INFORMATION

MEMORANDUM FOR THE SECRETARY

FROM: Chad F. Wolf
Senior Official Performing the Duties of the Under Secretary
Office of Strategy, Policy, and Plans

SUBJECT: Migrant Protection Protocols as only One Piece of a Comprehensive Approach to Regional Migration Management

Purpose: To contextualize the recent implementation of the Migrant Protection Protocols (MPP) within DHS’s larger efforts to promote a comprehensive, regional approach to migration management and identify where additional action is needed.

Context and DHS Equities: Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) via the MPP is a critical component of DHS’ comprehensive approach to improving migration management in the region. However, other components of this approach are less mature for two reasons: (1) the effort required to negotiate and implement MPP meant that other aspects have not received the attention necessary for development; and (2) there continues to be resistance to some of these efforts in the region.

The status update for the regional vision is as follows:

1) Increase access to humanitarian protections as close to migrants’ homes as possible

   Successes:
   • Following intense engagement between DHS, the Department of State (DOS), and the United Nations High Commissioner for Refugees (UNHCR) in the summer and fall of 2018, UNHCR began dramatically increasing its presence in both northern and southern Mexico in order to support Mexico’s effort to provide access to asylum and meaningful employment as an alternative to coming to the United States.
   • Mexico increased the availability of programs to provide both temporary and permanent immigration status, including access to employment permits, humanitarian visas, and refugee status.

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1 These are general categories of activities based on the “Regional Vision to Address Central American Migration Flows” drafted in June 2018. See Attachment A.
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Remaining Challenges:
- Mexico still has not allowed UNHCR to perform Refugee Settlement Determinations, which would facilitate third-country refugee resettlement (e.g., to Canada or Australia) outside of the bogged-down process managed by the Mexican Refugee Assistance Commission (COMAR) and provide resettlement destinations besides the United States and Mexico.
- COMAR’s budget was slashed by more than 25 percent in 2019 despite a mounting backlog of Central American and Venezuelan asylum cases and the coordinator general’s recognition that COMAR needs to build its capacity.
- In-country refugee resettlement programs in Guatemala, Honduras and El Salvador were largely discontinued in January 2018, although a small amount of Salvadorans continue to be processed under the Protection Transfer Arrangement (PTA). Central American countries have not taken responsibility for their own internally displaced citizens, nor (with the exception of Costa Rica) created functioning asylum systems to provide protection to refugees fleeing neighboring countries.

2) Develop programs in Central America to address push factors, including with private sector support

Successes:
- Mexico has announced a number of economic development initiatives in southern Mexico targeted at migrants from the Northern Triangle.
- Mexico continued to offer work permits for Central Americas seeking employment in Mexico’s southernmost states.

Remaining Challenges:
- Though there have been rumors of Mexico implementing a “Marshall-type” plan in Central America, Mexico has not publicly announced any development programs nor privately given specifics to the U.S. government.
- Mexican development programs to guarantee employment to Central Americans in southern Mexico have not begun, making it difficult for Central Americans currently with Mexican work permits to remain in Mexico. Further, wages in Southern Mexico may be lower than many places in Central America.
- The United States has not undertaken any serious discussion about increasing the amount of aid to Central America or expanding programming; in fact, the most recent discussions have focused on restricting aid.
- Despite verbal statements of support to DHS leadership from key regional business leaders and international groups, there has been no visible progress on an increased effort by the private sector to invest in Central America.
- DOS and Inter-American Develop Bank (IADB) led efforts to increase foreign direct investment, reform monopolistic industries that restrict economic growth, and spur job creation in the region have been haphazard.
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3) Implement a “compliance” mechanism to discourage undocumented migration

**Successes:**
- DHS implemented INA Section 235(b)(2)(C) via MPP, and GOM began activities which complement DHS’ unilateral discussion to do so.
- GOM is amenable to expanding MPP across the Southwest Border and applying it to family units.

**Remaining Challenges:**
- MPP is the recent subject of litigation. Although the initiative is still operational, to date, only a small number of individuals have been subject to MPP.
- Mexico remains opposed to negotiating a Safe Third Country Agreement.
- There is not an institutional, regularized process to share information with and between DHS Components, National Migration Institute (INM), and COMAR regarding individuals who apply for benefits in either the United States or Mexico in order to inform final benefit determinations.

4) Improve security in the region, particularly at or near borders

**Successes:**
- In response to migrant caravans that began in October, there has been some increased law enforcement cooperation between U.S., Mexican, and Northern Triangle law enforcement agencies.
- Mexican law enforcement was rather successful at preventing the October caravan from accessing La Bestia to quickly journey north through Mexico.
- The Northern Triangle countries have stepped up border enforcement, ensuring that the documents and paperwork of families and unaccompanied children are verified at the ports of entry.
- Northern Triangle countries recently committed to move forward on deepened law enforcement cooperation with DHS by signing a Joint Statement to inform negotiations on a Memorandum of Cooperation addressing these issues.

**Remaining Challenges:**
- INM’s independent enforcement efforts have all but stopped. Its current apprehensions comprise those who turn themselves in (mostly extra-continental migrants) or those who are turned over by other agencies for criminal infractions. The result is that more people are allowed to move north unimpeded through Mexico, including through caravans.
- Mexico’s budget for security at its southern border was decreased by more than 25 percent in 2019.
- There is currently no intention by the United States to increase foreign assistance aimed to improve the Central American countries’ ability to identify, apprehend, detain, and remove illegal migrants.
- Central American countries’ capacities to impede the flow of illegal migrants remains minimal.
Conclusion: As a stand-alone program, MPP will not ultimately affect the flow of migrants heading north. As DHS has always maintained, MPP must be considered one part of a multi-pronged effort in which all governmental and private sector entities assume responsibility to develop the region, to enforce domestic and international laws, and to provide protection to individuals at the soonest point possible. The United States should not expect MPP alone to substantially affect continued, sustained Central American migrant flows at the U.S. Southwest Border.
**Question**: Please describe the process CBP and other DHS entities are following to return certain asylum seekers to Mexico and retrieve them before scheduled immigration hearings.

