



The Department of Homeland Security's Reported "Metering" Policy: Legal Issues

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Update: Following publication of this Sidebar, the federal district court considering the lawsuit challenging the Department of Homeland Security's (DHS) "metering" policy largely denied the government's motion to dismiss. The court ruled, among other things, that the "extraterritorial" plaintiffs who were turned away when approaching the U.S. border could challenge the metering policy on statutory and constitutional grounds. The court determined that these plaintiffs were subject to the procedural protections generally available to asylum seekers under the Immigration and Nationality Act because they were "arriving in the United States." The court reasoned that the phrase "arriving in the United States" (or "arrives in the United States") refers to an "ongoing process," and rejected the government's contention that the phrase refers only to those who have physically arrived on U.S. soil. The court also determined that the "extraterritorial" plaintiffs were entitled to constitutional due process protections, even though they were physically outside the United States when turned away, because their lawsuit concerns a policy developed and implemented on U.S. soil. The court also ruled that under the Alien Tort Statute, which authorizes civil actions by aliens for torts "committed in violation of the law of nations or a treaty of the United States," the individual plaintiffs could pursue their claim for civil liability alleging that the metering policy violates international non-refoulement principles. (But the court ruled that the organizational plaintiff, Al Otro Lado, could not present this claim under the relevant statute.) Given the court's decision, the lawsuit challenging DHS's metering policy may proceed.

Below is the text of the Legal Sidebar from April 29, 2019.

Generally, a non-U.S. national (alien) who arrives in the United States without valid documentation may pursue asylum and related protections if the alien demonstrates a credible fear of persecution or torture in his or her country of origin. In recent years, the Department of Homeland Security's (DHS) U.S. Customs and Border Protection (CBP) has reportedly been limiting the number of asylum seekers who may be processed each day at designated ports of entry along the U.S. southern border. Aliens reportedly affected by this policy generally have not yet reached the U.S. border and, while at the cusp of physical entry, remain in Mexico. This policy—known as "turnback" or "metering"—is intended to address an "unprecedented rise in asylum requests," as well as safety and health concerns resulting from overcrowding at ports of entry. However, it also has reportedly led to long wait times and overcrowded conditions on the Mexican side of the border, and some contend the policy may incentivize attempts to illegally cross the border between ports of entry. In addition, there have been claims that CBP, in

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implementing this policy, has used [coercive and deceptive methods](#) to deter aliens from seeking asylum. In 2017, a [lawsuit](#) was filed challenging the metering policy on the basis that it unlawfully deprives aliens of the opportunity to seek asylum, and that case is currently pending in federal district court. The litigation raises important questions about the scope of protections available for asylum seekers who have not yet reached the U.S. border, and whether the reported metering policy complies with federal immigration laws, constitutional requirements, and international treaty obligations.

Background on Metering

There is no federal statute or regulation that directly governs the circumstances in which CBP may limit the number of asylum seekers who may be processed at designated ports of entry. But according to a 2018 DHS Office of Inspector General (OIG) [report](#), CBP has been “regulating the flow of asylum-seekers at ports of entry” since at least 2016 through its metering policy. The OIG report states that, under the policy, CBP officers direct asylum seekers who have not yet crossed the international boundary line into the United States to remain in Mexico if there is insufficient space and resources at the U.S. port of entry. The OIG report indicates that the CBP officers will inform the asylum seekers when the port of entry has the capacity to process them.

The metering policy is distinct from DHS’s “[Migrant Protection Protocols](#)” (MPP), which require most asylum seekers who have arrived at the U.S. southern border to return to Mexico pending their formal removal proceedings. Unlike the MPP, the metering policy applies to aliens who have not yet been inspected by CBP, whereas the MPP applies to aliens who have *already been inspected* and placed in removal proceedings. Recently, a federal district court issued a [preliminary injunction](#) barring DHS from continuing the MPP pending the court’s resolution of a legal challenge to that policy. The U.S. Court of Appeals for the Ninth Circuit has [temporarily stayed](#) that injunction pending the government’s appeal.

Importantly, when defending the metering policy in litigation, the government has [disputed](#) the existence of such a policy with respect to aliens who have physically arrived at U.S. ports of entry. The government, however, has [argued](#) that such a policy may be lawfully applied to aliens who have not physically crossed into the United States and who, while at the cusp of entry, remain on the Mexican side of the border.

