

# Downstream from Del Rio

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## Report

Version 1.0

Peter Costantini ~ Seattle ~ December 31, 2021



*Migrant encampment at Del Rio, Texas. Photo-collage, by Peter Costantini.  
Details from photographs by Jordan Vonderhaar, Texas Tribune; New York Post; and Reuters.*

## Costantini ~ Downstream from Del Rio

### CONTENTS

Introduction.....	3
Border Patrol follies.....	5
Breaking camp.....	7
Expulsions to Haiti .....	9
An asylum ban masquerading as a public-health measure.....	11
Homeland Security waffles on asylum .....	14
“Voluntary” returnees to Mexico.....	16
Welcoming the stranger.....	18
The Author.....	24
References.....	25

## Costantini ~ Downstream from Del Rio

### INTRODUCTION

The specters of slave patrols, Ku Klux Klan night riders and cops beating up civil-rights marchers haunted the viral videos. They showed cowboy-hatted Border Patrol agents on horseback yelling insults and threatening to whip and trample Haitian families with children to prevent them from crossing the Rio Grande into the town of Del Rio, Texas, on September 19.<sup>1</sup> The outrage reverberated around the world and inside the Beltway. But soon the story disappeared from the headlines, leaving behind confusion about what actually happened and what it meant.

The theatrical brutality against mainly Black immigrants at the Mexican border, and the government's contradictory responses to the large encampment where it took place, shone a harsh light on the cruel and often scofflaw immigration policies and institutional changes entrenched by the Donald Trump administration, some of which have been continued by the Joe Biden administration. Human rights and immigration justice groups at the border say it's the latest in a long parade of abuses inflicted by immigration enforcement in the smoldering ruins of the asylum system. And they call for broad and deep changes.

The weeks-long Del Rio episode also laid bare conflicts within the Biden administration over how to undo Trump's damages and absorb increased numbers of immigrants driven by the pandemic and other push factors, while moving towards its stated goal of a more "humane" immigration system.

The drama began in early September, when large numbers of migrants began arriving at the Mexican border town of Ciudad Acuña, Coahuila. Thousands began fording the shallows of *el río Bravo* on foot, carrying children and possessions, and setting up an improvised tent camp under the International Bridge in Del Rio. The goal of most was to ask the United States for asylum, which U.S. and international law allow them to do anywhere on U.S. territory, not just at official ports of entry. A majority were Haitians, a nationality not often seen in such large numbers at the southwest border until recently, and most of the rest were from Central and South America.<sup>2</sup> Two-thirds were part of a family group.<sup>3</sup>

Few of the Haitians, however, came to the U.S. border directly from Haiti: most had originally left their home country years ago after the 2010 earthquake, the deadliest disaster in Western Hemisphere history, which killed over 200,000. They had settled in South America, mostly in Chile and Brazil. When the pandemic and the ensuing economic crash hit, many reportedly lost jobs and visas, and were targets of resentment and racism.<sup>4</sup>

Rumors spread among migrants that the Biden administration would soon be opening the U.S. border, which turned out not to be true. The administration's extending of Temporary Protected

## Costantini ~ Downstream from Del Rio

Status to Haitian immigrants already in the U.S. as of July may have contributed to the confusion. But it did not apply to those reaching the U.S. in September.<sup>5</sup>

To traverse Mexico, many of the migrants apparently avoided large groups or caravans, but instead traveled as families or in small numbers. They sometimes used public transportation, and stayed in touch by cell phone.<sup>6</sup>

Del Rio is a small border crossing roughly 350 miles up-river from the normally more crowded ports of entry in the lower Rio Grande Valley. Migrants may have chosen it because Ciudad Acuña on the Mexican side was reputedly not so tightly controlled by Mexican organized crime, and there was a smaller border-enforcement presence on the U.S. side. By converging together on one crossing, the refugees sought safety in numbers. And in some respects, their strategy was effective: U.S. officials were caught off guard, and thousands of migrants were able to enter the U.S. to ask for asylum and set up their encampment by the river.<sup>7</sup>

The migrants in the camp needed to buy food and necessities. But border enforcement blocked them from going to stores in Del Rio. This meant they had to cross the river to Ciudad Acuña to buy supplies, and then cross back again to bring them to the camp. This informal arrangement was reportedly accepted as a *fait accompli* by U.S. authorities.<sup>8</sup> Although the border was officially closed to most migrants under Trump-era regulations, border officials initially did not try to push the migrants back across the river en masse, or prevent migrants from going back and forth between the camp and Mexico.

## Costantini ~ Downstream from Del Rio

### BORDER PATROL FOLLIES

The Border Patrol officers who assaulted the migrants in the infamous videos were apparently acting in defiance of this tacit accommodation allowing refugees to reprovision themselves.<sup>9</sup> Their performative thuggishness seemed stage-managed to conjure up the ghosts of racism past and present, and to light the tiki torches of the Trump base.

But it was just for show. There was no indication the migrants were trying to escape into the U.S. interior; they were simply bringing food and supplies back to their families under the bridge. They had strong incentives to stay in the camp and wait for a chance to ask for asylum.

