



The Department of Homeland Security's “Metering” Policy: Legal Issues

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Generally, an [alien](#) who arrives in the United States without valid documentation is subject to a streamlined, [expedited removal process](#), but [may pursue asylum and related protections](#) if, during processing, the alien demonstrates a credible fear of persecution in his or her country of origin. Before the Coronavirus Disease 2019 (COVID-19) pandemic, the Department of Homeland Security's (DHS's) [U.S. Customs and Border Protection](#) (CBP) had been [limiting](#) the number of aliens who were processed each day at designated ports of entry along the U.S. southwest border. Aliens affected by this policy generally had not yet reached the U.S. border and were required to remain in Mexico until CBP decided it had the capacity to process them. This CBP policy—known as “metering”—sought to address an [“unprecedented rise in asylum requests,”](#) as well as [safety and health concerns](#) resulting from overcrowding at ports of entry. The policy had [led to](#) long wait times and overcrowded conditions on the Mexican side of the border, and [arguably incentivized](#) attempts to illegally cross the border between ports of entry.

In response to the COVID-19 pandemic, CBP in March 2020 [implemented an order](#) that shut down asylum processing for many aliens arriving at the U.S. border (referred to as the [“Title 42” order](#)), with [certain exceptions](#). The Title 42 order remained in effect [until May 11, 2023](#). During that period, CBP largely [suspended](#) metering, and most asylum processing “waitlists” were closed to aliens seeking to enter the United States after March 2020. In November 2021, CBP [rescinded](#) the metering policy.

To date, there has been one challenge to CBP's metering policy that has resulted in a decision by a federal district court. In 2017, a group of asylum seekers and advocacy organizations sued in the U.S. District Court for the Southern District of California to challenge CBP's metering policy, alleging that the policy violated statutory, constitutional, and international law. In 2021, the district court [ruled](#) in *Al Otro Lado v. Mayorkas* that metering violates statutory provisions that require CBP officers to inspect and process asylum seekers arriving at the U.S. border, and infringes on their constitutional right to due process. In 2022, the court [issued a declaratory judgment](#) making it unlawful, “absent any independent, express, and lawful statutory authority,” for CBP officers to refuse to provide “inspection or asylum processing” to aliens “who are in the process of arriving” in the United States at a port of entry. Although CBP had rescinded its metering policy by the time of the ruling, the questions raised in the *Al Otro Lado* litigation may affect the extent to which CBP can restrict access to asylum at the southwest border in the future, particularly after DHS [announced initiatives](#) to [“manage regional migration”](#) following the termination of the Title 42 order in May 2023.

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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. According to a 2020 DHS Office of Inspector General (OIG) [report](#), CBP had been limiting the number of aliens processed at U.S. ports of entry since at least 2016 through its metering policy. Under the [policy](#), CBP officers directed asylum seekers who had not yet crossed the international boundary line into the United States to remain in Mexico if there was insufficient space and resources at the U.S. port of entry. When CBP had the operational capacity, CBP officers informed Mexican authorities that they could send specified numbers of asylum seekers to ports of entry for inspection and processing. Nongovernmental organizations and Mexican authorities maintained “[waiting lists](#)” identifying the asylum seekers awaiting CBP processing.

As noted, CBP suspended metering following implementation of the Title 42 order in March 2020, shutting down most asylum processing at the border in light of the COVID-19 pandemic (with [certain exceptions](#)). Waitlisted aliens [have either](#) remained in Mexican border cities, attempted to enter the United States between ports of entry, been deported to their countries of origin, moved to other cities within Mexico, or were processed under the Title 42 exceptions. In November 2021, CBP [rescinded](#) its metering policy and [directed officials](#) to increase their operational capacity and streamline asylum processing at U.S. ports of entry.

The metering policy is distinct from DHS’s “[Migrant Protection Protocols](#)” (MPP), a Trump Administration policy that required most asylum seekers arriving at the U.S. southwest border to return to Mexico pending their formal removal proceedings. Unlike the MPP, the metering policy applied to aliens who had not yet been inspected by CBP, whereas the MPP applied to aliens whom CBP had *already inspected* and placed in removal proceedings. (As discussed in another [Legal Sidebar](#), the Biden Administration [terminated](#) the MPP in 2021, though litigation concerning the termination is ongoing.)

Statutory Framework

The dispute over CBP’s metering policy largely centered on the language of (1) 8 U.S.C. § 1158, which establishes rules for [asylum eligibility](#) and (2) 8 U.S.C. § 1225, which requires the inspection of aliens seeking admission into the United States and provides a streamlined, [expedited removal](#) process for aliens who arrive at or between a U.S. port of entry without proper documentation. Three statutory provisions are particularly relevant:

1. [8 U.S.C. § 1158\(a\)\(1\)](#), 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 1225(b) of this title”;
2. [8 U.S.C. § 1225\(a\)\(3\)](#), which provides that all aliens “who are *applicants for admission or otherwise seeking admission* . . . shall be inspected by immigration officers”; and
3. [8 U.S.C. § 1225\(b\)\(1\)\(A\)\(ii\)](#), 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 section 1158 of this title or a fear of persecution.”