Statutory Framework

The dispute over CBP’s metering policy largely centers on the language found in Section 208 of the INA, which establishes rules for [asylum eligibility](#), and Section 235 of the INA, which requires the inspection of aliens seeking admission into the United States, and provides a streamlined, [expedited removal](#) process for aliens arriving at or between a U.S. port of entry who lack proper documentation. Three provisions are particularly relevant:

- [INA § 235\(a\)\(3\)](#), which provides that all aliens “who are *applicants for admission or otherwise seeking admission* . . . shall be inspected by immigration officers”;
- [INA § 208\(a\)\(1\)](#), which states that “[a]ny alien who is physically present in the United States *or who arrives in the United States* (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section [235(b)] of [the INA]”; and
- [INA § 235\(b\)\(1\)\(A\)\(ii\)](#), which states that an alien who is “*arriving in the United States*” and subject to expedited removal must be referred to an asylum officer if “the alien indicates either an intention to apply for asylum under [INA § 208] or a fear of persecution.”

Legal Challenge to the Metering Policy

Under CBP's metering policy, the agency is [reportedly](#) limiting the number of asylum seekers who can be processed at designated ports of entry each day, and instead instructing some asylum seekers to remain in Mexico until CBP has the capacity and resources to process them. In some cases, asylum seekers have [reportedly](#) waited in Mexico for weeks or months before they could present their claims.

In 2017, an immigration advocacy organization and six asylum seekers who allegedly had been turned away at various ports of entry after physically crossing the border filed a [class action lawsuit](#) challenging CBP's metering policy. The lawsuit was [amended](#) in 2018 to include eight additional asylum seekers, several of whom had been turned away "in the middle of the bridge" when *approaching* the U.S. border.

The plaintiffs, who [claimed](#) that asylum seekers are subject to "dangerous conditions of rampant crime and violence by gangs and cartels on the Mexican side of the border," argued that CBP's metering system "creates unreasonable and life-threatening delays in processing asylum seekers." They also [alleged](#) that CBP officials have discouraged aliens from pursuing asylum by forcibly removing them from ports of entry, threatening them with prolonged detention or separation from their children, and falsely telling them that they can no longer pursue asylum due to changes in U.S. law.

The plaintiffs [argued](#) that CBP's metering policy violates INA provisions that allow any alien who is physically present or arriving in the United States to pursue asylum, and that require CBP to refer any alien subject to expedited removal who indicates an intention to apply for asylum or a fear of persecution for a [credible fear interview](#). The plaintiffs [also argued](#) that CBP has violated their [due process](#) rights by denying or delaying their "access to the asylum process." Finally, the plaintiffs [argued](#) that CBP's policy violates the international law concept of *non-refoulement*, which instructs that no country should expel or return an individual to a place where he or she faces persecution. The plaintiffs [requested](#) the federal district court to declare CBP's metering policy unlawful and enjoin the agency from continuing it.

Following the filing of the plaintiffs' [initial complaint](#), the Department of Justice (DOJ) [disputed](#) the existence of a "broadly sanctioned" metering policy for aliens who have already arrived at U.S. ports of entry, and claimed that the plaintiffs' claims [became moot](#) because they were ultimately inspected and referred for credible fear interviews. After plaintiffs [amended](#) their complaint to include plaintiffs who were turned away when approaching the U.S.-Mexico border, the DOJ did not dispute the existence of a metering policy that applied to aliens outside the United States. Instead, in a motion to dismiss, the DOJ [argued](#) that the "extraterritorial" plaintiffs had no basis to challenge CBP's metering policy because, unlike the original named plaintiffs, they had not physically crossed into the United States when they were turned away. The DOJ [argued](#) that the INA provisions requiring the inspection of aliens "are triggered *only* if the alien is on American soil," and accordingly do not govern policies directed at aliens located outside the United States, even when such aliens are at the threshold of reaching the U.S. border.

At this juncture the key legal issue in the litigation is how the relevant statutes apply to those aliens who have not actually reached the U.S. border. (The federal district court has not yet ruled on the DOJ's motion to dismiss.)

Analysis of CBP's Metering Policy as Applied to Aliens outside the United States

The legal challenge to CBP's metering policy asks whether that policy is consistent with federal immigration statutes, including whether those statutes apply to aliens at the cusp of physical entry into the United States. In analyzing the metering policy, reviewing courts may consider whether that policy complies with relevant statutes concerning the inspection of applicants for admission, the constitutional protections generally available to aliens seeking admission, and any international treaty obligations.

