



Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, the Asylum Transit, and Metering

For decades, adults, families, and unaccompanied children have been arriving at the U.S.-Mexico border to seek protection from harm in their home countries. U.S. law allows any noncitizen who is in the United States, or at the border, to apply for protection.¹ However, the Trump administration has instituted a number of new policies, many being challenged in court, designed to deter families from seeking asylum at the U.S. southern border. Policies like the Migrant Protection Protocols (also known as “Remain in Mexico”), metering, and a ban on asylum for individuals who transited through Mexico before arriving at the U.S.-Mexico border have reshaped the state of asylum at the border in 2019.² This fact sheet explains the complicated interplay and application of protection and border processing policies.

How has the process for seeking asylum at the border changed?

As of November 2019, three significant new Trump administration policies affecting asylum seekers are in effect at the southern border, all of which have a significant impact in shaping the current state of the border. These policies do not apply to asylum applicants at the U.S. northern border with Canada.

Metering and asylum turnbacks

Throughout 2018, as asylum-seeking families began arriving at the border in large numbers, immigration officials told asylum seekers they should go to ports of entry and request asylum, rather than crossing the border between the ports of entry to ask for asylum.³ But at the same time, the administration effectively closed off the ports of entry to asylum seekers. Due to a practice known as “metering” (or “queue management”), asylum seekers at ports of entry are often turned back and required to wait for months in Mexico just for the opportunity to start the asylum process.

Under “metering,” U.S. Customs and Border Protection (CBP) limits the number of individuals who are permitted to access the asylum process each day at ports of entry across the border. Metering was used as early as February 2016, primarily at the San Ysidro port of entry.⁴ Metering is one of many tactics used by CBP officers to turn away asylum seekers at the U.S.-Mexico border, in a general practice of “asylum turnbacks.”⁵ In late April 2018, the administration ordered ports of entry across the U.S.-Mexico border to meter asylum seekers.⁶

The effect of metering has been significant. In November 2019, the Strauss Center estimated that more than 21,000 individuals were waiting in border cities across Mexico just for the opportunity to start the asylum process.⁷ Wait times varied from a low of one to three days at the ports of entry between Reynosa, Tamaulipas and McAllen, Texas, to a high of six months at the ports of entry between Ciudad Juárez, Chihuahua and El Paso, Texas.⁸

In most locations, asylum seekers turned away by CBP must place themselves on a “list” maintained by a person or group on the Mexican side of the border.⁹ Each day, CBP contacts the person or entity in charge of the list and informs them of how many people can be admitted and processed in order to request asylum.¹⁰ At that point, as discussed below, CBP may then subject the asylum seeker to the Migrant Protection Protocols (MPP) program and send them back to Mexico. At some ports of entry, multiple days pass with no people called off the list.¹¹

CBP has said that Mexicans and unaccompanied children are not subject to metering.¹² However, reports have repeatedly shown that Mexicans and unaccompanied children have been forced to wait in Mexico under metering or have simply been turned back without being permitted to apply for asylum.¹³ The Office of Inspector General at the Department of Homeland Security (DHS) has suggested that metering or turnbacks are a direct cause of some asylum seekers choosing to cross *between* ports of entry, rather than wait months in Mexico in limbo, with no guarantee of ever being permitted to access asylum at ports of entry.¹⁴

The “Migrant Protection Protocols”

In December 2018, the administration announced the creation of a new program called the “Migrant Protection Protocols” (MPP)¹⁵—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.¹⁶ They are instructed to return to a specific port of entry at a specific date and time for their next court hearing.¹⁷

As of November 2019, the federal government is using MPP at six U.S. border towns:¹⁸

1. San Ysidro, CA
2. Calexico, CA (individuals sent back here must travel to the San Ysidro port of entry for hearings)
3. El Paso, TX
4. Eagle Pass, TX (individuals sent back here must travel to the Laredo port of entry for hearings)
5. Laredo, TX
6. Brownsville, TX

