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Legal Sidebar

The Department of Homeland Security's "Metering" Policy: Legal Issues

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Generally, a non-U.S. national (*alien*, as the term is used in the Immigration and Nationality Act [INA]) who arrives in the United States without valid documentation is subject to a streamlined, expedited removal process, but may pursue asylum and related protections if the alien demonstrates a credible fear of persecution in his or her country of origin. Before the Coronavirus Disease 2019 (COVID-19) pandemic, the Department of Homeland Security's (DHS's) U.S. Customs and Border Protection (CBP) had been limiting the number of asylum seekers who were processed each day at designated ports of entry along the U.S. southern border. Aliens affected by this policy generally had not yet reached the U.S. border and were required to remain in Mexico until CBP decided it could process them. This policy—known as "metering"—sought to address an "unprecedented rise in asylum requests," as well as safety and health concerns resulting from overcrowding at ports of entry. The policy has led to long wait times and overcrowded conditions on the Mexican side of the border, and has arguably incentivized attempts to illegally cross the border between ports of entry.

In response to the COVID-19 pandemic, CBP in March 2020 implemented a policy that largely shut down asylum processing for many aliens arriving at the U.S. border (sometimes referred to as the "Title 42" policy). The policy remains in effect, but does not apply to certain categories of aliens (e.g., unaccompanied minors and other individuals whom CBP officials determine should be exempted for humanitarian reasons). As a result, since March 2020, CBP has largely suspended metering, and most asylum processing "waitlists" have been closed to aliens seeking to enter the United States after that date. Ultimately, in November 2021, CBP rescinded the metering policy and issued guidance for processing arriving aliens at ports of entry.

To date, there has only been one challenge to metering that has resulted in a decision by a federal district court, though litigation in that case remains ongoing. In 2017, a group of asylum seekers and advocacy organizations sued in the U.S. District Court for the Southern District of California to challenge CBP's metering policy. The district court ruled in *Al Otro Lado v. Mayorkas* that metering violates INA provisions that require immigration officers to inspect and process asylum seekers arriving at the U.S. border, and infringes on asylum seekers' constitutional right to due process. The court has not yet determined the appropriate remedy in the case, and has not yet assessed what effect the current Title 42 restrictions on asylum processing may have on the appropriate remedy, or to what extent CBP's rescission of the metering policy impacts the litigation.

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Background on Metering

There is no federal statute or regulation that directly governs the circumstances in which CBP may limit the number of asylum seekers who may be processed at designated ports of entry. According to a 2020 DHS Office of Inspector General (OIG) report, CBP had been limiting the number of aliens processed at U.S. ports of entry since at least 2016 through its metering policy. Under the policy, CBP officers directed asylum seekers who had not yet crossed the international boundary line into the United States to remain in Mexico if there was insufficient space and resources at the U.S. port of entry. CBP officers informed Mexican authorities when the asylum seekers could be sent on to ports of entry for inspection and processing. Nongovernmental organizations and Mexican authorities created and maintained "waiting lists" identifying the asylum seekers awaiting processing by CBP.

As noted above, CBP temporarily suspended metering following implementation of its Title 42 policy in March 2020, shutting down most asylum processing at the border in light of the COVID-19 pandemic (with certain exceptions). CBP rescinded its metering policy in November 2021 and directed officials to increase their operational capacity and streamline asylum processing at U.S. ports of entry. In the meantime, a lawsuit challenging the metering policy remains ongoing. Waitlisted aliens have either remained in Mexican border cities, attempted to enter the United States between ports of entry, been deported to their countries of origin, moved to other cities within Mexico, or been processed under the Title 42 exceptions.

The metering policy is distinct from DHS's "Migrant Protection Protocols" (MPP), a policy created during the Trump Administration that requires most asylum seekers arriving at the U.S. southern border to return to Mexico pending their formal removal proceedings. Unlike the MPP, the metering policy applied to aliens who had not yet been inspected by CBP, whereas the MPP applies to aliens whom CBP had *already inspected* and placed in removal proceedings. (The Biden Administration terminated the MPP in June 2021; however, following a legal challenge, a federal district court ruled that the termination was unlawful and ordered DHS to take steps to resume the MPP for the time being.)

