

## Migrant Protection Protocols

By Chloe Canetti

The Migrant Protection Protocols (MPP) policy, also referred to as Remain in Mexico, is a program that was implemented by the Trump administration in response to an increase in asylum seekers at the southern border. The program requires asylum seekers, both from Mexico and from other countries, to stay in Mexico while their asylum cases are pending in U.S. immigration courts. The policy has had grave effects on the safety of migrants, who are forced to stay in Mexico in dangerous and inadequately resourced camps. Reports of attacks and human rights abuses against the migrants are rampant, and basic necessities such as shelter and medical care are lacking. This snapshot details the effects of MPP on asylum seekers, the court case over the policy, and steps the Biden administration can take to end the policy for good.

### Effects of MPP on Asylum Seekers

MPP has had a devastating effect on over 70,000 asylum seekers who have been subjected to the program so far.<sup>1</sup> The Department of Homeland Security (DHS) has been sending people to wait in some of Mexico's most dangerous cities, knowing that many of the cities to which it sends migrants are on the State Department's "Do Not Travel" list.<sup>2</sup> In fact, in the first two years of MPP, Human Rights First documented "at least 1,544 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers" in MPP.<sup>3</sup> In a survey by Human Rights Watch, nearly half of the 71 people interviewed said they were extorted not only by gangs, but also by Mexican immigration agents and police.<sup>4</sup> When migrants were unable to pay the bribes, the agents would detain them, threaten to kill them, or "hand them over to cartels."<sup>5</sup>

The dangers do not just lie outside of the migrants' makeshift camps, but within. Migrants living in the border camps report that they live in tents made of plastic tarps, and that they do not have access to bathrooms or sanitation.<sup>6</sup> There is no sewage or garbage disposal, leading to disease and infections in the camps.<sup>7</sup> Children are unable to attend school, and their parents cannot work because the Mexican government does

<sup>1</sup> "Mexico: Abuses Against Asylum Seekers at US Border." Human Rights Watch (Mar. 5, 2021), <https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border#>.

<sup>2</sup> "Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger." Human Rights First (Feb. 19, 2021), <https://www.humanrightsfirst.org/campaign/remain-mexico>.

<sup>3</sup> *Id.*

<sup>4</sup> "Mexico: Abuses Against Asylum Seekers," Human Rights Watch (2021).

<sup>5</sup> *Id.*

<sup>6</sup> Lebrija, Jorge. "Conditions Worsen at Asylum Seekers' Camps in North Mexico." Border Report (July 6, 2021), <https://www.borderreport.com/hot-topics/immigration/conditions-worsen-at-asylum-seekers-camps-in-north-mexico/>.

<sup>7</sup> *Id.*

not issue them IDs that prove their work authorization.<sup>8</sup> As a result, they remain in the unsanitary camps, due to both the danger and lack of opportunity awaiting them outside.

In its implementation of MPP, DHS has continuously failed to account for the dangers many migrants face in Mexico. People fleeing persecution in their home countries have a right to seek asylum at the U.S. border, according to Article 14 of the Universal Declaration of Human Rights that guarantees “the right to seek and to enjoy in other countries asylum from persecution.”<sup>9</sup> The 1951 Refugee Convention also states that no state “shall expel or return... a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>10</sup> However, under MPP, migrants are not regularly screened to determine whether they have a fear of persecution, and instead are expected to affirmatively state their fear of return in order to be placed in asylum proceedings.<sup>11</sup> Those who do not affirmatively disclose their fear are sent back to Mexico, and even those who do are often still denied the chance to proceed to the next stage in the screening process.<sup>12</sup> Living in Mexico also makes it extremely difficult for them to find legal counsel and attend their immigration hearings in the United States. As a result, in the first year of MPP, only 7.5% of asylum seekers were able to access a lawyer and 1% were granted asylum.<sup>13</sup>

### **The MPP Court Case: *Texas v. Biden***

MPP was put in place under the previous administration, but right before President Trump left office in January of 2021, his administration made an agreement with the state of Texas that Texas would help DHS with immigration enforcement, and in return DHS would have to consult Texas before making any changes to the MPP program. Right after taking office, the Biden administration suspended and then published a memorandum terminating MPP. As a result, Texas and Missouri sued, claiming damages not only for not consulting Texas on the move, but also for expenses the states claimed they would have to pay to accommodate new immigrants. This case is called *Texas and Missouri v. Biden Administration*.<sup>14</sup>

The judge in *Texas v. Biden* ruled in favor of Texas and Missouri, finding that DHS’s memorandum did not properly justify the agency’s reason for ending MPP, and ordering that the program be reinstated. Judges are required to give great deference to agency policies like MPP, but can strike them down if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>15</sup> The judge in this case found that the administration’s decision to end MPP was arbitrary, given that DHS did not give enough reasoning for the decision.

The court concluded that DHS had failed to consider the “positive” deterrent effect MPP had on migration, the costs to states as a result of ending the program, or any alternative and less drastic actions that could be taken instead of shutting down the program altogether. The judge stated that the program must remain in

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<sup>8</sup> “Mexico: Abuses Against Asylum Seekers,” Human Rights Watch (2021).

<sup>9</sup> Universal Declaration of Human Rights art. 14, Dec. 10, 1948.

<sup>10</sup> United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951.

<sup>11</sup> “The ‘Migrant Protection Protocols.’” American Immigration Council (Oct. 6, 2021), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (noting that by December 2020, only 521 people out of over 42,000 MPP cases were granted asylum).

<sup>14</sup> *Texas & Minnesota v. Biden*, 2:21-cv-00067-Z (N.D. Tex. Aug. 13, 2021).

<sup>15</sup> *Id.* at 34.

effect “until such a time as it has been lawfully rescinded in compliance with the APA [Administrative Procedures Act] and until such a time as the federal government has sufficient detention capacity to detain all [noncitizens] subject to mandatory detention.”<sup>16</sup>

As a result of this ruling, the Biden administration has attempted to reinstate MPP in compliance with the court order. However, MPP was set up as an agreement with the Mexican government and the Mexican government has since refused to cooperate with the reinstatement.<sup>17</sup> An update from the administration on October 15<sup>th</sup> states that the administration anticipates being able to reinstate the program by mid-November, but only if the Mexican government agrees to the plan.<sup>18</sup>

### **Next Steps: How Biden can End MPP**

Due to the court ruling in *Texas v. Biden*, the Biden administration is legally required to reinstate MPP until it can give a more thorough justification for ending it. However, the administration still has the power to end MPP, by writing a new memorandum stating its reasoning and addressing the judge’s concerns over ending the program. In doing so, the administration can end MPP in compliance with the court order. This will be a vital step in restoring the rights, dignity, and safety of asylum seekers in the United States.

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<sup>16</sup> *Id* at 52.

<sup>17</sup> Stern, Mark Joseph. “The Judicial Crusade to Revive Trump’s Border Policy Isn’t Going so Well.” *Slate* (Sept. 20, 2021), <https://slate.com/news-and-politics/2021/09/trump-biden-mexico-border-migrants-judges.html>.

<sup>18</sup> Defendant’s First Supplemental Notice of Compliance with Injunction, *Texas & Minnesota v. Biden*, 2:21-cv-00067-Z (N.D. Tex. Aug. 13, 2021).