

70,000 RETURNED TO MEXICO THROUGH THE MIGRANT PROTECTION PROTOCOLS: JUST BAD POLICY OR ILLEGAL AS WELL?

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I. INTRODUCTION

The Migrant Protection Protocols (MPP), colloquially known as the “Remain in Mexico” program, is a Trump-era immigration initiative. Through this program, individuals entering or seeking admission to the United States at the southern border—illegally or without proper documentation—are sent back to Mexico and forced to wait outside of the U.S. for the duration of their immigration proceedings.¹ This was an extreme policy change that immediately affected thousands of vulnerable individuals each day.² Before the implementation of the MPP, asylum-seekers were entitled to remain in the U.S. pending court proceedings as long as they established a “credible fear” of persecution. “Credible fear” is a low threshold requiring only that an individual demonstrates a “significant possibility” of establishing eligibility for asylum.³ Within two weeks of the program’s implementation, the American Civil Liberties Union (ACLU) launched a legal attack on the MPP on behalf of eleven asylum-seekers returned to Mexico and six legal-service organizations, including Innovation Law Lab.⁴ On March 1, 2021, the Supreme Court was set to hear oral arguments in *Mayorkas v. Innovation Law Lab*—the culmination of this two-year legal challenge.⁵ However, the Court granted the Acting U.S. Solicitor General’s request to remove this case from its argument session because the Biden administration suspended the MPP on January 20, 2021,⁶ which could “*potentially* render the [case]

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1. See *Migrant Protection Protocols*, DEP’T OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

2. *Id.*

3. Ashoka Mukpo, *Asylum-Seekers Stranded in Mexico Face Homelessness, Kidnapping, and Sexual Violence*, AM. C.L. UNION, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face> (last accessed Apr. 7, 2021).

4. *Id.*

5. See *Pekoske v. Innovation Law Lab*, SCOTUS BLOG, <https://www.scotusblog.com/case-files/cases/pekoske-v-innovation-law-lab/> (last accessed Apr. 7, 2021).

6. *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, DEP’T OF HOMELAND SEC. (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>.

moot.”⁷ With the program’s ultimate fate still in limbo, this Current Development first provides background on the disastrous effects of the MPP and the Biden administration’s approach to the program and then analyzes the strength of the major legal arguments against the MPP.

II. THE EFFECTS OF THE MPP ON ASYLUM-SEEKERS

Former Secretary of Homeland Security Kirstjen M. Nielsen touted the MPP as a “humanitarian. . . . [and] commonsense approach . . . to help address the crisis at our Southern border.”⁸ However, since its implementation on January 24, 2019,⁹ the MPP has returned at least 70,000 people to Mexico¹⁰ to await court hearings in “border regions that the State Department considers as hazardous as active-combat zones.”¹¹ At least 1,544 of these individuals were raped, kidnapped, assaulted, tortured, or otherwise victimized.¹² The U.S. government provides no support to individuals subject to MPP.¹³ And despite its commitment to do so, the Mexican government fails to provide housing, work authorization, medical care, or education.¹⁴ This has left many homeless and living in shelters under deplorable and unsanitary conditions, including insufficient access to clean water, restrooms, and showers.¹⁵ This situation is especially dangerous in the wake of COVID-19.¹⁶

7. Amy Howe, *Justices Take Immigration Cases Off February Calendar*, SCOTUS BLOG (Feb. 3, 2021), <https://www.scotusblog.com/2021/02/justices-take-immigration-cases-off-february-calendar/> (emphasis added). The challengers (Respondents) in *Mayorkas v. Innovation Law Lab* consented to Acting Solicitor General Elizabeth Prelogar’s request to remove the case from the docket. *Id.*

8. *Migrant Protection Protocols*, *supra* note 1.

9. Vanessa Ceceña, *Dismantling Asylum: A Year into the Migrant Protection Protocols*, AM. FRIENDS SERV. COMM. 4 (Jan. 2020), https://www.afsc.org/sites/default/files/documents/MPP_Final_Jan2020-300hi.pdf. To read the Policy Guidance for Implementation of the Migrant Protection Protocols see Memorandum from Kirstjen M. Nielsen, Sec., U.S. Dep’t of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship and Immigr. Servs., Kevin McAleenan, Comm’r, U.S. Customs & Border Prot., Ronald D. Vitiello, Dept. Dir. & Senior Official Performing the Duties of Dir., U.S. Immigr. and Customs Enf’t (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

10. The “Migrant Protection Protocols,” AM. IMMIGR. COUNCIL 2 (Jan. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/migrant_protection_protocols.pdf.

11. Brief for Respondents at 6, *Wolf v. Innovation Law Lab*, et al., 141 S. Ct. 617 (2020) (No. 19-1212) (quoting U.S. Dep’t of State, *Mexico Travel Advisory*, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>), https://www.supremecourt.gov/DocketPDF/19/19-1212/147863/20200715161842224_19-1212%20Wolf%20v%20Innovation%20Brief%20in%20Opposition.pdf (last visited Jan. 13, 2021). See also David L. Wilson, *The US Has “Disappeared” More than 42,000 Migrants. Where’s the Outrage?*, TRUTHOUT (Sept. 14, 2019), <https://truthout.org/articles/the-us-has-disappeared-more-than-42000-migrants-where-the-outrage/>.