It was not clear whether the incident was an effort by individual agents freelancing or an organized group, nor whether they had support further up the chain of command. Four years of Trump implanted many partisans of his immigration policies in the leadership and rank-and-file of Customs and Border Protection, the parent agency of the Border Patrol. Biden's appointee to lead CBP, Chris Magnus, was finally confirmed by the Senate on December 7.<sup>10</sup>

Texas Governor Greg Abbott also sent state police to the border and encouraged local police to arrest immigrants for charges such as trespassing, since only federal officials could arrest them for immigration violations. At the Del Rio encampment, aerial photos showed his police parking their vehicles close together in a row outside the camp to improvise a vehicular wall, casting the immigrants as dangerous criminals trying to escape, and setting the stage of a chaotic and out of control border.<sup>11</sup> Abbott's posturing was widely seen as positioning himself as a Republican candidate for president in 2024 if Trump does not run.

President Biden and Secretary of Homeland Security Alejandro Mayorkas condemned the Border Patrol actions and vowed to quickly investigate the events and punish those responsible. The agents involved were put on administrative duty, and the Department of Homeland Security opened an investigation that Mayorkas said would be concluded in "days, not weeks". Nearly two months later, however, DHS issued a statement that the investigation had been referred to Customs and Border Protection's Office of Professional Responsibility, which is charged with investigating alleged misconduct of employees. No timeline was given.<sup>12</sup>

"These investigation and discipline systems at the border agencies are really broken and need a complete overhaul," Clara Long of Human Rights Watch told Joel Rose of National Public Radio. And James Wong, a former internal affairs official in CBP, said the Border Patrol sees itself as a "paramilitary force" more than a law enforcement agency: "I've had Border Patrol agents ... tell me that they will not retreat, and they will not give up one foot of American soil. They view these people [immigrants] as the enemy."<sup>13</sup>

## Costantini ~ Downstream from Del Rio

Civil-society organizations who monitor immigration enforcement say there has long been systemic anti-migrant prejudice undergirding a culture of impunity in parts of this bureaucracy, making it very difficult to hold officers accountable for abuses.

“Suddenly the nation realized that we have a Border Patrol that beats up Black immigrants or people of color”, Fernando García, Executive Director of the Border Network for Human Rights, told me in an interview. “We’ve been telling that story for many, many years already. ...

Yesterday, they were the Haitian refugees. But in the past, we talked about Guatemalan children dying in detention centers. Or Hondurans being placed in a makeshift camp at the bend of the Rio Grande river in extreme conditions. Mexicans being shot at. It shows the harsh situation at the border, that there’s a Border Patrol that acts with impunity.” Based in El Paso, Texas, since 1998, BNHR educates and organizes marginalized border communities to defend and promote human and civil rights in west Texas and southern New Mexico.<sup>14</sup>

The Border Patrol union still seems to have more control over operations on the ground than the Biden administration, García observed. “So we responded by denouncing the aggression, but also by calling for systemic change at the border, in the way the Border Patrol acts, but also in the whole strategy. There is no formal border strategy; there are just reactions in reactive situations such as this one.”

## Costantini ~ Downstream from Del Rio

### BREAKING CAMP

By the time of the Border Patrol aggression in mid-September, the encampment had grown to an estimated 15,000 people. Mayorkas cited a figure of nearly 30,000 enforcement encounters with immigrants in the Del Rio sector during the weeks of the encampment.<sup>15</sup> But some of these may have been repeat encounters with the same individual, and others may have occurred in other areas of the sector.

Although U.S. authorities and non-governmental organizations eventually brought in sanitation and medical facilities, water, food and other supplies, conditions in the camp were called “deplorable” by Filippo Grandi, the United Nations High Commissioner for Refugees.<sup>16</sup> Republican politicians loudly made political hay with the Biden administration’s handling of what they called chaos and crisis at the border.

Some observers said the U.S. border authorities should have paid attention to earlier reports from Central America and Mexico of large groups of asylum seekers heading north, and expanded facilities to process them. “The arrival of vulnerable asylum-seekers is not a crisis,” Wade McMullen, an attorney at RFK Human Rights, told Michelle García of *The Intercept*. “The militarized response and lack of preparation — that’s the crisis.”<sup>17</sup>

As the situation in Del Rio became increasingly untenable for migrants and authorities, the Biden administration abruptly shifted into high gear. It deployed personnel from the Coast Guard, Texas National Guard, state troopers, and Customs and Border Protection to process all the immigrants and clear the camp.<sup>18</sup> On September 24, less than a week after the Border Patrol incidents, DHS Secretary Mayorkas announced in a White House press briefing that the encampment under the highway in Del Rio had been completely emptied.<sup>19</sup>

However, the conflicting methods employed to accomplish this revealed a split political personality, apparently riven by clashing policy approaches among Biden’s advisors.

