



The “Migrant Protection Protocols”

In December 2018, the Trump administration announced the creation of a new program called the “Migrant Protection Protocols” (MPP)¹—often referred to as the “Remain in Mexico” program. Under MPP, individuals who arrive at the southern border and ask for asylum (either at a port of entry or after crossing the border between ports of entry) are given notices to appear in immigration court and sent back to Mexico.² They are instructed to return to a specific port of entry at a specific date and time for their next court hearing.³ MPP is distinct from a separate process known as “metering,” where CBP officials turn asylum seekers away from ports of entry without processing them or providing any specific date or time for when to return.⁴

Representation rates for people subjected to MPP are exceedingly low. Data suggests that just 7.5% of individuals subject to MPP ever managed to hire a lawyer,⁵ though the true representation rate may be even lower as that number includes individuals who were initially placed into MPP and then were later taken out of the program and allowed to enter the United States.

The lack of counsel, combined with the danger and insecurity that individuals face in border towns, have made it nearly impossible for anyone subject to MPP to successfully win asylum. By December 2020, of the 42,012 MPP cases that had been completed, only 638 people were granted relief in immigration court.⁶

In March 2020, in response to the outbreak of COVID-19, all pending MPP hearings were suspended temporarily, and then later indefinitely.⁷ This decision left tens of thousands of people in Mexico awaiting their hearings in a state of limbo. Despite the indefinite suspension of MPP hearings, the Trump administration continued to place thousands of people into MPP from March 2020 through January 2021.⁸ Individuals placed into MPP during this period were primarily those who Customs and Border Protection (“CBP”) could not rapidly “expel” under a public health order also instituted in March.⁹ These individuals were predominantly from countries that the United States could not expel people to, including Cubans, Ecuadorians, Nicaraguans, and Venezuelans.¹⁰

President Biden has promised to end MPP.¹¹ However, prior to inauguration, Biden and his advisors had suggested that damage done to the asylum system by the Trump administration has prevented them from immediately admitting people still waiting in Mexico under MPP, and it may take “months” to reverse Trump’s border policies.¹² Hours after he was inaugurated, Biden officially ordered CBP to stop placing people into MPP but left the fate of those already sent back to Mexico still unclear.¹³

As proposed below, now that CBP has stopped placing people into MPP, the administration should rapidly surge resources to ports of entry to process the likely fewer than 20,000 people with pending MPP cases who remain in Mexico.¹⁴ Under new guidance, CBP should be directed to issue parole quickly and safely to individuals subject to MPP who appear at the ports of entry at scheduled times, allowing them to reenter the United States. Once

inside the country, nonprofit organizations can help these individuals arrange transit to their final destination while the Department of Homeland Security (“DHS”) transfers the individuals’ court cases to their final destination.

How the Migrant Protection Protocols Have Been Carried Out

From January 2019, when the MPP process began, through December 2020, at least 70,000 people have been returned to Mexico to await court hearings, according to the nonpartisan TRAC center.¹⁵ The exact number of individuals subject to MPP since its inception has never been disclosed by DHS, although the department eventually began posting monthly data on MPP in August 2020 as required by Congress.¹⁶

The federal government has placed people into MPP at seven U.S. border towns:¹⁷

1. San Ysidro, CA
2. Calexico, CA (individuals returned to Mexico at Calexico were required to travel to the San Ysidro port of entry for hearings)
3. Nogales, AZ (individuals returned to Mexico at Nogales were required to travel to the El Paso port of entry for hearings)
4. El Paso, TX
5. Eagle Pass, TX (individuals returned to Mexico at Eagle Pass were required to travel to the Laredo port of entry for hearings)
6. Laredo, TX
7. Brownsville, TX

Many individuals were sent to Mexico under MPP at a location far from where they arrived at the border. For example, some families who crossed the border near Yuma, Arizona, were transported by CBP to the Calexico port of entry where they were returned to Mexico.¹⁸ Similarly, individuals who crossed in the Border Patrol’s Big Bend Sector were transported hundreds of miles and sent back to Mexico in El Paso.¹⁹

In San Diego and El Paso, individuals who return for court hearings arrive at the port of entry, are briefly “paroled” into the United States for the purpose of going to court, and then are transferred into the custody of Immigration and Customs Enforcement (ICE) for transport to the local immigration court.²⁰ According to a copy of ICE’s MPP Standard Operating Procedures obtained through a Freedom of Information Act request, in El Paso individuals were given just one hour after arriving at court to speak with their attorney.²¹

In Laredo and Brownsville, individuals who return for court hearings are taken to “tent courts” built next to the port of entry, where they appear in front of immigration judges through video teleconferencing equipment.²²

According to the U.S. government’s “guiding principles” for MPP, certain groups are considered exempt from the process:²³

