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Creating a More Responsive and Seamless Refugee Protection System: The Scope, Promise and Limitations of US Temporary Protection Programs

Donald Kerwin
Center for Migration Studies

Executive Summary

Temporary protection programs can provide haven to endangered persons while states and non-governmental organizations (NGOs) work to create durable solutions in sending, host and third countries.[1] They have the potential to further the interests of forced migrants in protection, states in effective and coordinated migration management, and the international community in solidarity.

US temporary protection programs rest primarily on executive discretion and have not been substantially revisited for nearly 25 years. "Parole" represents the primary vehicle for temporarily admitting non-citizens for emergency and humanitarian reasons.[2] Prior to 1980, the United States used parole to admit large refugee and refugee-like populations to whom (in most cases) it later extended lawful permanent resident (LPR) status. The 1980 Refugee Act made the US refugee resettlement program the primary vehicle for refugee admissions, limited the use of parole to individuals (not groups), and created a presumption against granting parole to refugees.

The United States provides immigrant (permanent) visas to abused, neglected and abandoned children, as well as to certain Iraqis and Afghanis who worked for the US military or for military contractors. It can also award up to 5,000 non-immigrant (temporary) "T" visas each year to victims of human trafficking and up to 10,000 non-immigrant "U" visas to survivors of crime who assist law enforcement officials in investigating and prosecuting crimes. However, since 1980, the United States has lacked a dedicated legal vehicle for admitting other refugee-like populations.

1 Temporary protection refers to the universe of programs that provide safe haven to persons who would be at risk in their home or host countries. Temporary protected status (TPS) is the US program that offers group protection to non-citizens from designated states.

2 In a legal fiction, parole does not constitute an "admission." Nor does it connote criminal conduct under US immigration law. It is an exercise of executive discretion that allows physical entry and residence for a temporary period.

Temporary protected status (TPS) applies to non-citizens from states experiencing armed conflict, the aftermath of natural disaster, or other extraordinary, temporary conditions that make it unsafe to return. The TPS statute allows the Secretary of the US Department of Homeland Security (DHS) to designate states or regions within states for TPS, although the United States has never limited TPS to sub-state groups. TPS does not cover persons from designated states who arrive following the effective date of the designation, even those who fled great peril. TPS recipients cannot petition for the admission of close family members. In addition, TPS cannot be granted to persons in substantial need of protection from undesignated states.

Like refugees and asylees, TPS recipients receive work authorization. Unlike refugees or asylees, they are not eligible for resettlement benefits or deemed "qualified" for most federal public benefit programs. They can apply for political asylum and immigration benefits. However, TPS does not, in itself, lead to permanent status or other durable solutions.

Beyond TPS, the executive branch can exercise its discretion not to remove persons who fall outside its law enforcement priorities, including persons who might otherwise suffer violence, extraordinary hardship, or death at home.

This paper outlines international standards for the design and operation of temporary protection programs, describes the US refugee protection program writ large, and identifies gaps in protection. It recommends that Congress create a non-immigrant "protection" visa for non-citizens who are at substantial risk of persecution, danger, or harm in their home or host countries, and that DHS expand its use of parole for *de facto* refugees and individuals in refugee-like situations. It also argues that the United States should prioritize the reconstruction and development of TPS-designated states and work to establish regional migration and development agreements covering North America, Central America and the Caribbean.

Congress should also pass legislation to extend LPR status to long-term recipients of temporary protection. In particular, it should advance the "registry" date to January 1, 1999 (which would provide LPR status to most non-citizens in the country since that date) and it should automatically move up the registry cut-off date each year thereafter by one year. It should also pass broad immigration reform legislation, including a legalization program that would credit years in receipt of temporary protection toward the time required to "earn" legalization. And it should allow temporary protection recipients to apply affirmatively for "cancellation of removal" (which brings LPR status) after 10 years.

DHS should also create a more inclusive TPS determination process by hosting quarterly public hearings on conditions in TPS-designated and

TPS–eligible nations. It should also re-designate more states for TPS in order to allow persons from designated states who have fled dangerous conditions and entered the United States between the initial designation and re-designation periods to qualify for TPS.

International Perspectives on Temporary Protection

The United Nations High Commissioner for Refugees (UNHCR), the Council of the European Union (EU Council), the European Council on Refugees and Exiles (ECRE) and refugee advocates generally align on the optimal scope, use and characteristics of temporary protection programs.

According to this rough consensus, temporary protection programs should not be used as a substitute to refugee status, to delay a grant of refugee status, or to deter and deny entry to those seeking protection. Rather, they should be used to safeguard persons who are in substantial peril and who do not meet the refugee standard or who cannot avail themselves of the refugee determination process (Fitzpatrick 2000, 280). The EU Council directive "on minimum standards for giving temporary protection" conceives of temporary protection as a procedure to use in situations of "mass influx or imminent mass influx," particularly if the asylum system cannot "process" the influx "without adverse effects for its efficient operation" (European Union 2001, Art 2(a)).