Individuals may be sent to Mexico under MPP at a location far from where they arrived at the border. For example, some families who cross the border in Arizona have been transported by CBP to the Calexico port of entry and sent back under MPP.¹⁹ Similarly, individuals who cross in the Border Patrol’s Big Bend Sector are transported hundreds of miles and sent back under MPP in El Paso.²⁰

In San Diego and El Paso, individuals who return for court hearings arrive at the port of entry and are transferred into the custody of Immigration and Customs Enforcement (ICE) for transport to the local immigration court.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, Brazil, Cameroon, or India), although nothing in the MPP "guiding principles" requires their exclusion.²⁶ CBP has implemented these "guiding principles" inconsistently across the border, with multiple reports of CBP officers sending back individuals with serious medical issues in violation of the guidelines.²⁷

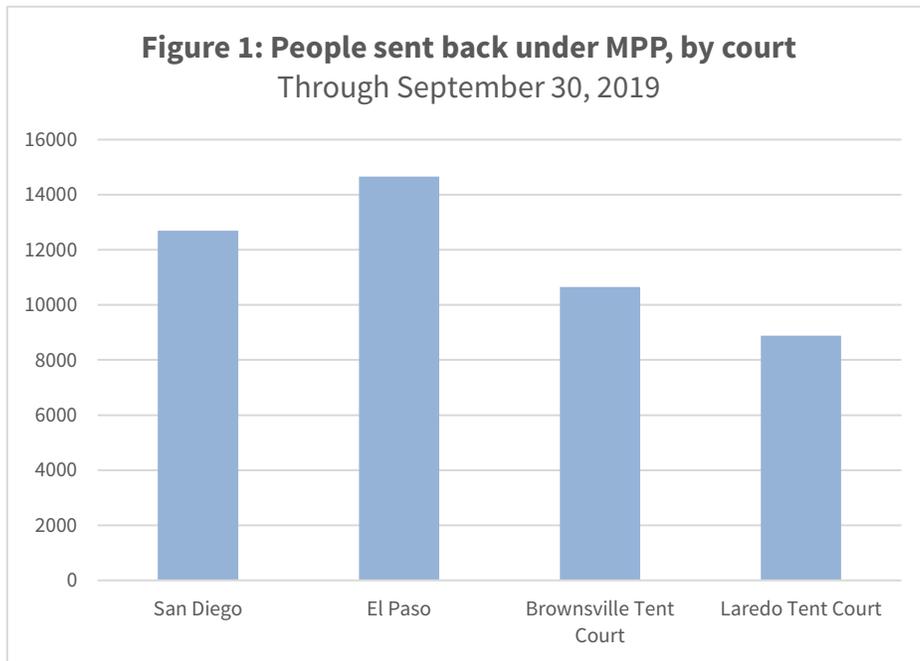
Under MPP, CBP officers do not ask asylum seekers if they are afraid of returning to Mexico. A person who fears harm in Mexico is required to "affirmatively" assert that fear if they want to be taken out of MPP.²⁸ If an asylum seeker does so, the person must be referred to an Asylum Officer for an interview about their fear.²⁹ Individuals generally are held in CBP custody for these interviews and are not allowed access to an attorney.³⁰ Some individuals report being handcuffed throughout the interview process.³¹

Government estimates of the number of people who pass these interviews range from 1% to 13%.³² 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."³³ 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."³⁴

In November 2019, reports emerged that internal DHS analysis of the program had found serious flaws in the screening process that call into question whether asylum seekers are consistently provided even the limited protections available under MPP. 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.”³⁵

These findings are supported by a study of 607 people sent back to Mexico under MPP, which determined that just 40.4% of asylum seekers who expressed a fear of returning to Mexico to CBP were actually given the required fear-screening interview.³⁶

From January 2019, when the MPP process began, through mid-November 2019, nearly 60,000 people have been returned to Mexico to await court hearings.³⁷ As of September 2019, the largest number of MPP cases had been filed in the El Paso Immigration Court (see Figure 1), where only four judges preside.³⁸



Source: Transactional Records Access Clearinghouse, *Details on MPP Proceedings*, <https://trac.syr.edu/phptools/immigration/mpp/>.