**Response:**
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DRAFT//PREDECISIONAL & DELIBERATIVE//ATTORNEY-CLIENT// ATTORNEY
WORK PRODUCT

INA Section 235(b)(2)(C)
“Migrant Protection Protocols”
SWB Expansion Implementation Plan

Executive Summary: Lead IBEC/UCG

Current MPP Implementation Status Along the SWB: Lead CBP (support ICE/CIS/PLCY)

MPP Implementation Lessons Learned To Date: Co-leads CBP/ICE (support CIS/PLCY)

MPP Expansion Planning Assumptions: Lead PLCY (support CBP/ICE/CIS)

Legal Considerations Associated with MPP Expansion: Lead OGC (support component OCCs)

Proposed Future MPP Expansion Locations Along the SWB: Lead PLCY (support CBP/ICE/CIS)

MPP Expansion Phased Timeline: Co-leads PLCY/CBP (support ICE/CIS)

Department and Agency Roles and Responsibilities to Achieve MPP Expansion: Lead PLCY (support OGC)

Risks/Challenges/Issues Associated with MPP Expansion: Tri-leads CBP/ICE/CIS (support PLCY/OGC)

**Note: Provide recommended solution(s) for each listed risk/challenge**

MPP Expansion Implementation Recommendations: Lead PLCY
MEETING WITH COMPONENT HEADS ON THE MIGRANT PROTECTION PROTOCOLS (MPP)
May 24, 2019

BOTTOM LINE UP FRONT:
• Seek senior leader alignment on key aspects of MPP expansion plan
• Discuss and decide key outstanding issues with MPP expansion.
• Reinforce ASI priorities and decide on next steps and timeline.

CURRENT STATE
• As of May 23, DHS has returned 6,542 migrants to Mexico.
• The El Paso non-detained court is currently scheduling master calendar hearings to occur in April 2020 and merits hearings to begin in the fall of 2019.
  ➢ This week, El Paso added another IJ and opened more master calendar hearings starting in September 2019, for an additional 2900 hearings.
  ➢ Before adding the additional IJ, for every day of returns in El Paso, one week’s worth of master calendar hearings were being scheduled, thus building a backlog.
• The San Diego non-detained court is currently scheduling master calendar hearings to occur in July/August 2019 and merits hearings to begin in mid-July 2019.
  ➢ San Diego is building a backlog of hearings but at a slower rate than El Paso.
• Both courts have infrastructure capacity and security limitations that are being exceeded by the addition of MPP cases to the existing non-detained case dockets, which will continue without establishing expanded hearing space.

Proposed Expansion Locations
• On May 22, the MPP Working Group identified the following locations for expansion: San Diego, Calexico, Nogales, Yuma, El Paso, Laredo, Del Rio and Brownsville.
  ➢ The working group was tasked with determining a timeline to bring each expansion location online and the estimated amenable MPP aliens to be processed per day per location.
  ➢ This information will be used to prioritize the list of locations and determine the requirements for soft-sided structures, including capacity and throughput.
  ➢ For the sites that can be brought online in the next month, a team from DHS Headquarters will travel to each location to meet with field staff the last week of May to gather those requirements that will populate Request For Assistance (RFA) 10. Future trips to the locations that will take more time to bring online will be taken as needed.

DHS/DISCUSSION PRIORITIES
Goal 1: Develop a new RFA 10 supported by the Department of Defense (DOD) to build and maintain soft-sided hearing facilities at new locations at or near ports of entry (POEs).
• To build RFA 10, DHS Headquarters (HQ) and its Components need to select priority POEs for MPP expansion and define how many new migrants U.S. Customs and Border Protection (CBP) intend to place in MPP each day at each location.
• Understanding the anticipated MPP capacity at each location will determine how many hearing rooms are necessary, and therefore the size of the soft-sided facility, at each location.
- Once the necessary size of the soft-sided facility is established, DHS facilities staff can perform a site survey and select a location for the soft-sided structure at or near the selected POEs.
- To develop the RFA, DHS will need to understand the facility, services and staffing requirements for each POE. While some of the requirements for each soft-sided structure may vary by location, the basic requirements—including the size of the spaces required for a video teleconference (VTC) hearing, waiting room, attorney/client meeting room, and USCIS phone booth for telephonic MPP assessments—should be the same and allow for scalability and other adjustments to address specific location needs.
  - **Staff Recommendations:**
    - Direct each component to specify the minimum requirements for a court hearing facility needed to meet their respective component missions.
    - Designate a single lead at the HQ level with the authority to coordinate and direct agencies and make decisions necessary to stand-up each soft-sided hearing location.
    - Designate one component to administer a contract to maintain and provide facility services at the soft-sided hearing facilities, to include security, transportation and food service.

