



TESTIMONY OF

Blas Nuñez-Neto
Acting Assistant Secretary for Border and Immigration
Office of Strategy, Policy and Plans

BEFORE

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ON

“Examining the Court-Ordered Reimplementation of the Remain in Mexico Policy”

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Introduction

Chairwoman Barragán, Ranking Member Higgins, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today.

I have been serving as the Acting Assistant Secretary for Border and Immigration Policy since October 1, 2021. My permanent role is the Chief Operating Officer at U.S. Customs and Border Protection (CBP), within the Department of Homeland Security (DHS), which I began on March 5, 2021. Since August 24, 2021, I have been concurrently serving as the Vice Chair for the Secretary of Homeland Security's Southwest Border Taskforce. I also previously served at DHS as an Advisor to CBP Commissioner Gil Kerlikowske from January 12, 2015 to January 16, 2017.

Before discussing the court-ordered reimplementation of the Migrant Protection Protocols (MPP), I want to highlight the fact that Secretary of Homeland Security Alejandro N. Mayorkas has repeatedly stated that MPP has endemic flaws and should be terminated. These flaws include that it imposed unjustifiable human costs on migrants, subverted the asylum system, pulled resources and personnel away from other priority efforts, and failed to address the root causes of irregular migration. DHS continues to vigorously defend its decision to terminate MPP in court and has taken the extraordinary step of asking for expedited review by the U.S. Supreme Court. In the interim, however, DHS is required to abide by the order to re-implement the program in good faith and it continues to do so, demonstrating this Administration's commitment to the rule of law.

As we move forward with this court-ordered reimplementation of MPP, DHS is seeking to do so in the most humane way possible. I want to make clear, however, that this Administration recognizes that these changes, while significant, are not sufficient to address the concerns with the program that Secretary Mayorkas has identified, and that no matter what measures are put in place to attempt to protect migrants enrolled in MPP, we cannot ensure their safety and security in Mexico.

We will continue to challenge the court's ruling, even as we abide by the court order to reimplement MPP in good faith.

Terminating MPP

On February 2, 2021, President Biden issued Executive Order (EO) 14010, *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*. EO 14010 directed the Secretary of Homeland Security to "promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols."

During the course of his first review, Secretary Mayorkas identified a number of critical factors that contributed to his final conclusions to terminate MPP:

- While DHS originally intended the program to more quickly adjudicate legitimate asylum claims and clear asylum backlogs, over the course of the program, asylum backlogs actually increased before both the U.S. Citizenship and Immigration Services (USCIS) Asylum Offices and the Department of Justice’s (DOJ) Executive Office for Immigration Review (EOIR).
- The focus on speed was not matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings.
- As a result, a high percentage of cases resulted in an order of removal *in absentia* (approximately 44 percent, based on DHS data) which raised significant questions about whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief and whether conditions faced by some MPP enrollees in Mexico—including, for example, the lack of stable access to housing, income, and safety—resulted in the abandonment of potentially meritorious protection claims.
- MPP as initially implemented did not sufficiently improve border management so as to justify the program’s extensive operational burden and other shortfalls. The program also imposed additional responsibilities on border personnel and resources that detracted from other aspects of DHS’s critically important mission sets.

Having completed the comprehensive and thorough review required by the EO, Secretary Mayorkas concluded that MPP should be terminated and issued a memorandum to that effect on June 1, 2021.

On August 13, 2021, the U.S. District Court for the Northern District of Texas determined that the Secretary’s June 1 memorandum was not issued in compliance with the Administrative Procedure Act of 1946 because it failed to address all relevant considerations. As a result, the District Court vacated the June 1 memorandum in its entirety, remanded the matter to DHS for further consideration, and ordered DHS to re-implement MPP. DHS sought a stay of this injunction to the Fifth Circuit, which was denied by both the Fifth Circuit and then the Supreme Court.

