



Supreme Court Grants Stay in MPP Case

March 13, 2020

On March 11, 2020, the Supreme Court issued an [order](#) in *Wolf v. Innovation Law Lab* allowing the Trump Administration to continue enforcing its Migrant Protection Protocols (MPP)—also known as the “Remain in Mexico” policy—while litigation concerning the policy’s legality continues. Under the MPP, Customs and Border Protection (CBP), a component of the Department of Homeland Security (DHS), may require many non-U.S. nationals (aliens) who arrive at the southern border seeking asylum or related protections to wait in Mexico while U.S. immigration courts process their cases. DHS first [announced](#) the policy in December 2018 and began implementation in January 2019. As of early March, CBP had returned some [60,000 aliens](#) to Mexico under the MPP and [an estimated 25,000](#) of them were still in Mexico pending ongoing removal proceedings in U.S. immigration court, according to a DHS court filing. The MPP does not apply to Mexican nationals, unaccompanied alien children, and certain other groups specified in [CBP guidance](#). CBP also appears to exclude some other populations from the program, such as aliens from non-Spanish speaking countries other than [Brazil](#) and, [reportedly](#), aliens who the agency believes are at greater risk of harm in Mexico on account of their sexual orientation or gender identity. But these limitations do not appear to be set forth in any centralized, written guidance document that is publicly available.

The Supreme Court order in *Innovation Law Lab* caps a series of lower court orders in the ongoing MPP litigation. In April 2019, a federal district court judge in California [ruled](#) that the policy was likely illegal on the grounds that it violated the Immigration and Nationality Act (INA) and failed to include adequate safeguards against returning aliens to Mexico who would face persecution or torture there. The district court issued a preliminary injunction that would have blocked the policy pending further proceedings, but a panel of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) [intervened](#) before the order took effect, [allowing](#) the policy to continue pending further Ninth Circuit review. Another panel of the Ninth Circuit ultimately [affirmed](#) the preliminary injunction on February 28, 2020 and issued a [related order](#) that would have blocked the MPP in California and Arizona beginning on March 12, 2020. The Supreme Court’s March 11, 2020 order, however, granted the government a stay of the preliminary injunction that prevented that Ninth Circuit order from taking effect. The stay will remain in place until the Supreme Court resolves the government’s appeal from the Ninth Circuit proceedings, which will likely take at least a year.

Congressional Research Service

<https://crsreports.congress.gov>

LSB10420

The MPP in Context

Before the advent of the MPP early last year, CBP essentially had two processing options when it encountered adults or families at the border who claimed asylum or fear of persecution: (1) transfer them to the custody of DHS's Immigration and Customs Enforcement (ICE) for screening interviews pursuant to [expedited removal](#) procedures; or (2) release them into the United States for formal removal proceedings in immigration court, [which often took years](#). Given the limited space in ICE facilities for families, among other reasons, CBP had a general policy of releasing family units until September 2019, when DHS [announced](#) an end to the policy following broad implementation of the MPP.

The MPP gives CBP another option for processing adults or families seeking asylum: it may return many of these aliens to Mexico during their immigration court proceedings. The MPP forms part of a broader series of policies that the Trump Administration is pursuing to transform the processing of asylum and related protections at the border, particularly for adults and family units. These policies include (1) [metering](#), under which immigration officers positioned at the international boundary line direct arriving aliens lacking documents (who may be asylum seekers) to return at a later date; (2) an asylum ineligibility for [third-country transit](#) (Transit Rule); (3) [safe third country agreements](#) with El Salvador, Honduras, and Guatemala, which would allow DHS to transfer some asylum seekers to those countries instead of evaluating their claims for protection in the United States (though to date only the agreement with Guatemala has been implemented); and (4) [nascent](#) programs—[known](#) as Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP)—under which asylum screening interviews occur in short-term holding facilities at the border instead of in long-term detention facilities in the interior. A CRS Infographic gives a visual overview of these policies.

The policies are complex but have some evident bottom-line impacts. From a processing perspective, they grant DHS more options for advancing removal proceedings against asylum seekers without releasing them into the interior of the country while their claims move forward. As noted above, the MPP allows CBP to return many asylum seekers to Mexico during their immigration court proceedings. PACR and HARP introduce another option: CBP may keep asylum seekers in its own custody while they undergo telephonic screening interviews, instead of transferring them to ICE. Two of the other policies—the Transit Rule and the safe third country agreements—also curtail asylum eligibility in ways that enable DHS to reject more claims at the screening stage and, as a result, to remove more asylum seekers quickly, before their claims reach immigration court.

In a different vein, two of the policies—metering and the MPP—have generated a significant build-up of asylum seekers on the Mexican side of the border, where they wait to initiate or pursue applications for protection in conditions that advocates criticize as [dangerous and inhumane](#). Advocacy groups have also [criticized](#) the full series of policies for limiting access to counsel, creating overly demanding screening procedures, and generally restricting asylum eligibility to the point that few aliens, other than Mexican nationals, qualify for it anymore. For its part, the Trump Administration [contends](#) that the MPP minimizes any risk of harm in Mexico by requiring CBP officers to assess an asylum seeker's expressed fear of returning to that country before the alien is returned. The Administration further argues that the policy creates a "more orderly process" to manage asylum seekers at the border, while reducing overcrowding at U.S. detention facilities and preventing aliens from eluding authorities in the interior of the United States. Understanding the mechanics of asylum processing that apply at any given place and time along the border has become challenging under this group of policies, for at least three reasons.