A properly-structured temporary protection program can encourage states to allow access to their territory by ensuring that they will not be permanently and solely responsible for the imperiled persons that they admit. Frontline states can condition the admission of refugees and refugee-like populations on the financial and resettlement commitments of more distant states (Fitzpatrick 2000, 283, 286). They can also enlist neighboring states in a coordinated response to the conditions that compel migration.

The scope of a temporary protection program invariably depends on a state's definition of a "refugee." Under the 1951 United Nations (UN) Convention relating to the Status of Refugees and the 1967 UN Protocol relating to the Status of Refugees, contracting states cannot "expel or return" a refugee to territories "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[3] The Refugee Convention represents a point of convergence by the international community on a humanitarian priority. It has also spurred the creation of a vast legal and operational infrastructure to protect those at risk, including the US refugee resettlement and political asylum programs.

International bodies and refugee advocates fear that temporary protection might be used to dilute refugee protections and reduce the likelihood that states will honor the legal guarantees set forth in the Refugee Convention. According to the European Union (EU), temporary protection should not be used "to prejudge" refugee determinations (European Union 2001, Art 3(1)). ECRE supports temporary protection only in emergencies when

3 Convention relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954); Protocol relating to the Status of Refugees, 606 UNTS 267, 31 Jan. 1967 (entry into force: 4 Oct. 1967). Refugee Convention of 1951, Art. 33(1).

individual refugee determinations are not "immediately practicable" and when temporary protection will enhance the likelihood of admission and territorial protection (ECRE 1997, par. 1). UNHCR views temporary protection as a stepping stone that can safeguard those in immediate need until a more durable solution can be secured (UNHCR 1981).

Commentators argue that temporary protection, if used as a "substitute protection," will impede integration (Mansouri, Leach and Nethery 2009, 135). An analysis of the use of temporary protection for refugees in Australia, Germany and Denmark from 1999 to 2005 supports this concern. It found that those granted temporary protection experienced social and financial difficulties; separation from family members; and a heightened sense of uncertainty and political exclusion (ibid., 140-144). In addition, non-governmental organizations (NGOs) reported difficulties in meeting the needs of temporary protection recipients for support services.

International bodies aver that temporary protection should have a firm legal foundation. UNHCR starts from "the "fundamental principle of *non-refoulement*, including non-rejection at frontier" (UNHCR 1981, Sec. IIA(2)). However, temporary protection programs typically rest on executive discretion (not legal obligations) and, as a result, they tend to be *ad hoc* (Yakoob 1999, 622).

Beyond its legal basis and the appropriate use of temporary protection, UNHCR, the EU Council and ECRE also broadly agree on the structure and characteristics of such programs. These include:

- Limited duration (ECRE 1997, par. 5);[4]
- Timely access to refugee or asylum determinations (European Union 2001, Art. 17(1); ECRE 1997, par. 6);
- Rights proportionate to duration of status (ECRE 1997, par. 7), including civil rights and non-discrimination (UNHCR 1981, Sec. II B 2(b), (d) and (e));
- Access to justice, including to courts and administrative authorities (UNHCR 1981, Sec. II, B 2(f));
- No unfavorable treatment due to unlawful presence (UNHCR 1981, Sec. II B 2(a));
- Family unity (UNHCR 1981, Sec. II, B 2(h) and (i); ECRE 1997, par. 8; European Union 2001, Art. 15, 2 and 3);
- Education (ECRE 1997, par. 8), including equal access to education for children (European Union 2001, Art. 14, 1) and "educational opportunities for adults, vocational training and practical workplace experience" (European Union 2001, Art. 12);
- Basic necessities like food, shelter and health care (UNHCR 1981, Sec. II, B 2(c); ECRE 1997, par. 8; European Union 2001, Art. 13);
- Employment to promote self-sufficiency (ECRE 1997, par. 8; European Union 2001, Art. 12); [5]

4 Setting a maximum length for temporary protection encourages states to grant protection and to transition recipients toward a durable solution (UNHCR 2012b, par. 21).

5 States may opt against extending temporary protection if it does not entail work authorization and social support. The United States, for example, admitted Kosovars from Macedonia in 1999 as refugees due, in part, to the lack of benefits and support services afforded under other available forms of protection (Hansen, Randall, Martin, Schoenholtz and Weil 2000, 811).