**Goal 2:** Bolster DHS capacity, specifically staffing and fiscal resources, to process the projected number of MPP amenable populations at each location.
- To address staffing and fiscal resource needs expressed by each component, DHS needs to understand each component’s specific needs at each location in order to successfully complete the projected number of MPP cases.
  - **Staff Recommendations:**
    - Direct CBP to specify the number of additional U.S. Border Patrol (USBP) agents and CBP officers needed to manage the projected MPP inbound and outbound flows for each location and the funding mechanism to secure this staffing need.
    - Direct ICE Office of the Principal Legal Advisor (OPLA) to specify the number of additional attorneys and support staff required to respond to the projected increase in MPP cases at soft-sided hearing facilities and the funding mechanism to meet this staffing need.
    - Direct ICE Enforcement and Removal Operations (ERO) to specify resource needs for acquiring, maintaining and providing transportation services to soft-sided facilities at each location.
    - Direct U.S. Citizenship and Immigration Services (USCIS) to specify the number of personnel and resources needed to respond to the projected increase in MPP cases at soft-sided hearing facilities and additional funding needs if any.
    - Inform component heads to express all operational and staffing concerns through the MPP Working Group so that concerns can be elevated to DOD, Department of Justice or the Government of Mexico through the proper channels.

**BACKGROUND:**
- The Joint Interagency Action Group (JIAG) MPP Coordinator facilitates daily calls with the MPP Working Group, consisting of DHS and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) headquarters and component/field staff personnel, to resolve operational level challenges and provide updates on the execution of the program.
Component Deputies Discussions

- Since May 3, Deputy Undersecretary (DUS) McCament and Chris Tomney have held two MPP meetings with Component Deputies, DHS Front Office Senior Counselors, DHS Office of Policy (PLCY) and the Office of the General Counsel (OGC) to discuss and resolve outstanding challenges.
- At the May 3 meeting, several challenges were resolved internally leaving two to be elevated to you in a Decision Memorandum that is now being transmitted through the Executive Secretariat. Notably, the group agreed to pursue soft-sided hearing structures in the short term and to begin discussions at the DUS level with DOJ.
- At the May 17 meeting, DUS McCament updated the deputies on the DOJ discussions and requested input on the locations and requirements for soft-sided structures. CBP and ICE agreed to DOJ’s proposal to open morning hearing times, despite early morning operational constraints. PLCY agreed to host a soft-sided requirements meeting.

DOJ Discussions

- Over the past two weeks, DUS McCament and Chris Tomney have been speaking with Gene Hamilton, EOIR Director McHenry and David Wetmore from DOJ every week to have a direct line of communication to resolve interagency issues. This has been an effective channel for progress on scheduling issues.
- DOJ’s primary remaining issue is docket prioritization. DOJ indicated that it would need to devote 1/3 of its 400 Immigration Judges (IJs) nationwide to MPP in order to adjudicate all of the current cases within a year, at the expense of other pending non-detained cases. Currently, only a few IJs are hearing MPP cases on the non-detained dockets in San Diego and El Paso.

Government of Mexico (GOM) Negotiations

- On May 30, DUS McCament, Counselor Gountanis and AGC Baroukh will travel to Mexico City to continue negotiations with the Secretariats of Governance (SEGOB) and Foreign Relations (SRE).
- The primary purpose of the trip is to obtain GOM agreement for the next locations and implementation of MPP expansion across the Southwest Border (SWB). Priority expansion locations will allow for a discussion on an agreed volume each location can accept.
- The negotiation team will also update GOM on the current processing timelines as they are notably longer than originally anticipated.

WATCH OUT FOR/ IF ASKED:

MPP Withdrawals

- The International Organization for Migration (IOM) recently informed Embassy Mexico City that hundreds of MPP migrants have requested voluntary repatriation (VR) to their countries of origin.
- Embassy Mexico City and DHS agreed that MPP migrants will not be stopped from returning home if they request this assistance from IOM.
- There has been an interagency discussion about whether to have the migrants requesting VR to sign a form that would: a) inform DHS and DOJ of who these individuals are; and b)
potentially serve as evidence for OPLA to request a motion to dismiss the case in an effort to free up EOIR docket space.

- CBP has expressed concern about allowing migrants to withdraw their cases and return home without suffering any consequences. CBP holds that the best course of action is to allow the migrants to return home but proceed with an order of removal in absentia that can be reinstated if the migrant is encountered again at the SWB.
- The MPP Working Group decided to request that IOM collect biographic information from each migrant participating in the VR program so that DHS can understand the baseline trends of who exactly is being VR’ed in order to decide in the future whether to withdraw the cases or to proceed with removal orders in absentia.
  - Staff recommendation: Assure the component heads that their concerns about consequence delivery are heard and that the working group can revisit the decision once there is a baseline of data to analyze the VR trends.

ATTACHMENTS:
A. Topline Talking Points
B. Participant List

Staff Responsible for Briefing Memo: [b](6), JIAG detailees, Phone Number: [b](6)

OGC Reviewer: Name, Title, Component, Phone Number.
MEETING WITH COMPONENT HEADS ON THE MPP

Participant List

DHS Participants
Acting Secretary McAleenan
Patrick Flanagan
Valerie Boyd
Brandon Wales
John Sanders, CBP
Matt Albence, ICE
Francis Cissna, USCIS
Chad Wolf, PLCY
John Mitnick, OGC
Tex Alles, MGMT
MEETING WITH COMPONENT HEADS ON THE MPP
Topline Talking Points

Summary:
- The objective of this meeting with component heads is to align their operations with administration priorities to expand MPP across the Southwest Border (SWB) and establish soft-sided hearing facilities.

Topic/Issue:
Request for Assistance (RFA) 10
- In order to populate RFA 10, I need CBP to determine the number of amenable aliens each port of entry (POE) and USBP Sector has the capacity to place in MPP each day at each location.

