Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Rescission of the Migrant Protection Protocols: Litigation Developments

February 8, 2023

Federal immigration laws set forth procedures applicable to aliens (as defined under federal law) seeking admission into the United States who have no legal basis to enter the country. Generally, under this legal framework, applicants for admission who are inadmissible "shall be detained" during the pendency of their removal proceedings. The Department of Homeland Security (DHS), however, has lacked the funding and capacity to detain most inadmissible aliens encountered at the border. Given the limited detention resources, DHS has had a longstanding practice of releasing many arriving aliens on "parole" pending the outcome of their proceedings, particularly those who pose no risk of flight or danger to the community. During the Trump Administration, DHS took a different approach. In 2019, the agency established a new policy to discourage unauthorized migration and prevent arriving aliens encountered at the southern border who were believed to be inadmissible from being released into the United States. Known as the Migrant Protection Protocols (MPP), this program required some arriving asylum seekers at the U.S. southern border to return to Mexico pending the outcome of their removal proceedings.

In 2021, Secretary of Homeland Security Alejandro Mayorkas issued two separate memoranda announcing the rescission of the MPP. In June 2021, Secretary Mayorkas issued the first rescission memo, and Texas and Missouri sued. The U.S. District Court for the Northern District of Texas ruled that the MPP rescission was unlawful and issued a nationwide injunction requiring DHS to resume the MPP. The U.S. Court of Appeals for the Fifth Circuit affirmed that decision. On June 30, 2022, the Supreme Court in *Biden v. Texas* reversed, holding that DHS had the "discretionary authority" to rescind the MPP. The Court also held that Secretary Mayorkas's second rescission memo issued in October 2021 was the final agency action and directed the district court to review that memo in the first instance (more information about the Supreme Court's decision can be found here). In December 2022, following more litigation, the district court stayed implementation of the October 2021 memo pending the final outcome of the case on the merits. This Legal Sidebar discusses the recent litigation following the Supreme Court's *Biden v. Texas* decision.

Background

Generally, under 8 U.S.C. § 1225(b)(1), certain inadmissible aliens, as defined under federal law, arriving at designated ports of entry or who recently entered the United States unlawfully are subject to expedited

Congressional Research Service
https://crsreports.congress.gov
LSB10915

removal, and the determination that the alien should be expeditiously removed from the United States is not subject to review. This process is subject to certain exceptions, however, including if an alien shows a "credible fear" of persecution, as defined under 8 U.S.C. § 1225(b)(1)(B)(v).

Under 8 U.S.C. § 1225(b)(2)(A), inadmissible aliens who are not subject to expedited removal are placed in "formal" removal proceedings before an immigration judge. Aliens placed directly into formal removal proceedings have more procedural protections than those who undergo expedited removal, including the right to counsel at no expense to the government and the ability to pursue relief from removal (e.g., asylum) without having to meet any threshold screening requirement (e.g., a "credible fear"). While aliens subject to formal removal proceedings are often released from custody during the pendency of those proceedings, applicants for admission who are placed in formal removal proceedings (including those who were first screened for expedited removal and later transferred to formal removal proceedings following a credible fear determination) generally "shall be detained" during those proceedings.

As an alternative to detention, 8 U.S.C. § 1225(b)(2)(C) provides that the DHS Secretary "may return" inadmissible aliens placed directly into formal removal proceedings to "a foreign territory contiguous to the United States" pending adjudication if the alien is "arriving on land" from that territory. Based on this authority, in January 2019, the Trump Administration implemented the MPP to address a "security and humanitarian crisis on the Southern border." With the cooperation of Mexican authorities, immigration officials returned some arriving asylum seekers to Mexico while U.S. immigration courts processed their cases in formal removal proceedings. In June 2021, under the Biden Administration, DHS Secretary Alejandro Mayorkas issued the first memorandum rescinding the MPP. During litigation regarding the lawfulness of the MPP rescission, Secretary Mayorkas issued a second memorandum in October 2021, terminating the MPP and superseding the June 2021 memorandum. The October 2021 rescission memorandum provided a supplemental explanation addressing factors found to be inadequately considered in the earlier rescission.

Status of Current MPP Litigation

As noted above, Texas and Missouri sued to challenge the June 2021 MPP rescission in the U.S. District Court for the Northern District of Texas. The district court ruled that the rescission was unlawful and the Fifth Circuit upheld that decision. On June 30, 2022, the Supreme Court in *Biden v. Texas* held that the June 2021 MPP rescission was not unlawful because DHS has "discretionary authority" to decide whether to return aliens under 8 U.S.C. § 1235(b)(2)(C), and nothing in the statute mandates the use of that authority. The Court, however, remanded the case to the district court to consider whether DHS's superseding October 2021 rescission memo complied with the requirements of the Administrative Procedure Act (APA). Following remand, Texas and Missouri filed a motion, under Section 705 of the APA, to stay the effective implementation date of the October 2021 memo pending the district court's decision. On December 15, 2022, the district court granted that motion.