- Identity documents (ECRE 1997, par. 8) and residence permits (European Union 2001, Art. 8, 1);
- The ability to obtain visas (European Union 2001, Art. 8, 3) and only narrow restrictions on movement (UNHCR 1981, Sec. II B 2(a));
- Protection of minors and unaccompanied children (UNHCR 1981, Sec. II, B 2(j));
- Permission to send and receive mail (UNHCR 1981, Sec. II, B 2(k));
- Registration of births, deaths and marriages (UNHCR 1981, Sec. II, B 2(m));
- Burden sharing by states, including in establishing durable solutions (UNHCR 1981, Sec. II, B 2 and IV 3; ECRE 1997, par. 5); and
- Removal of the causes of large-scale influxes and establishment of "conditions favorable to voluntary repatriation." (UNHCR 1981, Sec. IV(6)).

Many of the preferred features of temporary protection programs could as easily apply to refugees. This is fitting since the conditions that trigger temporary protection are not inherently more fleeting than and often mirror those that necessitate refugee protection (Fitzpatrick 2000, 281). "Temporary," in fact, might better be characterized as "impermanent." For this reason, the EU requires that beneficiaries of subsidiary protection receive roughly equal treatment to refugees (Bergeron 2014; European Union 2011, Art. 20 to 35).

Like refugee status, temporary protection can be withdrawn when the conditions giving rise to it no longer obtain.[6] However, according to a 2012 UNHCR roundtable, the decision to terminate or withdraw temporary protection should occur only when return can be "carried out in safety and dignity," the recipient has transitioned to another status, protection responsibilities have transferred to another state, or the individual finds a durable solution (UNHCR 2012(a), par. 20). In addition, repatriation must be structured so that it does not contribute to further instability in the community of origin. ECRE holds that return should take place only on the basis of an independent and impartial human rights assessment (ECRE 1997, par. 9). Voluntary repatriation may be more successful when "the rights to work, housing, health, family reunification and education" have been honored in the host nation (Yakoob 1999, 623).

US Refugee Protection and Asylum Systems

In 2012, the United States admitted more than 58,000 refugees, provided political asylum to nearly 30,000 asylum-seekers, and granted withholding of removal in more than 1,910 cases (Martin and Yankay 2013; DOJ 2013, K4). It also granted relief from removal to more than 500 persons who would likely have been tortured if returned (DOJ 2013, M1).

Under the 1951 UN Convention relating to the Status of Refugees and the 1967 UN Protocol relating to the Status of Refugees, states cannot "expel or return" a refugee to a territory "where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."[7] Yet individualized refugee

6 The Refugee Convention's "cessation" clause can be triggered by a fundamental change in the circumstances that gave rise to refugee status. Refugee Convention, Art. 1C(5).

7 Convention relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954); Protocol relating to the Status of Refugees, 606 UNTS 267, 31 Jan. 1967 (entry into force: 4 Oct.

determinations (for persons outside the United States) and political asylum adjudications (for those within the country) exclude vast categories of persons in genuine peril. In 2011, less than one-fourth of the world's 72 million forced migrants—those displaced by violence, conflict, development projects, natural disasters and hazards—met the refugee definition (IFRC 2012, 14-17).

Nothing prevents contracting states from extending rights and benefits beyond those set forth in the Convention.[8] The Organization of African Unity (OAU), for example, adopted a broad definition of refugee that covers persons compelled to leave their nations by "external aggression, occupation, foreign domination or events seriously disturbing public order."[9] The Cartagena Declaration, adopted by 10 Latin American nations and subsequently approved by the Organization of American States (OAS) General Assembly, enlarges the refugee definition to cover persons whose "lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances that have seriously disturbed public order."[10] The European Union has created a "subsidiary" legal status for non-refugees at risk of "serious harm" in their countries of origin (European Union 2011, Art. 15; Bergeron 2014).

Subjective human rights are conceived as powers or faculties that inhere in individuals. Still it is incongruous that the Refugee Convention, adopted in response to the mass displacement caused by World War II, requires case-by-case refugee determinations and cannot be used to protect groups at immediate risk (Fitzpatrick 2000, 282). In fact, certain rights apply to groups (as in the collective right to self-determination) and group membership can serve as an effective proxy for individual rights violations. In the United States, the "Lautenberg Amendment" represents a form of group protection, establishing a presumption of refugee eligibility for persons in historically persecuted groups (particularly religious minorities) from the former Soviet Union, Southeast Asia, and Iran.[11] The Amendment eases the burden of proof for refugee applicants from these groups, and allows beneficiaries to apply for adjustment to lawful permanent resident (LPR) status after one year.

The US *Refugee Act of 1980* enshrined the obligations and standards set forth in the Refugee Convention into domestic law.[12] Under current law, the United States cannot admit refugees as a group (there must be individual screening), and it cannot admit as refugees non-citizens displaced by generalized violence, civil war, human rights violations, man-made or natural disasters, or those at risk of persecution but not on an enumerated ground.