Mayorkas said that approximately 2,000 migrants had been summarily expelled on 17 flights back to Haiti. The number would eventually rise to 8,700 on 83 flights by mid-November,<sup>20</sup> along with some 2,000 more sent back to Haiti from other countries including Mexico.<sup>21</sup> All were denied any chance to ask for asylum. A larger number – he cited 12,400, but 13,000 was later reported – were allowed to enter the immigration system and make their claim for asylum or other protection in immigration courts. Of these, 10,000 were released from custody to family or sponsors around the U.S. while they pursue their cases, while 3,000 were held in immigration detention as their cases proceeded.<sup>22</sup> All of those 13,000 released or detained could still be subject to deportation or expedited removal if they are not granted asylum or some other form of protection. Another 8,000 “voluntarily” returned to Mexico, Mayorkas said, presumably opting

## **Costantini ~ Downstream from Del Rio**

to stay out of the U.S. immigration system. Finally, just over 5,000 other migrants were still being processed by DHS, a number reduced to 4,000 within a few days.<sup>23</sup>

The U.S. Agency for International Development, Mayorkas said, “has established a \$5.5 million program to provide on-the-ground assistance to repatriated Haitian migrants.” The money was to be distributed in Haiti through the International Organization for Migration of the United Nations.<sup>24</sup>

This aid included stipends and SIM cards for the phones of the expelled Haitians, Raphael Bernal of The Hill reported, although activists said it was not always forthcoming. In any case, it amounted to only a little more than one-third of the expense of transporting them from Del Rio to Haiti. Jesse Franzblau of the National Immigrant Justice Center told Bernal that DHS documents detail costs of some \$15 million for the flights, paid by the government to GEO Group, a private prison company.<sup>25</sup>

The mass expulsions to Haiti represented a dereliction of U.S. obligations under international and U.S. law, even more draconian than required by the Trump regulations still in effect. Yet at the same time, the numbers of migrants allowed to enter the immigration system and request asylum – about half again more than the expulsions – represented an unexpected break for some asylum seekers. The Biden administration did not clarify what criteria were used to triage those expelled and those accepted into the asylum process, nor how it decided which accepted asylum seekers to detain and which to release.



## Costantini ~ Downstream from Del Rio

### EXPULSIONS TO HAITI

Debates have reportedly broken out within the administration between aides favoring harsh policies to deter immigrants and others favoring more welcoming approaches. The New York Times wrote that Biden's domestic policy adviser, Susan Rice, favored more "aggressive enforcement", while her deputy, Esther Olavarria, pushed to allow more asylum seekers into the country. Homeland Security Secretary Alejandro Mayorkas, it said, was sympathetic with a more open approach in internal discussions, but continued to publicly defend harsher measures.<sup>26</sup>

Some prominent Democratic politicians and administration officials broke with Biden to publicly criticize the expulsion of the Haitians. Senate Majority Leader Chuck Schumer of New York, one of the President's close allies, said in a speech that the decision to send asylum seekers back to Haiti "defies common sense", according to Marianne Levine of Politico. Schumer urged Biden and Mayorkas "to immediately put a stop to these expulsions and to end this Title 42 policy at our southern border. We cannot continue these hateful and xenophobic Trump policies that disregard our refugee laws. We must allow asylum seekers to present their claims at our ports of entry and be afforded due process."<sup>27</sup>

In Haiti, two veteran U.S. diplomats resigned from their roles in protest against the expulsion of Haitians back to the island. In a letter to Secretary of State Antony Blinken, U.S. special envoy for Haiti Daniel Foote wrote: "I will not be associated with the United States' inhumane, counterproductive decision to deport thousands of Haitian refugees and illegal immigrants to Haiti. ... The collapsed state is unable to provide security or basic services, and more refugees will fuel further desperation and crime."<sup>28</sup>

Harold Koh, a senior State Department legal adviser, sent an internal memo warning: "'I believe this Administration's current implementation of the Title 42 authority continues to violate our legal obligation not to expel or return ('refouler') individuals who fear persecution, death, or torture, especially migrants fleeing from Haiti." He added that "lawful, more humane alternatives plainly exist."<sup>29</sup>

Human rights authorities from United Nations agencies to non-governmental organizations such as Human Rights Watch and the American Civil Liberties Union condemned both the summary methods used to expel the migrants and their forced return to Haiti.

That Caribbean nation is in the throes of cascading disasters: an earthquake that killed more than 2,000, followed by a hurricane; the assassination of the president in the wake of the dissolution of the legislature and much of the police force; and unbridled violence by organized crime. Major swathes of the city are controlled by gangs that block traffic and outgun police, robbing and kidnapping with impunity and bringing much of the struggling economy to a halt.

## **Costantini ~ Downstream from Del Rio**

As Haitian migrants were being flown from Texas back to Port-au-Prince, the Haitian capital, an epidemic of kidnappings for ransom that sometimes turned deadly targeted poor Haitians as well as the middle class, and ultimately 17 Christian missionaries from the U.S. Few countries have been trapped in a more dystopian nightmare with less capacity to receive returning emigrants.<sup>30</sup>

Four major human rights organizations of the U.N. issued a joint statement calling on governments “to refrain from expelling Haitians without proper assessment of their individual protection needs, to uphold the fundamental human rights of Haitians on the move, and to offer protection mechanisms or other legal stay arrangements for more effective access to regular migration pathways.”<sup>31</sup>

The U.N. agencies pointed out that some migrants might qualify for refugee or asylum status, while others, such as children or victims of gender-based violence, might need other forms of protection. “International law prohibits collective expulsions and requires that each case be examined individually to identify protection needs under international human rights and refugee law”, the statement said. “Discriminatory public discourse portraying human mobility as a problem risks contributing to racism and xenophobia and should be avoided and condemned.”