Before addressing the October 2021 rescission memo, the district court determined that it had authority to stay the memo's implementation despite 8 U.S.C. § 1252(f)(1). That statute bars lower courts from issuing "injunctive relief" that requires federal officials to enforce or not to enforce certain statutory provisions concerning the inspection, apprehension, detention, and removal of aliens, including 8 U.S.C. § 1225(b)(2)(C), except with respect to an individual alien in removal proceedings. Previously, the Supreme Court held that the district court acted outside its authority in violation of 8 U.S.C. § 1252(f)(1) when it issued a nationwide injunction requiring DHS to continue the MPP. On remand, the district court determined, in the first instance, that 8 U.S.C. § 1252(f)(1) does not prohibit issuance of a stay under the APA because, unlike injunctive relief, a stay merely postpones the effective date of agency action, but does not order federal officials to take or refrain from taking any specific actions.

After determining that 8 U.S.C. § 1252(f)(1) does not prohibit a stay under the APA, the district court ruled that a stay of the October 2021 MPP rescission memo was warranted because it was likely that the agency's actions were "arbitrary and capricious" in violation of the APA. According to the court, the October 2021 recession memo failed to adequately consider whether DHS could fulfill its mandatory detention obligations under 8 U.S.C. § 1225(b)(2)(A) in the event of the MPP's termination. The court also explained that the memo relied on the legally erroneous conclusion that 8 U.S.C. § 1225(b)(2)(A) "does not impose a near-universal detention mandate" for applicants for admission placed in formal removal proceedings because that statute's detention requirements are "mandatory."

Similarly, the court determined that the October 2021 rescission memo failed to adequately consider how terminating the MPP, coupled with DHS's admitted inability to detain all arriving aliens, would result in the agency's violation of its parole authority under 8 U.S.C. § 1182(d)(5)(A). That statute authorizes an alternative to detention and permits the parole of aliens seeking admission—thus allowing for the release from DHS custody during removal proceedings—but "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." The statute does not define "urgent humanitarian reasons" or "significant public benefit," but DHS regulations have authorized parole in varied circumstances, including if an alien poses no flight risk or danger to the community. The court in granting the stay of the MPP rescission explained that 8 U.S.C. § 1182(d)(5)(A) allows for parole "only on a case-by-case basis" and that "parole cannot be granted on a categorical basis by a broad, programmatic decision." Rather than address this limitation, the court explained, the October 2021 memo erroneously construed DHS's parole authority as permitting the release of nearly all aliens seeking admission.

The district court also found that the October 2021 rescission memo failed to consider the MPP's benefits, including the "deterrent effect on illegal border crossings and the reduction of unmeritorious asylum claims." In short, the court explained that DHS relied largely on "intuitional decisionmaking," speculative presumptions, and irrelevant data, demonstrating a lack of rational decisionmaking. Finally, the court found that the October 2021 memo failed to adequately consider the costs to the states in the event of the MPP's termination and how much the states have relied on federal immigration enforcement in the past.

The district court thus stayed the October 2021 rescission memo and "corresponding decision to terminate MPP" pending final adjudication of the states' legal challenge.

Takeaways from the District Court's Decision

Initially, after the Supreme Court's decision holding that DHS's rescission of the MPP was not unlawful, DHS announced its intention to terminate the MPP and that individuals were no longer being newly enrolled in that program. While the Supreme Court's decision enabled DHS to proceed with the rescission of the MPP, the Court never considered whether that rescission otherwise violated the APA's requirements. The Court, moreover, directed the district court to consider, in the first instance, the legality of the intervening October 2021 rescission memo, which the Court construed as the final agency action in that case. Upon remand, the district court stayed implementation of that rescission memo pending further litigation, concluding that the rescission was likely "arbitrary and capricious" under the APA because DHS failed to adequately consider certain factors in its decision. As a result of the district court's stay order, the rescission of the MPP is not currently effective. It remains to be seen whether or to what extent DHS reinstates the MPP as litigation continues in this case. Furthermore, on February 6, 2023, the Mexican government expressed its opposition to the reinstatement of the MPP, which would require the cooperation of Mexican officials to be fully implemented.

In the meantime, the government could appeal the district court's order to the Fifth Circuit and request a stay of that order pending the adjudication of its appeal. Additionally, Congress through legislation has addressed whether DHS should have authority to implement programs like the MPP, or be required to return arriving aliens to Mexico pending the outcome of their proceedings. For instance, on the one hand,

in the 118th Congress, the Border Safety and Security Act of 2023 (H.R. 29) would require the DHS Secretary to prohibit the entry into the United States of aliens who lack valid documentation if either (1) DHS cannot detain such aliens pending the outcome of their removal proceedings; or (2) the agency cannot return such aliens to a contiguous country pending adjudication of those proceedings under a program consistent with 8 U.S.C. § 1225(b)(2)(C). Similarly, in the 117th Congress, legislation such as the Solving the Border Crisis Act (S. 4518) would have required immigration authorities to either detain applicants for admission or return them to contiguous territory (or a "safe third country") throughout their formal removal proceedings. On the other hand, legislation in the 116th Congress, such as the Strategic and Humane Southern Border Migrant Response Act (H.R. 3731) would have terminated the MPP, and the End the Migrant Protection Protocols Act (H.R. 5207) would have removed DHS's statutory authority to return aliens to a contiguous territory.

Finally, to address concerns that the agency lacks the capacity and resources to detain more inadmissible aliens arriving at the border, additional funding for bed space could be provided as some Member of Congress have argued. Conversely, some advocacy groups and Members of Congress have called for reduced detention, and to increase the use of certain alternatives to detention programs that rely on case management services and electronic monitoring instead.

Author Information

Hillel R. Smith
Legislative Attorney

Disclaimer