12. Anna-Theresa Unger & Austin Kocher, *Migrant Protection Protocols Along U.S.- Mexico Border Come to an End, but the Assault on Asylum Continues*, UNIV. OF OXFORD FACULTY OF LAW: BORDER CRIMINOLOGIES (Mar. 18, 2021), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/03/migrant>.

13. AM. IMMIGR. COUNCIL, *supra* note 10, at 4.

14. *Id.* at 2.

15. Ashoka Mukpo, *Asylum Seekers Stranded in Mexico Face a New Danger: COVID-19*, AM. C.L. UNION (Mar. 26, 2020), <https://www.aclu.org/news/immigrants-rights/asylum-seekers-stranded-in-mexico-face-a-new-danger-covid-19/>.

16. *Id.*

The MPP was premised on the claim that noncitizens frequently game the immigration system by skipping their court dates to stay in the U.S. illegally.¹⁷ However, data contradicts this assertion.¹⁸ A study of 18,378 deportation proceedings initiated between 2001 and 2016¹⁹ found that 86% of families released from detention appear in court for all of their court hearings.²⁰ Another study found that 99% of asylum-seekers attended all of their court hearings in FY 2019 when immigration judges decided a record number of asylum cases.²¹ In a sad irony, the MPP has created the illusory problem it was purported to address: 85% of the deportation orders delivered by immigration judges in cases completed under the MPP were not based on any substantive findings but solely because these individuals failed to appear for their court hearings.²²

MPP created a myriad of challenges that prevented enrollees from attending their court hearings. Without permanent addresses, there was no mechanism for the Immigration Courts to send enrollees hearing notices, and those who were lucky enough to receive notices often did not receive accurate or complete information about how to cross the border to attend these hearings.²³ Due to the lack of resources and the instability of the border towns, some migrants had no choice but to abandon their cases and return home.²⁴ The United Nation's International Organization for Migration provided buses traveling from the U.S.-Mexico border to the Mexico-Guatemala border for those abandoning their cases.²⁵ To add insult to injury, in some instances, individuals were coerced to board these buses against their will.²⁶ This resulted in asylum-seekers ending up hundreds of miles from where they needed to cross the border for their court hearings with no way to return.²⁷

For the outliers able to attend their hearings, MPP decreased the likelihood of success by making access to legal counsel much more difficult. Everyone in the MPP has the right to an attorney at their own cost.²⁸ However, research has demonstrated that immigrants enrolled in MPP were seven times less

17. Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration, U.S. DEP'T OF HOMELAND SEC. (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

18. Unger & Kocher, *supra* note 12.

19. INGRID EAGLY, STEVEN SHAFER, & JANA WHALLEY, DETAINING FAMILIES: A STUDY OF ASYLUM ADJUDICATION IN FAMILY DETENTION 5 (Am. Immigr. Council Aug. 2018), <https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention>

20. Unger & Kocher, *supra* note 12.

21. *Record Number of Asylum Cases in FY 2019*, TRAC, <https://trac.syr.edu/whatsnew/email.200108.html> (last accessed Apr. 7, 2021).

22. See Unger & Kocher, *supra* note 12.

23. *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, TRAC (Dec. 19, 2019), <https://trac.syr.edu/immigration/reports/587/>.

24. *Id.*

25. AM. IMMIGR. COUNCIL, *supra* note 10, at 5.

26. *Id.*

27. See *id.*; Unger & Kocher, *supra* note 12.

28. *US Move Puts More Asylum Seekers at Risk: Expanded 'Remain in Mexico' Program Undermines Due Process*, HUM. RTS. WATCH (Sept. 25, 2021), <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk>.

likely to find an attorney to represent them than those allowed to wait for their hearings within the US.²⁹ Immigration lawyers have a hard time staying connected with MPP participants.³⁰ These individuals do not have stable places to live nor consistent contact information, and Mexican resentment of migrants can make it more difficult for attorneys to find places to meet with clients safely.³¹ Furthermore, many lawyers cannot travel to Mexico to work directly with MPP participants due to security and logistical issues.³²

Not only have attorneys had no access to their clients in the months leading up to immigration proceedings, but many report that they have had virtually no opportunity to meet in person with their clients even on the day of their hearings.³³ DHS originally issued guidance that agents would arrange transportation of aliens to the immigration court to give them time to meet in person for no less than one hour with their legal representatives.³⁴ While one hour is insufficient to adequately prepare a client for a hearing, this time is still essential because it is often the only time that MPP participants have the opportunity to meet with an attorney.³⁵ However, it has been reported that DHS and the Executive Office for Immigration Review (EOIR) have “effectively barred attorneys from meeting with clients for the full hour.”³⁶ Access to legal representation in these immigration proceedings is crucial because the likelihood of being granted asylum without an attorney is extremely low³⁷—a 2016 study showed that detained immigrants without counsel were five times less likely to succeed in legally remaining in the U.S. than their represented counterparts.³⁸

Due to the aforementioned obstacles, MPP has nearly foreclosed grants of asylum to MPP enrollees. Only 1.5% of all completed cases from January 2019 through March 2021 resulted in asylum or other forms of relief.³⁹ For comparison, 40% of asylum-seekers not subject to MPP had their claims granted in FY 2017.⁴⁰

29. TRAC, *supra* note 23. “In FY 2017, 90 percent of applicants without an attorney were denied, while almost half of those with representation were successful in receiving asylum.” *Fact Sheet: U.S. Asylum Process*, NAT’L IMMIGR. F. (Jan. 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/>.