### AN ASYLUM BAN MASQUERADING AS A PUBLIC-HEALTH MEASURE

In March 2020, however, the Trump administration had invoked an obscure federal law to rapidly expel en masse nearly all migrants at the border without affording them any opportunity to request asylum or other protections. United States Code Title 42 Section 265 – “Suspension of entries and imports from designated places to prevent spread of communicable diseases” is a statute dating from World War II that enables the government to respond to a public-health emergency by suspending normal immigration procedures.<sup>32</sup> These are codified in United States Code Title 8 – “Aliens and Nationality”, which details the long-standing pre-pandemic immigration process that allows migrants to petition for asylum and other relief, and provides for hearings before immigration officials.<sup>33</sup>

Trump used Title 42 to expedite removal of migrants of all ages, until the expulsion of children was contested in court. The incoming Biden administration decided not to expel unaccompanied children under Title 42. Yet it has continued Title 42 expulsions of families and adults in the face of a crescendo of criticism from within and without the administration. Meanwhile, the exception for children has led some families to send their youngsters to the border alone to request asylum, in an effort to get them out of the dangerous Mexican borderlands. This has resulted in yet more separated migrant families.

In mid-September, a federal District Court blocked the Biden administration from expelling immigrant families under Title 42, although it still allowed the expulsion of individual adults.<sup>34</sup> However, the administration appealed the ruling, and at the end of September a U.S. Court of Appeals stayed the initial ruling ending use of Title 42, allowing the government to continue expelling families under the order while the appeal moves forward.<sup>35</sup>

Since the implementation of Title 42, numerous public health, human rights and immigration authorities have discredited the law’s public-health rationale, highlighted the damage it has done to asylum seekers and other migrants, and litigated and lobbied for its termination.

Dr. Anthony Fauci, President Biden’s top medical advisor, disputed the public-health logic of Title 42. “Let’s face reality here,” he told CNN. “The problem is within our own country. Focusing on immigrants, expelling them ... is not the solution to an outbreak.” Asked whether he believed immigrants are a “major reason why Covid-19 is spreading in the U.S.,” he responded, “Absolutely not.”<sup>36</sup>

A letter to the Biden administration from leading epidemiologists and public health experts under the aegis of Columbia University condemned Title 42 as “scientifically baseless and politically motivated” and urged the administration to rescind the order, which it said “continues to unethically and illegally exploit the COVID-19 pandemic.” Signatories recommended

## Costantini ~ Downstream from Del Rio

replacing the Trump policy with public health measures that “process asylum seekers at the border and parole them to live in safety in their communities, thereby avoiding congregate detention and high-risk transportation.”<sup>37</sup>

In a commentary on Inter Press Service, two public-health scientists at Drexel University also called for repeal of Title 42. “These scattershot measures have no meaningful impact on the pandemic in this country,” Jamila Tellez Lieberman and Joe Amon wrote. “Instead, they victimize migrants attempting to cross into the U.S. from Mexico, including asylum seekers.” The policy causes “profound and irreparable harm” to migrants: “If forced back to Mexico, they would be once again at the mercy of the violent Mexican cartels they were so desperate to escape.”<sup>38</sup>

Internationally, the United Nations Refugee Agency’s representative to the United States and the Caribbean, Matthew Reynolds, asserted that “protecting public health and protecting access to asylum, a fundamental human right, are fully compatible. At the height of the public health emergency, many countries put in place protocols such as health screening, testing and quarantine measures, to simultaneously protect both public health and the right to seek asylum.”<sup>39</sup>

Beyond public-health considerations, many human rights and refugee organizations have excoriated Title 42 for violating the right to seek asylum, whatever the reason, and have urged the U.S. to terminate the order.

Filippo Grandi, High Commissioner for Refugees of the United Nations, criticized the summary expulsions under Title 42 of hundreds of thousands of people without screening for their protection needs, and called for the government “immediately and fully to lift its Title 42 restrictions.” Denying access to asylum procedures in this way, he said, “is inconsistent with international norms and may constitute refoulement.” Refoulement is the forced return of asylum seekers to the location of the persecution they are trying to escape. “Guaranteed access to safe territory and the prohibition of pushbacks of asylum-seekers are core precepts of the 1951 Refugee Convention and refugee law,” Grandi explained, “which governments are required to uphold to protect the rights and lives of refugees. The expulsions have also had serious humanitarian consequences in northern Mexico.”<sup>40</sup>

Before the Inter-American Commission on Human Rights, an arm of the Organization of American States, human-rights advocates submitted an emergency request for “precautionary measures” to protect 31 asylum seekers excluded from the U.S. under Title 42. The Lowenstein Project at Yale Law School and 3 other organizations argued that the restrictions exposed the migrants to “severe and urgent risks to their lives”. The petitioners urged the IACHR “to ask the United States government to stop ... barring the entry of these individuals and others” and to

## **Costantini ~ Downstream from Del Rio**

permit them to file asylum claims, James Cavallaro, former president of the IACHR, told Jihan Abdalla of Al Jazeera.<sup>41</sup>

The many Trump administration assaults on the human rights of migrants had already made the United States effectively a rogue state in this domain. While the Biden administration has ended many of Trump's restrictions, it has persisted in defending some of his most widely condemned measures.