- This will determine how many aliens will be scheduled for court hearings, and, therefore, how many hearing rooms are needed at each location.

- The number of hearing rooms will determine how large the soft-sided facility needs to be at each location, in addition to the number of services and staffing required to run each facility.

- Once the DHS team knows how large each soft-sided facility needs to be at each location, a proper site assessment can be undertaken to determine where is suitable to erect the soft-sided facility.

- I need each of you to determine the minimum requirements to run your component’s operations at each location.

- I am designating Chief Patrol Agent Rodney Scott to bring all the components to a consensus and coordinate this expansion effort.

- One entity must be selected to contract out facility services at each of these locations, and I believe that ICE is best suited to carry that out.

Staffing Capacity
- I understand that each of your components is stressed for resources right now, but I am committed to trying to get you the resources you need.

- MPP is a priority for this Administration, and we need to do everything in our power to successfully implement and expand it.

- Many of your employees have raised capacity concerns, and we hear them. However, we need to get past them because this program has the potential to substantially decrease the flows at the SWB once we get past the initial burden.

- I’m here to listen to your resourcing needs to make this happen as quickly as possible.
Good afternoon,

Attached please find the requested additional guidance from OGC concerning public visitors to the IHFs for the group’s consideration. We will send the group an Outlook invitation for a follow up call to develop guidance on public visitors to the IHFs shortly.

Cordially,

Get Outlook for iOS
Migrant Protection Protocols (MPP): Public Access to Soft-Sided Immigration Hearing Facilities (for the purpose of the immigration court hearings)

The Immigration and Nationality Act (INA) provides for certain fundamental procedural safeguards for aliens in removal proceedings pursuant to INA § 240. These include, as relevant to the immigration court hearings being conducted at the soft-sided facilities, the privilege of being represented by counsel (at no expense to the government) and a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s behalf, and to cross-examine witnesses. INA § 240(b)(4)(A)-(B). Per Department of Justice regulations, immigration court hearings generally are open to the public. 8 C.F.R. §§ 1003.27, 1240.10(b), 1240.11(c)(3)(i).

Attorney Access

Attorneys who represent aliens returning for their hearings must be able to attend their clients’ hearings, whether this be by appearing at the immigration court with the immigration judge or at the soft-sided facility with the alien. DHS, however, does not have the authority to specify where counsel is to appear for immigration court hearings. See generally INA § 240(b)(1)-(2) (conferring authority on the immigration judges as to the conduct of proceedings). But, DHS does maintain the authority to control who has access to its facilities. Additionally, aliens need to have a meaningful opportunity to meet with counsel, whether it be in person or by telephone prior to the hearing.

Aliens in removal proceedings pursuant to INA § 240 have the privilege of being represented by counsel (at no expense to the government). INA §§ 240(b)(4)(A), 292; 8 C.F.R. § 1003.16(b). In accord with these provisions, aliens returned to Mexico pursuant to MPP are provided with a list of free or low-cost legal service providers. In addition, the tear sheet provided to aliens also notes that aliens may consult with counsel through any available mechanism, including by telephone, email, video conference, or other remote communication method; in person at a location in Mexico; or on the day of the hearing, in person, in the United States, in the assigned immigration hearing facility located at the port of entry, prior to the hearing.

“The right to counsel in immigration proceedings derives from the Due Process clause, the Act, and the regulations promulgated under the Act, and entitles an alien to obtain counsel at his own expense.” Matter of Madrigal, 21 I&N Dec. 323, 327 (BIA 1996); see Matter of Assaad, 23 I&N Dec. 553, 558 (BIA 2003) (“a respondent has a Fifth Amendment due process right to a fair immigration hearing”). The U.S. Court of Appeals for the Fifth Circuit, where these cases will arise, has “recognized that ‘the absence of an attorney may create a due process violation if the defect impinged upon the fundamental fairness of the hearing in violation of the fifth amendment,’ and there was substantial prejudice.” Soto v. Holder, 547 F. App’x 414, 415 (5th Cir. 2013) (quoting Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir.1993)). Deprivin an alien in removal proceedings and subject to MPP of his or her right to access to counsel may result in district court litigation challenging MPP on the basis that it deprives aliens of their statutory right to counsel and of a fundamentally fair hearing. An alien may also raise a claim of denial of access to counsel in an appeal to the Board of Immigration Appeals (Board), and in a subsequent
petition for review filed with the federal court of appeals, which may result in a remand to the immigration court for further proceedings. See, e.g., Biwot v. Gonzales, 403 F.3d 1094, 1099 (9th Cir. 2005) (finding a violation of the statutory right to counsel where conditions were “tantamount of denial of counsel” and remanding to the immigration court for further proceedings).

Witness Access

Witnesses, as necessary to support and/or corroborate an alien’s claim, must be able to appear at immigration court hearings, whether at the immigration court with the immigration judge, at the soft-sided facility with the alien, or telephonically (at the discretion of the immigration judge). As with attorneys, DHS does not have the authority to specify where (or how) witnesses appear for immigration court hearings. See generally INA § 240(b)(1)-(2). But, DHS does maintain the authority to control who has access to its facilities.

The INA provides that aliens in section 240 removal proceedings must have a reasonable opportunity to present evidence on his or her own behalf; this includes the right to present testimony from witnesses. INA § 240(b)(4)(B); see, e.g., Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1056-57 (9th Cir. 2005) (finding due process violation where the immigration judge refused to hear testimony from witness). Should witnesses be precluded from attending hearings, it may result in litigation challenging MPP on the grounds that it deprives aliens of their right to a fair hearing under the INA by infringing on their right to present evidence, as well as provide a basis for an appeal to the Board of an immigration judge’s order of removal.