Importantly, when defending the metering policy in litigation, the government disputed the existence of such a policy with respect to aliens who have physically arrived at U.S. ports of entry. The government argued nonetheless that such a policy could be lawfully applied to aliens who had not physically crossed into the United States and who, while at the cusp of entry, remained on the Mexican side of the border. As discussed further below, the federal district court considering the lawsuit challenging metering rejected the government's argument.

Statutory Framework

The dispute over CBP's metering policy largely centers on the language of (1) Section 208 of the INA, which establishes rules for asylum eligibility and (2) Section 235 of the INA, which requires the inspection of aliens seeking admission into the United States and provides a streamlined, expedited removal process for aliens who arrive at or between a U.S. port of entry without proper documentation. Three provisions are particularly relevant:

- INA § 235(a)(3), which provides that all aliens "who are *applicants for admission or otherwise seeking admission* . . . shall be inspected by immigration officers";
- INA § 208(a)(1), which states that "[a]ny alien who is physically present in the United States *or who arrives in the United States* (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section [235(b)] of [the INA]"; and
- INA § 235(b)(1)(A)(ii), which states that an alien who is "*arriving in the United States*" and subject to expedited removal must be referred to an asylum officer if "the alien

> indicates either an intention to apply for asylum under [INA § 208] or a fear of persecution."

Legal Challenge to the Metering Policy

Under CBP's metering policy, the agency limited the number of asylum seekers who were processed at designated ports of entry each day, and instructed some asylum seekers to remain in Mexico until CBP had the capacity and resources to process them. In some cases, asylum seekers waited in Mexico for weeks or months before they could present their claims.

In *Al Otro Lado v. Mayorkas*, an immigration advocacy organization and six asylum seekers whom CBP allegedly had turned away at various ports of entry after they had physically crossed the border filed a class action lawsuit in 2017 challenging CBP's metering policy. The plaintiffs amended their complaint in 2018 to include eight additional asylum seekers, several of whom CBP allegedly had turned away "in the middle of the bridge" when *approaching* the U.S. border.

The plaintiffs, who claimed that asylum seekers are subject to "dangerous conditions of rampant crime and violence by gangs and cartels on the Mexican side of the border," argued that CBP's metering system "creates unreasonable and life-threatening delays in processing asylum seekers." They also alleged that CBP officials have discouraged aliens from pursuing asylum by forcibly removing them from ports of entry, threatening them with prolonged detention or separation from their children, and falsely telling them that they can no longer pursue asylum due to changes in U.S. law.

The plaintiffs argued that CBP's metering policy violated INA provisions that allow any alien who is physically present or arriving in the United States to pursue asylum, and that require CBP to refer any alien subject to expedited removal who indicates an intention to apply for asylum or a fear of persecution for a credible fear interview. The plaintiffs also argued that CBP violated their due process rights by denying or delaying their "access to the asylum process." Finally, the plaintiffs argued that CBP's policy violated the international law concept of *non-refoulement*, which instructs that no country should expel or return an individual to a place where he or she faces persecution. The plaintiffs requested that the federal district court declare CBP's metering policy unlawful and enjoin the agency from continuing it.

The government disputed the existence of a "broadly sanctioned" metering policy for aliens who have already arrived at U.S. ports of entry, but did not dispute that a metering policy applied to aliens outside the United States. The government argued that the "extraterritorial" plaintiffs had no basis to challenge metering because they had not physically crossed into the United States when they were turned away. The government argued that the INA provisions requiring the inspection of aliens "are triggered *only* if the alien is on American soil," and accordingly do not govern policies directed at aliens located outside the United States, even when such aliens are at the threshold of reaching the U.S. border.

On September 2, 2021, the federal district court considering the legal challenge ruled that the metering policy violated INA provisions that require the inspection and processing of asylum seekers arriving at the U.S. border. The court also held that metering violated the asylum seekers' constitutional right to due process. The court is considering the appropriate equitable remedy in the case (e.g., an injunction halting the use of metering), and the extent to which the Title 42 policy generally suspending asylum processing at the border would affect the implementation of that remedy. The court has not yet addressed the extent to which CBP's subsequent rescission of the metering policy will impact the litigation.