30. Alejandro Lazo, *Fewer Asylum Seekers Have Lawyers Under Trump Administration Policy*, WALL ST. J. (Jan. 31, 2020), <https://www.wsj.com/articles/fewer-asylum-seekers-have-lawyers-under-trump-administration-policy-11580472003>.

31. *Id.*

32. *Id.*

33. See HUM. RTS. WATCH, *supra* note 28.

34. *Id.*

35. *Id.*

36. *Id.*

37. TRAC, *supra* note 23.

38. NAT’L IMMIGR. F., *supra* note 29.

39. Unger & Kocher, *supra* note 12.

40. *Id.*; see Alicia Caldwell, *Trump Administration Program Nearly Ended Asylum. Now, Coronavirus Has Halted It*, WALL ST. J. (April 25, 2020), <https://www.wsj.com/articles/trump-administration-program-nearly-ended-asylum-now-coronavirus-has-halted-it-11587812402>.

III. BIDEN'S APPROACH TO THE MPP

At first glance, President Biden moved quickly to actualize his campaign promise to undo the Trump administration's dismantling of the American immigration system,⁴¹ but for some, Biden's actions have fallen short of his rhetoric.⁴² Within hours of taking the oath of office, President Biden suspended the MPP, halting the enrollment of individuals into the program.⁴³ Less than two weeks later, he instructed the Secretary of Homeland Security to promptly "review and determine whether to terminate or modify the program," and "to consider a phased strategy for the safe and orderly entry into the United States . . . of those individuals who have been subjected to MPP for further processing of their asylum claims."⁴⁴ By not immediately putting forward a plan to bring MPP enrollees into the U.S., the Biden administration left tens of thousands in limbo at the border.⁴⁵ On February 19, 2021, DHS began to process the approximately 25,000 active MPP cases.⁴⁶ Through this process, asylum-seekers have started to be allowed to cross the border.⁴⁷ Those with active cases welcomed this news⁴⁸ since all pending MPP hearings were suspended temporarily and then indefinitely in the wake of the Covid-19 outbreak in March 2020.⁴⁹ However, to the chagrin of many immigration advocates, these directives did not officially terminate the MPP

41. Miriam Valverde, *Joe Biden Tackles Immigration, Hoping to Undo Trump-Era Policies*, POLITIFACT (Jan. 21, 2021), <https://www.politifact.com/article/2021/jan/21/joe-biden-tackles-immigration-hoping-undo-trump-er/>.

42. See Molly O'Toole, *Biden's Early Immigration Orders Largely Limited to Reviewing, Not Undoing, Trump Policy*, LA TIMES (Feb. 2, 2021), <https://www.latimes.com/politics/story/2021-02-02/biden-immigration-executive-orders-trump>; Monica Campbell, *Why Biden's Day One Promise to End 'Remain in Mexico' Program May Go Unfulfilled*, THE WORLD (Jan. 12, 2021), <https://www.pri.org/stories/2021-01-12/why-biden-s-day-one-promise-end-remain-mexico-program-may-go-unfulfilled>.

43. Michael D. Shear, *On Day 1, Biden Moves to Undo Trump's Legacy*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/01/20/us/politics/biden-executive-action.html>.

44. *Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, THE WHITE HOUSE (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>; *Executive Order 14010*, HOMELAND SEC. DIGITAL LIBR., <https://www.hsd1.org/?abstract&did=849584> (last accessed Apr. 7, 2021).

45. O'Toole, *supra* note 42.

46. *DHS Announces Process to Address Individuals in Mexico With Active MPP Cases*, DEP'T OF HOMELAND SEC. (Feb. 11, 2021), <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>.

47. To read about the process by which individuals with active MPP cases will be processed across the border, see Shawna Chen, *Biden to Begin Allowing Migrants Forced to Wait in Mexico to Enter U.S.*, AXIOS (Feb. 12, 2021), <https://www.axios.com/biden-trump-remain-in-mexico-mpp-migrants-49a93f25-4121-48d8-ba0a-fa8588b10a26.html>.

48. Ted Hesson & Mimi Dwyer, *Biden to Bring in Asylum Seekers Forced to Wait in Mexico Under Trump Program*, U.S. LEGAL NEWS (Feb. 12, 2021), https://www.reuters.com/article/us-usa-biden-immigration-asylum-idUSKBN2AC113?fbclid=IwAR2CNLPV4EvLrOJFAqJXy0yanWn_mWsnfaGJD Iyk0VlygMYGuuOPLxkFXSc ("I've been reading all the articles," said Salvadoran asylum-seeker Sandra Andrade, who has been waiting in Mexico for over a year to resolve her U.S. court case. "Honestly, I have no words for how I'm feeling right now!").