"It's like [former Trump adviser] Stephen Miller's ghost is still pulling the strings of Biden's immigration policies", Nicole Phillips, legal director at Haitian Bridge Alliance, commented to Rafael Bernal of The Hill. "And the Biden administration needs to do more to root out Stephen Miller's ghost."<sup>42</sup>

## Costantini ~ Downstream from Del Rio

### HOMELAND SECURITY WAFFLES ON ASYLUM

As it summarily expelled some of the Del Rio migrants, and perhaps in response to the outpouring of opprobrium, the U.S. also accepted substantial numbers of them to pursue asylum in the pre-pandemic asylum system under Title 8.

DHS Secretary Mayorkas told Sandra Sanchez of Border Report that 13,000 of the migrants would be allowed to “have their asylum claims heard by an immigration judge in the United States”. This figure was greater by nearly 50 percent than the 8,700 expelled to Haiti. Of those accepted, 3,000 were being detained by ICE, while the other 10,000 were being released into the U.S. to family or sponsors. Under Title 8, asylum seekers are sometimes detained while their cases proceed. “The numbers placed in immigration court proceedings are a function of operational capacity and also what we consider to be appropriate,” Mayorkas said. But he did not explain any further details of the detentions or releases, such as criteria for decisions or terms of release.<sup>43</sup>

The 10,000 released immigrants from Del Rio were sent initially to a network of non-governmental shelters near the border. There, they were able to contact the family members or sponsors around the country to whom they were being released, and to arrange transportation.

The arrival of the refugees at one shelter elicited an outpouring of material, logistical and spiritual solidarity from the local community, Hannah Hollandbyrd, Policy Specialist for Hope Border Institute<sup>44</sup>, told me in an interview. A hotel had to be rented to lodge some of them, and volunteers took people to the airport to fly to their final destinations. All migrants were tested for COVID-19, she said, and everyone’s result was negative. The El Paso-based HBI “brings the perspective of Catholic social teaching” to research and policy work, leadership development and action, in their mission to “to build justice and deepen solidarity across the borderlands.”

According to a shelter official, most migrants were able to move on after spending only a few days there, so that by early October, nearly all of the 2,000 refugees passing through that shelter had been reunited with family or sponsors elsewhere in the U.S.

The large proportion of migrants at Del Rio released to pursue asylum was an acceleration of a trend for all border encounters during the past year.

With little publicity, immigration enforcement under Biden began to gradually reduce its reliance on Title 42 in practice. In the course of the fiscal year, the percentage of Border Patrol enforcement actions under the measure dropped sharply from 88.3 percent in Fiscal Year 2021 1<sup>st</sup> Quarter (October – December 2020), the last full quarter under Trump, to 49.4 percent in FY 2021 4<sup>th</sup> Quarter (July – September 2021) under Biden.<sup>45</sup> For Haitian migrants, the percentage

## **Costantini ~ Downstream from Del Rio**

expelled under Title 42 plunged from 55 percent in January to 8 percent in July, according to CBP data cited by Nick Miroff in the Washington Post.<sup>46</sup>

This meant that where the Trump administration had used Title 42 to deny any possibility of asylum in the great majority of cases during its last year, the Biden administration's first half-year-plus saw a shift to handling half of the cases under Title 8's pre-pandemic procedures allowing for claims of asylum and established due process. The relative use of Title 42, however, crept up again in September and October. And despite the shift, there were still over 280,000 expulsions under Title 42 in the final quarter of FY 2021.<sup>47</sup>

Some of this recent increase in admitting migrants under Title 8 has occurred because "Mexico has been increasingly resistant to accepting families expelled from the U.S. under Title 42", according to Sabrina Rodriguez of Politico.<sup>48</sup> The shift may also reflect controversies within the administration.

## Costantini ~ Downstream from Del Rio

### "VOLUNTARY" RETURNEES TO MEXICO

Of the migrants in the Del Rio camp, Mayorkas said that some 8,000 returned to Mexico "voluntarily", a number nearly equal to those flown back to Haiti. Apparently, they decided not to take their chances with a U.S. immigration system that must have seemed arbitrary and incomprehensible. This also meant that they could no longer be tracked by the U.S. government. Many of these migrants, though, will likely rejoin the throngs of people still trying to enter or re-enter the U.S. one way or another.

