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On December 20, 2018, the Trump administration created the Migrant Protection Protocols ("MPP")[1], followed by formal guidance issued on January 25, 2019.[2] The cited purpose of MPP was to "combat an influx of illegal aliens"[3] into the United States, to alleviate the "resource constraints" which "forced DHS to release thousands of undocumented aliens into the United States and to trust that those aliens would voluntarily appear for their removal proceedings."[4] The guidance removed "aliens apprehended at the Southwest border"[5] or anyone who "left a third country and traveled through Mexico to reach the U.S. border"[6] and placed them in Mexico while they were "awaiting their removal proceedings."[7] According to Section 235(b)(2)(C) of the Immigration and Nationality Act (INA), the Secretary of Homeland Security is allowed "to return applicants for admission to the contiguous country from which they are arriving on land pending their removal proceedings."[8] The Trump administration employed the "programmatic use" of this authority to justify MPP.[9] In December of 2018, "Mexico agreed to admit MPP enrollees so such aliens could be held outside the United States pending their removal proceedings."[10]

In October of 2019, the Department of Homeland Security ("DHS") issued an assessment of MPP, calling it "effective" because it decreased "the number of illegal aliens present in the United States."[11] DHS also coordinated an agreement with Texas whereby Texas agreed to help DHS with "border security, legal immigration, immigration enforcement, and national security missions," and, in return, DHS would consult Texas on a number of policies and procedures regarding immigration.[12] DHS was also required to "provide Texas with 180 days of written notice…of any proposed action" and to consider Texas's input.[13]

A few days after Joe Biden was sworn in as President on January 20, 2021, the Biden administration suspended MPP "pending further review of the program."[14] On April 13, 2021, Texas and Missouri "filed suit challenging the suspension of MPP in federal court in Texas, which was assigned to Judge Kacsmaryk,"[15] citing injuries such as "having to provide services like drivers' licenses to immigrants allowed into the United States under the program."[16] While the case was pending in federal court, on June 1, 2021, the new DHS secretary, Alejandro Mayorkas issued a memorandum that terminated the program completely, citing three reasons for the termination: (1) MPP does not "adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens"; (2) "MPP did not ensure that aliens waiting in Mexico were able to attend their immigration proceedings"; and (3) the benefits of the program are outweighed by the cost of personnel and resources, especially during COVID.[17]

The new memorandum was "rolled into the pending case brought by the states."[18] On August 13, 2021, the district court "determined that the June 1, 2021, memorandum was not issued in compliance with the Administrative Procedure Act. The Court remanded it to the Department for further consideration, enjoined the termination of MPP, and ordered DHS to 'enforce and implement MPP in good faith.'"[19] The Court made three conclusions about DHS and the termination of MPP: (1) DHS ignored critical factors such as the "main benefits of MPP" to address "perverse incentives"[20]; (2) DHS's reasons for terminating MPP were "arbitrary"[21]; and (3) DHS failed to consider the effect that terminating MPP would have on Section 1225 of the INA statute.[22]

Section 1225 of Title 8 of the United States code "establishes procedures for DHS to process aliens who are 'applicant[s] for admission' to the United States, whether they arrive at a port of entry or cross the border unlawfully."[23] The court reasoned that when DHS "places an applicant for admission to a full removal proceeding under Section 1229a," DHS had the option of either mandatory detention or returning the "alien" to the territory "from which they just arrived pending their immigration proceedings."[24] According to the court, "without MPP, Defendants' only remaining option under Section 1225 is mandatory detention," which "DHS admit[ed] it [did] not have the capacity to meet its detention obligations under Section 1225 because of 'resource constraints.'"[25]

DHS appealed the lower court decision and requested a stay of the district court's injunction while the appeal was pending, which was denied.[26] In addition, on October 29, 2021, the Friday before oral arguments were scheduled to begin, DHS issued another memorandum "to explain the Termination Decision" which it believed "mooted [the Fifth Circuit] case."[27] The Fifth Circuit disagreed with DHS, finding that the case was not moot, because a case is moot only "when the controversy between the parties is dead and gone," which, according to the court, in this case it was not.[28]

On December 13, 2021, the Fifth Circuit held that the "Termination Decision was arbitrary and capricious under the APA" and that "[t]he Termination Decision is independently unlawful because it violates 8 U.S.C. § 1225."[29] The court reasoned that "DHS failed to consider several 'relevant factors' and 'important aspect[s] of the problem' when it made the Termination Decision. These include (1) the States' legitimate reliance interests, (2) MPP's benefits, (3) potential alternatives to MPP, and (4) the legal implications of terminating MPP."[30] In addition to the legal issues, the court was "not pleased with the way the administration presented this case," citing dirty "litigation tactics."[31]

The Fifth Circuit decision is controversial because it reinstated MPP, but also because critics argue that "court's conception of administrative law" is "inappropriate and damag[es] status quo."[32] Critics also argue that the court:

effectively reads the Immigration and Nationality Act (INA) to *require* the government to adopt something like MPP, unless it can otherwise detain each and every asylum seeker as they pursue the claims for protection that the

law entitles them to make – a logistical impossibility in times of crisis, and a sharp break from what courts and policymakers alike have understood the law to require.[33]

