U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Decision

Matter of: Department of Homeland Security—Applicability of the Congressional Review Act to the Memoranda Terminating the Migrant Protection Protocols

File: B-334045

Date: July 5, 2023

DIGEST

The Department of Homeland Security (DHS) issued a memorandum entitled "Termination of the Migrant Protection Protocols" and an accompanying memorandum entitled "Explanation of the Decision to Terminate the Migrant Protection Protocols" (together, October Memoranda). The October Memoranda terminated the Migrant Protection Protocols, a program under which DHS could return certain migrants, who arrived at the southern border, to Mexico to await proceedings to determine inadmissibility or deportability.

The Congressional Review Act (CRA) requires that before a rule can take effect, an agency must submit the rule to both the House of Representatives and the Senate as well as the Comptroller General, and provides procedures for congressional review where Congress may disapprove of rules. We conclude that the October Memoranda meet the definition of a rule under CRA but that the October Memoranda fall under the CRA exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. Therefore, the October Memoranda are not subject to the submission requirement of CRA.

DECISION

On October 29, 2021, the Department of Homeland Security (DHS) issued a memorandum entitled "Termination of the Migrant Protection Protocols" and an accompanying memorandum entitled "Explanation of the Decision to Terminate the Migrant Protection Protocols" (together, October Memoranda). *See* Memorandum from Secretary, DHS, *Termination of the Migrant Protection Protocols* (Oct. 29, 2021), *available at* https://www.dhs.gov/archive/publication/mpp-policy-guidance (last visited Mar. 31, 2023); *Explanation of the Decision to Terminate the Migrant*

Protection Protocols (Oct. 29, 2021), available at https://www.dhs.gov/archive/publication/mpp-policy-guidance (last visited Mar. 31, 2023). We received a request for a decision as to whether the October Memoranda are a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Hagerty to the Comptroller General (Feb. 16, 2022). For the reasons discussed below, we conclude that the October Memoranda are not subject to the submission requirement of CRA.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/gao-06-1064sp. Accordingly, we reached out to DHS to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, DHS (Mar. 3, 2022). We received DHS's response on April 4, 2022. Letter from General Counsel, DHS, to Assistant General Counsel for Appropriations Law, GAO (Apr. 4, 2022) (Response Letter).

BACKGROUND

October Memoranda

On February 2, 2021, President Joseph R. Biden, Jr., issued Executive Order No. 14010 directing the Secretary of DHS to "promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols." The Migrant Protection Protocols (MPP) implemented 8 U.S.C. § 1225(b)(2)(C) to address migration on the southern border. Memorandum from Secretary, DHS, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), at 1, *available at* https://www.dhs.gov/publication/policy-guidance-implementation-migrant-protection-protocols (last visited Mar. 31, 2023). That statutory authority permits DHS to return migrants, who are not clearly and beyond a doubt entitled to be admitted, to the contiguous foreign territory from which they arrived on land, pending a proceeding to determine inadmissibility or deportability. 8 U.S.C. § 1225(b)(2)(C).

On June 1, 2021, DHS issued a memorandum terminating MPP (June Memorandum). *See* Memorandum from Secretary, DHS, *Termination of the Migrant Protection Protocols Program* (June 1, 2021), *available at* https://www.dhs.gov/archive/publication/mpp-policy-guidance (last visited Mar. 31, 2023). Two states filed suit in the U.S. District Court for the Northern District of Texas, and on August 13, 2021, the district court vacated the June Memorandum and ordered DHS to "enforce and implement MPP *in good faith*." *Texas v. Biden*, 554 F. Supp. 3d 818, 857 (N.D. Tex. 2021). The district court concluded that DHS has two options for migrants who are not clearly and beyond a doubt entitled to be admitted—mandatory detention under 8 U.S.C. § 1225(b)(2)(A) or return to a contiguous foreign territory under 8 U.S.C. § 1225(b)(2)(C)—and that "terminating MPP necessarily leads to the systemic violation of [8 U.S.C. § 1225]." *Texas v.*

Biden, 554 F. Supp. 3d at 852. The district court also determined that the June Memorandum was not issued in compliance with the Administrative Procedure Act (APA). *Texas v. Biden*, 554 F. Supp. 3d at 847–851.

