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The Supreme Court May Entrench Trump's Cruel "Remain in Mexico" Policy

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The Supreme Court is poised to entrench protocols that expose thousands of asylum-seekers to inhumane conditions, usurping the Biden administration's ability to conduct foreign policy and striking yet another blow to American democracy. By forcing the continuation of the Trump administration's cruel Migrant Protection Protocols ("MPP") — widely referred to as the "Remain in Mexico" policy — the Supreme Court would be imposing a second Trump presidency from the bench despite his decisive loss in the 2020 election.

MPP is an inhumane policy that exposes asylum seekers with credible fear of persecution to violence

The Trump administration designed the so-called Migrant Protection Protocols to inflict suffering on those seeking safety in the U.S., and particularly targeted asylum seekers who arrive by land at the Southern border. The MPP policy, started in December 2018, requires people who have completed the first step of requesting asylum, and who have been confirmed by a U.S. asylum officer to have a credible fear of persecution, to wait in or return to Mexico indefinitely while U.S. immigration officials process their case.

These protocols target migrants arriving from Central and South America and expose them to physical harm, illness, and dangerous surroundings in shelters and squalid encampments while they wait for their applications to be processed. More than 71,000¹ people seeking asylum

have been affected by the policy — 21,000 of whom are children. Human Rights First documented more than 1,500² reported cases of murder, rape, kidnapping, torture, and assault of those sent to Mexico under the policy, and Human Rights Watch documented the kidnappings of at least 38 children.³

Trump-appointed judges have forced the Biden administration to reinstate Trump's MPP Policy

President Biden suspended MPP on his first day in office, recognizing the inhumane, unjust, and ineffective nature of the program. The Department of Homeland Security (DHS) subsequently terminated the policy in an extensive and well-documented memorandum.

In response to a lawsuit by Texas and Missouri, a Trump-appointed federal district judge for the Northern District of Texas ruled that the Biden administration could not terminate the policy because DHS lacked the

1 Ceron, Ella. "Children Were 30% of Those Affected by U.S. 'Remain in Mexico' Rule." Bloomberg Quint, www.bloomberquint.com/onweb/remain-in-mexico-30-of-those-affected-under-trump-rule-where-children

2 "Delivered to Danger." Human Rights First, www.humanrightsfirst.org/campaign/remain-mexico

3 "Like I'm Drowning." Human Rights Watch, www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program

resources to detain asylum seekers in the U.S. and that the agency violated administrative law by failing to adequately explain its decision to end the policy. The ruling was based on a false reading of immigration law; the district court judge stated DHS was required by law to detain or expel asylum seekers, ignoring a host of alternative measures at DHS's disposal.

By rejecting the administration's request to block the lower court order, the Supreme Court's 6-3 Republican supermajority forced the Biden administration to reinstate MPP. After briefly restarting the program, the Biden administration then issued a new decision to terminate MPP, releasing a 38-page memorandum to detail its reasoning. In his announcement of the new memo, DHS Secretary Alejandro Mayorkas explained that the policy had "endemic flaws," "imposed unjustifiable human costs," and "fails to provide the fair process and humanitarian protections" required under the law.⁴ In December 2021, a Fifth Circuit three-judge panel — composed of two Trump appointees and one senior judge appointed by George H.W. Bush — denied the Biden's administration's appeal and effectively ordered MPP to be reinstated indefinitely.

In a sharp break from legal precedent, the Fifth Circuit upheld the lower court opinion and upended decades of immigration law and policy, inventing a

reading of the Immigration and Nationality Act that requires the government to adopt a policy that looks like MPP unless DHS has the capacity to detain every individual asylum seeker. But the relevant provisions of the Immigration and Nationality Act were passed in 1996, and MPP was adopted in 2018; in the 24 years in between, the Act and its amendments had never required such a policy. The Immigration and Nationality Act offers DHS several alternatives, including granting asylum seekers parole or releasing them on bond. The court also cast the Biden administration's attempts to review its policies after the district court opinion as a form of gamesmanship rather than standard administrative law doctrine, attacking the Biden administration's ability to address and correct for elements of the district court's ruling.

The case is now again in front of the Supreme Court, which will hear oral arguments in April and will likely decide the case by July 2022.

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4 *DHS Issues A New Memo to Terminate MPP*. U.S. Department of Homeland Security. October 2021

An adverse SCOTUS ruling would hamstring the president's ability to negotiate foreign policy

By demanding that the administration restart MPP, the lower court is also forcing the president to renegotiate the terms of the program with Mexico. In its August 2021 application for stay,⁵ the Justice Department referenced the “extensive coordination . . . and assistance from Mexico” required to implement and restart the program. Effectively, the U.S. cannot restart or permanently implement such a program unilaterally; it is highly inappropriate for the judiciary to force a negotiation between the president and another state sovereign and dictate the terms of the final agreement.



People walking alongside the Tijuana-San Diego border. **Barbara Zandoval/Unsplash**

If upheld by the Supreme Court, the lower court's decision would dismantle decades of precedent in foreign policy. The courts have a long-standing history of deference to the executive branch

in matters of foreign policy, as interference by courts could jeopardize sensitive negotiations between diplomats.⁶ But here, the Supreme Court is set to break with that precedent for ideological reasons: if the Court permits a district court judge to order the president to significantly alter his foreign policy, the right-wing judiciary would be reversing historical precedent to usurp Biden's executive authority. Allowing district courts to interfere in immigration and foreign policy could result in judges unilaterally blocking agreements or negotiations they personally disagree with, derailing the credibility of United States diplomats and imposing a lengthy judicial appeals process that would make the country less responsive to time-sensitive negotiations.

A Supreme Court decision reinstating MPP would expose asylum seekers to violence while weakening American democracy and usurping the executive branch's authority to conduct foreign policy

If the Supreme Court again forces the Biden administration to reinstate MPP, it will subject thousands of people seeking asylum in the United States due to a credible fear of prosecution to inhumane conditions and expose them to rape, murder, kidnapping, and torture. The Court is poised to upend immigration law precedent in order to

⁵ Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of Texas and for an Administrative Stay, *Biden v. Texas*, 142 S. Ct. 926. (Aug. 20, 2021)

⁶ Margulies, Peter. “The Courts Restore the 'Remain in Mexico' Program: An End to Judicial Deference?” Lawfare, www.lawfareblog.com/courts-restore-remain-mexico-program-end-judicial-deference

permanently entrench a cruel program launched by the Trump administration that demands mass detention or expulsion of the most vulnerable.

The immoral human toll of such a Supreme Court decision on the oppressed and vulnerable is incalculable. The unelected justices on the Supreme Court would also once again weaken American democracy, forcing a sitting president to maintain the policies of the predecessor he defeated by a decisive margin — and the votes to do so would come from justices appointed by the defeated president.

The stakes for administrative law precedent and diplomacy are high; an adverse ruling by the Court would vest individual district court judges with unprecedented power over a president's rightful ability to set immigration policy and control diplomacy with other countries. The Supreme Court could upend hundreds of years of judicial deference to the elected branches of government and weaken the credibility of United States diplomats in sensitive negotiations with foreign leaders.

The unelected, illegitimate Supreme Court may permanently mandate a Trump-era or similar policy, to the detriment of the most vulnerable — those seeking to escape violence and forge a new life in the United States. The Court's Republican supermajority

cannot be allowed to usurp executive authority and entrench an anti-democratic, anti-immigrant policy for decades to come. We must act today to expand the Court.



Family sitting in front of the Tijuana-San Diego border. [Barbara Zandoval/Unsplash](#)