The Haitians now back in Mexico have largely relocated downriver in groups to Mexican border cities in the lower Rio Grande valley, such as Reynosa and Matamoros, according to Camilo Cruz of the International Organization for Migration. Many Haitians, he said, have been applying to Mexico to regularize their migration status there. In an interview in Ciudad Juárez, Chihuahua, over 400 miles upriver from Del Rio, Cruz told me that few Haitians had appeared there, but that the shelters were still beyond capacity with other migrants excluded from the U.S. Mexican government data showed that more than 26,000 Haitians have asked for asylum in Mexico this year, up from under 6,000 in 2019 and 2020, Nick Miroff reported in the Washington Post.<sup>49</sup>

In Haiti, IOM Chief of Mission Giuseppe Loprete told the Spanish news agency EFE that he did not expect a massive exit of emigrants from Haiti despite the hard conditions there. The IOM gives returning Haitians reentry support and financial aid for several weeks after their arrival. He noted that many who had been living in Chile or Brazil are going directly to those countries' embassies in Haiti and asking to be allowed to return there.<sup>50</sup>

According to an IOM report, an estimated 100,000 migrants, 62 percent of them originally from Haiti, crossed the Darien Gap between South and Central America from January through October of this year. It did not estimate how many might still be planning to seek asylum at the U.S. border.<sup>51</sup>

However, despite some claims that more large groups of Haitian migrants were heading north, Miroff cited preliminary data from CBP that encounters at the U.S. - Mexican border with Haitian migrants from September to October fell by more than 90 percent, from 17,638 to around 1,000.<sup>52</sup> Numbers of encounters are generally inflated by multiple apprehensions of the same individual, so the number of discrete individuals apprehended is usually considerably smaller.

A small caravan of mostly Central American migrants was reportedly heading towards the U.S. from southern Mexico since late October. But over a couple of weeks, its numbers declined from 4,000 to fewer than 1,000, according to Adam Isacson of Washington Office on Latin America, and its progress was slowed by alleged harassment and violence by Mexican security forces.<sup>53</sup>



## **Costantini ~ Downstream from Del Rio**

The remaining group of Del Rio migrants mentioned by Mayorkas was the 4,000 still being processed as of late September. Homeland Security has not yet issued an update on their status.

## Costantini ~ Downstream from Del Rio

### WELCOMING THE STRANGER

Despite the white sado-nationalism that surfaced at Del Rio, the outcome could be seen by future migrants as a partially successful campaign of non-violent civil disobedience to thwart unjust laws and enforcement.

The migrants in the camp were able to access the asylum process somewhat more frequently than asylum seekers nationally during the same period. About 60 percent of those in the camp who did not return to Mexico were accepted into the asylum and normal immigration process under Title 8, while 40 percent were expelled to Haiti under Title 42. For all immigrants reaching the border in September, the ratio was roughly 47 percent Title 8 versus 53 percent Title 42, and although some Central and South Americans were flown to southern Mexico, most of them were simply expelled across the border.<sup>54</sup>

The Biden administration's removal of at least 8,700 Haitian migrants back to Haiti was a gratuitously cruel operation that threw the victims into a life-threatening situation. Title 42 should have been terminated at the beginning of Biden's term, and none of the Haitians should have been expelled to Haiti under it. Nevertheless, it is doubtful that the law will have any lasting deterrent effect on future migrants. It created a global backlash that has been politically costly for the government. Yet for the nativist Republican audience that the move appeared to be pandering to, which values immigrants only as a political punching bag, no abuse of them can be vindictive enough.

The Del Rio incident did foster a consensus among a surprisingly wide range of stakeholders on some ways to avoid future recurrences of those kinds of injustices.

Both the mayor of Del Rio, Bruno Lozano, and the Val Verde County executive, Lewis Owens, had criticized the Biden administration's handling of the border for months, Michelle García of The Intercept reported. Lozano said of the camp, "I don't feel it's in anybody's best interest to come in mass movement like that," and Owens said local governments needed to "lean on law enforcement to stop flow". Yet both agreed that "there has to be a process to ask for asylum", as Owens put it. Lozano seconded him: "The policy needs to be reformed so ports of entry have to take them in legally and not be criminally charged."<sup>55</sup>

Hollandbyrd of Hope Border Institute also emphasized the urgent need to open ports of entry to asylum seekers and end Title 42. Longer-term solutions, she told me, will require restoring and expanding the asylum system, diversifying other legal pathways for immigration, and addressing the root causes of migration.

## Costantini ~ Downstream from Del Rio

“They need to create a system that processes people in a way that’s dignified,” she said, so people can have a rapid initial hearing, be fed and given a medical screening, and then be released quickly to go to the venue of their asylum claim. She advocated creating “a stand-alone system that’s separate from the enforcement agencies,” and promoting clearer messaging about how to seek asylum. “In the long-term, the whole asylum system has to be remade to reflect what happens in the 21<sup>st</sup> Century. You have to look at why people are fleeing” and broaden what are still narrow qualifications for protection.

Beyond asylum, Hollandbyrd proposed “creating more legal pathways, like work visas, family reunification visas”, and making applying for them a simple, fast process. People should be able to, “for example in Honduras, apply easily for a visa and then get it there.” Although the Biden administration has talked about confronting the root causes of migration, she said these efforts have stalled. The U.S. needs to make big investments in areas that people are leaving, “listen to those communities about what they need, what would help them, what would promote thriving at home, and then do that.”