Legal Challenge to the Metering Policy

Under CBP’s metering policy, the agency limited the number of asylum seekers who were processed at designated ports of entry each day and instructed some asylum seekers to remain in Mexico until CBP had

the capacity and resources to process them. In some cases, asylum seekers [waited](#) in Mexico for weeks or months before they could present their claims.

In *Al Otro Lado v. Mayorkas*, an immigration advocacy organization and six asylum seekers whom CBP allegedly had turned away at various ports of entry after they had physically crossed the border filed a [class action lawsuit](#) in 2017 challenging CBP's metering policy. The plaintiffs [amended](#) their complaint in 2018 to include eight additional asylum seekers, several of whom CBP allegedly had 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 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 violated existing statutes 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 violated their [due process](#) rights by denying or delaying their "access to the asylum process." Finally, the plaintiffs [argued](#) that CBP's policy violated 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 [asked](#) a federal district court to declare CBP's metering policy unlawful and enter an injunction enjoining the agency from continuing the policy.

The government [disputed](#) the existence of a "broadly sanctioned" metering policy for aliens who have already arrived at U.S. ports of entry, but did not dispute that a metering policy applied to aliens outside the United States who were attempting to arrive at the ports of entry. The government [argued](#) that these "extraterritorial" plaintiffs had no basis to challenge metering because they had not physically crossed into the United States when they were turned away. The government [argued](#) that statutory provisions requiring the inspection of aliens "are triggered *only* if the alien is on American soil," and 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.

Thus, the central issue in the *Al Otro Lado* case was whether CBP's policy of turning back asylum seekers attempting to arrive at U.S. ports of entry from Mexico complied with statutes governing the inspection of applicants for admission, the constitutional protections generally available to aliens seeking admission, and international law principles.

Statutory Considerations

The question of whether the metering policy was permissible largely turned on what it means for an alien seeking admission to have "arrived in the United States" under federal statute. Plaintiffs alleged that the metering policy conflicted with the applicable statutory framework because the plain language of [8 U.S.C. § 1225\(a\)\(3\)](#) states that all applicants for admission (who are defined to include an alien "who arrives in the United States") "*shall be inspected* by immigration officers" (emphasis added). Furthermore, plaintiffs argued that [8 U.S.C. § 1158\(a\)\(1\)](#) 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). Additionally, although most asylum seekers without valid documentation are subject to expedited removal, [8 U.S.C. § 1225\(b\)\(1\)\(A\)\(ii\)](#) 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. The plaintiffs argued that these statutory provisions applied to aliens attempting to arrive at U.S. ports of entry from Mexico, even if they have not yet set foot on U.S. soil.

In *Al Otro Lado*, the government cited two Supreme Court decisions to support its contention that aliens who have yet to reach U.S. ports of entry are not “arriving” aliens. In the 1993 case of *Sale v. Haitian Center Council, Inc.*, the Supreme Court reviewed the lawfulness of the Coast Guard’s interdiction of vessels on the high seas carrying Haitian migrants and repatriation of those migrants back to Haiti. There, the Court **concluded** that various immigration statutes—including those concerning asylum eligibility—did not apply to aliens apprehended extraterritorially. More recently, in the 2020 case of *DHS v. Thuraissigiam*, the Court rejected a constitutional challenge to the streamlined expedited removal process brought by an alien apprehended by immigration authorities between U.S. ports of entry and roughly 25 yards from the border. In so doing, the Court **observed** that “[w]hen an alien *arrives* at a port of entry . . . the alien *is on U.S. soil*” but the alien is still treated for purposes of procedural due process analysis as having not yet entered the country. The *Thuraissigiam* Court **held** that the same constitutional principle applied to those persons apprehended when illegally crossing into the United States between ports of entry.

The district court **concluded** that both cases cited by the government were distinguishable and not controlling upon its analysis of the metering policy. With regard to *Sale*, the district court **observed** that the governing immigration statutes had been amended or superseded in the intervening years, so that the *Sale* Court’s interpretative analysis was inapposite to the present-day statutory framework governing metering. Additionally, the *Al Otro Lado* court **explained** that, unlike the individuals in *Sale*, the plaintiffs in this case were turned away by CBP officers standing on the U.S. side of the border; therefore, their actions, the court reasoned, involved a “domestic application of the statute,” negating the presumption of extraterritoriality. Regarding *Thuraissigiam*, the district court viewed the Supreme Court’s observation that an arriving alien is on U.S. soil as being “*mere dicta*” and **concluded** that nothing in *Thuraissigiam* undercut the district court’s prior interpretation that the statutes apply to aliens “in the process of arriving” at a U.S. port of entry who had not yet reached that destination.