The experience of Mexican and Central American asylum-seekers exemplifies the difficulties faced by endangered persons that seek protection in the United States. Over the

1967). Refugee Convention of 1951, Art. 33(1).

8 Refugee Convention, Art. 5.

9 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1(2), Sep. 10, 1969, 14691 U.N.T.S.

10 Similarly ECRE maintains that temporary protection "does not reduce need of supplementary refugee definition in Europe" (ECRE 1997, par. 1).

11 Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No. 101-167, 103 Stat. 1195, § 599D and 599E (November 11, 1989); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, § 213 (January 23, 2004).

12 The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (March 17, 1980), US Statutes at Large 94 (1980): 103.

last three years, US Border Patrol arrests of unaccompanied minors—who are primarily from Mexico, Honduras, Guatemala and El Salvador—have increased dramatically (UNHCR 2014). Many minors report having fled transnational criminal gangs. Their fear of violence appears to be well-founded. In 2011, the intentional homicide rates in Honduras (91.6 per 100,000), El Salvador (70.2 per 100,000) and Guatemala (38.5 per 100,000) substantially exceeded the rate in Mexico (23.7 per 100,000) (UNODC 2013). To place this level of violence in context, the lower-end estimate of drug-related killings in Mexico since the government's crack-down on drug cartels in December 2006 is 60,000 (BBC News 2013; Molloy 2013).

Substantial percentages of those fleeing violence in Mexico would appear to be strong candidates for political asylum, including journalists, police officers who fought cartel infiltration, and members of targeted families in violence-ravaged communities.[13] Unaccompanied minors fleeing gang violence in certain Central American states present equally strong claims. Yet asylum approval rates for Mexicans and Central Americans have been extremely low (Chang and Linthicum 2013; Kerwin 2012; Hennessey-Fisk 2012).

Temporary Protection for Non-Citizens in the United States

US temporary protection programs rest primarily on executive discretion and have not been overhauled for nearly 25 years. Parole is the primary vehicle for offering physical entry to non-citizens for emergency and humanitarian reasons. Prior to 1980, the United States used parole to admit large refugee populations. Congress later extended LPR status to most of these groups. The *Refugee Act of 1980* formalized and made the US refugee resettlement program the primary vehicle for refugee admissions. The Act limited the use of parole to individuals (not groups), created a presumption against parole for refugees, and set narrow eligibility criteria ("urgent" humanitarian reasons or "significant public benefit"). Parole does not, in itself, lead to LPR status. Moreover, legislation to adjust parolees to LPR status requires a supermajority vote in the Senate, and the US Department of Homeland Security (DHS) does not consider TPS recipients to have been admitted or paroled, as is required to adjust to LPR status in the United States (Bergeron 2014).

Temporary protected status (TPS) applies to non-citizens from designated foreign states or regions within states.[14] TPS does not cover nationals of designated states who enter the United States following the effective date of the designation, even those who have fled great peril. Nor does it permit recipients to petition for the admission of close family members. In addition, it applies only to persons from designated states, not to those from non-designated states who are in substantial need of protection. In the event of an extension or re-designation of TPS, beneficiaries must re-register. Some do not and, thus, lose status.

Like the US refugee program, TPS status affords employment authorization. However,

13 However, those who fear generalized violence, criminality or persecution (but not "on account of" an enumerated ground) would not be eligible for political asylum.

14 The DHS Secretary can designate foreign states for TPS based on armed conflict, environmental disaster, or other "extraordinary and temporary conditions" that prevent the safe return of their nationals. Immigration and Nationality Act (INA) § 244(b)(1).

unlike refugees or asylees, TPS recipients do not receive refugee resettlement benefits and are not deemed "qualified" for most federal public benefits. They can apply for political asylum and pursue other avenues to legal status. However, the TPS statute does not identify durable solutions for recipients following the termination of a TPS designation or the withdrawal of TPS in individual cases. Nor does US Citizenship and Immigration Services (USCIS) track how many TPS recipients fall out of status, secure another status, or return home, either voluntarily or through deportation.

TPS populations are not among the "protracted" refugee populations that the United States has prioritized for durable solutions. Nor has the United States explicitly prioritized TPS-designated states for foreign aid and development assistance, which could lay the groundwork for the voluntary return of beneficiaries.

Temporary Protection for Non-Citizens outside the United States

The United States has limited options for temporarily admitting imperiled non-citizens. DHS can grant parole for urgent humanitarian reasons or significant public benefit on a "case by case" basis. Parole can only be used "sparingly." Immigrant visas are also available for certain Iraqi nationals who worked for the United States or for US contractors, and to Iraqi and Afghani translators who worked for the US military.

