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DESTROYING THE CASE IN ORDER TO SAVE IT: WHY RETURNING ASYLUM APPLICANTS TO CONTIGUOUS TERRITORY UNDER INA §235(B)(2)(C) WOULD OFTEN VIOLATE BOTH LAW AND COMMON SENSE

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During the Vietnam War, an American official was once quoted as saying of the town of Ben Tre that "It became necessary to destroy the town to save it." This author was reminded of that quote recently when considering the approach to certain removal proceedings proposed in a recent Executive Order issued by Donald Trump and implementing memorandum issued by Secretary of Homeland Security John Kelly. Depending on how one reads this guidance, it appears that the government may be proposing that certain asylum applicants should be returned to the country from which they fear persecution, or to a country from which they risk being returned to that country of persecution, pending a determination of whether their fear of harm upon such return is well-founded. To force such a return in the course of adjudicating an asylum claim risks destruction of the claim and the claimant, in defiance of law and common sense.

Section 7 of the January 25, 2017, Executive Order entitled "Border Security and Immigration Improvements" provided as follows:

> Sec. 7. Return to Territory. The Secretary shall take appropriate action, consistent with the requirements of section 1232 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding.

The cited section of the INA, §235(b)(2)(C), provides as follows:

> Treatment of aliens arriving from contiguous territory.-In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240.

Subparagraph (A), in turn, refers to "an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted," and does not by its terms exclude those who are applying for asylum.

The February 20, 2017, implementing memorandum of Secretary Kelly, entitled "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," expands further on this proposal:

> Section 235(b)(2)(C) of the INA authorizes the Department to.return aliens arriving on land from a foreign territory contiguous to the United States, to the territory from which they arrived, pending a formal removal proceeding under section 240 of the INA. When aliens so apprehended do not pose a risk of a subsequent illegal entry or attempted illegal entry, returning them to the foreign contiguous territory from which they arrived, pending the outcome of removal proceedings saves the Department's detention and adjudication resources for other priority aliens.
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> Accordingly, subject to the requirements of section 1232, Title 8, United States Code, related to unaccompanied alien children and to the extent otherwise consistent with the law and U.S. international treaty obligations, CBP and ICE personnel shall, to the extent appropriate and reasonably practicable, return aliens described in section 235(b)(2)(A) of the INA, who are placed in removal proceedings under section 240 of the INA-and who, consistent with the guidance of an ICE Field Office Director, CBP Chief Patrol Agent, or CBP Director of Field Operations, pose no risk of recidivism-to the territory of the foreign contiguous country from which they arrived pending such removal proceedings. To facilitate the completion of removal proceedings for aliens so returned to the contiguous country, ICE Field Office Directors, ICE Special Agents-in-Charge, CBP Chief Patrol Agent, and CBP Directors of Field Operations shall make available facilities for such aliens to appear via video teleconference. The Director of ICE and the Commissioner of CBP shall consult with the Director

> of EOIR to establish a functional, interoperable video teleconference system to ensure maximum capability to conduct video teleconference removal hearings for those aliens so returned to the contiguous country.

Since the Executive Order and border memorandum appear to be primarily (although not exclusively) focused on the Mexico/U.S. border, and the significant majority of those who seek to enter from Mexico and are placed in removal proceedings under INA §240, rather than being admitted into the U.S. or removed without §240 proceedings, will be those who have established a credible fear of persecution and seek to apply for asylum, one's attention is naturally drawn to how these directives might operate with respect to such asylum applicants. It is true that there will be others who could be subjected to this §235(b)(2)(C) procedure, and indeed there have been "port courts" held on the Canadian border under this procedure for some time, but asylum applicants at the Mexican border seem likely to be among the principal groups affected by an expansion of §235(b)(2)(C) usage under the Executive Order and implementing memorandum.

When the U.S. government seeks to return an asylum applicant to Mexico pending further proceedings, there are three logical possibilities. First, the person may be a citizen of Mexico. Second, the person may be a citizen of some third country, but have a valid immigration status in Mexico which would allow them to remain there. Third, the person may be a citizen of some third country and lack valid immigration status in Mexico. In the first and third cases, returning the person to Mexico under §235(b)(2)(C) pending removal proceedings would be deeply problematic.

If a Mexican national is claiming a well-founded fear of persecution in their home country of Mexico, then returning them to Mexico, pending a determination of whether that fear is indeed well-founded, would be nonsensical. One would hope it is obvious that a journalist at risk due to his reporting on abuses by members of the Mexican military, for example, should not be returned to the jurisdiction of that military, and so placed again at risk of persecution, pending a determination of the magnitude of that risk. A former police officer killed by a drug cartel will not be helped by a subsequent determination that yes, he had a well-founded fear of this occurring. If Mexico is the place where an asylum applicant fears persecution, then it would make no sense to return that applicant to Mexico before determining whether this fear is justified.

Returning a Mexican national to Mexico prior to determining the well-foundedness of that Mexican national's fear of persecution would also violate the law. Section 241(b)(3) of the INA indicates that, with limited exceptions not at issue here, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (often referred to as "CAT" for short) similarly restricts the ability of the United States to return someone to a country in which that person will be tortured. While the issue has not previously been litigated, so far as this author is aware, because the United States has not been brazen enough to attempt to return someone to their country of claimed persecution or torture pending a decision on whether they will indeed be persecuted or tortured, there is a strong argument that these prohibitions would be violated by a §235(b)(2)(C) return to Mexico of a Mexican asylum applicant.

Returning to Mexico a non-Mexican asylum applicant who had passed through Mexico, but lacked any immigration status there, could create similar practical and legal problems, because of the possibility of such a person's being deported from Mexico back to their home country. In that event, irreparable harm could befall the asylum applicant before their application was processed, and it could be difficult for them to get back to the U.S. border to have their application processed at all. Moreover, by potentially causing the return of the asylum applicant to a country where they would be persecuted or tortured, such action would again be deeply problematic under INA §241(b)(3) and the CAT.

Another problem with returning non-Mexican nationals to Mexico pending a removal hearing is that Mexico has indicated it will not accept them. It is true that in *Jama v. ICE*, 543 U.S. 335 (2005), a case involving removal to Somalia, the Supreme Court indicated that the advance consent of a receiving government was not a necessary precondition for certain removals, but trying to return asylum applicants to Mexico without Mexico's permission could create mind-boggling consequences. Does the Trump Administration envision pushing people out onto bridges across the international boundary, despite knowing that Mexico will not receive them on the other end of the bridge, thus creating a sort of impromptu refugee camp in the middle of each bridge which would

lead to substantial human suffering as well as blocking traffic? I certainly hope not.

It may be that DHS will understand these problems, and recognize that, in the language of Secretary Kelly's memo, it is not "appropriate and reasonably practicable" or "otherwise consistent with law and U.S. international treaty obligations" to return most asylum applicants to Mexico pending their removal proceedings. In that case, the proposed expansion of §235(b)(2)(C) will have comparatively little practical effect. It is reasonable to be concerned, however, about whether the proposal to expand use of §235(b)(2)(C) will indeed be cabined by these bounds of law and practicality.