Analysis of CBP's Metering Policy as Applied to Aliens Outside the United States

The legal challenge to CBP's metering policy asked whether that policy was consistent with federal immigration statutes, including whether those statutes apply to aliens at the cusp of physical entry into the United States. In analyzing the metering policy, the district court in *Al Otro Lado* considered whether that policy complied with statutes concerning the inspection of applicants for admission, the constitutional protections generally available to aliens seeking admission, and international law principles.

Statutory Considerations

The question of whether the metering policy was permissible largely turned on what it means for an alien seeking admission to have "arrived in the United States," as required by several INA provisions. Plaintiffs alleged that the metering policy conflicted with the applicable framework because INA § 235(a)(3) states that all applicants for admission (who are defined to include an alien "who arrives in the United States") "*shall be inspected* by immigration officers" (emphasis added). Furthermore, plaintiffs argued that INA § 208(a)(1) provides that "[a]ny alien who is physically present in the United States *or who arrives in the United States* . . . irrespective of such alien's status, may apply for asylum" (emphasis added). Additionally, though most asylum seekers without valid documentation are subject to expedited removal, INA § 235(b)(1)(A)(ii) requires a credible fear interview if an alien "arriving in the United States" indicates either an intention to apply for asylum or a fear of persecution.

At least two Supreme Court decisions may be relevant to interpreting these statutes' application to metering policies. In the 1993 case of *Sale v. Haitian Center Council, Inc.*, the Supreme Court reviewed the lawfulness of the Coast Guard's interdiction of vessels on the high seas carrying Haitian migrants and repatriation of those migrants back to Haiti. There, the Court concluded that various immigration statutes—including those concerning asylum eligibility—did not apply to aliens apprehended extraterritorially. More recently in the 2020 case of *DHS v. Thuraissigiam*, the Court rejected a constitutional challenge to the streamlined expedited removal process brought by an alien apprehended by immigration authorities between U.S. ports of entry and roughly 25 yards from the border. In so doing, the Court observed that "[w]hen an alien *arrives* at a port of entry . . . the alien *is on U.S. soil*" but the alien is still treated for purposes of procedural due process analysis as having not yet entered the country. The *Thuraissigiam* Court held that the same constitutional principle applied to those persons apprehended when illegally crossing into the United States between ports of entry.

In *Al Otro Lado*, the government cited these Supreme Court decisions to support its contention that aliens who have yet to reach U.S. ports of entry are not "arriving" aliens covered by the INA. The district court concluded both cases were distinguishable and not controlling upon its analysis of the metering policy. With regard to *Sale*, the district court observed that the governing immigration statutes had been amended or superseded in the intervening years, so that the *Sale* Court's interpretative analysis was inapposite to the present-day statutory framework governing metering. Additionally, unlike *Sale*, the *Al Otro Lado* court explained, the plaintiffs were turned away by CBP officers standing on the U.S. side of the border; their actions, the court reasoned, thus involved a "domestic application of the statute." Regarding *Thuraissigiam*, the *Al Otro Lado* court viewed the High Court's observation that an arriving alien is on U.S. soil as being "mere dicta," and the district court concluded that nothing in *Thuraissigiam* undercut the district court's interpretation of the INA statutes as applying to aliens "in the process of arriving" at a U.S. port of entry who had not yet reached that destination.

The district court held that CBP's metering policy ran afoul of its "statutorily mandatory duties" to inspect and process asylum seekers even though the individual plaintiffs were eventually permitted to come to the ports of entry and seek asylum. The court determined that the plain text of the relevant

statutes impose the inspection and processing requirements when the alien *first* "arrives" or "is arriving" in the United States, not upon some "unspecified future arrival." The court further opined that metering was incompatible with Congress's intent when it created the statutory framework governing applicants for admission, to protect credible asylum applicants and enable the prompt admission of all aliens who are entitled to be admitted, no matter whether they had arrived at a port of entry or entered unlawfully between ports of entry.