Pre-1980 Parole of Refugee Groups

Until 1980, the US Attorney General (AG) frequently exercised his discretionary parole authority to admit groups of refugees. In a legal fiction, parole does not constitute a legal "admission;" it simply allows physical entry.[15] Between 1956 and 1979, the United States admitted far more "parolees," an average of more than 44,000 per year,[16] than it did "conditional entrants" under the legislative quota for refugees.[17] Paroled groups included 640,000 Cubans who fled the communist revolution, 360,000 Indochinese after the fall of Saigon, 32,000 Hungarian refugees following the failed revolution in October 1956, 30,000 Soviet Jews and other religious minorities, nearly 20,000 from displaced persons camps following World War II, and several hundred Chileans following the 1973 overthrow of the Allende government (CRS 1979, 18, 47; USCIR 1997, 215).

During these years, Congress passed several laws to allow *de facto* refugees and parolees to adjust to LPR status outside the quota system (CRS 1979, 24). In 1958, for example, it authorized the adjustment of Hungarian parolees after two years of residence.[18] In 1975, it allowed certain Vietnamese, Laotian and Cambodian parolees to adjust.[19] In total, between

15 In the immigration context, parole does not imply criminal conduct.
16 S. Rep. No. 96-256, at 6 (1979).
17 Prior to 1980, conditional entrants could apply to adjust to LPR status after two years.
18 Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (1958).
19 The law applied to Vietnamese, Cambodians and Laotians that had been paroled into the United States subsequent to March 31, 1975 or had been "inspected and admitted or paroled" on or before March 31, 1975 and were present in the United States on March 31, 1975. Indochina Migration and Refugee Assistance Act of 1975, as amended in 1977, Pub. L. No. 95-145, 91 Stat. 1223 (Oct. 28, 1977).

World War II and passage of the *Refugee Act of 1980*, more than 2 million persons adjusted status on the basis of legislation of this kind (Kerwin 2012, 31).

The *Cuban Adjustment Act of 1966* (CAA) has been the largest and longest U.S. adjustment program for a national group.[20] It allows Cubans to adjust to LPR status one year after they have been admitted or paroled to the United States.[21] The *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* stipulates that the CAA can only be repealed upon a Presidential determination that Cuba has a democratically elected government.[22] The United States granted LPR status to roughly 1.1 million Cuban nationals between 1960 and 2011 (DHS 2012, table 2).

The Refugee Act of 1980

The US *Refugee Act of 1980* created the US refugee resettlement program and sought to channel refugees ("normal flow" and emergency admissions) into it.[23] In doing so, it responded to concerns regarding the legality of the AG's discretionary admission of refugee populations.[24] The Act's emergency admission provisions were intended to replace the AG's authority to parole "large groups of refugees," to set criteria for emergency admissions, and to formalize the consultative process that had arisen with Congress to guide the exercise of parole.[25] The Act did not seek to limit the AG's authority to parole non-refugees.[26]

Humanitarian Parole

Although eviscerated as a refugee protection tool, parole remains the primary means for admitting non-citizens on humanitarian grounds who do not meet the refugee standard. It can be granted by DHS "on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[27] However, an individual refugee cannot be paroled unless there are "compelling reasons in the public interest" to admit him or her as a parolee, rather than as a refugee.[28] In addition, would-be parolees must first exhaust other legal immigration alternatives (GAO 2008, 15)

All three of DHS's immigration agencies can grant parole to persons from abroad. A 2008 Memorandum of Agreement (MOA)[29] between the agencies seeks to coordinate and establish

20 Pub. L. No. 89-732, 79 Stat. 919 (1966): 1161.
21 The CAA also covers accompanying spouses and children.
22 Pub. L. No. 104-208, 110 Stat. 3009 (1996), § 606(a).
23 Pub. L. No. 96-212, 94 Stat. 102 (1980); S. Rep. No. 96-256, 5.
24 S. Rep. No. 96-256, at 43, 70 (1979).
25 *The Refugee Act of 1979: Hearing on S. 643, Before the U.S. Senate Committee on the Judiciary*, 96th Cong. 10-12, 22 (1979).
26 H.R. Rep. No. 96-781, at 20 (1980) (Conf. Rep).
27 INA § 212(d)(5)(A).
28 INA § 212(d)(5)(B).
29 Memorandum of Agreement Between United States Citizenship and Immigration Services (USCIS), United States Immigration and Customs Enforcement (ICE), and United States Customs and Border Protection, "Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority Under INA § 212(d)(5)(A) With Respect to Certain Aliens Located Outside of the United States" (September 10, 2008), http://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf.

a framework for the exercise of parole for those at US ports-of-entry.[30] The agreement does not constrain the "inherent authority" of US Customs and Border Protection (CBP) to grant parole or stipulate the categories of parole requests within its jurisdiction. It provides that USCIS will handle requests that entail "urgent medical, family, and related needs" and for persons that seek to participate in civil proceedings with "private" (non-government) litigants. US Immigration and Customs Enforcement (ICE), in turn, is responsible for adjudicating requests that involve persons in government proceedings or investigations; in removal proceedings or with a final order of removal; that wish to attend events hosted by international organizations; and who are admitted for intelligence purposes.