49. Camilo Montoya-Galvez, *U.S. Postpones Court Hearings for Asylum-Seekers in Mexico Over Coronavirus*, CBS NEWS (Mar. 23, 2020), <https://www.cbsnews.com/news/u-s-postpones-court-hearings-for-asylum-seekers-in-mexico-over-coronavirus/>.

program, as Biden promised to do on his first day in office.⁵⁰ The Administration also did not indicate whether it will offer migrants with closed cases a second chance at securing asylum.⁵¹

Immigration lawyers, scholars, and service providers have recommended that the Biden administration quickly take further steps to address the damage caused by the MPP.⁵² For example, the American Immigration Lawyers Association (AILA) has asked DHS to bring all families and adults subject to MPP to safety in the U.S., not just those with *active* cases.⁵³ They base this request on the aforementioned challenges that caused many MPP participants to miss their court hearings, resulting in *in absentia* final removal orders. They also base this request on the assertion that many other final removal orders resulted from due process violations and illegal Trump administration rules, such as the third-country transit asylum ban.⁵⁴ On the same premises, AILA also recommends that DHS should use its legal authority to rescind all *in absentia* removal orders, initiate a review of all other removal orders, and agree to reopen cases at migrants' requests.⁵⁵ Erika Andiola, a chief advocacy officer at the Refugee and Immigrant Center for Education and Legal Services, has chastised the Biden administration for its decision to review but not immediately terminate the MPP. She states, "There's nothing to review about a policy that leads to people getting beaten, tortured, and kidnapped regularly, as they wait like sitting ducks on the Southern Border."⁵⁶ Citing Biden's tentative plan to allow about 600 asylum-seekers a day into the U.S. in contrast to the approximately 4,600 undocumented immigrants that were processed each day before the MPP, David J. Bier of the CATO Institute

50. O'Toole, *supra* note 42.

51. Lomi Kriel, *For Some Transgender Asylum Seekers Fleeing a Dangerous Migrant Camp Meant Being Left Behind*, PROPUBLICA, <https://www.propublica.org/article/the-people-we-left-behind-how-closing-a-dangerous-border-camp-adds-to-inequities?token=PNdp3JnBZi8MNvZOWQA12CU3X1KFZTke> (last accessed Apr. 7, 2021).

52. See J.D. Long-Garcia, '*Stop Blaming Trump*': Immigration Advocates Call on Biden to Address the Border Crisis, AMERICA: THE JESUIT REVIEW (Mar. 16, 2021), <https://www.americamagazine.org/politics-society/2021/03/16/border-crisis-immigration-advocates-biden-trump-240258>; Katrina Eiland, *Biden Must Restore and Rebuild Asylum*, ACLU (Jan. 12, 2021), <https://www.aclu.org/news/immigrants-rights/biden-must-restore-and-rebuild-asylum/>; Fernanda Echavarri, *Biden is Trying to Jettison Trump's Cruel "Remain in Mexico" Policy. It's Not Going to Be Easy*, MOTHER JONES (Feb. 2, 2021), <https://www.motherjones.com/politics/2021/02/biden-is-trying-to-jettison-trumps-cruel-remain-in-mexico-policy-its-not-going-to-be-easy/>.

53. Letter from AILA and Partners to Secretaries Mayorkas and Blinken, Wind Down of the Migrant Protection Protocols 1 (Mar. 12, 2021), <https://www.aila.org/advo-media/aila-correspondence/2021/aila-and-partners-sends-letter-recommending> (emphasis added) [hereinafter Letter from AILA].

54. *Id.* at 2. "On July 16, 2019, the Trump administration issued a rule barring asylum for virtually all refugees who travel through another country on their way to seek protection at the southern Border of the United States." *Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban*, HUM. RTS. FIRST (July 2020), <https://www.humanrightsfirst.org/resource/asylum-denied-families-divided-trump-administration-s-illegal-third-country-transit-ban>.

55. Letter from AILA, *supra* note 53.

56. Suzanne Monyak, *Immigration Advocates Seek More as Biden Moves to Overturn Trump Policies*, CQ ROLL CALL (Feb. 3, 2021), [https://today.westlaw.com/Document/I81ec7b28665a11ebbea4f0dc9fb69570/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default](https://today.westlaw.com/Document/I81ec7b28665a11ebbea4f0dc9fb69570/View/FullText.html?contextData=(sc.Default)&transitionType=Default).

writes, “[Biden] campaigned against Trump’s restrictionism, but has implemented mostly symbolic initiatives so far.”⁵⁷

