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Legal Sidebar

"Migrant Protection Protocols": Legal Issues Related to DHS's Plan to Require Arriving Asylum Seekers to Wait in Mexico

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Update: The Migrant Protection Protocols (MPP) remain in effect after an initial round of litigation (which followed initial publication of this Sidebar). On May 7, 2019, a motions panel of the U.S. Court of Appeals for the Ninth Circuit granted the government an emergency stay of a preliminary injunction issued by a federal district court in a lawsuit challenging the legality of the MPP. The district court had issued the injunction after concluding that plaintiffs were likely to succeed in their argument that the statutory provision relied upon by the Department of Homeland Security (DHS) to institute the MPP, § 235(b)(2)(C) of the Immigration and Nationality Act (INA), did not apply, "and even if it did, further procedural protections would be required to conform to the government's acknowledged obligation to ensure aliens are not returned to unduly dangerous circumstances." The preliminary injunction, had the Ninth Circuit allowed it to take effect, would have prohibited DHS from continuing to implement the MPP. The emergency stay permits DHS to enforce the MPP pending its appeal of the preliminary injunction. DHS has returned more than 3,000 aliens to Mexico under the MPP thus far, according to press reports.

In granting the emergency stay, the Ninth Circuit reasoned that the return authority of INA § 235(b)(2)(C) covers asylum seekers who are eligible for expedited removal proceedings (based on their lack of valid entry documentation) but whom DHS opts to place in formal removal proceedings instead. "[W]e think that Congress' purpose was to make return to a contiguous territory available during the pendency of [formal] removal proceedings, as opposed to being contingent on any particular inadmissibility ground," the court wrote. One judge disagreed, rejecting as "clearly and flagrantly wrong" the proposition that § 235(b)(2)(C) provides statutory authority for the MPP. In this judge's view, § 235(b)(2)(C) does not apply to aliens who are eligible for expedited removal, regardless of whether DHS decides to place them in formal proceedings in lieu of expedited proceedings.

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A third judge, who agreed that DHS likely has statutory authority for the MPP, wrote separately to argue that the MPP has a different flaw: it is likely arbitrary and capricious under the Administrative Procedure Act because its procedures are "ill-suited to achieving [DHS's] stated goal" of ensuring that it does not return aliens to Mexico if they face a likelihood of persecution or torture there. Because the MPP does not require DHS officers to ask aliens if they fear persecution or torture in Mexico, the judge reasoned, the MPP is "virtually guaranteed to result in some number of applicants being returned to Mexico" notwithstanding a heightened risk of persecution or torture. Nevertheless, the judge concurred in the decision to grant the emergency stay because he reasoned that the deficient procedures for assessing torture and persecution risk could be remedied without prohibiting DHS from implementing the MPP altogether, as the district court's preliminary injunction would have done. The judge suggested, however, that it would be appropriate for the district court to grant a new preliminary injunction, after further proceedings, "directing DHS to ask applicants for admission whether they fear being returned to Mexico."

The original CRS post from February 1, 2019 is below.

Through two press releases posted on its website—the first on December 20, 2018, and the second on January 24, 2019—the Department of Homeland Security (DHS) has announced a new policy that could require many asylum seekers who arrive at the southern border to wait in Mexico while U.S. immigration courts process their cases. DHS calls the new policy the "Migrant Protection Protocols" (MPP) and contends that it will serve to address a "security and humanitarian crisis on the Southern border." Details about the policy's implementation are still developing. A DHS memorandum indicates that the MPP went into effect at the San Ysidro port of entry (south of San Diego) on January 28, 2019, and that DHS anticipates expanding implementation of the new policy "in the near future." According to media reports, DHS first returned an asylum seeker to Mexico under the policy on January 29, 2019, when it returned to Tijuana one Honduran national who presented himself at San Ysidro. The next day, DHS returned about a dozen more asylum seekers to Tijuana from San Ysidro, according to a report.

Secretary of Homeland Security Kirstjen Nielsen and officials from two agencies within DHS—Customs and Border Protection (CBP) and United States Citizenship and Immigration Services (USCIS)—have issued memoranda and instructions that, together with the January 24 press release, provide details about how the MPP is expected to work in operation, including the following:

- The MPP applies to aliens who "attempt[] to enter the U.S. illegally or without documentation, including those who claim asylum." As such, the policy apparently will apply both to aliens arriving at ports of entry and also to aliens apprehended between ports of entry.
- The policy apparently does not apply retroactively to aliens who arrived and were placed in removal proceedings in the United States before the policy's implementation.
- The policy does not apply to some categories of aliens, including unaccompanied alien children, Mexican nationals, and aliens who demonstrate that it is more likely than not that they would face persecution or torture in Mexico.
- If an alien subject to the MPP expresses a fear of returning to Mexico, an asylum officer "will interview the alien to assess whether it is more likely than not" that the alien would be persecuted or tortured in Mexico. The alien will not have access to counsel during the interview process.
- For aliens to whom the MPP applies, CBP officers have discretion on a "case-to-case basis" to process and return them to Mexico under the MPP or to process them under

other removal procedures, such as expedited removal (a streamlined removal process explained further below). Where the officer opts to place an alien in expedited removal, the MPP will not apply.