HBI recently released a report, *No queda de otra (There is no other way)*, by Hollandbyrd and Omar Ríos, based on interviews with 51 mainly Mexican and Central American immigrants. It asked them: “What led you to leave your home?”. Their research found that “climate change and the impact of the COVID-19 pandemic are accelerating the underlying drivers of forced migration from Central America and Mexico”. It also asked about experiences with immigration enforcement. The report includes recommendations to the Biden administration on root causes of migration, better legal pathways, the journey through Mexico, and access to asylum.<sup>56</sup>

On issues of border-enforcement reform, the Border Network for Human Rights has been meeting with the local Border Patrol for many years to dialogue with them and exert pressure for changes, Executive Director García explained in an interview. The organization has negotiated accountability mechanisms with them, he said, including standards for use of force, training in de-escalation techniques, use of body cameras, and the deployment of ununiformed, unarmed community liaison officers.

BNHR has recently joined with partners and Congressional allies to develop draft legislation and a long-term framework for broad immigration reform. Their coalition, the New Ellis Island Border Policy Working Group, is partnering with congressional representatives to codify transparency and accountability of border security operations in legislation. In the U.S. House of Representatives, Veronica Escobar, Democrat from El Paso, is sponsoring H.R. 3557 - Homeland Security Improvement Act, while U.S. Senator Ben Ray Luján, Democrat from New Mexico, is drafting a Senate version, the Border Accountability, Oversight & Community Engagement Act.<sup>57</sup>

## Costantini ~ Downstream from Del Rio

Rep. Escobar has also introduced a bill, now in the House Committee on the Judiciary, that she said would revamp and strengthen the asylum process.<sup>58</sup> H.R. 5618, the Reimagining Asylum Processing Act, “establishes a humane and equitable asylum process designed for America’s immigration realities in the 21st century.” The law would create “Humanitarian Processing Centers” near the border which would provide legal counsel, community-based case management, and medical and linguistic support. All asylum seekers, whether arriving at ports of entry or in between, would have to be rapidly transferred to the centers, where they could be held only up to 15 days, after which alternatives to detention would have to be considered. Rather than uniformed officers, the initial hearing would be with asylum officials, who along with asylum would have to consider other forms of protection and special visas.<sup>59</sup>

To get to the border, most of the Haitians and other migrants at Del Rio had to make a quasi-biblical exodus of thousands of miles from South America, sometimes lasting months, crossing forbidding jungles and preyed on by *narcos*, often costing 10 thousand dollars or more. The U.S. and other countries en route could easily create more reasonable alternatives.

For example, the Biden administration could provide ways for people to begin the process of asking for protection at embassies and consulates around Latin America. This could take the form of asylum officers stationed there to hold preliminary hearings, or it could be implemented through a provisional visa or official letter allowing the bearer to fly into the U.S. and ask for asylum at the airport. Tourist visas, which usually require proof of substantial assets and established employment in the home country, could be made more accessible to enable poorer people to seek protection.

Allowing migrants to fly into the U.S. would obviously permit them to avoid the mortal dangers of the road and the border. They could buy a ticket costing less than one thousand dollars from most locations in Latin America to most in the U.S., and fly directly to wherever they have family or sponsors. These humanitarian measures for travelers would also cut into a growing profit center for organized crime, which either taxes or runs many *pollero* operations in northern Mexico.

Another important advantage of flying is that migrants entering the U.S. at an airport can request what the U.S. system calls “affirmative asylum”, which allows those accepted to go directly into the immigration court system. At the land border, by contrast, accepted asylum seekers are immediately put into removal hearings – in effect, treated as guilty until proven innocent. Once in court, they can request what is known as “defensive asylum”, but they are often kept in immigration detention during the process.<sup>60</sup> Ending defensive asylum and detention of asylum seekers, which is cruel, expensive and unnecessary, while allowing all

## Costantini ~ Downstream from Del Rio

asylum seekers to use the affirmative asylum process, would be a significant advance for family reunification and human rights.

For those unable to fly into the U.S., the Biden administration could work with Mexico and the U.N. to establish safe zones on the Mexican side of the border with protected access to U.S. ports of entry. This presupposes a reconstructed, strengthened and staffed-up asylum program accessible at the ports and between them.

U.N. High Commissioner Grandi voiced an international consensus: "I encourage the US administration to continue its work to strengthen its asylum system and diversify safe pathways so asylum-seekers are not forced to resort to dangerous crossings facilitated by smugglers."<sup>61</sup>

Besides expanded opportunities to seek asylum, several related kinds of protected immigration status exist. But to people who have had to leave their home countries involuntarily, these alternatives present a confusing and intimidating patchwork. The many migrants who fall through the cracks expose an urgent need to rationalize and broaden the whole fragmented system.

Refugees have to meet the same standards of need for protection as asylum seekers. Both require that people have been forced to flee their home countries because of "a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group."<sup>62</sup> Where migrants have to come to the U.S. to request asylum, though, refugees must apply through international channels run by the United Nations and non-governmental organizations, often in official camps established near areas of war or disaster. Achieving refugee status there requires a long vetting process.