- Unaccompanied children
- Citizens or nationals of Mexico
- Individuals processed for expedited removal
- Individuals in “special circumstances,” including:
 - Individuals with “known physical/mental health issues”
 - Individuals with criminal records or a history of violence
- Individuals determined by an Asylum Officer to be “more likely than not” to face torture or persecution in Mexico on the basis of race, religion, nationality, political opinion, or membership in a particular social group

The decision to send a person or family back under MPP is discretionary and is made by individual CBP officers or Border Patrol agents. Individuals who cross the border at the same time may be treated differently, with one person sent back under MPP and the other person admitted to seek asylum through the normal process. In some situations, this has led to families being separated at the border, with one parent sent back to Mexico and the other parent and the child allowed to enter the United States.²⁴

CBP also retains discretion to take any individual out of MPP on a case-by-case basis.²⁵ In addition, CBP has stated that it does not subject individuals to MPP from countries where Spanish is not the primary language (for example, Cameroon or India), although nothing in the MPP “guiding principles” requires their exclusion.²⁶ In December 2019, Acting CBP Commissioner Mark Morgan threatened to end this exemption and send individuals from non-Spanish-speaking countries back to Mexico under MPP, emphasizing that the policy could be changed at any moment.²⁷ On January 29, 2020, DHS official announced that it had expanded MPP to Brazilian nationals.²⁸

CBP has implemented its MPP “guiding principles” inconsistently across the border. For example, there are reports of CBP officers sending back individuals with serious medical issues in violation of the guidelines.²⁹ On December 7, 2020, DHS issued “supplemental guidance” on MPP.³⁰ The guidance made few substantive changes to the operation of MPP, but confirmed a number of troubling practices by which DHS carried out the program, including forcing individuals to wait in Mexico during the course of any appeal of a negative decision in their case.³¹

Under MPP, CBP officers do not ask asylum seekers if they are afraid of returning to Mexico. A person who fears harm in Mexico is required to “affirmatively” assert that fear if they want to be taken out of MPP.³² If an asylum seeker does so, the person must be referred to an Asylum Officer for an interview about their fear.³³ Individuals generally are held in CBP custody for these interviews and are not allowed access to an attorney.³⁴ Some individuals report being handcuffed throughout the interview process.³⁵

Government estimates of the number of people who pass these interviews range from 1% to 13%.³⁶ Since MPP began, some Asylum Officers who conduct these interviews have spoken out about pressure to deny people and send them back to Mexico, calling the interviews “lip service.”³⁷ The labor union representing Asylum Officers filed an amicus brief with the Ninth Circuit Court of Appeals asking the court to strike down MPP as a directive that is “fundamentally contrary to the moral fabric of our nation and our international and domestic legal obligations.”³⁸

In December 2019, an internal DHS analysis of the program revealed serious flaws in the screening process that called into question whether asylum seekers were consistently provided even the limited protections available under MPP.³⁹ These flaws include CBP’s reported use of “a pre-screening process that preempts or prevents a role for USCIS to make its determination,” and reports that “CBP officials pressure USCIS [Asylum Officers] to arrive at negative outcomes.”⁴⁰

These findings are supported by a study of 607 people sent back to Mexico under MPP, which determined just 40.4% of asylum seekers who expressed a fear of returning to Mexico to CBP were given the required fear-screening interview.⁴¹

Prior to the indefinite suspension of MPP hearings, many individuals were forced to wait months to have their asylum case decided or even receive an initial hearing.⁴² During the time these asylum seekers remain in Mexico, it is extremely difficult to obtain counsel. According to an independent analysis of data obtained from the Executive Office for Immigration Review (the office that oversees the immigration courts), roughly 7.5% of asylum seekers in MPP have a lawyer.⁴³ Through the end of December 2020, just 5,285 people subject to MPP had secured lawyers out of 70,467 people who had been placed in court proceedings.⁴⁴

Many asylum seekers placed into MPP are in danger in Mexico. Individuals sent to the Laredo or Brownsville courts must reside or pass through the Mexican state of Tamaulipas, which the State Department classifies as the same level of danger as Syria, Afghanistan, and Yemen.⁴⁵ Many asylum seekers and families have been kidnapped and assaulted after having been sent back to Mexico, sometimes within hours of crossing back over the border.⁴⁶

According to Human Rights First, through December 2020, there were at least 1,314 publicly documented cases of rape, kidnapping, assault, and other crimes committed against individuals sent back under MPP.⁴⁷ Multiple people, including at least one child, have died after being sent back to Mexico under MPP and attempting to cross the border again.⁴⁸

The U.S. government provides no support to individuals sent back to Mexico, leaving people to fend for

themselves. Many are homeless during their time in Mexico.⁴⁹ In some locations on the border, the Mexican government has created shelters that can house some—but not all—of the people sent back.⁵⁰ Private shelters also provide housing for some individuals sent back under MPP. In Matamoros, a tent camp sprang up in 2019 where thousands of asylum seekers eventually resided along the Rio Grande in squalid conditions with no running water or electricity.⁵¹