On October 29, 2021, DHS issued the October Memoranda addressing points raised by the district court, terminating MPP, and rescinding and superseding all prior DHS memoranda and guidance on MPP. *See* Memorandum from Secretary, DHS, *Termination of the Migrant Protection Protocols* (Oct. 29, 2021), *available at* https://www.dhs.gov/archive/publication/mpp-policy-guidance (last visited Mar. 31, 2023); *Explanation of the Decision to Terminate the Migrant Protection Protocols* (Oct. 29, 2021), available at https://www.dhs.gov/archive/publication/mpp-policy-guidance (last visited Mar. 31, 2023). On December 13, 2021, the Fifth Circuit affirmed the district court, concluding, among other things, that the decision to terminate MPP was arbitrary and capricious under APA and that it violated 8 U.S.C. § 1225. *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021). The Fifth Circuit also determined that DHS's October Memoranda, which were issued in response to the district court's decision and while the appeal was pending, did not have legal effect. *Id*. at 957–58.

In *Biden v. Texas*, 597 U.S. __, 142 S. Ct. 2528 (2022), the Supreme Court reversed the Fifth Circuit's judgment and remanded for the district court to consider whether the October Memoranda comply with section 706 of the APA, which lists reasons the court may set aside an agency action, including that the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Supreme Court held that termination of MPP did not violate 8 U.S.C. § 1225 because the word "may" in 8 U.S.C. § 1225(b)(2)(C) "makes clear that contiguous-territory return is a tool that the Secretary 'has the authority, but not the duty,' to use." *Biden v. Texas*, 142 S. Ct. at 2541 (citation omitted). The Supreme Court also determined that the October Memoranda were a final agency action under APA and were "agency statement[s] . . . designed to implement, interpret, or prescribe law or policy." *Id.* at 2544–45.

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. *Id*. CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. *See* 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA adopts the definition of rule under APA, 5 U.S.C. § 551(4), which states that a rule is "the whole or a part of an agency statement of general or particular

applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 804(3). CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

DISCUSSION

At issue here is whether the October Memoranda are a rule for purposes of CRA. When determining whether an agency action is subject to review under CRA, we first examine whether it meets the APA definition of a rule, and then, if it does, whether any of the CRA exceptions apply.

We conclude that the October Memoranda meet the definition of a rule. First, the October Memoranda are agency statements sent from the DHS Secretary to other DHS officials. Second, the October Memoranda are of future effect as they announce DHS's plans to terminate MPP. *Cf.* B-316048, Apr. 17, 2008 (determining that letter had future effect because it was prospective in nature, concerning policy considerations for the future rather than the evaluation of past or present conduct). Lastly, consistent with the Supreme Court's opinion in *Biden v. Texas*, we conclude that the October Memoranda are "designed to implement, interpret, or prescribe law or policy" as they inform DHS officials on how DHS will use the discretionary authority in 8 U.S.C. § 1225(b)(2)(C). *Biden v. Texas*, 142 S. Ct. at 2545. Thus, the October Memoranda meet the APA definition of a rule. We next must analyze whether any exception applies.

We address first whether the October Memoranda are a rule of particular applicability. We have previously concluded that a rule has general, as opposed to particular, applicability when it has "general applicability within its intended range, regardless of the magnitude of that range." B-330843, Oct. 22, 2019, at 5 (citing B-287557, May 14, 2001, where we found that an agency record of decision having significant economic and environmental impact throughout several major watersheds in the nation's largest state is not a rule of particular applicability). The October Memoranda terminates the MPP for all migrants who are arriving on land from a foreign contiguous territory and who are not clearly and beyond a doubt entitled to be admitted. Because the October Memoranda have general application to that group—their "intended range," they are a rule of general, not particular, applicability.

We turn next to whether the October Memoranda fall within the exception to CRA for rules relating to agency management or personnel. We can readily conclude that the October Memoranda do not fall within this exception. A rule falls within this exception if it relates purely to matters of internal agency management and organization (including governmentwide matters) and does not have an effect on non-agency parties. B-334221, Feb. 9, 2023.