Data on all MPP court cases through the end of September shows that of the 9,974 cases that have been completed, just 11 people had been granted relief in immigration court, compared to 5,085 people who had been issued orders of removal.³⁹

Under MPP, many individuals will be forced to wait many months to have their asylum case decided.⁴⁰ 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), less than 2% of asylum seekers in MPP have a lawyer.⁴¹ Through the end of September 2019, just 1,109 people subject to MPP had secured lawyers out of 47,313 people who had been placed in court proceedings.⁴²

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.⁴³ 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.⁴⁴

According to Human Rights First, through September 2019, there were more than 340 publicly documented cases of rape, kidnapping, assault, and other crimes committed against individuals sent back under MPP.⁴⁵ Multiple people, including at least one child, have died after being sent back to Mexico under MPP and attempting to cross the border again.⁴⁶

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.⁴⁷ In some locations on the border, the Mexican government has created shelters that can house some—but not all—of the people sent back.⁴⁸ Private shelters also provide housing for some individuals sent back under MPP. In Matamoros, as of November 2019, more than 2,000 asylum seekers resided in a tent camp along the Rio Grande river in squalid conditions with no running water or electricity.⁴⁹

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.⁵⁰ Some have missed hearings because the danger and instability of the border region forced them to abandon their cases and go home.⁵¹ Others have missed hearings because they were the victims of kidnapping, or were prevented from attending because robbers stole their court paperwork.⁵²

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.⁵³

Asylum Transit Ban

On July 16, 2019, the Trump administration announced a ban on asylum for any individuals who enter the United States at the “southern land border” after transiting through another country after leaving their home.⁵⁴ It applies to all who cross after that date, regardless of immigration status and how they enter. Even tourists or international students who travel from the United States to Mexico and back through the border could find themselves permanently banned from asylum. There are exceptions to the ban for victims of a “severe form of trafficking in persons” or individuals who applied for protection in another country and had their applications denied.⁵⁵

The Asylum Transit Ban makes no exceptions, however, for unaccompanied children; even though the Immigration and Nationality Act provides special paths to asylum for unaccompanied children, who are allowed to apply for asylum outside of the immigration court process.⁵⁶ It also has been applied to individuals who tried to apply for asylum at the border before July 16, 2019 but instead were turned back to Mexico and made to wait a lengthy period to seek asylum, although this is the subject of a pending legal challenge.⁵⁷

The Asylum Transit Ban applies to people at different stages of the asylum process. For individuals sent back under MPP or released into the United States from the border with a notice to appear in immigration court, the Asylum Transit Ban applies at the end of the process, when an immigration judge makes a decision on an application for humanitarian protection.

For people not sent back under MPP, the Asylum Transit Ban applies at the beginning of the process, when asylum seekers are put through an alternative fast-track removal process called “expedited removal.”⁵⁸ These individuals are given an initial screening interview by an Asylum Officer after arriving at the border and expressing a fear of returning to their home country.⁵⁹

If the officer determines that the Asylum Transit Ban applies, the officer will make a determination that the individual is ineligible for asylum and instead screen the person to determine whether they have a “reasonable fear” of persecution or torture.⁶⁰ If the applicant passes this heightened screening and the officer determines their fear is “reasonable,” they are placed into full removal proceedings in immigration court.⁶¹

Importantly, individuals subject to the Asylum Transit Ban are eligible for two very limited forms of protection against deportation, known as withholding of removal and protection under the Convention Against Torture (CAT).⁶² These forms of relief are more difficult to win than asylum and provide fewer benefits. A person who wins asylum can eventually acquire a green card and later become a citizen.⁶³

Unlike asylum, winning withholding of removal or CAT protections does not provide any permanent status in the United States.⁶⁴ Both forms of relief can be taken away in the future if circumstances change in a person’s home country. A person who wins withholding or CAT can never leave the United States without losing the status.⁶⁵ In addition, a person who wins asylum can bring their family to the United States from their home country, but individuals who win withholding or CAT are not permitted to do so.⁶⁶ This can leave families permanently separated.

How does the Asylum Transit Ban interact with MPP?