Parole requests and approvals can vary substantially from year to year. However, in 2012, CBP granted parole in 3,054 cases and USCIS approved 353 parole applications (Hennessy-Fisk 2013; USCIS, n.d.). No public figures exist for ICE parole adjudications, and neither CBP nor ICE produced parole statistics at the author's request.[31]

The principal grounds for humanitarian parole requests are family reunification, medical emergencies, and "emergent" reasons such as visiting a sick or dying family member or attending a funeral (GAO 2008, 41-42). Between FY 2002 and FY 2008, USCIS approved roughly 25 percent of the nearly 10,000 humanitarian parole requests it received (GAO 2008, 4-12; USCIS 2009).

Since 1980, the United States has regularly granted parole to at-risk and vulnerable persons. In the early 1990s, for example, the AG used her parole authority to allow nearly 11,000 Haitians—those screened at Guantánamo Naval Base and found to have a credible fear of persecution in Haiti—to enter the United States to seek asylum.[32] In the year following the January 12, 2010 earthquake in Haiti, the DHS Secretary paroled nearly 900 Haitians, most of them orphans who had been approved for adoption by US families (Hennessey-Fiske 2013; DHS 2010). Since 1980, however, parole has not served as a reliable or designated vehicle for admitting persons in refugee-like situations.

DHS can also expedite adjudication of cases, relax deadlines and documentation requirements, and exercise its discretion on behalf of persons from nations that have experienced a natural or human disaster. Following the devastation of Typhoon Haiyan in November 2013, for example, USCIS announced limited "immigration relief measures" for Filipinos in the United States, including extension of grants of parole, advance parole (which allows non-citizens to leave the country knowing they will be allowed to return), and expedited processing of advanced parole requests (USCIS 2013a).[33]

Legislation to Adjust Parolees and De Facto *Refugees*

In the 1990s, Congress passed legislation that allowed several refugee-like groups to adjust

30 The memorandum does not apply to the parole of persons in the United States.

31 ICE ultimately advised the author to submit a Freedom of Information Act (FOIA) request for parole statistics and CBP failed over several months in response to numerous requests to provide statistics.

32 Prior to the establishment of DHS, the parole authority resided with the Attorney General.

33 USCIS also offered to consider changes or extensions of nonimmigrant status despite late filings; expedited adjudication of requests for work authorization for foreign students; expedited processing of family-based immigration petitions; expedited adjudication of work authorization applications; and requests for assistance by LPRs overseas who had lost immigration or travel documents.

to LPR status, including:

- Nationals from the former Soviet Union, Vietnam, Laos, and Cambodia who had been inspected and paroled into the United States after being denied refugee status between August 15, 1988 and September 30, 1990;[34]
- Nationals from the People's Republic of China who had received deferred enforced departure (DED), an exercise of executive discretion not to remove, following the repression at Tiananmen Square;[35]
- El Salvadoran, Guatemalan, and Soviet bloc asylum-seekers, and certain Nicaraguan and Cuban nationals;[36] and
- Haitian asylum-seekers who had been paroled into the United States to seek political asylum in 1991 and 1992, and unaccompanied minors.[37]

In 2008, Congress established special immigrant (permanent) visas for Iraqi nationals who worked for the United States or for US contractors in Iraq for at least one year after March 20, 2003, to Iraqi and Afghani translators who worked for the US military, and to the spouses and minor children of both groups.[38] These groups receive refugee resettlement assistance and benefits.

Temporary Protection for Non-Citizens within the United States

US law offers two primary vehicles for residents who do not qualify for political asylum or a related form of protection, but who could face violence or hardship if returned home: (1) TPS for persons from states or from regions within states that the DHS Secretary designates for protection; and (2) an executive decision not to pursue removal, either in the normal course of enforcement of the law or in the form of special programs for individuals in particular groups.

US law also reserves immigrant (permanent) and non-immigrant (temporary) visas for select categories of endangered persons. Special immigrant visas are available for abused, abandoned or neglected children who have been declared dependents of a juvenile court or placed in the custody of an agency or department of a state, or a court-appointed individual or entity. Non-immigrant (temporary) visas, which can lead to LPR status, are available to survivors of human trafficking and to victims of crime who assist law enforcement to detect, investigate, or prosecute crime.