IV. OBSTACLES TO ELIMINATING THE MPP IN BOTH NAME & EFFECT

At the same time, some advocates have recognized that Trump’s immigration policies will be difficult to undo. It is estimated that the Trump administration passed anywhere from 400 to over 1,000 immigration-related regulations in four years.⁵⁸ By producing so many regulations, bigger, more sweeping declarations, like the Muslim Ban, overshadowed smaller changes and allowed them to slip under the radar.⁵⁹ Sarah Pierce, an analyst with the nonpartisan Migration Policy Institute (MPI), explains that the Trump administration used a technique called ‘layering’ to implement these regulations in an interlocking fashion, making them more difficult to eliminate.⁶⁰ Through this strategy, they used different bureaucratic tools to enforce the same policy change so that if one was struck down, another might survive.⁶¹ For example, while an executive order might be struck down in a high-profile court case, a smaller modification, such as inserting a line in a consular handbook, might go unnoticed.⁶² The MPI explains that the MPP has been layered upon by two less-visible programs that have a similar capacity to “throttl[e] asylum applications”: the Prompt Asylum Case Review Program (PACR) and the Humanitarian Asylum Review Program (HARP).⁶³ Both of these initiatives are designed to remove individuals with unsuccessful humanitarian and asylum claims from the country within ten days.⁶⁴ PACR and HARP illustrate that even if the Biden administration eliminates the MPP, there will still be other regulations in place that accomplish similar, if not the same, goals.

Due to the sheer number of policies to tackle and the procedures needed to change them, restructuring the immigration system will not only be difficult but take time. Lucas Guttentag, a senior counselor at DHS during the Obama administration, explains that in order to change the immigration system as a whole, each policy must be addressed individually.⁶⁵ He states, “As to each policy, [there must be] an assessment of what the replacement ought to be,

57. David J. Bier, *Joe Biden Offers Bold Talk, Timid Action on Immigration*, CATO INST. (Feb. 19, 2021), <https://www.cato.org/commentary/joe-biden-offers-bold-talk-timid-action-immigration>.

58. Tessa Stuart, *Why Trump’s Immigration Policies Will Be So Hard to Undo*, ROLLING STONE (Oct. 13, 2020), <https://www.rollingstone.com/politics/politics-features/immigration-policy-changes-under-trump-1073343/>.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Muzaffar Chishty & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POL’Y INST. (Feb. 27, 2020), <https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum>.

64. *Id.*

65. Rebecca Beitsch, *Biden Struggles to Unravel Web of Trump Immigration Rules*, THE HILL (Mar. 14, 2021), <https://thehill.com/homenews/administration/543041-biden-officials-struggle-to-unravel-web-of-trump-immigration-rules?rl=1>.

what the legal requirements are for changing it, and what the operational and logistical challenges are for implementing a new policy.”⁶⁶ While some policies, such as those achieved through internal memos, can easily be changed, regulations will likely need to be replaced by new ones that often require a rule-making process under the Administrative Procedure Act, which can last anywhere from months to years.⁶⁷ Legal challenges to these policies in the courts can provide the Biden administration with another route to rolling back regulations, but litigation can take a long time.⁶⁸ Even though these routes to effect change are available, the Biden administration is already facing enormous pressure from Republicans.⁶⁹ Blaming a surge of migrants at the Southern border on Biden’s decision to reverse the MPP and other Trump immigration policies, Senate Republicans have already tried to pass numerous initiatives to pressure the White House to change course.⁷⁰ If he fails to follow proper procedures while attempting to move too quickly, Biden’s opponents could also thwart his agenda by filing lawsuits.⁷¹ For example, a federal judge has already blocked a 100-day pause on many deportations, which was one of Biden’s first immigration actions, after the Republican-led state of Texas filed suit.⁷²

V. THE LEGALITY OF THE MPP

In light of the aforementioned obstacles, the legality of the MPP remains relevant for a number of reasons, even with Biden’s suspension of the program. First, if DHS ultimately decides not to terminate the MPP, the Supreme Court can put *Mayorkas v. Innovation Law Lab*—the case-in-point on the policy’s legality—back on its docket at any time.⁷³ Second, even if the program is terminated, legal arguments against the MPP could be used to argue that regulations or legislation which accomplish similar goals, such as PACR and HARP, are also illegal. Third, since Republicans in Congress are opposed to Biden’s immigration policies, a legal challenge might be the strongest and least impregnable route to terminating the MPP because the Supreme Court is insulated from political pressure.⁷⁴ A ruling that the MPP is illegal would not only foreclose a future Republican administration from

66. *Id.*

67. *Id.*

68. *Id.*

69. David Morgan, *U.S. Senate Republicans Try to Pressure Biden on Border Policy*, REUTERS (Mar. 24, 2021), <https://www.reuters.com/article/us-usa-immigration-congress/u-s-senate-republicans-try-to-pressure-biden-on-border-policy-idUSKBN2BG2CL>.

70. *Id.*

71. Ted Hesson & Steve Holland, *Biden Moves to Reverse Trump Immigration Policies, Too Slowly for Some*, REUTERS (Feb. 2, 2021), <https://www.reuters.com/article/uk-usa-biden-immigration-actions-idUKKBN2A306C>.

72. *Id.*

73. Ian Millhiser, *Two Major Supreme Court Immigration Cases Just Went Up In Smoke*, VOX (Feb. 3, 2021), <https://www.vox.com/2021/2/3/22264190/supreme-court-immigration-border-wall-remain-in-mexico-trump-biden-sierra-club-innovation-law-lab>.