Statutory Considerations

The question of whether the metering policy is permissible largely turns on the application of INA provisions concerning the inspection of aliens seeking admission. Plaintiffs allege that the metering policy is inconsistent with this framework because [INA § 235\(a\)\(3\)](#) states that all applicants for admission (which is defined to include an alien “who arrives in the United States”) “*shall be inspected by immigration officers*” (emphasis added). Furthermore, plaintiffs contend, [INA § 208\(a\)\(1\)](#) provides that “[a]ny alien who is physically present in the United States *or who arrives in the United States . . .* irrespective of such alien’s status, may apply for asylum” (emphasis added). And though most asylum seekers without valid documentation are subject to expedited removal, [INA § 235\(b\)\(1\)\(A\)\(ii\)](#) requires a credible fear interview if an alien “arriving in the United States” indicates either an intention to apply for asylum or a fear of persecution. Thus, plaintiffs allege, by indefinitely delaying the inspection of asylum seekers, CBP’s metering policy violates the INA’s express statutory command.

However, in response, the DOJ [argues](#) that some—though not all—of the named plaintiffs are not entitled to these statutory protections because they never “arrived in the United States,” but were turned back while *approaching* the U.S.-Mexico boundary. In these circumstances, the DOJ contends, CBP had no statutory obligation to inspect the “extraterritorial plaintiffs” and process their asylum claims. The 2018 [OIG report](#) states that, under the metering policy, CBP officers “stand at the international line out in the middle of the footbridges” linking the United States and Mexico, and, if no space is available at the port of entry, they direct asylum seekers to go back *before* they actually cross the boundary line.

With respect to its argument that the relevant INA provisions do not apply to aliens who have not yet reached the U.S. boundary, the DOJ may find some support in [Sale v. Haitian Center Council, Inc.](#), where the Supreme Court held that a [statute](#) prohibiting the removal of aliens to countries where their life or freedom would be threatened on account of a protected ground had no extraterritorial application to aliens intercepted on the high seas. The Court determined that the statute applied only to “the domestic procedures” by which the government determines whether an alien should remain in the United States. Based on this precedent, the DOJ argues that the statutory protections generally available to aliens seeking asylum in the United States do not apply to those who have not crossed the U.S.-Mexico boundary line. On the other hand, it might be argued that the aliens in *Sale* were in a meaningfully different position than aliens near the U.S.-Mexico border who are affected by the metering policy, because the aliens intercepted on the high seas in *Sale*, unlike the aliens impacted by the metering policy, were not at the threshold of physical entry into the United States when turned back.

A key question in resolving the challenge to the metering policy may involve the reviewing court’s interpretation of INA provisions requiring the inspection of applicants for admission, which at various points refer to an alien who “arrives in,” is “arriving in,” or is “otherwise seeking admission” to the United States. Based on this language, the plaintiffs argue that the inspection requirements extend even to those who are in the process of coming to the United States. The plaintiffs and their supporters contend that [DHS regulations](#) support their interpretation, as they define an “arriving alien” as “an applicant for admission coming *or attempting to come into the United States at a port-of-entry*” (emphasis added). They [contend](#) that this definition would cover asylum seekers who, though technically on Mexican soil, are attempting to arrive at a designated port of entry. The DOJ [argues](#) that, under governing statutes and regulations, an alien must be *physically present* on U.S. soil in order to be “arriving in” the United States. To the extent there is any ambiguity in that phrase (and the associated term “arriving alien”), a reviewing court may consider whether such a construction is [reasonable](#).

Additionally, the DOJ [argues](#) that Congress has granted the Secretary of Homeland Security broad immigration enforcement powers at the border. For example, under [INA § 101\(a\)\(5\)](#), the Secretary “shall have the power and duty to control and guard the boundaries and border of the United States against the illegal entry of aliens.” Similarly, under the [Homeland Security Act of 2002](#), the Secretary is charged with

“[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States,” and, in carrying out those responsibilities, the Secretary may “ensur[e] the speedy, orderly, and efficient flow of lawful traffic and commerce.” These authorities arguably supply some support for CBP’s metering policy. On the other hand, these broad authorities may not override other specifications found in the INA, including those establishing inspection procedures for arriving aliens seeking to apply for asylum. Accordingly, notwithstanding the general authority conferred to the Secretary of Homeland Security to secure the borders and deter illegal crossings, the legality of the metering policy may turn on the proper construction of the INA provisions concerning the inspection of arriving aliens.