34 Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, § 599D, US Statutes at Large 103 (1989): 1219, 1261-63; 8 CFR §245.7(b)(2).

35 Chinese Student Protection Act of 1992, Pub. L. No. 102-404, US Statutes at Large 106 (1992): 1969. More than 53,000 persons secured LPR status through this law (Kerwin 2010).

36 Nicaraguan and Central American Relief Act of 1997 (NACARA) Pub. L. No. 105-100, US Statutes at Large 111 (1997): 2193. Between 1999 and 2011, more than 67,000 persons obtained LPR status through NACARA (DHS 2012, table 6; DHS 2008, table 6).

37 Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. No. 105-277, US Statutes at Large 112 (1998): 2681. Between 1999 and 2011, more than 31,000 persons adjusted to LPR status through HRIFA (DHS 2012, table 6; DHS 2008, table 6).

38 The Consolidated Appropriations Act, 2008, Public L. No. 110-161, US Statutes at Large 121 (2007): 1844; The Defense Authorization Act for FY 2008, Pub. L. No. 110-181, US Statutes at Large 122 (2008): 3.

Temporary Protection Pre-1990: Extended Voluntary Departure

Prior to 1990, the AG could grant extended voluntary departure (EVD) to persons from nations experiencing civil strife, rampant human rights abuses, and other dangerous conditions (Seltzer 1992, 783-4). EVD removed the threat of deportation and allowed recipients to work. Between 1960 and passage of the *Immigration Act of 1990*, the AG extended EVD to residents from 13 nations (ibid., 785). EVD took the form of blanket protection for nationals from designated states who were in the United States at the time of the designation (Frelick and Kohnen 1995, 341). Unlike TPS, it did not have a statutory basis.

Although widely used, EVD proved to be an imperfect protection tool for several reasons. First, the conditions prompting EVD often persisted for lengthy periods, undermining the expectation that it would lead to voluntary departure in a short period of time. Czechoslovakia, for example, received EVD from August 1968 to December 1977 and Uganda from June 1978 to September 1986.[39] Second, foreign policy and political considerations influenced EVD designations, leading to the denial of EVD to persons targeted by regimes that the United States supported. Third, the Immigration and Naturalization Service (INS) did not track the location of EVD recipients. The government did not know who EVD covered until individuals in the designated populations faced deportation. Fourth, the AG did not exercise discretion to grant, extend or terminate EVD through a publically accessible process.

Congress ultimately allowed persons granted EVD over the five-year period ending on November 1, 1987, including Poles, Afghanis, Ugandans and Ethiopians, to apply for temporary residence and, thereafter, to adjust to LPR status.[40]

The executive branch also exercised its discretion to allow failed Nicaraguan asylum seekers to remain in the United States. In July 1987, AG Edwin Meese created the Nicaraguan Review Program, which allowed Nicaraguans denied political asylum to register, obtain work authorization, and reapply for political asylum (Wasem 1997, 7-8). The Supreme Court's 1987 decision in *Immigration and Naturalization Service v. Cardoza-Fonseca* prompted the creation of the review program.[41] In *Cardoza-Fonseca*, the Court held that the stringent "clear probability of persecution" standard for withholding of deportation (*non-refoulement*) did not apply to political asylum cases. The AG ordered Nicaraguan asylum cases reviewed under the more generous "well-founded fear" asylum standard.

Temporary Protected Status

In 1990, Congress attempted to formalize and codify its temporary protection programs by creating temporary protected status.[42] In doing so, it did not seek to eliminate executive discretion, but to create a more structured process to guide its exercise (Seltzer 1992, 788). TPS represents the DHS Secretary's "exclusive remedy" to allow parolees and those

39 By contrast, Iranian nationals received EVD for a short period—from April to December 1979—following the overthrow of the Shah.

40 Pub. L. No. 100-204, 101 Stat 1331, § 902 (Dec. 22, 1987).

41 480 U.S. 421, 449 (1987).

42 Immigration Act of 1990, Pub L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), § 302.

potentially subject to removal to remain temporarily based on their nationality.[43]

After consulting with the "appropriate agencies of the Government,"[44] the DHS Secretary can designate for TPS any foreign state or part of a foreign state:

- experiencing armed conflict that would "pose a serious threat to the personal safety" of returning nationals;
- that experienced an "environmental disaster … resulting in a substantial, but temporary, disruption of living conditions," which is "unable, temporarily, to handle adequately" the return of its nationals and that requests TPS; or
- undergoing "extraordinary and temporary conditions" that prevent nationals from returning in safety, unless contrary to US national interests.[45]

The TPS determination process can be opaque. Under the law, the DHS Secretary is required to provide notice in the Federal Register of designations, the relevant time periods, the number of non-citizens likely to be affected, their immigration status(es) and the basis for designations.[46] Foreign states often advocate for the designation, re-designation and extension of TPS status. Often they argue for re-designation or extension based on the difficulty of re-integrating returned nationals, a rationale that arguably goes beyond the statutory criteria for a TPS designation in certain cases. NGOs likewise advocate for TPS designations through regular liaison meetings with USCIS, sign-on letters and other means.