As a result, Secretary Mayorkas began a second comprehensive review of MPP. During this process, the Secretary once again carefully reviewed the arguments, evidence, and perspectives presented by those who support re-implementation of MPP, those who support terminating the program, and those who have argued for continuing MPP in a modified form.

After this review, Secretary Mayorkas again determined that MPP should be terminated. Secretary Mayorkas considered perspectives the District Court determined were insufficiently addressed in the June 1 memorandum, including claims that MPP discouraged unlawful border crossings, decreased the filing of non-meritorious asylum claims, and facilitated more timely relief for asylum seekers, as well as predictions that termination of MPP would lead to a border surge, cause DHS to fail to comply with alleged detention obligations under the Immigration and Nationality Act, impose undue costs on states, and put a strain on U.S.-Mexico relations.

Throughout the course of this second review, Secretary Mayorkas examined multiple factors that informed the government’s decision to terminate the MPP. These factors included:

- As described by an assortment of independent findings, including those made by non-governmental organizations and U.S. courts, MPP placed migrants in harm's way. Significant evidence indicates that individuals awaiting their court hearings in Mexico under MPP were subject to extreme violence and frequently became targets for transnational criminal organizations that profited by exploiting migrants' vulnerabilities.
- As previously designed and implemented, MPP's non-refoulement screening process was inadequate. Issues included individuals not being affirmatively asked questions about fear of return to Mexico, insufficient access to counsel, and use of the "more likely than not" standard during *non-refoulement* screenings, a standard typically reserved for adjudication on the merits of withholding of removal and Convention Against Torture claims before an Immigration Judge.
- Individuals in MPP faced numerous barriers in accessing counsel and receiving sufficient information about their court hearings. There were several problems in communicating accurate and up-to-date information to enrollees about rescheduled court hearings. Opportunities for attorneys to meet with their clients, outside of those meetings organized at the hearing locations, were limited due to, among other constraints, complications associated with cross-border communication and U.S. attorneys not being licensed to practice law in Mexico.
- Due to these factors, among others, many individuals in MPP were unwilling or unable to remain in Mexico during the course of their removal proceedings. Comparing noncitizens enrolled in MPP to similar noncitizens (i.e., non-Mexican single adults and family units who were issued notice to appear) from the same period who were not enrolled in MPP, EOIR granted relief to 3.4 percent of non-MPP enrollees who had been issued NTAs versus 1.1 percent of MPP enrollees. This discrepancy suggests that at least some MPP enrollees with meritorious claims either abandoned or were unable to adequately present their claims given the conditions faced by migrants in Mexico and barriers to legal access.
- Additionally, MPP was originally intended to reduce burdens on border security personnel and resources and to help clear the backlog of unadjudicated asylum claims. In reality, however, Secretary Mayorkas observed that backlogs in immigration courts and asylum offices grew significantly during the period that MPP was in effect. MPP also diverted resources from other priority Department missions by requiring DHS to build, maintain, and operate the infrastructure and processes supporting MPP.
- MPP also played a particularly outsized role in diplomatic engagements with the Government of Mexico (GOM), diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of irregular migration and forced displacement.
- Lastly, MPP also diverts DHS's resources from the Administration's priority efforts to implement effective, fair, and durable asylum reforms that reduce adjudication delays and tackle the immigration court backlog. For example, both the Dedicated Docket, designed so that immigration judges can adjudicate cases within 300 days, and the Asylum Officer rule, which will substantially streamline the asylum process, rely on the same USCIS personnel.

As a result, on October 29, 2021, Secretary Mayorkas issued a new memorandum terminating MPP that will be implemented as soon as practicable pending a final judicial decision to vacate the injunction. As part of our vigorous efforts to challenge this injunction, on December 28, 2021, the U.S. Government (USG) filed with the U.S. Supreme Court a petition for a writ of

certiorari seeking expedited review of the judgment of the Fifth Circuit in *Texas v. Biden*, which rejected DHS's arguments and left the injunction in place. DHS's petition for writ of certiorari was granted by the Supreme Court on February 18, 2022, and oral arguments are anticipated in April. For as long as the injunction remains in place, DHS is bound to comply with it and make good faith efforts to reimplement MPP.