A possible way to protect more migrants would be to establish formal refugee programs in Latin America, where currently few exist. This would have to be done in collaboration with U.N. and OAS agencies, NGOs, and local governments. In the long run, it might make sense to merge these two categories of protection, asylum and refuge, so that bureaucratic boundaries do not exclude endangered people. For both categories, a more just system would expand accepted reasons for fear of persecution, which were originally based on a post-World War II world, to include a broader range of current causes of dislocation, such as climate-related disasters and exogenous economic devastation.

Some advocates have also called on the administration to grant a status known as "humanitarian parole"<sup>63</sup> to those immigrants who do not qualify for asylum but need temporary protection for "urgent humanitarian reasons".<sup>64</sup> There are also certain kinds of visas designed to protect migrants in particular situations, such as spousal abuse, that might be expanded as part of an integrated 21<sup>st</sup> Century system.

## Costantini ~ Downstream from Del Rio

Temporary protected status, which was granted by the U.S. to Haitians already in the country before July, is an emergency provision that allows immigrants from a place stricken by human or natural disasters to remain in the U.S. for a given period.<sup>65</sup> The Biden administration should use it more broadly, for example by extending its protections to Haitians and others who continue to arrive. It might also be a good candidate to merge with asylum and refuge into a meta-category of protection offering a pathway to citizenship.

Unfortunately, though, even a more functional migration system might not ensure that all endangered migrants would be granted asylum or other protections. The U.S. should work with the International Organization for Migration and other international bodies, as well as the migration-related agencies of Mexico, Central America, Haiti, and other sending countries. Together, they should create safe zones and welcoming resources for stranded migrants in Mexico and elsewhere, and provide more opportunities to obtain legal status there.

“The U.S. – Mexico border is the new Ellis Island”, Fernando García of BNHR said, because Latin Americans and others are coming there for the same reasons Europeans came to the immigration portal in New York Harbor 100-plus years ago. “Just as the Statue of Liberty defined the nation then”, the southwest border is now “defining the character of America. Immigrants have been essential in the past, they will be in the future.”

The New Ellis Island Border Policy Group is “developing policy recommendations from the perspective of border communities ... rooted in shared values of welcoming, opportunity, and humanity ... on a range of measures that impact border communities.”<sup>66</sup> The goals of these policies are to pass an immigration reform package in Congress without draconian enforcement tradeoffs; to repeal the destructive policies of the Trump administration; to provide a pathway to citizenship for all 11-plus million undocumented people in the U.S.; to demilitarize the U.S.-Mexico border; to close immigrant detention centers and decriminalize immigrant families; to rebuild and expand refugee and asylee resettlement programs; and to make other areas of the immigration system more just and welcoming.

“Before we’re going to really change policy,” García stressed, “we have to change the narrative at the border.” Bipartisan policy has long portrayed immigration as a national security issue, and considered immigrants a threat. But Trump clarified that “this is about poor immigrants of color coming from the south. They became the enemy.” Trump used fear as a motivator: he accused Mexicans, Haitians, and other people of color of bringing disease and crime. “This is very cynical”, García said, because “they are needed here as essential workers.” So advocates are working to rehumanize the faces of refugees and immigrants, “to say that those who are coming to the border, they are families, children, mothers, fathers, grandparents, uncles. And they are

## **Costantini ~ Downstream from Del Rio**

either fleeing from violence and extreme situations, or economic depreciation and poverty, or natural disasters.” Just as at Ellis Island, the right thing and the smart thing to do is to welcome them.

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## Costantini ~ Downstream from Del Rio

### THE AUTHOR

Peter Costantini is an independent analyst. Over four decades, he has published work on topics including migration, Latin America, labor, housing and economics, reporting from Nicaragua, Honduras, Mexico, Haiti, Italy, Ireland, China, and the U.S. southwest border. He is the coordinator of the Migration | Migración section of Americas Program and a commentator on Inter Press Service. His work has also appeared in Foreign Policy In Focus, MSNBC News, and many other publications, in English, Spanish and French. For his first twenty years in the workforce, he made his living doing blue-collar work, primarily in construction, shipyards and office-equipment repair. During part of that time, he was active in the Laborers International Union of North America. He also volunteered a second shift as a community organizer. After co-founding the Seattle Tenants Union, he served on the executive board of the National Tenants Union. He was involved in Central America solidarity in the 1980s and 1990s, and taught a short course on microprocessors at the Universidad Nacional de Ingeniería, Managua, Nicaragua. For his last twenty years of gainful employment, he worked in the software industry as a program manager, technical evangelist, documentation manager, and programming writer. He is now retired and embedded as a volunteer with the immigration justice movement. He is a native of New York City, grew up mainly in New Jersey, attended Antioch College, Yellow Springs, Ohio and the Université de Montpellier, France. Since 1973, he has made his home in Seattle.



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## Costantini ~ Downstream from Del Rio

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- 61 UNHCR 2021/05/20
- 62 UNHCR "What is a refugee?"
- 63 USCIS "Humanitarian Parole"
- 64 Bernal 2021/08/30
- 65 Ewing 2021/05/26
- 66 BNHR. "New Ellis Island Border Policy Group"