The district court **held** that CBP’s metering policy ran afoul of its “statutorily mandatory duties” to inspect and process asylum seekers even though the individual plaintiffs were eventually permitted to come to the ports of entry and seek asylum. The court **determined** that the plain text of the relevant statutes impose the inspection and processing requirements when the alien *first* “arrives” or “is arriving” in the United States, not upon some “unspecified future arrival.” The court further opined that metering was **incompatible with Congress’s intent** when it created the statutory framework governing applicants for admission, to protect credible asylum applicants and enable the prompt admission of all aliens who are entitled to be admitted, no matter whether they had arrived at a port of entry or entered unlawfully between ports of entry.

Constitutional Considerations

The *Al Otro Lado* plaintiffs also **argued** that the metering policy violated their right to due process under the Fifth Amendment by delaying or denying their ability to seek asylum in the United States. Plaintiffs asserted a protected due process interest, i.e., “the right to be processed at a POE and granted meaningful access to the asylum process,” against the backdrop that the Supreme Court has long held that aliens seeking initial entry into the United States **have limited 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 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, under the “**entry fiction doctrine**,” as though they had never entered the country. In *Thuraissigiam*, the Supreme Court reaffirmed this “**century-**

old rule” and held that an alien detained shortly after entering the United States between designated ports of entry could be treated “as if stopped at the border.”

The government relied upon these principles in arguing that the Fifth Amendment’s due process protections did not apply to the plaintiffs because they were physically outside U.S. territory when turned away. The district court disagreed, ruling that the “extraterritorial” asylum seekers were entitled to due process protections. To the district court, it was less constitutionally significant that the asylum seekers may not have reached U.S. soil than it was that immigration authorities stationed in U.S. territory turned them away, and that these personnel (in the view of the district court) violated governing statutes in carrying out the metering policy, unlike the immigration authorities in *Thuraissigiam* who afforded the petitioner all the rights he was due under the expedited removal statute. The court rejected the notion that the availability of due process depends upon “bright-line” tests, such as whether an alien has developed significant connections with the United States. The court concluded that “the Fifth Amendment applies to conduct that occurs on American soil.” The court also determined that the plaintiffs’ due process rights derived from protections Congress afforded through statute. The court held that CBP’s failure to inspect the plaintiff asylum seekers, as required under governing statutes, thus violated their right to due process.

International Law Principles

The *Al Otro Lado* plaintiffs also claimed that CBP violated international law principles “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 (e.g., political opinion).

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.”

Initially, the district court in *Al Otro Lado* had ruled that under the Alien Tort Statute (ATS), which authorizes civil actions by aliens for torts “committed in violation of the law of nations or a treaty of the United States,” the plaintiffs had sufficiently pleaded a claim for civil liability on the grounds that the metering policy violated non-refoulement principles. In its September 2021 ruling on the merits of the case, the court recognized that *Sale*’s interpretation of Article 33 of the Refugee Convention as not imposing extraterritorial non-refoulement obligations “remains binding precedent.” The court thus held that the plaintiffs’ ATS claim “is not actionable as a matter of law.”

After the federal district court ruled on September 2, 2021, that the metering policy violated statutory requirements concerning the inspection and processing of asylum seekers arriving at the U.S. border, the court issued a declaratory judgment ruling on August 5, 2022. The government has appealed that judgment to the Ninth Circuit, and the appeal remains pending before that court.

Conclusion

As *Al Otro Lado* shows, the legality of metering turned largely on the interpretation of statutes that require the inspection of applicants for admission, and that generally afford aliens physically present or arriving in the United States the opportunity to pursue asylum—including those subject to expedited removal. The district court determined that these statutory requirements apply equally to aliens outside of

the United States who are “in the process of arriving” at a port of entry, even if they have not yet reached U.S. soil. Although CBP ultimately rescinded the metering policy, the district court’s decision may inform consideration as to what extent the agency can limit access to the asylum screening and inspection process for aliens seeking to enter the United States. For example, following the end of the Title 42 order in May 2023, DHS [implemented new initiatives](#) to create “safe and orderly” processes at the southwest border. These initiatives include the use of an app called “[CBP One](#)” that allows individuals to schedule a time and place for inspection at ports of entry, and a [final rule](#) that makes aliens who fail to utilize this system (or other specified “lawful pathways”) ineligible for asylum. Legal challenges to these initiatives may raise questions over whether they unlawfully restrict the ability to access the inspection and asylum process in the same way that metering was found to impede access to that process. In one pending [lawsuit](#) challenging the final rule, plaintiffs argue that many asylum seekers are unable to secure appointments using the CBP One app in a timely manner, or otherwise cannot access the app for a variety of reasons (e.g., because of technical issues, lack of internet access, or language barriers).

Given the uncertainty about the reach of the statutory inspection and processing requirements for asylum seekers outside the United States, and the prior litigation concerning CBP’s metering practice, Congress may consider clarifying the statutory framework governing aliens seeking admission. For example, Congress may specify whether (or under what circumstances) CBP may regulate or limit the movement and flow of asylum seekers attempting to arrive at designated ports of entry (whether through metering or a digital appointment scheduling system). Additionally, Congress may consider clarifying the meaning of “arrives” or “arriving” in the United States for purposes of determining when CBP’s “[statutorily mandated](#)” duties to inspect and screen asylum seekers are triggered.

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