Because the Asylum Transit Ban and MPP both apply to individuals arriving at the southern border, asylum applicants may be subjected to either policy or both policies. In addition, thousands of people may have been forced to wait months in Mexico due to metering before they even enter this process. Figure 2 shows how these two policies intersect for individuals subject to either MPP, the Asylum Transit Ban, or both. Figure 3 then details exactly who is subject to these policies, at least in principle.

Figure 2: Consequences of Being Subject to MPP and the Asylum Transit Ban

| | Subject to MPP | Exempt From MPP |
|------------------------------------|--|--|
| Subject to the Asylum Transit Ban | <p>Blocked from entering the United States to seek humanitarian protection and must wait in Mexico for immigration court hearings.</p> <p>Ineligible for asylum and may only apply for withholding of removal and protection under the Convention Against Torture.</p> | <p>Permitted to enter the United States to seek humanitarian protection.</p> <p>Ineligible for asylum and may only apply for withholding of removal and protection under the Convention Against Torture. May be subject to heightened screenings at the start of the process for seeking protection.</p> |
| Exempt from the Asylum Transit Ban | <p>Blocked from entering the United States to seek humanitarian protection and must wait in Mexico for immigration court hearings.</p> <p>May apply for asylum as well as withholding of removal and protection under the Convention Against Torture.</p> | <p>Permitted to enter the United States to seek humanitarian protection.</p> <p>May apply for asylum as well as withholding of removal and protection under the Convention Against Torture.</p> |

Figure 3: MPP vs. the Asylum Ban—Who Is Subject and Who Is Exempt

| | Subject to MPP | Exempt From MPP |
|---|--|--|
| Subject to the Asylum Transit Ban | <p>Non-Mexican adults and families from countries where Spanish is a primary language who lack any special circumstances that would exempt them from MPP, who:</p> <ul style="list-style-type: none"> - Entered after July 16, 2019; and - Do not qualify for an exception to the Asylum Transit Ban | <p>Individuals who entered after July 16, 2019 who are exempt from MPP and do not qualify for an exception to the Asylum Transit Ban, including:</p> <ul style="list-style-type: none"> - Unaccompanied children; - Individuals in “special circumstances”; - Asylum seekers from countries where Spanish is not a primary language; or - Individuals who an Asylum Officer determines are more likely than not to be persecuted in Mexico |
| Exempt from the Asylum Transit Ban | <p>Non-Mexican adults and families from countries where Spanish is a primary language, who:</p> <ul style="list-style-type: none"> - Entered before July 16, 2019;[†] - Are the victim of “a severe form of trafficking in persons”; or - Previously applied for asylum in another country and were denied <p>[†]Although DHS has said that people put into MPP before July 16, 2019 should not be subject to the Asylum Transit Ban, this is a legal determination that can only be made by judges hearing MPP cases who may disagree. As a result, this remains an open legal question.⁶⁷</p> | <p>Mexican citizens and nationals who entered at any time.</p> <p>Individuals who entered before July 16, 2019 who meet one of the exemptions under the MPP guiding principles, including:</p> <ul style="list-style-type: none"> - Unaccompanied children; - Individuals in “special circumstances” - Asylum seekers from countries where Spanish is not a primary language - Individuals who an Asylum Officer determines are more likely than not to be persecuted in Mexico; or |

| | | |
|--|--|---|
| | | <p>Individuals who meet one of the exemptions under the MPP guiding principles who entered at any time, who:</p> <ul style="list-style-type: none"> - Are the victims of “a severe form of trafficking in persons”; or - Previously applied for asylum in another country and were denied |
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Have there been any direct legal challenges to these programs?

At the time of publication, legal challenges have been filed against both MPP⁶⁸ and the Asylum Transit Ban.⁶⁹ Although these challenges met initial success at the lower level, injunctions stopping the programs are currently on hold.⁷⁰ Thus, the policies remain in effect across the U.S.-Mexico border while the appellate process continues in those cases.