- Mexico's position: the January 24 DHS press release states that "the Mexican government has made its own determination" to grant aliens returned to Mexico under the MPP permission to remain in Mexico. The Mexican Foreign Ministry has made an announcement along similar lines. According to news reports, however, Mexico's immigration agency will not accept returnees who are under 18 or over 60—a position that may hamper DHS's ability to apply the MPP to family units.
- Logistics: aliens returned to Mexico under the policy are to receive a "Notice to Appear" instructing them to appear for a hearing in immigration court at a specific date and time. DHS will allow those aliens to enter the United States at a port of entry for the purpose of attending such hearings, and Immigration and Customs Enforcement (ICE) will transport the aliens to court and then back to the port of entry (if removal proceedings remain ongoing after the hearing). Aliens who lose their cases and are ordered removed by an immigration judge will be removed directly to their country of origin from the United States.

Some advocacy organizations have expressed concern that the MPP will endanger asylum seekers forced to remain in Mexico for long periods of time and will hinder their access to counsel. Groups have vowed to challenge the MPP in court. While a challenge does not appear to have been filed as of the time of this Sidebar's publication, the MPP does raise legal issues. Most significantly, there is a question as to whether DHS possesses authority to implement the MPP under the Immigration and Nationality Act (INA). The statutory provision that DHS cites in support of the policy, INA § 235(b)(2)(C), does not plainly authorize application of the MPP to one significant group of aliens: those who are subject to "expedited removal" under the INA. This group probably includes most Central American asylum seekers coming to the U.S.-Mexico border.

Expedited Removal and the MPP

Most aliens who present themselves at U.S. ports of entry without visas or other valid entry documentation, or who attempt to enter illegally between ports of entry, are subject to expedited removal. The DHS press releases make clear that DHS intends to apply the MPP to such aliens, but the interplay between the expedited removal statute and the INA provision that underlies the MPP raises questions about whether DHS has statutory authority to do so.

Expedited Removal Generally

As explained in this CRS Report, expedited removal under INA § 235(b)(1) is a streamlined removal process that generally applies to aliens who arrive at a designated port of entry and are inadmissible for one of two reasons: (1) they lack valid entry documents; or (2) they have attempted to procure their admission through fraud or misrepresentation. Pursuant to authority conferred by INA § 235(b)(1), DHS has also extended expedited removal to other categories of aliens who are inadmissible on the same grounds, including those apprehended within 100 miles of the border within 14 days of entering the country. Thus, aliens without valid entry documents who claim asylum at a port of entry or shortly after crossing the border illegally are generally subject to expedited removal procedures under INA § 235(b)(1). Those procedures provide an avenue for such aliens to pursue their asylum claims or certain other types of humanitarian relief in immigration court if they demonstrate a credible fear of persecution or torture.

Aliens whom immigration officers determine to be inadmissible on grounds not covered by the expedited removal statute, such as aliens who have been convicted of certain types of crimes, are placed in formal removal proceedings under INA § 240 rather than expedited proceedings under INA § 235(b)(1). Additionally, expedited removal does not apply to unaccompanied alien children; if the government intends to seek their removal, it must be through formal proceedings under INA § 240. Formal removal proceedings confer more procedural protections—including the right to a hearing before an immigration judge, the right to counsel at no expense to the government, and the right to some forms of administrative and judicial review—than expedited removal proceedings.

Statutory Authority for the MPP

The primary legal issue raised by the MPP is whether DHS has statutory authority to implement it. DHS contends that its authority to implement the policy comes from INA § 235(b)(2)(C), which states as follows:

> **(C) Treatment of aliens arriving from contiguous territory**
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a proceeding under section 1229a of this title.

This provision authorizes DHS to return some aliens "described in subparagraph (A)" to Mexico pending the outcome of the aliens' formal removal proceedings. But whether that return authority encompasses asylum seekers who arrive at the border without valid entry documents requires a closer look at the cross-references in the statute. "Subparagraph (A)" refers to INA § 235(b)(2)(A). "An alien described in subparagraph (A)" apparently does not include any alien who is subject to expedited removal under § 235(b)(1), because another subparagraph—INA § 235(b)(2)(B)—provides that "[s]ubparagraph (A) shall not apply to an alien" to whom expedited removal applies under § 235(b)(1):

> **(A) In general**
>
> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.
>
> **(B) Exception Subparagraph (A) shall not apply to an alien—**
>
> (i) who is a crewman,
>
> (ii) to whom paragraph (1) [*establishing expedited removal*] applies, or
>
> (iii) who is a stowaway.

