, CDC would have virtually unlimited power to expel any migrants from anywhere, anytime it wants.

Last week, the US Court of Appeals for the DC Circuit issued a kind of split decision in the case. The court ruled that the CDC did have the authority to expel migrants, but not to countries where they are likely to face torture or be subject persecution on account of their "race, religion, nationality, membership in a particular social group, or political opinion."

The legal authority cited by Trump and Biden to justify the Title 42 expulsions is 42 USC Section 265, which gives the CDC Director the following powers:

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.

The DC Circuit rejected the plaintiffs' argument and the district court's conclusion that the power to prevent "introduction" of persons does not include the power to expel those already in the United States. Even if this reasoning is correct (which I have doubts about), it ignores the point that Section 265 only gives the CDC the power to prevent "introduction" of persons if doing so is necessary to prevent the "introduction" of a disease. As explained in my amicus brief (and here), it is impossible to prevent "introduction" of a disease that is already widely present in the US, as Covid-19 has been throughout virtually the entire time the CDC order has been in force.

Giving the CDC the power to block and expel migrants any time doing so might reduce the spread of disease - including one already massively present in the US - would effectively give the agency unconstrained authority over all of immigration and border control policy, thereby violating the "major question" and nondelegation doctrines, and creating serious constitutional problems. As discussed in my brief, the Title 42 expulsion policy has much in common with the CDC eviction moratorium, which the Supreme Court and several lower court rulings invalidated precisely because it violated major question and nondelegation constraints.

However, while upholding the Title 42 expulsions in one sense, the DC Circuit to a large extent neutered them, by barring expulsions to countries where the migrants in question are likely to face persecution or torture:

We find it likely that aliens covered by a valid § 265 order have no right to be in the United States, and the Executive can immediately expel them.

But § 265 does not tell the Executive *where* to expel aliens. Another statute does that. Section 1231 of Title 8 lists several possible destinations. 8 U.S.C. § 1231(b)(1)-(b)(2). It adds that the Executive cannot remove aliens to a country where their "life or freedom would be threatened" on account of their "race, religion, nationality, membership in a particular social group, or political opinion." Id. § 1231(b)(3)(A). And it prohibits the Executive from expelling aliens to a country where they will likely be tortured….

Consider first what § 1231(b)(3)(A) does not say. It does not prohibit the Executive from immediately expelling aliens. And it does not provide them with the lawful status that § 265 forecloses. So applying § 1231(b)(3)(A) and § 265 to an alien would not make that alien's presence both legal and illegal at the same time.

Now consider what § 265 does not say. It says nothing about where the Executive may expel aliens. Neither does § 1227(a)(1)(B). Section § 1231(b) governs that aspect of aliens' expulsions.

See 8 U.S.C. § 1231(b) ("Countries to which aliens may be removed"). In particular, § 1231(b)(3)(A) says the Executive cannot expel them to a place where they will likely be persecuted.

As a result, we can give effect to both statutes. And because we can, we must. See *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). That leaves the Executive with the power to expel the Plaintiffs (per § 265) to any place where the Plaintiffs will not be persecuted (per § 1231(b)(3)(A)).

Closely related to § 1231(b)(3)(A), the Convention Against Torture provides aliens with protections that Congress codified in a note to § 1231. Under those protections, the Executive cannot expel an alien to a country in which the alien "demonstrates that he likely would be tortured." *Nasrallah v. Barr*, 140 S. Ct. 1683, 1687 (2020).
Like § 1231(b)(3)(A), those protections are mandatory. Id. Like § 1231(b)(3)(A), they limit only where aliens can be expelled… And like § 1231(b)(3)(A), they grant aliens no lawful status in the United States.

Our earlier analysis of § 1231(b)(3)(A) thus applies equally to the protections that Congress has enacted to implement the Convention Against Torture.

The Court goes on to affirm the district court injunction against expelling the plaintiffs to countries where they might be persecuted or tortured. This ensures that they (and, eventually, others in the same position), will be able to adjudicate the question of whether the country to which the government wants to expel them is one where torture or persecution is likely to occur.

As a practical matter, therefore, many - perhaps even most - of the people currently targeted for Title 42 expulsions cannot be expelled immediately. This, I think, is why the ACLU and other organizations representing the plaintiffs have hailed the DC Circuit decision as a victory, even though the court rejected many of their key arguments.

The Title 42 expulsion system isn't completely gone. But it has been weakened. Yet the relaxatoin only goes so far. As the DC Circuit opinion notes, those protected from deportation are still not allowed to petition for asylum, or get any kind of permanent legal status in the US, at least not so long as the CDC's Title 42 order remains in for

The court's also somewhat mitigates the major question and nondelegation problems with the government's position. The CDC no longer can claim near-total power to bar and deport migrants at will. But it still has very broad authority under a vague statutory delegation. So it's far from clear that the DC Circuit's approach to the case fully avoids these problem.

The DC Circuit has remanded the case to the district court for final disposition. It's fairly clear which way the appellate panel wants the district court to go on most of the key issues: whether Section 265 allows expulsion (yes), and whether there are any limits on that power (also yes). However the DC Circuit did not address the question of whether the CDC order is "arbitrary and capricious," and thereby in violation of the the Administrative Procedure Act (an issue that also was not previously resolved by the trial court).

Normally, the "arbitrary and capricious" standard is very difficult for plaintiffs to meet. But there are some indications that the DC Circuit judges believe this may be one of the rare cases where such a claim can succeed. The court pointedly notes that the "[t]he CDC's § 265 order looks in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty," and casts doubt on its usefulness in stopping the spread of Covid. It further indicates that "we would be sensitive to declarations in the record by CDC officials testifying to the efficacy of the § 265 Order. But there are none." Even more damningly, the court writes that "from a public-health perspective, based on the limited record before us, it's far from clear that the CDC's order serves any purpose."

Indeed, as pointed out in our amicus brief, CDC public health experts believed from the start that the Title 42 expulsions have few, if any public health benefits. CDC and other administration experts - including Dr. Fauci - have admitted that the expulsion policy is essentially worthless. Trump and Biden initiated and continued the policy for political reasons having little to do with public health (an anti-immigration agenda in the former case; the need to forestall the appearance of disorder on the southern border in the latter).

If the government's own experts can't offer any proof that the expulsion policy promotes public health, that may be enough for a court to conclude that it is "arbitrary and capricious." It is blatantly obvious that the Title 42 expulsions failed to prevent the original Covid and later variants from becoming established in the United States. It didn't even meaningfully delay their arrival.

Meanwhile, a federal district court in Texas has ruled that the Biden administration's exception for unaccompanied minors is "arbitrary and capricious," rather than the underlying Title 42 policy. I doubt this ruling will hold up on appeal, because there are obvious, nonarbitrary reasons to avoid expulsion of lone children, given their extreme vulnerability. I will have more to say about the district court ruling in the future.

In sum, the DC Circuit would have done better to strike down the Title 42 expulsions in their entirety. That may yet happen if the district court concludes that the whole thing is "arbitrary and capricious" and that ruling stands up on appeal.

But, for the moment, the policy remains in place in weakened form, and the legal battle over it will continue.

Legal issues aside, the Biden Administration would do well to put an end to this extraordinarily cruel policy, which has already blighted the lives of many thousands of people for no discernible benefit. The DC Circuit notes that the government admits "admits it is "aware of . . . the quite horrific circumstances that non-citizens are in in some of the countries that are at issue here…."And for covered aliens who have already been forced to walk the plank into those places, the record is replete with stomach-churning evidence of death, torture, and rape."