There are three aspects of the "court's conception of administrative law" that are "inappropriate and damag[e] status quo [:]" (1) that the decision "reflects a deeply misguided view about the role of reason-giving and justification in agency decisionmaking,"[34] (2) that "the Fifth Circuit appears to be ratcheting up arbitrary and capricious review into a form of interventionist administrative law that empowers courts to second guess agency policy judgments and block policy development,"[35] and (3) that "the Fifth Circuit has forced not just this administration but the government generally into a litigation vise that will have the effect of stymying change."[36]

In addition to critics' concern about the way that the Fifth Circuit has interpreted the function of the administrative state, critics also argue that there is a problem with their "stark conclusion about the Immigration and Nationality Act."[37] The provision of the INA at issue is section 235(b)(1).[38] Critics argue that the court's interpretation:

belies the way its interlocking parts have been administered for decades, in two ways. First, the court begins from the premise that the statute mandates that all persons seeking admission but lacking documentation must be detained (8 U.S.C. s. 1225(b)(2)(A)) until their asylum claims are fully resolved by DHS. From there, it reasons that the statute provides only one exception to this mandatory detention rule – if the government sends these asylum seekers to await their hearings outside the United States (8 U.S.C. 1225(b)(2)(C)).[39]

According to critics, this interpretation ignores the possibility of parole,[40] with the court concluding that "parole cannot be used for arriving asylum seekers because the parole provision requires that it be awarded on an 'individualized' basis," which would require that the release of these individuals would "amount to a categorical, rather than individualized, exercise of the parole power."[41] This is, according to critics, a sharp break from what courts and policymakers alike have understood the law to require,[42] and the "reasoning [of the court] is wrong" because "even if large numbers of applicants ultimately receive parole, parole judgments are nonetheless made on a case-by-case basis."[43]

The controversy here is far from over, as critics continue to push back on the program's existence and implementation, citing issues such as the "extreme danger" that "asylum seekers placed into MPP [have] experienced"[44] and "reports that migrants are being returned to Mexico without publicly available plans on the provision of shelter and transportation."[45]The Biden administration filed an appeal of the Fifth Circuit's decision and "has requested the case to be heard this term, which ends in late June or early July [of 2022]."[46]

[1] *Texas v. Biden*, No. 21-10806, 2021 U.S. App. LEXIS 36689, at *2 (5th Cir. 2021).

[2] *Texas v. Biden*, 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 152438, at *7-8 (N.D. Tex. Aug. 13, 2021).
[3] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *7 (Stating that there were around "2,000 inadmissible aliens each day in 2018" and that "[b]y May 2019, that number had increased to 4,800 aliens crossing the border daily." Additionally, the goal was to "ensure that '[c]ertain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim.'").
[4] *Texas,* 2021 U.S. App. Lexis 36689, at *6.
[5] Andrew R. Arthur, *"The Latest Fifth Circuit 'Remain in Mexico' Decision Is a Doozy,"* Center for Immigration Studies (Dec. 15, 2021), https://cis.org/Arthur/Latest-Fifth-Circuit-Remain-Mexico-Decision-Doozy.
[6] Adam Liptak, *Supreme Court Allows Revival of Trump-Era "Remain in Mexico" Asylum Policy,* N.Y. Times (Aug. 24, 2021), https://www.nytimes.com/2021/08/24/us/politics/supreme-court-immigration-asylum-mexico.html.
[7] Arthur, *supra* note 5.
[8] U.S. Dep't of Homeland Sec., Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols 1 (Dec. 2, 2021).
[9] U.S. Dep't of Homeland Sec., *supra* note 8, at 1.
[10] *Texas,* 2021 U.S. App. Lexis 36689, at *7; *See also* U.S. Dep't of Homeland Sec., *supra* note 8, at 2.
[11] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *9-10. *See also* Arthur, *supra* note 5 (Noting that "DHS determined that MPP was 'an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system,' particularly as related to alien families. Asylum cases were expedited under the program, and MPP removed incentives for aliens to make weak or bogus claims when apprehended.").
[12] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *13-14.
[13] *Id.*
[14] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *15-16. *See also Texas,* 2021 U.S. App. Lexis 36689, at *2.
[15] Arthur, *supra* note 5; *See also Texas*, 2021 U.S. Dist. LEXIS 152438, at *2 (Noting that the States of Texas and Missouri "filed suit challenging the temporary suspension of the Migrant Protection Protocols ("MPP")").
[16] Liptak, *supra* note 6; *See also Texas*, 2021 U.S. Dist. LEXIS 152438, at *2 (Discussing that "[p]laintiffs alleged that DHS's 'two-sentence, three-line memorandum' that suspended enrollments in the Migrant Protection Protocols pending review of the program was in violation of the APA, 8 U.S. C § 1225, the Constitution, and a binding agreement between Texas and the federal government.").
[17] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *15-16.
[18] Arthur, *supra* note 5.
[19] U.S. Dep't of Homeland Sec., *supra* note 8, at 2; *See also Texas*, 2021 U.S. Dist. LEXIS 152438, at *52 (Concluding that DHS is "permanently enjoined and restrained from implementing or enforcing the June 1 Memorandum. The June 1 Memorandum is Vacated in its entirety and remanded to DHS for further consideration. Defendants are ordered to enforce and implement MPP in good faith.").
[20] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *36.
[21] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *38.
[22] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *41.
[23] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *6-7.
[24] *Id.*
[25] *Texas*, 2021 U.S. Dist. LEXIS 152438, at *41.
[26] *Texas,* 2021 U.S. App. Lexis 36689, at *2.