Constitutional Considerations

In their lawsuit, the plaintiffs [argue](#) that the metering policy violates their right to due process by delaying or denying their “access to the asylum process.” The Supreme Court, however, has long held that aliens seeking initial entry into the United States [have no constitutional rights](#) regarding their applications for admission because “the power to admit or exclude aliens is a sovereign prerogative,” and they are only entitled to whatever procedures Congress authorized by statute. These limitations, moreover, apply not only to aliens who are [physically outside of the United States](#), but also to those who are standing “[on the threshold of initial entry](#),” such as at a border checkpoint, and who are treated, by virtue of the “[entry fiction doctrine](#),” as though they had never entered the country. Therefore, to the extent the plaintiffs contend that CBP’s metering policy violates a substantive due process right by preventing their entry into the United States, those claims are likely foreclosed by Supreme Court precedent (though claims raised alleging [inhumane treatment](#) or [abuse](#) by aliens who reached U.S. soil might have greater viability).

In defending the metering policy, the DOJ has also [urged](#) that the government has the inherent authority “to control the flow of travel across the border,” and that this authority is rooted in its “plenary power” over immigration. The Supreme Court [has long held](#) that the federal government has “broad, undoubted power over the subject of immigration and the status of aliens,” and that this power stems from the government’s inherent sovereign authority to control its borders and its relations with foreign nations. Notably, the Court has construed this “plenary power” as being [more absolute](#) than any other power conferred by the Constitution, and that “Congress [may make rules](#) as to aliens that would be unacceptable if applied to citizens.” Accordingly, it could be argued that, based on this power, CBP has the authority to restrict the number of aliens who may be processed at ports of entry. On the other hand, the Supreme Court has typically described this plenary power as [primarily residing](#) with Congress, and CBP’s exercise of such power is presumably informed and constrained by the parameters set forth in the INA.

International Law Principles

The plaintiffs have also [claimed](#) that CBP has violated international law concepts “reflected in treaties which the United States has ratified and implemented.” The 1967 [United Nations Protocol Relating to the Status of Refugees \(Refugee Protocol\)](#), to which the United States is a party, incorporates Articles 2 through 34 of the 1951 U.N. Convention relating to the Status of Refugees (Refugee Convention). Under Article 33 of the Refugee Convention, member states may not “expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened” on account of a protected ground. Similarly, under Article 31, member states “shall not impose penalties, on account of their illegal entry or presence, on refugees who, [are] coming directly from a territory where their life or freedom was threatened” on account of a protected ground. Recently, a federal district court [enjoined](#) DHS from continuing the unrelated MPP policy that requires most asylum seekers who arrive at the U.S. southern border to return to Mexico pending their formal removal proceedings, in part because the court believed that policy provides insufficient safeguards against the return of aliens to places where they face the threat of persecution.

U.S. authorities have generally construed the protections afforded by the Refugee Convention as applying only to aliens who are within U.S. territory, and who may not be *expelled* or otherwise penalized because of their unlawful *entry or presence*. In *Sale*, the Supreme Court determined that the Refugee Protection’s *non-refoulement* provisions “cannot reasonably be read to say anything at all about a nation’s actions toward aliens outside its own territory.” Thus, to the extent asylum seekers are turned back while they are still in Mexico, as DHS’s [OIG report](#) indicates, CBP’s metering policy arguably does not implicate the Refugee Convention as construed by U.S. courts.

In any case, the Refugee Protocol is not [self-executing](#) and therefore is not directly enforceable in federal court. But as one federal district court has concluded, the Refugee Protocol may serve an “[interpretive guide](#)” for revealing Congress’s intent. Thus, the INA provisions requiring the inspection of applicants for admission (and consideration of any asylum claims raised during such inspection), when read in light of the Refugee Convention, suggest that Congress clearly intended that any arriving alien must have an opportunity to seek asylum even if he lacks authorization to enter the country. As discussed above, whether these statutory protections extend to aliens who have not yet crossed the U.S.-Mexico threshold remains uncertain, and courts may decide to address whether they have any extraterritorial application.

Conclusion

The legality of CBP’s metering policy thus turns largely on the proper interpretation of INA provisions that require the inspection of applicants for admission, and that afford all aliens physically present or arriving in the United States the opportunity to pursue asylum—even those who would otherwise be subject to expedited removal. The key question raised in the metering policy litigation is whether these statutory requirements apply to aliens outside of the United States who have not yet reached the U.S.-Mexico threshold. To the extent there is any ambiguity concerning the reach of these provisions, Congress may consider clarifying the statutory framework governing the inspection of aliens seeking admission, and specifying whether (or under what circumstances) CBP may regulate the flow of asylum seekers attempting to arrive at designated ports of entry.

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