Given these issues, thousands of people subject to MPP have not been able to return to the border for a scheduled court hearing and have been ordered deported for missing court.⁵² Some have missed hearings because the danger and instability of the border region forced them to abandon their cases and go home.⁵³ Others have missed hearings because they were the victims of kidnapping or were prevented from attending because robbers stole their court paperwork.⁵⁴

Complicating matters, the Mexican government and the United Nation’s International Organization for Migration provide buses traveling from the U.S.-Mexico border to the Mexico-Guatemala border for individuals who choose to abandon their cases and go home. However, multiple reports have indicated that some individuals sent back under MPP have been coerced onto these buses and end up hundreds of miles from the border with no way to get back for their court dates.⁵⁵

The Effect of the COVID-19 Pandemic on MPP

On March 23, 2020, in response to the global pandemic of the coronavirus, both DHS and the Executive Office for Immigration Review (“EOIR”) suspended MPP hearings across the border.⁵⁶ From March through July, MPP hearings were periodically re-suspended, each time creating more uncertainty among those still waiting for a court date.⁵⁷ Finally, on July 17, 2020, DHS and EOIR announced a plan for when MPP would be “restarted,” formally admitting that the program had been indefinitely suspended.⁵⁸

The joint DHS and EOIR policy requires that MPP hearings stay suspended until California, Arizona, and Texas each reach the penultimate stage of their COVID-19 reopening plans, as well as the five Mexican border states of Tamaulipas, Nuevo Leon, Coahuila, Chihuahua, Sonora, and Baja California.⁵⁹ Additionally, the program would not resume until both the Centers for Disease Control and the State Department lowered the global threat level for COVID-19 to a 2 out of 4.⁶⁰ In short, the standards for “re-starting” MPP are so high that the program has in effect been suspended for the duration of the COVID-19 pandemic.

Despite the possibility that these reopening criteria would mean that those with pending cases might have to wait 2-3 years in Mexico before a hearing, the Trump administration refused calls to admit those in MPP with pending cases. Since hearings were suspended in March through the end of 2020, CBP subjected at least an additional 5,500 people to MPP,⁶¹ sending them to Mexico to wait for an unknown period.

Along with worsening conditions in shelters at the border and pandemic-related restrictions imposed across Mexico, the indefinite suspension of MPP has led many people with pending cases to abandon their hope of seeking protection. The refugee camp in Matamoros which housed 2,000-3,000 people waiting for MPP hearings in February⁶² only held around 600 people by December.⁶³ Shelters in Ciudad Juárez which held more than 1,500

people before the pandemic⁶⁴ now hold fewer than 1,000.⁶⁵ A federal shelter in Tijuana which was designed to hold 3,000 people in MPP now holds fewer than 100.⁶⁶

Many of those subject to MPP have returned to their home countries.⁶⁷ Some have tried to enter the United States again, but this time trying to evade the Border Patrol to avoid being sent right back.⁶⁸ At least 700 children who were part of families subject to MPP have been sent across the border alone by their parents.⁶⁹

How the Biden Administration Should Address MPP

Under the Trump administration, the United States government misled tens of thousands of asylum seekers and told them they would have an “expedited” opportunity to seek asylum at the border, and the Mexican government would keep them safe in the meantime. Instead, MPP plunged migrants into a dangerous limbo, one which has only grown more tenuous through 2020.

The Biden administration must take immediate steps to (1) prioritize the readmission of those individuals with pending cases still waiting in Mexico, and then (2) take steps to allow any person harmed by MPP to receive a second chance at seeking asylum, either from within the United States or abroad.

Allowing asylum seekers with pending MPP cases to enter the U.S.

On his first day in office, President Biden directed CBP to cease placing any people into MPP as of January 21, ensuring that no person will be forced back to Mexico going forward. However, the order did not address the status of individuals who had already been placed into MPP, declaring that “All current MPP participants should remain where they are, pending further official information from U.S. government officials.”⁷⁰ That leaves an open question as to how and when the Biden administration may readmit individuals who remain in Mexico with pending MPP cases.⁷¹ This section provides a detailed plan for how the Biden administration can quickly and safely process people out of Mexico.

As soon as possible, Biden should direct the creation of a staggered admission process for the readmission of individuals with pending cases. The plans for this admission process should be shared with nongovernmental organizations in the United States and Mexico, in English, Spanish, Brazilian Portuguese, and any other relevant languages.

Under this staggered admission process, individuals would travel to any port of entry where people were previously placed into MPP, or any other port of entry designated for the readmission processing. Each individual would be allowed to present themselves for processing beginning on a specific date linked to the amount of time they had been waiting in Mexico, with those waiting the longest given priority.