Media/General Public Access

Removal hearings are to be open to the public, unless the immigration judge exercises his or her discretion to close proceedings. 8 C.F.R. §§ 1240.10(b), 1003.27 (stating that hearings “shall be open to the public” and listing exceptions), 1240.11(c)(3)(i) (providing that hearings on applications for asylum or withholding of removal are to be open to the public unless the alien expressly requests the hearing to be closed and requiring immigration judges to inquire whether the alien requests closure of the hearing). The regulations further provide that “[d]epending on the physical facilities,” an immigration judge “may place reasonable limits upon the number in attendance at any one time with priority being given to the press over the general public.” Id. § 1003.27(a). The EOIR fact sheet on observing immigration court hearings acknowledges that EOIR does not control entry to certain facilities in which immigration courts are located and instructs individuals who wish to observe hearings to contact DHS or facility to learn of security requirements for entry to the building.

Limitations on public access can be set due to security and public safety concerns. See Woods v. Moss. et al, 572 U.S. 744 (2014); Citizens for Peace in Space v. City of Colorado Springs, 477

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1 This appears to relate to an immigration judge’s discretion over a DOJ EOIR courtroom, by allowing for an immigration judge to limit public access “based on space availability,” i.e. “physical facilities.” Aliens and Nationality: Rules of Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931-01, 2933 (Jan. 29, 1987) (to be codified at 8 C.F.R. pt. 3).
2 https://www.justice.gov/EOIR/observing-immigration-court-hearings
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F.3d 1212 (10th Cir. 2007). Legitimate security and safety concerns include preventing fire hazards. For instance, if the security screening post becomes overrun with individuals it could block the ingress and egress to the building. Additionally, the number of people permitted in the facility must adhere to the fire marshal’s safety limit. Also, a credible security threat to the facility may require limiting the number and types of people permitted into the facility to ensure the safety of the proceedings. Lastly, to ensure due process rights and statutory rights under the INA, it may be necessary to limit access to the hearings only to attorneys and witnesses to ensure those individuals have full and timely access to the facility.

A blanket policy of precluding all members of the media and general public from observing hearings of aliens subject to MPP may result in litigation challenging MPP on the ground that it violates the regulations. It may also result in challenges by members of the press that the closure of removal proceedings of MPP aliens violates the First Amendment right to access. See Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (concluding that directive of the Chief Immigration Judge closing “special interest” deportation proceedings to the public impermissibly infringed on newspapers’ First Amendment Right of access to deportation proceedings), but see North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (concluding that newspapers did not have First Amendment right of access to “special interest” deportation proceedings). However, if the rationale for closing the proceedings is based on security concerns, then DHS may prevail. See, Woods, 572 U.S. 744; Citizens for Peace in Space, 477 F.3d 1212. In addition, even if excluded from the soft-sided facilities, media/public access arguably is available through attendance of hearings at the immigration court.
Good afternoon,

Thank you all again for participating on this morning’s call.

Per the discussion, please find below an outline of the policy and operational plan for providing access to public visitors to the temporary hearing locations –

- Attorneys of record and witnesses will be allowed access to ensure that due process is fully afforded to aliens.
  - Attorneys must be representing an alien with a scheduled hearing at the temporary hearing location on the day and timeframe.
  - *OGC will make a legal determination on whether family members are essential to due process.
  - *Ongoing discussions on impact of operational (capacity and staffing) constraints on ability to accommodate attorney’s observance of fear of Mexico screening interviews at the temporary hearing locations.
- Members of the media and all other members of the general public will have full access consistent with EOIR and POE rules and procedures.
  - Advance notice and approval of request for access must be provided due to the sensitivities of the active POE locations.
  - While master calendar hearings are more accessible, access to merits hearings requires consent and approval of the alien and the IJ.
- Pursuant to earlier discussions, access will be restricted consistent with hearing location capacity limitations and prioritized in the following order:
  - attorneys with EOIR-28 filed with EOIR;
  - attorneys without EOIR-28s filed with EOIR;
  - witnesses included on witness lists;
  - witnesses for cases without witness lists;
  - members of the media with agency approval as appropriate; and
  - members of the general public (including family members not identified as witnesses).

**Operational plan:**

- Access to the temporary hearing locations will be permitted starting 90 minutes before the scheduled hearing begins.
- For attorneys, access requires either that the visitor:
○ Have previously filed a Form EOIR-28 with EOIR for an alien scheduled for a hearing at the temporary hearing location on the day access is sought; or
○ Is a licensed attorney and provides the name of an alien scheduled for a hearing at the temporary hearing location on the day access is sought.
• For witnesses, access can be established through the visitor’s inclusion on a witness list previously filed with EOIR in anticipation of the merits hearing.
  ○ *Additional discussion needed on requirements for witnesses requesting access to appear for pro se cases.
• For media and other members of the general public, requests will be triaged through DHS HQ for coordination with DOJ and other DHS components as appropriate to the nature of the request. DHS HQ will notify CBP OFO of which individuals have the needed agency approval to support access to the temporary hearing locations.
  ○ *Additional discussion needed to determine mechanism and process for directing.
• *Additional discussion needed to operationalize prioritization of the categories of visitors.
  ○ *Additional information from EOIR on the numbers and categories of public visitors seen at EOIR court facilities may be helpful.

Should you have any ongoing concerns with any of the policies outlined above, please reply to me and [b](6) in writing with additional explanation of those concerns by COB today. We will compile and share the feedback with DHS HQ senior leaders for consideration.