If a rule has an effect on non-agency parties, then we must consider whether the rule is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties under the third exception to CRA. *Id*. In its response letter, DHS asserts that the October Memoranda fall within this third exception to CRA. Response Letter, at 4. When determining whether there is a substantial impact on non-agency parties, the question is whether the October Memoranda have "a substantial impact on the regulated community such that [they are] a substantive rather than a procedural rule for purposes of CRA." B-238859, Oct. 23, 2017, at 14. In B-238859, we looked to federal cases interpreting an APA exception on which this CRA exception is modeled. B-238859, Oct. 23, 2017. Those cases "focused on whether the agency action has substantive impacts on the regulated community." B-238859 Oct. 23, 2017, at 12 (describing *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994), as an example). Based on those cases, we examined whether the 2016 Tongass Amendment, which governed where old-growth and new-growth timber harvesting was allowed, had a substantial impact on the regulated community—the local timber industry. B-238859, Oct. 23, 2017 (concluding that there was a substantial impact on the local timber industry); *see also* B-334032, Dec. 15, 2022 (explaining that a Federal Highway Administration memorandum setting out preferred projects for funding did not qualify for the third exception because it had a substantial impact on the regulated community, funding recipients); B-331324, Oct. 22, 2019 (finding that a supervision and regulation letter did not fall into the third exception because it had a substantial impact on banks, the regulated community).

Consistent with our prior precedent, we find that the October Memoranda do not have a substantial impact on the regulated community—migrants who are arriving on land from a foreign contiguous territory—because they do not alter the individual rights of the migrants. In B-330190, we determined that the Attorney General's Zero-Tolerance memorandum, which set forth DOJ's enforcement policies and practices for violations of 8 U.S.C. § 1325, fell within the third CRA exception because "the rights and obligations in question [were] prescribed by existing immigration laws and remain[ed] unchanged by the agency's internal enforcement procedures at issue." B-330190, Dec. 19, 2018, at 6. We explained that, although the Attorney General's Zero-Tolerance memorandum changed previous policy, "there [was] no underlying change in the legal rights" of the regulated community. B-330190, Dec. 19, 2018, at 5. We reached this conclusion relying on, among other things, *United States Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984), where the court determined that there was no substantial impact on the regulated community (employers) even though the agency's revised administrative plan changed the criteria and method for selecting employers for routine safety and health inspections. B-330190, Dec. 19, 2018; *see Kast Metals*, 744 F.2d at 1147. The court in *Kast Metals* pointed out that the rights and obligations of the regulated parties "exist[ed] independently of a plan whose sole purpose [was] the funneling of agency inspection resources." *Kast Metals*, 744 F.2d at 1155.

As with the memorandum in B-330190 and the plan in *Kast Metals*, the October Memoranda change previous policy, but there is no underlying change in the legal rights of migrants. The ultimate inadmissibility or deportability of migrants arriving on land from a foreign contiguous territory is already prescribed by existing immigration laws, and those rights remain unchanged by DHS's termination of MPP and the location from which individuals await the proceedings to determine inadmissibility or deportability. Additionally, terminating MPP just returns DHS to its prior state of using the discretionary authority conferred by 8 U.S.C. § 1225(b)(2)(C) on a case-by-case basis.[1] *Cf. Biden v. Texas*, 142 S. Ct. at 2541 (stating that "[s]ection 1225(b)(2)(C) plainly confers a *discretionary* authority to return aliens to Mexico during the pendency of their immigration proceedings").

We therefore agree with DHS that the October Memoranda fall within the CRA exception for a "rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."

CONCLUSION

The October Memoranda are not subject to CRA because they fall within the exception for a "rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." Therefore, the October Memoranda are not subject to the CRA submission requirements.

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[1] An agency's non-enforcement decision is generally committed to an agency's absolute discretion. *Compare Hecker v. Cheney*, 470 U.S. 821, 831 (1985) (observing that an agency's non-enforcement decision "often involves a complicated balancing of a number of factors which are peculiarly within its expertise"), *with United States Department of Homeland Security vs. Regents of the Univ. of Cal.*, 591 U.S. __, 140 S.Ct. 1891, 1906 (2020) (explaining that the Deferred Action for Childhood Arrivals (DACA) program was "not simply a non-enforcement policy" and that the DACA Memorandum created a program for conferring affirmative immigration relief where based on the DACA Memorandum's directive, the relevant agency "solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive forbearance").