Constitutional Considerations

The *Al Otro Lado* plaintiffs also argued that the metering policy violated their right to due process by delaying or denying their "access to the asylum process." The Supreme Court has long held that aliens seeking initial entry into the United States have limited constitutional rights regarding their applications for admission because "the power to admit or exclude aliens is a sovereign prerogative," and they are only entitled to whatever procedures Congress authorized by statute. These limitations apply not only to aliens who are physically outside of the United States, but also to those who are standing "on the threshold of initial entry," such as at a border checkpoint, and who are treated, under the "entry fiction doctrine," as though they had never entered the country. In *Thuraissigiam*, the Supreme Court reaffirmed this "century-old rule" and held that an alien detained shortly after entering the United States between designated ports of entry could be treated "as if stopped at the border."

In *Al Otro Lado*, the government cited these principles in arguing that the Fifth Amendment's due process protections did not apply to the plaintiffs because they were physically outside U.S. territory when turned away. The district court disagreed, ruling that the "extraterritorial" asylum seekers were entitled to due process protections. To the district court, it was less constitutionally significant that the asylum seekers may not have reached U.S. soil than it was that immigration authorities stationed in U.S. territory turned them away, and that these personnel (in the view of the district court) violated governing INA statutes in carrying out the metering policy, unlike the immigration authorities in *Thuraissigiam* who afforded the petitioner all the rights he was due under the expedited removal statute. The court rejected the notion that the availability of due process depends upon "bright-line" tests, such as whether an alien has developed significant connections with the United States. The court concluded that "the Fifth Amendment applies to conduct that occurs on American soil." The court also determined that the plaintiffs' due process rights derived from protections Congress afforded through statute. The court held that CBP's failure to inspect the plaintiff asylum seekers, as required under governing statutes, thus violated their right to due process.

International Law Principles

The *Al Otro Lado* plaintiffs also claimed that CBP violated international law principles "reflected in treaties which the United States has ratified and implemented." The 1967 United Nations Protocol Relating to the Status of Refugees (Refugee Protocol), to which the United States is a party, incorporates Articles 2 through 34 of the 1951 U.N. Convention relating to the Status of Refugees (Refugee Convention). Under Article 33 of the Refugee Convention, member states may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on account of a protected ground (e.g., political opinion).

U.S. authorities have generally construed the protections afforded by the Refugee Convention as applying only to aliens who are within U.S. territory, and who may not be *expelled* or otherwise penalized because of their unlawful *entry or presence*. In *Sale*, the Supreme Court determined that the Refugee Protection's *non-refoulement* provisions "cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory."

Initially, the district court in *Al Otro Lado* had ruled that under the Alien Tort Statute (ATS), which authorizes civil actions by aliens for torts "committed in violation of the law of nations or a treaty of the

United States," the plaintiff asylum seekers had sufficiently pleaded a claim for civil liability on the grounds that the metering policy violated non-refoulement principles. In its September 2020 ruling on the merits of the case, the court recognized that *Sale's* interpretation of Article 33 of the Refugee Convention as not imposing extraterritorial non-refoulement obligations "remains binding precedent." The court thus held that the plaintiffs' ATS claim "is not actionable as a matter of law."

Conclusion

As the *Al Otro Lado* case shows, the legality of CBP's metering policy turned largely on the proper interpretation of INA provisions that require the inspection of applicants for admission, and that generally afford aliens physically present or arriving in the United States the opportunity to pursue asylum—including those otherwise subject to expedited removal. The district court determined that these statutory requirements apply equally to aliens outside of the United States who are in the process of arriving at a port of entry, even if they have not yet reached U.S. soil. While the district court has ruled on the legality of metering, it remains to be seen to what extent the court prohibits CBP from employing that policy, or whether a reviewing appellate court will agree with the district court's conclusion that metering is unlawful. As noted earlier, the court is considering the appropriate remedy, and the extent to which the intervening Title 42 policy suspending most asylum processing at the border would affect implementation of that remedy. The court also has not yet considered the impact of CBP's recent rescission of the metering policy on the litigation.

Given the dispute concerning the reach of the INA's statutory inspection and processing requirements for asylum seekers, and the litigation concerning CBP's metering practice, Congress may consider clarifying the statutory framework governing the inspection of aliens seeking admission. Congress, for example, may specify whether (or under what circumstances) CBP may regulate or limit the movement and flow of asylum seekers attempting to arrive at designated ports of entry.

Author Information

Hillel R. Smith
Legislative Attorney

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