First, the interplay between the policies is complex. Sometimes, as in the case of PACR and the Transit Rule, the policies intertwine. PACR is essentially a procedural complement to the substantive Transit Rule, as the DHS "[proof of concept](#)" for PACR explains. (The Transit Rule has the effect of imposing a [stricter standard](#) for many screening interviews, and PACR allows those interviews to happen more quickly.) Other times, as in the case of PACR and the MPP, the policies work as a set of alternative

processing options that CBP officials may choose between. (The MPP allows CBP officials to return aliens to Mexico pending the outcome of their formal removal proceedings, while PACR facilitates the expedited screening of aliens at the border.) Regulations and policy documents offer little information about the criteria CBP uses to choose between the options.

Second, the policies have population-based limitations (their applicability may depend on the asylum seeker’s nationality, language, or other demographic characteristics) that are not always evident from the governing regulations or policy documents. For example, DHS [reportedly](#) does not apply the MPP to aliens from non-Spanish speaking countries other than Brazil, although the published guidance documents about the MPP do not mention this limitation. Sometimes, as in the case of metering, PACR, and HARP, governing policy documents are not available at all until the Administration produces documents during litigation. Other unwritten limitations are geographic. Some policies apply only in certain border sectors. For example, DHS [reportedly](#) began [implementing](#) the Guatemala safe third country agreement, PACR, and HARP only in El Paso. Reports [indicate](#) that PACR and HARP have been expanded to other border sectors. Generally, information about where along the border, exactly, particular policies have gone into effect becomes public through media reporting, litigation documents, and agency announcements, rather than through centralized and accessible guidance documents or regulations governing the programs.

Third, lawsuits currently challenge the legality of each policy and have generated a patchwork of federal court orders—some blocking specific policies, others lifting blocks imposed by lower courts. The recent series of orders described above in the MPP case is the latest example of this shifting litigation landscape. Similar events [transpired](#) in a case challenging the legality of the Transit Rule: the Supreme Court issued a stay to allow the government to enforce the policy after lower courts issued orders that would have blocked it in California and New Mexico. In a third case, the Supreme Court [denied](#) the government’s request for relief from lower court orders blocking implementation of a [policy](#) that would render aliens ineligible for asylum if they enter the country unlawfully. That policy [remains blocked](#) while litigation continues. However, court orders do not currently block any of the five major border processing policies discussed above—metering, the MPP, the Transit Rule, the safe third country agreements, and PACR/HARP—although litigation over the legality of each of these policies remains ongoing.

Considerations for Congress Regarding the MPP

One of the salient issues in the MPP case is whether the INA authorizes the policy. DHS relies on [INA § 235\(b\)\(2\)\(C\)](#) as the statutory basis for the program. That provision authorizes DHS to return an alien “who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States” to the contiguous territory (i.e., Mexico, in the case of the MPP) pending formal removal proceedings against the alien. A different provision in the same statutory subsection indicates, however, that the return authority does not cover aliens “to whom [expedited removal] applies.” Most asylum seekers returned to Mexico under the MPP are eligible for expedited removal because they lack visas or other valid entry documents. The Ninth Circuit ultimately ruled that the MPP lacks statutory authority because the return authority does not cover “[bona fide asylum seekers](#).” But the earlier Ninth Circuit panel that considered the case in an emergency posture had reached a different conclusion: because DHS has discretion not to place asylum seekers in expedited removal even if they are eligible for it, and because DHS exercises such discretion when it opts to place asylum seekers in the MPP rather than in expedited removal, expedited removal does not “apply” to such asylum seekers. These asylum seekers therefore fall within the return authority of § 235(b)(2)(C), [according to the first panel](#). The disagreement between the two panels centers on what it means for the expedited removal statute to “apply” to an alien—does it mean that the alien is *statutorily eligible* for expedited removal (as the second panel concluded), or that DHS *opts to place* the alien in expedited removal (as the first panel concluded)? The Supreme Court did not issue an opinion and thus did not address this question when it granted the stay.

Congress has numerous options for resolving this debate and deciding the fate of the MPP. If Congress wants to terminate the MPP, it could repeal INA § 235(b)(2)(C) altogether, as [one bill](#) proposes, leaving the program without any arguable basis of authority. Such a repeal would not alter the legal contours of expedited removal proceedings, which are governed by § 235(b)(1). Congress could also leave some return authority under § 235(b)(2)(C) in place but specify that the provision does not apply to some or all asylum seekers. More narrowly, Congress could expressly terminate the MPP itself or strip DHS of funding to implement the policy. On the flip side, if Congress seeks to leave the MPP in place, it could amend § 235(b)(2)(C) to state clearly that the return authority applies to aliens whom DHS opts not to place in expedited removal even though they are statutorily eligible for it.

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