Ultimately, while recognizing that MPP may potentially have contributed to some reduced migratory flows, Secretary Mayorkas concluded that the program imposes unjustifiable human costs, pulls resources and personnel away from other priority efforts, and fails to address the root causes of irregular migration. The Secretary also noted that MPP is inconsistent with the values and approaches taken by the Biden-Harris Administration, which is pursuing a series of policies that disincentivize irregular migration while incentivizing safe, orderly, and humane pathways for persons seeking to enter the United States. These policies—including the ongoing efforts to reform the U.S. asylum system and address the root causes of irregular migration in the region—seek to achieve sustainable, long-term change by addressing longstanding problems that have plagued the U.S. immigration system for decades. Once fully implemented, Secretary Mayorkas believes that these policies will address migratory flows more effectively while holding true to our nation's values.

Operational Changes to MPP

DHS, working with our federal and international partners, has taken multiple steps to reimplement MPP while attempting to address some of the most profound humanitarian concerns that MPP presents. These changes are intended to minimize the harms associated with the program to the greatest extent feasible, but as Secretary Mayorkas has repeatedly confirmed, no changes short of termination are sufficient to fully address the inherent flaws and human costs of MPP.

First, both the U.S. and Mexican Governments are committed to protecting particularly vulnerable individuals from being returned to Mexico and put in harm's way. Although GOM is not responsible for reimplementing MPP nor upholding U.S. court decisions, its cooperation is critical to operationalize the program. Unaccompanied children cannot be enrolled in MPP. Additionally, those with particular vulnerabilities including those with known physical and mental health issues, disabilities and advanced age are not eligible for MPP. When CBP officials observe or learn of a particular vulnerability, they make case-by-case decisions about whether the vulnerability falls within an exception to enrollment. When there is doubt as to whether a vulnerability merits exception to enrollment, CBP has been instructed to err on the side of excepting the individual from MPP.

Second, DHS has enhanced policies and procedures to protect from return those who may be subject to torture or persecution in Mexico. CBP officials are now required to proactively ask individuals subject to MPP if they fear being returned to Mexico. In the prior implementation, individuals were not asked these questions and had to instead affirmatively assert a fear of return to Mexico. Individuals who express a fear of being returned to Mexico are referred to USCIS for a *non-refoulement* interview. Rather than the "more likely than not" standard that was used in the previous version of MPP, USCIS officials now use the lower "reasonable possibility"

standard. Importantly, they are provided access to telephones and are generally given 24 hours to consult with a legal representative in advance of their interview. It continues to be the case that individuals enrolled in MPP can tell a USG official that they fear return to Mexico at any time while they are in the United States, including during initial processing, court hearings or any other encounters with USG officials.

Third, DHS and DOJ are taking additional steps to provide individuals subject to MPP with reasonable and meaningful opportunities to meet with counsel or a legal representative. Upon enrollment, individuals are provided a legal resource packet. As already stated, individuals who express a fear of return to Mexico have 24 hours prior to their USCIS *non-refoulement* interviews to consult with legal representatives on the telephone. Under current operational guidance, CBP is to provide individuals enrolled in MPP with access to telephones during their time in custody, and volunteers from law firms and legal service providers are providing migrants with free telephonic legal consultations. At the request of an individual in MPP, legal representatives may participate by telephone in USCIS *non-refoulement* interviews. DHS and DOJ are coordinating returns to the United States for court hearings to allow individuals enrolled in MPP with substantial time to meet with counsel on the day of the hearing, and DOJ is providing access to the Legal Orientation Program for individuals in MPP. Counsel may be present at the noncitizens' court hearings by video or in person. Additionally, the Department of State is working with international organizations to increase access to legal and other informational resources via shelters in Mexico, including through provision of WiFi and outfitting of private spaces that can be used to consult remotely with legal representatives or others.