The staggered admission process should be set to begin within weeks of inauguration, or as soon as operationally feasible. In the interim, and continuing throughout the admissions process, any individual who fell in a narrow category of vulnerable individuals, such as those with medical conditions, disabilities, or whose life was in immediate danger, should be allowed to travel to any port of entry and request admission.

Upon arrival, CBP officers at the port of entry would confirm that the individual had previously been placed into MPP, a process which should take a matter of minutes. At that point, a CBP officer would ask the person a short series of questions about their final destination in the United States and begin the process of issuing humanitarian parole under section 212(d)(5) of the Immigration and Nationality Act. Because these individuals have already been processed, questioned, and fingerprinted on their initial entry into the United States, this process would not require a protracted interview and could be carried out in a short period of time not requiring detention or prolonged exposure. At some ports of entry, these interviews could likely be done outside in a manner that permits social distancing.

Once this process is finished, CBP would arrange transportation for the individual to a pre-arranged shelter or transportation provider. CBP should arrange for nonprofit attorneys to conduct brief legal orientation programs in the likely event that individuals need to be briefly held while waiting for transportation to arrive. Once the individual has left CBP custody, the agency should send a list of all individuals who have been processed to the ICE Office of Principal Legal Advisor (OPLA), who would move the individual’s immigration court case to the court with jurisdiction over their ultimate destination. DHS also should work with nonprofit legal providers to prepare a written legal orientation document in each individual’s language which provides basic information about the court process inside the United States.

In coordination with the announcement of this staggered admissions process, the president should direct that resources be surged to ports of entry across the southern border, including manpower, consumable resources, and sufficient stores of Personal Protective Equipment (PPE). CBP should immediately procure rapid COVID-19 tests and deploy them strategically to ports of entry across the southern border. At the same time, DHS should direct OPLA, which handles the prosecution of MPP cases, to immediately begin preparing to file large numbers of changes of venue motions.

CBP also should be directed to begin contacting shelters in cities near the border to determine who is ready and able to help individuals released from the border travel to their ultimate destination or take shelter while quarantining, if necessary. Should additional funding be necessary, DHS should explore all grant authority that could be used to support shelter providers.

The State Department and DHS should also coordinate with Mexican state and local authorities to not only increase security near ports of entry on the Mexican side of the border, but also increase shelter capacity to ensure that individuals who arrive prior to their scheduled admissions period can wait briefly in safety.

Furthermore, to limit any possible stress on the ports of admission, the State Department should direct consulates in Mexico, Honduras, Guatemala, El Salvador, and any other country necessary to process humanitarian parole paperwork for individuals with a pending MPP case. Anyone granted parole by the State Department then could enter the United States at any port of entry without requiring further processing.

Finally, EOIR should administratively close or terminate all MPP cases for individuals who have not been admitted. In addition, the Board of Immigration Appeals should suspend all pending MPP appeals. ICE OPLA should be directed to expeditiously review all such pending appeals, and either drop its appeal of a prior grant of relief, or consent to the remand and/or grant of relief for any other case, thus ensuring that no individual is deported through a removal order granted under MPP. ICE Enforcement and Removal Operations should move to reopen the case, issue parole, and move to change venue for any individual they encounter who was previously removed under MPP or with a pending MPP case.

Under this process, all individuals who were still in Mexico waiting for court hearings could be quickly, safely, and humanely allowed to reenter the United States to pursue protection. In addition, any plan to unwind the deleterious effects of the MPP program should also account for those asylum seekers waiting in Mexico to be processed by CBP because of the government’s metering policy, ensuring that it does not exacerbate and perpetuate that harmful policy.⁷²

Given the extreme insecurity which most people in MPP face on a daily basis, the Biden administration must move fast to make this a reality.

Addressing the harm to those already removed under MPP

While the staggered admissions process would provide immediate relief for those whose cases were still pending, more than 40,000 additional people had their chance of seeking protection eliminated by MPP. The Biden administration must establish a process by which these people are given a second chance to come to the United States. One way to do that would be through designating individuals removed as a result of MPP and other anti-asylum policies as a group qualified to openly access the U.S Refugee Admissions Program through Priority 2 (P-2) (“groups of special concern”).⁷³ A version of this approach has also been recommended by the organization HIAS.⁷⁴

However, because the U.S. refugee process has its own limitations this should only be one option for those subject to MPP. The U.S. could also establish a process where individuals could travel to any U.S. consulate abroad and have their prior order of removal terminated, allowing them to travel back to the United States to seek asylum along with a grant of parole. ICE must not reinstate any removal order for individuals encountered inside the United States who entered without inspection following an MPP removal order.

There is no way to undo the damage which has already been done. But by rapidly admitting those with pending cases and providing a remedy for those already ordered removed, the Biden administration can begin to heal the wounds caused by MPP.

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