74. *The Judicial Branch*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/1600/judicial-branch> (last accessed Apr. 7, 2021).

reinstating the MPP,⁷⁵ but it would deter Congress, desiring to avoid judicial review, from creating future legislation too reminiscent of the MPP.

The remainder of this piece will analyze some of the major substantive arguments as to the legality of the MPP, discussed in the briefs of Petitioners and Respondents in *Mayorkas v. Innovation Law Lab*. Petitioners are the Acting Secretary of Homeland Security and other government officials, which hereinafter will be referred to as ‘Government.’ Respondents are asylum-seekers subject to the MPP and legal-service organizations, which hereinafter will be referred to as ‘Asylum-Seekers.’ The arguments focus on two areas of law: the Immigration and Nationality Act (INA) and *non-refoulement* obligations. Each of these areas will be analyzed in turn to demonstrate that the MPP is illegal, in accordance with Asylum-Seekers’ arguments.

A. *Is the MPP a Lawful Implementation of the INA?*

The Government claims, “MPP invokes DHS’ express authority under the INA. . . to return aliens temporarily to Mexico during the pendency of their removal proceedings.”⁷⁶ The INA is a federal law codified in Title 8 of the United States Code (U.S.C.), which contains the principal set of federal rules and regulations regarding aliens and nationality.⁷⁷ While they disagree as to its meaning, Government and Asylum-Seekers concur that the specific statutory provision at issue in deciding the aforementioned legal question is 8 U.S.C. 1225(b), which codifies Section 235 of the INA.⁷⁸ 1225(b) provides for the “[i]nspection of applicants for admission” to the United States.⁷⁹ To understand the parties’ arguments, one must be familiar with the construction and language of this statute. The sections of 1225(b) most central to the parties’ arguments are copied below, and the most salient language is italicized:

8 U.S. Code § 1225 – Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

- (i) *In general**
*If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(c)** or 1182(a)(7)****

75. Millhiser, *supra* note 73.

76. Brief for Petitioners at 2, *Wolf v. Innovation Law Lab*, 141 S. Ct. 617 (2020) (No. 19-1212).

77. *Immigration and Nationality Act*, DEP’T OF HOMELAND SEC., <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> (last accessed Apr. 7, 2021).

78. See Brief for Respondents, *supra* note 11, at i; Brief for Petitioners, *supra* note 76, at i.

79. 8 U.S.C. § 1225(b).

of this title, the officer shall order the alien removed from the United States without further hearing or review . . .

[*Hereinafter “(b)(1)”

**1182(a)(6)(c): aliens who committed fraud or misrepresentation in connection with application for admission to the U.S.

***1182(a)(7): aliens who lack valid documentation]

(2) **Inspection of other aliens**

(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.

[*Hereinafter “Subparagraph (A)”]

(B) **Exception***

Subparagraph (A) shall not apply to an alien—

- (i) who is a crewman,
- (ii) to whom paragraph [(b)](1) applies, or
- (iii) who is a stowaway.

[*Hereinafter “Subparagraph (B)”]

(C) **Treatment of aliens arriving from contiguous territory***

In the case of an alien described in subparagraph (A) who is arriving on land . . . from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

[*Hereinafter “Subparagraph (C)”]

Subparagraph (C) is the Government’s predicate for the MPP’s return authority because Mexico is a foreign territory “contiguous to the United States.”⁸⁰ Both Government and Asylum-Seekers agree that this return

80. Brief for Respondents, *supra* note 11, at 4.

authority is only available for aliens described in Subparagraph (A).⁸¹ Subparagraph (B), titled “Exception,” states three categories of aliens to which Subparagraph (A) “shall not apply.”⁸² The Government and Asylum-Seekers disagree on how to treat this provision.⁸³ This contributes to their different interpretations of which aliens are described in Subparagraph (A), and as a result, which aliens can be subject to contiguous-territory return.

Asylum-Seekers’ interpretation of Subparagraph (A) is stronger than the Government’s interpretation because it correctly applies principles of statutory interpretation. When a court sets out to determine what a particular statute means, it starts by looking at the plain language of the text and applies its usual and ordinary meaning to discover the statute’s original intent.⁸⁴ It then interprets specific statutory provisions by looking at them within the broader statutory context.⁸⁵ Only if, after considering the language of the statute, the meaning still remains ambiguous, the court will employ other tools to decipher the intent of the legislature.⁸⁶ The canons of construction are a widely used and defended tool.⁸⁷ They are guiding principles for interpreting statutes that “supply default assumptions about the way Congress generally expresses meaning.”⁸⁸ The plain language of 1225(b) is very clear in support of Asylum-Seekers’ interpretation. But even giving the Government the benefit of the doubt and conceding that the language is ambiguous, one of the canons of construction, the canon of superfluity, forecloses the Government’s interpretation of the statute.