[27] *Id*. See *also* U.S. Dep't of Homeland Sec., Termination of the Migrant Protection Protocols 2 (Oct. 29, 2021).
[28] *Texas,* 2021 U.S. App. Lexis 36689, at *3.
[29] *Texas,* 2021 U.S. App. Lexis 36689, at *2-4 (Finding that the "statute (among other things) requires DHS to detain aliens, pending removal proceedings, who unlawfully enter the United States and seek permission to stay. It's true that DHS lacks the capacity to detain all such aliens. Congress, however, created a statutory safety valve to address that problem. Another part of § 1225 allows DHS to return aliens to contiguous territories, like Mexico, while removal proceedings are pending. That safety valve was the statutory basis for the Protocols. DHS's Termination Decision was a refusal to use the statute's safety valve. That refusal, combined with DHS's lack of detention capacity, means DHS is not detaining the aliens that Congress required it to detain." DHS argued that parole is the way to solve this issue, but the Court asserted that parole is only allowed by statute in a case-by case basis, and paroling "en masse" is the opposite of that.).
[30] *Texas,* 2021 U.S. App. Lexis 36689, at *89.
[31] Arthur, *supra* note 5 (Noting that "[t]he government had requested that the Fifth Circuit vacate the district court's judgment and remand it back, an equitable — as opposed to legal — remedy. The circuit court held that 'DHS's litigation tactics' — issuing the October 29 MPP termination redo while the case was on appeal — 'tilt the equities decidedly against vacatur.'").
[32] Cristina Rodriguez & Adam Cox,"*The Fifth Circuit's Interventionist Administrative Law and the Misguided Reinstatement of Remain in Mexico,"* Just Security (Dec. 21, 2021), https://www.justsecurity.org/79617/the-fifth-circuits-interventionist-administrative-law-and-the-misguided-reinstatement-of-remain-in-mexico/ (Asserting that "[a] core aspect of administrative law is that agencies, unlike legislatures, are required by law to give reasons for their decisions. But an equally foundational principle is that agencies are permitted to rethink their policies and positions, including by developing new justifications for an action initially found wanting by a court.").
[33] *Id*.
[34] *Id*.
[35] *Id*. (Asserting that the *Regents v. DHS* case which the court relies on had flaws that the Fifth Circuit is "parroting" here – that "the government failed to take account of reliance interests and did not adequately consider alternatives." Also arguing that "while the court concludes that the Biden administration 'insufficiently addressed alternatives to terminating MPP,' it doesn't even bother to suggest a single policy alternative that it believes the agency should have considered.").
[36] *Id*. (Noting that "the government can appeal the district court injunction and wait for the eventual resolution of the validity of the policy at issue in the litigation; OR, the government can accept a district court injunction and attempt to re-do its policymaking process in order to satisfy that trial court. But [that according to the Fifth Circuit] it cannot do both simultaneously.").
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Texas,* 2021 U.S. App. Lexis 36689, at *3 (Noting that "[a]s it stands today, then, the § 1182(d)(5) parole power gives the executive branch a limited authority to permit incoming aliens to stay in the United States without formal authorization when their particular cases demonstrate an urgent humanitarian need or that their presence will significantly benefit the public. The power must be exercised on a case-by-case basis.").
[41] Cristina Rodriguez & Adam Cox, *supra* note 32.
[42] *Id*.
[43] *Id*.
[44] American Immigration Council, *The 'Migrant Protection Protocols'* (Jan. 7, 2022),

https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols (Noting that "[m]any asylum seekers and families were kidnapped and assaulted after having been sent back to Mexico, sometimes within hours of crossing back over the border. According to Human Rights First, through February 2021 there were at least 1,544 publicly documented cases of rape, kidnapping, assault, and other crimes committed against individuals sent back under MPP. Multiple people, including at least one child, died after being sent back to Mexico under MPP and attempting to cross the border again." The American Immigration Council concludes that "[g]iven these conditions, thousands of people subjected to MPP were unable to return to the border for a scheduled court hearing and were ordered deported for missing court. Some missed hearings because the danger and instability of the border region forced them to abandon their cases and go home. Others missed hearings because they were the victims of kidnapping or were prevented from attending because their court paperwork was stolen.")

[45] American Immigration Lawyers Association, *"Featured Issue: Migrant Protection Protocols"* (Jan. 12, 2022), https://www.aila.org/advo-media/issues/all/port-courts.

[46] Id.