Cordially,

[b](6)

Joint Duty Officer / USCIS, Refugee, Asylum and International Operations Directorate, Fraud Detection and National Security HQ
Joint Incident Advisory Group (JIAG) Staff
DHS Office Operations Coordination (OPS)

[b](6)
Good evening,

Thank you all again for your participation on the working group conversations on the public visitor access to the IHFs. As discussed, please find below a summary of the discussions from the working group and follow up conversations as well as the IPT’s recommendations –

- **Attorney Access**: All partners recognized the importance of ensuring aliens’ access to counsel at the IHFs, and the need to establish procedures for affording access to attorneys that present themselves for security screening with an EOIR-28 with the name of an alien scheduled to appear for a hearing at the IHF. Recognizing that the IHFs are on an active /operational POE, and to maintain security and public safety, CBP/OFO requests as much notice as possible (ideally 5 days) for attorneys that plan to appear for hearings at the IHFs in order to conduct standard vetting and safety screening. DHS OGC advised that with the proper procedures and public notice, requiring attorneys to provide prior notice could work though not for the hearings planned this week or next week. In cases where advance notice is not possible, CBP/OFO intends to conduct safety screening onsite in as timely manner as operations allow.

- **Witness Access**: Similar consensus was reached on due process interests underlying witness access to the IHF. Understanding that witness lists would generally be provided to EOIR in advance of the hearings, CBP/OFO expressed interest in also screening the lists in advance of the scheduled hearings to expedite IHF access. In cases where prior notice is not possible, CBP/OFO intends to conduct safety screening onsite in as timely a manner as operations allow.

CBP/OFO will provide additional guidelines for the notice and vetting process.

- **Media Access**: Balancing the regulatory requirements of ensuring that removal hearings are open to the public, CBP/OFO considers media requests for access as it would for any facility at the POE made in advance through standard CBP/OPA process. EOIR noted that media access is allowed and accommodated at the immigration courts with priority over general public but would not be feasible for any planned use of the IJs at the Immigration Adjudication Centers (IACs) (approximately 20 IJs). EOIR further clarified that while the master calendar hearings are scheduled with IJs at immigration courts where media access can be accommodated, EOIR will leverage resources at IACs for merits hearings. Consequently, for those merits hearings,
CBP/OFO proposed creating a separate tent near the IHFs where the media could view merits hearings via closed circuit television.

- **General Public Access**: Since IHFs are on an active POE, security and public safety concerns were raised with allowing members of the general public to access the IHFs. Limited capacity available within the public waiting areas and hearing rooms at the IHFs may also necessitate restricting access to attorneys and witnesses. DHS OGC advised that exclusion of members of the general public would require access at EOIR facilities during the hearings. EOIR noted that general public access is allowed and accommodated at the immigration courts but would not be feasible for any planned use of the IJs at the IACs (approximately 20 IJs). EOIR further clarified that while the master calendar hearings are scheduled with IJs at immigration courts where general public access can be accommodated, EOIR will leverage resources at IACs for merits hearings. For those merits hearings, CBP/OFO proposed directing members of the general public to same tent as the media to view merits hearings via closed circuit television.

Based the DHS/OGC guidance and the working group’s aforementioned concerns and proposals, the IPT recommends the following:

**Attorney and Witness Access**
- Public notice should be provided to inform attorneys and witnesses who plan to appear at hearings held at the IHFs of the process for providing CBP/OFO with advance notice of their request for access prior to the date of the scheduled hearing.
- For attorneys and witnesses for whom CBP/OFO does not have advance notice, CBP/OFO should conduct safety screening onsite in as timely manner as operations allow.
- CBP should restrict access consistent with IHF capacity limitations and prioritized in the following order:
  - attorneys with EOIR-28 filed with EOIR;
  - attorneys without EOIR-28s filed with EOIR;
  - witnesses included on witness lists;  
  - witnesses for cases without witness lists; and 
  - members of the media with approval by CBP/OFO.

**Media and General Public Access**
- **For Master Calendar Hearings**
  - Members of the press and general public should be directed to seek access to hearings at EOIR immigration court facilities.

- **For Merits Hearings**
  - For members of the press and general public, DHS should construct additional tents near each IHF for public viewing of the merits hearings at the IHF on closed circuit television.
  - CBP should restrict access consistent with tent capacity limitations and prioritized in the following order:
    - members of media without approval by CBP/OFO; and 
    - members of the general public.

Given planned soft openings this week, this readout and recommendations was also shared with DHS senior leaders today.
Cordially,

Joint Duty Officer / USCIS, Refugee, Asylum and International Operations Directorate, Fraud Detection and National Security HQ,
Joint Incident Advisory Group (JIAG) Staff
DHS Office Operations Coordination (OPS)

From: (b)(6)
Sent: Wednesday, September 4, 2019 5:25 PM

Subject: MPP WG Follow Up - Non-Atty Public Visitor Access to IHFs

Good afternoon,

Attached please find the requested additional guidance from OGC concerning public visitors to the IHFs for the group’s consideration. We will send the group an Outlook invitation for a follow up call to develop guidance on public visitors to the IHFs shortly.
Cordially,

Get Outlook for iOS
From: (b)(6); (b)(7)(C)
Sent: 4 Sep 2019 21:12:23 +0000
To: (b)(6)
Cc: (b)(6)
Subject: FW: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities
Attachments: Public Access to soft-sided facilities v.2 (OGC OPLA CBPOCC).docx

This is the completed white paper on the topic of attorney access o the SS structures.