As Asylum-Seekers contend, the plain meaning of 1225(b) communicates that MPP enrollees are not described in Subparagraph (A). (b)(1) states that it governs applicants determined to be inadmissible under 1182(a)(7), which describes noncitizens who do not possess valid documents.⁸⁹ MPP enrollees are inadmissible under 1182(a)(7), and thus governed by (b)(1), because “[v]irtually all were placed in MPP solely because they lack proper documents.”⁹⁰ Both the content and title of Subparagraph (B) demonstrate that (b)(1) aliens are not described in Subparagraph (A). Subparagraph (B) states, “Subparagraph (A) shall not apply to an alien— . . . to whom paragraph [(b)](1) applies.” It is indisputable that Subparagraph (B) is not a mere suggestion but a mandate because it says, “shall not,” and the plain meaning of this

81. Brief for Respondents, *supra* note 11, at 4, 18. See Brief for Petitioners, *supra* note 76, at 22.

82. 8 U.S.C. § 1225(b)(2)(B).

83. See Brief for Respondents, *supra* note 11, at 11; Brief for Petitioners, *supra* note 76, at 26–27.

84. *Statutory Construction*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/statutory_construction (last accessed Apr. 10, 2021).

85. CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (Apr. 5, 2018), https://www.everycrsreport.com/reports/R45153.html#_Toc510711652.

86. LEGAL INFO. INST., *supra* note 84.

87. CONG. RSCH. SERV., *supra* note 85, at 25.

88. *Id.*

89. 8 U.S.C. § 1182(a)(7).

90. Brief for Respondents, *supra* note 11, at 7.

phrase is “something certainly will or must happen.”⁹¹ Furthermore, Subparagraph (B) is titled “Exception” and directly follows Subparagraph (A), which is titled “In general.” The plain meaning of the word “exception” is “someone or something that is not included in a rule, group or list.”⁹² It logically follows that Subparagraph (B) is indicating someone or something that is not included in Subparagraph (A). Thus, MPP enrollees are not, and cannot be, described in Subparagraph (A) because they are applicants to whom “paragraph [(b)](1) applies,” and (b)(1) applicants are excluded from Subparagraph (A) by the plain language of the statute.

On the other hand, the Government violates the canon of superfluity to argue that MPP enrollees are described in Subparagraph (A). The canon of superfluity, also known as the rule of surplusage, “requires courts to give each word and clause of a statute operative effect, if possible.”⁹³ However, the Government performs linguistic gymnastics to circumvent the operative effect of Subparagraph (B). The Government claims that even if MPP enrollees are individuals to “whom paragraph [(b)](1) applies,” this would only mean that “subparagraph (A) shall not apply.”⁹⁴ They reason that MPP enrollees “would still be eligible for contiguous-territory return ‘as alien[s] described in subparagraph A’ because they have the salient identifying features of that subparagraph.”⁹⁵ The Government explains that MPP enrollees have the “salient identifying features” of Subparagraph (A) because “‘Subparagraph A’ refers to the case of an alien *who is an applicant for admission*, if the examining immigration officer *determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted.*”⁹⁶ This portion of the Government’s argument is unassailable: MPP enrollees do have these salient, identifying features. However, this assertion is meaningless because they are also mandatorily excepted from Subparagraph (A) by the plain language of Subparagraph (B).⁹⁷ Whereas the Government violates the rule of surplusage to justify its use of Subparagraph (C)’s return authority for MPP enrollees, Asylum-Seekers give “effect” to Subparagraph (B) in two ways. First, they acknowledge that this Subparagraph “carves out three categories of noncitizens” from Subparagraph (A),⁹⁸ and second, they recognize that since (b)(1) applicants are one of the three categories that are “carved out,” they are not described in Subparagraph (A).⁹⁹ Thus, Asylum-Seekers logically conclude, “Congress could not have been clearer: applicants

91. *Shall*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/shall> (last accessed Apr. 10, 2021).

92. *Exception*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/shall> (last accessed Apr. 26, 2021).

93. CONG. RSCH. SERV., *supra* note 85, at 28.

94. Brief for Petitioners *supra* note 76, at 27.

95. Brief for Petitioners *supra* note 76, at 27–28.

96. Brief for Petitioners *supra* note 76, at 21.

97. Brief for Respondents, *supra* note 11, at 17.

98. *Id.*

99. *Id.* at 11.

for admission ‘to whom [(b)(1)] applies’ are expressly excepted from subparagraph (A).”¹⁰⁰

In conclusion, Asylum-Seekers’ interpretation of the INA is more accurate than the Government’s interpretation because it applies the plain language of the statute and satisfies the canon of superfluity while the Government’s reasoning violates both of these principles of statutory construction. Thus, in accordance with Asylum-Seekers’ reasoning, the MPP is not a lawful implementation of the INA. MPP enrollees are aliens governed by (b)(1), and thus, they cannot be described in Subparagraph (A). Since Subparagraph (C)’s contiguous return authority is only available for aliens described in Subparagraph (A), MPP enrollees have been unlawfully subject to this return authority.