Re-Implementation to Date

On December 6, 2021, DHS began to enroll individuals in MPP and subsequently return them through a port of entry (POE) in El Paso, and court hearings began at the El Paso Immigration Court for individuals enrolled in MPP on January 3, 2022. On January 3, 2022, DHS began to enroll individuals in MPP and subsequently return them through a POE in San Diego, and court hearings began at the San Diego Immigration Court on February 1, 2022. On January 20, 2022, DHS began to enroll individuals in MPP and subsequently return them through a POE in Brownsville, and court hearings began at the Brownsville Immigration Hearing Facility on February 15, 2022. On February 28, 2022, DHS began to enroll individuals in MPP and will subsequently return them through a POE in Laredo, and court hearings will begin on or about March 28, 2022 at the Laredo Immigration Hearing Facility. DHS intends to continue incremental expansion of returns across the Southwest Border in the coming months contingent on GOM's continued agreement to receive returns and location-specific reception capacity.

As of February 28, a total of 1,602 individuals have been enrolled in MPP and 893 of them have been returned to Mexico, while 181 are still being processed. Not all individuals who are enrolled in MPP are actually returned to Mexico since some are disenrolled due to a particular vulnerability or a positive determination in their non-refoulement interview.

Of the 1,602 enrollments, only one was a family unit individual (who was later disenrolled), while the rest were single adults. To date, all individuals enrolled have been Spanish speakers

primarily from Nicaragua, Venezuela, Cuba, Colombia, and Ecuador. In principle, anyone from the Western Hemisphere (other than Mexico) is potentially eligible for MPP processing if they are not an unaccompanied child or fall into another vulnerable group.

Of the 1,602 enrollments, 82 percent (1,313) claimed a fear of harm in Mexico during initial enrollment and were referred to USCIS for a non-refoulement interview, 225 of which resulted in a positive determination (17 percent). The remaining 83 percent of those who claimed fear either received a negative determination (69 percent), had their cases administratively closed (12 percent), or remain pending (2 percent). Individuals disenrolled from MPP generally still have a pending Notice to Appear before EOIR and continue their removal proceedings while remaining in the United States. During their non-refoulement interviews, 2 percent were legally represented.

DHS will continuously evaluate MPP operations and effectiveness and make necessary adjustments to improve the integrity and operations of the program, and the safety of those who are enrolled in it. As part of these efforts, DHS has created a case review process for individuals who believe they should not have been subject to MPP or should no longer be subject to MPP due to a particular vulnerability or a changed circumstance. Individuals or their representatives can email DHS with information about why the individual's enrollment is believed to have been incorrect or how the individual's circumstances have changed since enrollment, and DHS will promptly review their cases.

Conclusion

As the Biden-Harris Administration and Secretary Mayorkas have repeatedly acknowledged, the United States is a nation with borders and laws that must be enforced, and it is also a nation that was built by immigrants. This Administration is, as a result, committed to securing our borders while also offering protection to those fleeing persecution and torture. The Secretary has been clear that, in his view, MPP is not the best strategy for achieving either of these goals—even with the significant changes that have been made that seek to mitigate its inherent flaws.

Despite the Secretary's views concerning MPP, DHS is bound by court order to make good faith efforts to implement it until the injunction is lifted—and we have been complying with this court order.

That said, efforts to address irregular migration cannot solely be focused on our borders. Our immigration laws have not been updated in decades, and during this time we have seen a dramatic change in the nature and magnitude of migratory flows. These changes have only accelerated during the COVID-19 pandemic. This Administration is committed to working with Congress to transform our flawed immigration system so that we can better secure our borders and create fair, orderly, and humane pathways for migrants seeking protection or opportunity. A key part of these efforts involves the critical work our colleagues at the State Department are engaged in to create regional approaches to addressing migration that recognize it is a shared responsibility of all countries in the Hemisphere. DHS hopes to work alongside members of this Committee and this Congress to develop sustainable solutions to better manage migration at the border and in the region.

Thank you. I am pleased to answer your questions.