Associate Deputy Principal Legal Advisor
Office Of The Principal Legal Advisor, Field Legal Operations
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
202-732 Desk
716-316 Cell

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From (b)(6)
Sent: Wednesday, September 4, 2019 4:40 PM
To: (b)(6)
Cc: (b)(6); (b)(7)(C)

Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Thank you everyone for your input. Attached is what I sent back to the JIAG.

Attorney Advisor - Immigration Enforcement
Office: (b)(6)
Cell: (b)(6)
hereby notified that any dissemination, distribution, use or copying of this message is strictly prohibited. If you have received this in error, please reply immediately to the sender and delete this message.

From: [redacted]
Sent: Thursday, August 29, 2019 4:47 PM
To: Padilla, Kenneth (b)(6); (b)(7)(C)
Cc: Kelliher, Brian (b)(6)
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Sorry for the delay. Here are our edits.

From: [redacted]
Sent: Wednesday, August 28, 2019 5:32 PM
To: Padilla, Kenneth (b)(6); (b)(7)(C)
Cc: Kelliher, Brian (b)(6)
Subject: Re: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Thank you!

[b](6)  
Attorney-Advisor - Immigration Enforcement  
U.S. Department of Homeland Security, Office of General Counsel  
Office: [redacted]  
Cell: [redacted]

From: Padilla, Kenneth (b)(6); (b)(7)(C)
Sent: Wednesday, August 28, 2019 5:08:50 PM
To: [redacted]
Cc: Kelliher, Brian (b)(6)
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Hello All,

Attached are the OPLA comments.

Best,

Ken Padilla
Deputy Principal Legal Advisor for Field Legal Operations
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
(202) 732-b(6); b(7)(C)

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(b)(7).

From: (b)(6)
Sent: Wednesday, August 28, 2019 10:28 AM
To: (b)(6)
Cc: Padilla, Kenneth (b)(6); (b)(7)(C)
Kellisher, Brian (b)(6)
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Thank you everyone for taking the time yesterday to discuss the legal requirements with regard to
access to counsel, witnesses, and public/media access for hearings conducted at the soft-sided
structures. The JIAG reached out to OGC and requested legal guidance on how restricted public access
can be at the soft-sided structures being constructed at the ports of entry in Laredo and Brownsville.
Attached is what I have drafted up, including what we discussed yesterday (and input from our OELD
and FPS colleagues on the public/media access piece). Given the ICE and CBP equities in this issue
(especially as to the operational issues), your thoughts/edits/comments are greatly appreciated. If
possible, I would like to get this to the JIAG tomorrow.

Thank you,
(b)(6)
Tuesday, August 27th at 2 pm works for me too.

Senior Attorney (Enforcement and Operations), San Antonio Field Office
Office of the Chief Counsel
U.S. Customs and Border Protection
1400 E. Grayson St.
San Antonio, TX 78208

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On Aug 22, 2019, at 10:03 AM, wrote:

Thanks that works for me.
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

How about Tuesday, August 27, at 2 p.m.?

Attorney Advisor (on detail from ICE)  
Immigration Law Division  
DHS Office of the General Counsel  
Office:  
Cell:  
Email:  

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From:  
Sent: Thursday, August 22, 2019 10:39 AM  
To: Padilla, Kenneth  
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Actually, sorry, I just realized I’ll be traveling Monday (which is why I look available). Sigh. Tuesday? I can do Tuesday afternoon any time.

From:  
Sent: Thursday, August 22, 2019 10:37 AM  
To: Padilla, Kenneth  
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Per the Outlook Scheduling Assistant, it looks like most of us are available on Monday, August 26 from 12-2 p.m. How about a call at 1 p.m.? If this is amenable to all, I will send a meeting invitation.

for some reason, the Scheduling Assistant is not picking up your availability on Monday.

Thanks,
Attorney Advisor (on detail from ICE)
Immigration Law Division
DHS Office of the General Counsel
Office: 202-287-9810
Cell: 202-987-8800
Email: [redacted]

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From: [redacted]
Sent: Thursday, August 22, 2019 10:30 AM
To: Padilla, Kenneth

Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

I would agree that discussing Monday would be preferable, yes. Thanks for the response.

From: Padilla, Kenneth
Sent: Thursday, August 22, 2019 10:28 AM
To: [redacted]

Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Hello

There are detention locations where the alien is at the facility and the counsel and witnesses are in the courtroom. That happens in several locations. But, before and in between hearings, the attorneys are allowed to visit the facilities to meet with their clients to prepare for the hearing. Unlike here, that does not happen on the same day because the alien is in the United States and the attorney can go visit at his or her leisure. How that gets handled here and legal requirements of access to counsel are one discussion to have.

However, we have to look at what happens when this expands to IJs outside of San Antonio. EOIR plans to use 166 IJs. Not all from the San Antonio AOR. In fact, at
this point, they plan to use one El Paso IJ to hear Brownsville cases, and they have been “discussing” using other IJs in central locations (e.g. Chicago, Dallas, Minnesota’s) to cover MPP dockets. Moreover, notwithstanding our continued warnings about not using Ft Worth IJs, they may use them, and FT Worth IJs do not have courtrooms. If this happens, then where will the attorneys and witnesses appear?

Our folks have been at the operational meetings for the soft-sided structures, since OPLA presences has been requested for the courtroom settings, and we have advised of the need for the rooms to accommodate the attorneys and witnesses. If CBP does not want the attorneys or witnesses as the facility, then there will be a huge problem when EOIR uses IJs outside of the San Antonio AOR. I think you know by now that no matter how much we talk to EOIR, they will do what they want to do.