B. *Is the MPP Consistent with Applicable and Enforceable Non-refoulement Obligations?*

Non-refoulement is the principle of international law that prohibits the return of noncitizens to a country where they would risk being persecuted or tortured.¹⁰¹ The sources of this obligation are Article 33 of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) and Article 3 of the Convention Against Torture (CAT).¹⁰² Congress officially adopted both of these obligations into US law: Article 33 is implemented in the withholding statute, 8 U.S.C. 1231(b)(3), and Article 3 is implemented in the Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. 1231 note.¹⁰³ In *Cf. INS v. Cardoza-Fonseca* (1987), the Supreme Court held that DHS must provide protection to all who meet the statutory qualifications under the withholding statute and CAT.¹⁰⁴

When it heard this case, the Ninth Circuit was correct in concluding that MPP’s “procedures for assessing whether potential returnees will face persecution in Mexico are so inadequate that they violate the withholding statute.”¹⁰⁵ The Government argues that a temporary “return” of individuals to Mexico through MPP does not violate the withholding statute because it is not a “removal.”¹⁰⁶ However, there is “nothing in the statute or the treaty to support this counterintuitive proposition that it is permissible to deliver a person to persecution or torture so long as the delivery is temporary.”¹⁰⁷

100. *Id.* at 17.

101. *Asylum & The Rights of Refugees*, INT’L JUST. RESOURCE CTR., <https://ijrcenter.org/refugee-law/> (last accessed Apr. 7, 2021).

102. Brief for Respondents, *supra* note 11, at 5.

103. *Id.*

104. *Id.*

105. *Id.* at 25.

106. Brief for Petitioners *supra* note 76, at 18.

107. Brief for Respondents, *supra* note 11, at 29.

The Government also argues that MPP cannot violate the withholding statute because the statute “does not mandate any particular procedures.”¹⁰⁸ However, at the heart of due process principles is the understanding that minimum standards of fair procedure do not have to be spelled out because they automatically attach to statutory rights.¹⁰⁹ At a minimum, the Court has found that due process requires notice and an opportunity to be heard by an impartial tribunal¹¹⁰ when a government’s action may deprive an individual of life, liberty, or property, including statutory entitlements.¹¹¹ Withholding is such a statutory entitlement.¹¹² The MPP fails to provide any of these due process rights because it requires that individuals meet a high burden of proof to avoid being returned to Mexico without notifying them of their rights or providing a meaningful opportunity to be heard.¹¹³ Immigration officers do not notify individuals that there is any protection from being returned to Mexico, nor do they ask individuals if they fear persecution.¹¹⁴ In contrast, immigration officers must provide notice of the right to seek withholding in other immigration proceedings.¹¹⁵ Furthermore, even when aliens are aware of this right to protection, the high burden of proof needed to secure it in combination with the absence of procedural safeguards in the proceedings “make the protection nearly impossible to access.”¹¹⁶ Aliens subject to MPP must prove that they are “more likely than not” to face persecution if returned to Mexico.¹¹⁷ This is the same standard of proof that aliens must meet in regular removal proceedings.¹¹⁸ Yet, in regular removal proceedings, aliens have far more procedural safeguards, including “a full evidentially hearing before an immigration judge, notice of their rights, access to counsel, time to prepare, and administrative and judicial review.”¹¹⁹ MPP participants, on the other hand, must meet the same high burden of proof “in an informal interview, without any of the procedural tools necessary to do so.”¹²⁰ In these informal interviews, individuals have no opportunity to present witnesses or gather documentary evidence, and these determinations are decided by an asylum officer, not a judge, whose determination is reviewed only by a supervisor

108. Brief for Petitioners *supra* note 76, at 35.

109. Brief for Respondents, *supra* note 11, at 35–36 (holding in *Meachum v. Fano*; *Califano v. Yamaski*).

110. Nathan S Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701> (last accessed Apr. 7, 2021).

111. *The Procedure That Is Due Process*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-procedure-that-is-due-process> (last accessed Apr. 26, 2021).

112. Brief for Petitioners *supra* note 76, at 35.

113. Brief for Respondents, *supra* note 11, at 26.

114. *Id.* at 30.

115. *Id.* at 33.

116. *Id.* at 7.

117. *Id.* at 9.

118. *Id.*

119. *Id.* at 4.

120. *Id.* at 34.

with no other administrative or judicial review permitted.¹²¹ In addition, MPP participants did not even have the opportunity to acquire counsel until recently.¹²² Thus, even though the withholding statute does not specify any particular procedures for removal through the MPP, the procedures used in this program violate minimum standards of due process because the procedures fail minimum standards of fairness.¹²³

VI. CONCLUSION

The Biden administration has halted the Migrant Protection Protocols, providing hope that it will permanently terminate the program. However, the unfortunate reality still exists that similar orders, regulations, and statutes that the Trump administration layered upon this program will subsist for a long time. As discussed in Section V *supra*, there are strong legal arguments as to why the MPP violates not only the Immigration and Nationality Act but also *non-refoulement* obligations. Whether the MPP comes before the Supreme Court in the future or legal claims against similar policies must be made, these legal arguments could be used to chip away at the wall of anti-immigration legislation the Trump administration built over the last four years. Despite this possibility, the disturbing reality remains: a government program that wreaked havoc on the lives of tens of thousands of vulnerable individuals was not only bad policy but likely illegal as well.

121. *Id.* at 26.

122. *Id.*

123. *Id.* at 27.