Metering has also been challenged in court.⁷¹ Plaintiffs in that lawsuit have sought a preliminary injunction preventing the government from applying the Asylum Transit Ban to any individual who was subject to metering prior to July 16, 2019.⁷²

Endnotes

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50. Through the end of September, nearly 40% of people subject to MPP did not appear for a scheduled court hearing. See Transactional Records Access Clearinghouse, *Details on MPP (Remain in Mexico) Deportation Proceedings*, <https://trac.syr.edu/phptools/immigration/mpp/>.
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53. Patrick J. McDonnell, “Mexico sends asylum seekers south — with no easy way to return for U.S. court dates,” *Los Angeles Times*, October 15, 2019, <https://www.latimes.com/world-nation/story/2019-10-15/buses-to-nowhere-mexico-transport-migrants-with-u-s-court-dates-to-its-far-south>.
54. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019), <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

55. See 8 C.F.R. 208.13(c)(4). A third exception exists if the country the person passed through before arriving at the Southern Border is not a signatory to the UN Protocol on Refugees, but as Mexico is a signatory it is literally impossible to qualify for this exception.
56. 8 U.S.C. § 1158(b)(3)(C).
57. American Immigration Council, *Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers*, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers>; see also Dara Lind, "Asylum-Seekers Who Followed Trump Rule Now Don't Qualify Because of New Trump Rule," *ProPublica*, July 22, 2019, <https://www.propublica.org/article/asylum-seekers-that-followed-trump-rule-now-dont-qualify-because-of-new-trump-rule>.
58. See American Immigration Council, *A Primer on Expedited Removal* (Washington, DC: July 22, 2016), <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.
59. 8 C.F.R. § 208.30(e)(5)(ii).
60. *Ibid.*
61. *Ibid.*
62. 8 C.F.R. § 208.30(e)(5)(i).
63. American Immigration Council, "Asylum in the United States" (Washington, DC: May 2018), <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.
64. *Ibid.*
65. See, e.g., Withholding of Removal and CAT, Immigration Equality, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/>.
66. *Ibid.*
67. It is possible that some immigration judges may believe that individuals who initially entered prior to July 16, 2019, but who later re-enter for an immigration court hearing, may be subject to the Asylum Transit Ban. Although the government initially indicated that this was not the case, the ultimate outcome is an open legal question. See Dara Lind, "Trump's Asylum Ban Could Apply Retroactively to Thousands of Migrants Even Though Officials Promised It Wouldn't," *ProPublica*, October 22, 2019, <https://www.propublica.org/article/trumps-asylum-ban-could-apply-retroactively-to-thousands-of-migrants-even-though-officials-promised-it-wouldnt>.
68. See American Civil Liberties Union, *Innovation Law Lab v. McAleenan*, ACLU.org, <https://www.aclu.org/cases/innovation-law-lab-v-mcaleenan>.
69. See Center for Constitutional Rights, *East Bay Sanctuary Covenant v. Barr*, CCRJustice.org, <https://ccrjustice.org/home/what-we-do/our-cases/east-bay-sanctuary-covenant-v-barr>; *CAIR Coalition v. Trump: A Case Summary*, Human Rights First, August 28, 2019, <https://www.humanrightsfirst.org/resource/cair-coalition-v-trump-case-summary>.
70. Adam Liptak, "Supreme Court Says Trump Can Bar Asylum Seekers While Legal Fight Continues," *New York Times*, Sept. 11, 2019, <https://www.nytimes.com/2019/09/11/us/politics/supreme-court-trump-asylum.html>; Richard Gonzales & Laurel Wamsley, "Appeals Court Rules Trump Administration Can Keep Sending Asylum-Seekers To Mexico," *NPR*, May 8, 2019, <https://www.npr.org/2019/05/08/721293828/appeals-court-rules-trump-administration-can-keep-sending-asylum-seekers-to-mexi>; Vanessa Romo, "Federal Judge Blocks Trump Administration's New Asylum Rule," *NPR*, July 24, 2019, <https://www.npr.org/2019/07/24/744860482/trump-administrations-new-asylum-rule-clears-first-legal-hurdle>.
71. American Immigration Council, *Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers*, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers>.
72. *Ibid.*