Thus, there needs to a discussion of the legal requirements, but that may be moot when EOIR expands outside of the San Antonio AOR unless we plan to argue that we can legally require that witnesses and counsel appear in Chicago and Minnesota, for example.

Can we hold this discussion until Monday when I return?

Ken Padilla
Deputy Principal Legal Advisor for Field Legal Operations
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
(202) 732-

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(www.blackberry.com)

From: (b)(6)
Date: Thursday, Aug 22, 2019, 09:39
To: Padilla, Kenneth (b)(6); (b)(7)(C)
Cc: (b)(6)

Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities
Dropping [b][6], as I think this is best for counsel. May I please ask that we don’t expand this beyond counsel until we’re done discussing amongst ourselves?

This is the first time that I’ve heard any discussion of the lawyers arriving at soft side facilities. You say below: There must be an option for an attorney to come to the SS structures to speak to their clients before the hearings if desired. My question is, why? My understanding from previous call son this issue from Ken is that in lots of detained dockets the aliens appear in one location and the attorneys, IJs and witnesses are in a different location. If there is a LEGAL reason that we cannot structure the facilities in this way, please let us know. We’re not aware of any case law, regulation or statute that would require this. While I understand the policy preference for doing this such that everyone can show up at the soft side facilities, it would seem that the policy makers need to make that decision understanding all of the risks. Also, I see your logistic concerns. But is there a reason that the IJ can’t VTC to San Antonio, essentially appearing by VTC before the alien and in San Antonio? And if that is the case, then wouldn’t one of the options here be to discuss with EOIR?

I’ll note that while we all agree that aliens have a right to counsel, I don’t think that there has ever been agreement that the counsel communication MUST occur in person at the hearing location. Instead, counsel could arrive in Mexico and/or it could be done by phone.

I am extremely concerned that it appears that we’re taking firm legal positions about things that may need to be operational issues.

From: [b][6]; [b][7](C)
Sent: Thursday, August 22, 2019 9:24 AM
To: [b][6]
[b][6] Padilla, Kenneth [b][6]; [b][7](C)
Cc: [b][6]
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

Hi [b][6]

We have consistently stated that aliens who want representation have a right to counsel at their hearings. The counsel can appear in San Antonio or at the SS structure. The aliens are brought in a least one hour prior to meet with attorneys. As for consultation by phone or in person. There will not be enough phones for all the aliens who want to speak to their attorneys to do so. Competing for phones will be aliens who have expressed fear and are speaking to USCIS. There must be an option for an attorney to come to the SS structures to speak to their clients before the hearings if desired. This will be important when EOIR begins to use IJs in distant locations to hear MPP cases. For example, if the San Antonio court has an IJ in Seattle hear the individual hearing, the only place for the San Antonio attorney to appear will be at the soft sided structure along with witnesses. We can’t realistically expect the San Antonio attorney and witnesses to appear in person in Seattle.
That’s why the individual hearing rooms were designed to accommodate an alien and counsel.

There is a call everyday at 2pm hosted by CBP regarding the facilities. There was also a working group regarding these structures that meet for two days to talk about the operations at the structures. CBP OFO and BP attended these meetings. I have copied [b](6) to make certain you get invitations.

Happy to discuss and resolve.

[b](6); (b)(7)(C)
Associate Deputy Principal Legal Advisor
Office Of The Principal Legal Advisor, Field Legal Operations
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
202-732- [b](6) Desk
716-316- [b](7) Cell

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From: [b](5)
Sent: Thursday, August 22, 2019 7:39 AM
To: [b](6); (b)(7)(C)
[b](6)
[b](6)
Padilla, Kenneth [b](6); (b)(7)(C)
Cc: [b](6)
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

[b](6);
b)(7)(C)

Wait, I don’t think we’re all on the same page here. First, where is the hearing location? I think that to date CBP has been expecting that the location would be where the NTA is filed. So, for Laredo it is San Antonio. I believe (Belinda can correct me if I’m wrong) that the attorneys are being instructed to show up there. If that’s the case, then we need to have some other way for the aliens to meet with attorneys. I think we need to nail down that point first. Our understanding has consistently been that witnesses, attorneys, and OPLA attorneys would be showing up at the hearing locations. If that has changed, then we need to have a much bigger discussion because I doubt that the soft side that is
contemplated will accommodate everything that would now be needed. Can we please clarify this first?

If we are having very large numbers, I’m not sure why we think that it would be easier to have space for private conversations in person rather than phones. Can you elaborate on that?

Also, it looks like there was a call on soft sides that CBP OCC wasn’t on. Does anyone have more background on that? Neither of us in CBP OCC see the call on our calendars.

From: (b)(6); (b)(7)(C)
Sent: Wednesday, August 21, 2019 7:16 PM
To: (b)(6)
Cc: (b)(6); Padilla, Kenneth (b)(6); (b)(7)(C)
Subject: RE: Attorney/Witness/Media/Public Access at Laredo/Brownsville soft-sided hearing facilities

The aliens will be brought to the hearing rooms at least one hour prior to the start of the hearing to consult an attorney. With the numbers contemplated for each master calendar hearing, there will not be sufficient phones in the facility for every alien to consult with an attorney before court begins. Thus allowing the alien’s attorney to meet in person with their clients at the hearing location would be consistent with the procedures in place in San Diego and El Paso. As for witnesses, I don’t see how sending them to the place the IJ is sitting will be a bad decision, except if the IJ happens to be appearing via VTC from a distant courtroom like Seattle, with no connection to San Antonio.

Associate Deputy Principal Legal Advisor
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Attorney Advisor - Immigration Enforcement

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