In other words, aliens who are subject to expedited removal do not appear to fall within DHS's return authority under INA § 235(b)(2)(C). The return authority conferred by that provision only applies to aliens "described in subparagraph (A)," which by virtue of the exclusions in subparagraph (B) does not encompass aliens who are subject to expedited removal. And, as explained previously, aliens who arrive at the border without valid entry documents—a group that includes most asylum seekers from Central American countries—are generally subject to expedited removal and therefore do not appear to fall within DHS's return authority under INA § 235(b)(2)(C). Instead, INA § 235(b)(2)(C) appears to grant DHS return authority only with respect to aliens seeking to enter the United States (other than stowaways and crewmen) who are inadmissible on grounds *other than* the two grounds covered by the expedited removal statute: a lack of valid entry documents or their attempt to procure admission by fraud. (For example, an alien convicted of a drug trafficking offense would fall within the § 235(b)(2)(C) return authority.)

Nonetheless, DHS appears to believe that § 235(b)(2)(C) applies even to aliens who generally fall within the scope of the expedited removal statute. Its announcements make clear that it intends to apply the MPP to asylum seekers who attempt to enter the country "illegally or without documentation." The MMP announcements do not, however, articulate legal reasoning to support this broad interpretation of DHS's § 235(b)(2)(C) authority. One DHS regulation arguably supports the interpretation in providing that the agency may, in its discretion, "require *any alien* who appears inadmissible and who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing." In the 1997 *Federal Register* notice that proposed this regulation, the legacy Immigration and Naturalization Service (INS) said that the regulation recognized "long-standing [INS] practice" but did not provide relevant statutory analysis. As such, it is unclear what legal arguments DHS would use to defend in court its application of the MPP to asylum seekers who fall within a category generally subject to expedited removal under INA § 235(b)(1).

DHS might pursue an argument based on the idea of enforcement discretion—namely, that it may bring asylum seekers within the reach of § 235(b)(2)(C) by exercising discretion not to pursue expedited removal orders against them. The USCIS guidance memorandum mentions the concept of "prosecutorial discretion" in connection with the MPP. One potential challenge with this argument is that the expedited removal statute uses mandatory rather than permissive language: it says that DHS "shall" implement expedited removal procedures with respect to covered aliens. But DHS appears to have exercised discretion to waive expedited removal in the past. For example, in 2004 DHS expanded expedited removal to cover aliens who entered the U.S. without inspection, and who were apprehended within 100 miles of the border within 14 days of their entry. In doing so, the agency limited the application of expedited removal to non-Mexican and non-Canadian nationals, and Mexican and Canadian nationals with histories of criminal or immigration violations. Thus, nationals of Mexico and Canada were generally placed in formal removal proceedings instead of expedited removal. In the *Federal Register* notice announcing the expansion of expedited removal, DHS described the decision not to enforce the new policy against most Mexican and Canadian nationals as "a matter of prosecutorial discretion." In addition, in the 1990s the INS reportedly had a policy of "permitting asylum seekers to wait in Mexico or Canada for an affirmative asylum procedure in lieu of expedited removal proceedings."

In short, although the INA seems to describe expedited removal in mandatory terms for aliens who meet its criteria, DHS (and the legacy INS) previously asserted discretion not to employ expedited removal in certain circumstances. It remains an open question, however, whether such exercises of discretion adhere to INA § 235(b)(1), or whether the exercise of such discretion would allow DHS to compel aliens arriving at or between ports of entry along the southern border to remain in Mexico while their asylum claims are adjudicated. Courts do not appear to have decided these questions.

Other Legal Issues

Aside from the question of DHS's statutory authority, the MPP may raise other legal issues. First, DHS has reportedly decided to implement the MPP without promulgating regulations. This decision might invite challenges under the Administrative Procedure Act (APA), which generally requires that agencies follow specific rulemaking requirements when implementing new "legislative rules" (as opposed to "interpretive rules" and "guidance documents," which are not subject to APA rulemaking requirements). DHS would likely argue that the MPP constitutes a "guidance document" rather than a legislative rule because of the discretion that officers have (according to the DHS documents) to decline to apply the MPP to individual aliens on a case-by-case basis.

Challengers might also claim that the MPP violates asylum seekers' substantive and procedural due process rights. Such claims would trigger unresolved questions about the extent to which aliens at the threshold of entry to the United States enjoy due process protections (particular those of a procedural

nature). In a different vein, any legal challenge to the MPP in federal court would have to be brought by a party that has suffered a concrete and particularized injury on account of the MPP sufficient to confer standing to sue. Asylum seekers denied entry to the United States under the policy may face obstacles in stating claims against the MPP themselves, so the success of a legal challenge may depend, as a threshold matter, on whether any organizations that provide services to asylum seekers can demonstrate that they have standing to challenge the MPP directly. Advocacy organizations have succeeded in establishing standing in challenging past immigration policies, including in the first stage of a challenge last year to a currently suspended DHS regulation that would bar asylum claims by aliens who enter the country unlawfully.

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