The current process permits the DHS Secretary to make determinations that invariably implicate sensitive diplomatic, political, humanitarian and resource considerations, without publically offending the state under review (or other states) or establishing untenable precedents. It also allows for more expeditious decision-making in response to emergency situations than might otherwise be possible with a more involved process.

On the other hand, the system's lack of transparency leads stakeholders to mistrust the stated rationale for TPS decisions. It can be difficult to understand why certain nations receive TPS designations and others do not. Armed conflicts have led to designations for some nations, but not for others (Frelick and Kohnen 1995, 45-6). Natural disasters have prompted TPS designations for Haiti, Nicaragua, and Honduras, but not for states in similar circumstances (Wasem and Ester 2011, 6). As of this writing, the DHS Secretary had not designated the Philippines for TPS, despite the massive destruction caused by Typhoon Haiyan, including more than 10,000 deaths, and four million displaced. This may be due, in part, to the large Filipino population in the United States and the significant resource challenge that a TPS designation for the Philippines would present to USCIS.

It can also be difficult to understand the timing of TPS decisions. Even before the January 12, 2010 earthquake, for example, Haiti was the poorest nation in the Western Hemisphere. In 2008, Hurricanes Gustav and Ike and Tropical Storms Fay and Hanna led to widespread devastation and suffering, including 800 deaths, the destruction of more than 100,000

43 INA § 244(g). At the creation of DHS, the authority to designate nations for TPS and to administer the TPS program transferred from the AG to the DHS Secretary (Wasem and Ester 2011, 2, note 5).

44 The US Department of State enjoyed a more direct role in initiating and advising INS on EVD requests (Seltzer 1992, 774, 784).

45 INA § 244(b)(1).

46 INA § 244(b)(1)(C); INA § 244(b)(3)(A).

homes, and food and water shortages. Despite these conditions, the United States did not designate Haiti for TPS until after the cataclysmic earthquake in January 2010.

TPS limits participation to members of designated groups. It cannot be granted to individuals from non-designated states that would face extreme danger and insecurity if returned home, or to persons who arrive after the TPS-designation date. TPS recipients cannot petition for family members to join them on the basis of TPS status. In addition, TPS requires individual registration and re-registration, which leads many to fall out of status.[47]

The initial period of designation must be between six and 18 months.[48] If the conditions giving rise to the designation persist, the DHS Secretary can extend the period of designation.[49] Designation cut-off dates and registration deadlines seek to deter influxes of migrants from designated nations (Frelick and Kohnen 1995, 344).[50] TPS determinations are not subject to judicial review.[51] Recipients can pursue political asylum or apply for any other immigration relief or benefit. The statute does not detail the options available to those whose TPS status is terminated or withdrawn.[52]

The DHS Secretary can also re-designate nations for TPS, which extends eligibility to nationals of designated states who arrive between the designation and re-designation dates. Thus, following the January 2010 earthquake in Haiti, the United States granted TPS to Haitians residing in the United States as of January 12, 2010. It subsequently extended TPS to Haitians for an additional 18 months and "re-designated" Haiti for TPS, which effectively moved the arrival date forward to January 12, 2011 (DHS 2011). In this way, the DHS Secretary can relax the normal practice of limiting TPS to those in the country on the initial TPS designation date. TPS has since been extended for Haiti to January 22, 2016.[53]

Like EVD, TPS beneficiaries can work, avoid removal, travel abroad with prior authorization, and secure documentation.[54] However, TPS does not, in itself, lead to LPR status.[55] Congress cannot extend LPR status to TPS groups without a supermajority vote of the Senate, which has never occurred.[56]

TPS recipients are "not qualified" for federal public benefits, making them ineligible for most means-tested benefit programs.[57] However, they are eligible for emergency Medicaid, public health programs (like immunizations), disaster relief, school breakfast and lunch programs, and public education through high school. TPS cannot be granted to persons who are inadmissible on criminal and national security grounds.[58]

47 INA § 244(c)(1)(A); INA § 244(b)(3))C).
48 INA § 244(b)(2)(B).
49 INA § 244(b)(3).
50 The concern over a magnet effect would not justify short re-registration periods.
51 INA § 244(b)(5).
52 INA § 244(b)(3); INA § 244(c)(3).
53 94 Fed. Reg. 11808 (Mar. 3, 2014).
54 INA § 244(a)(1); INA §244(d); INA § 244(f)(3).
55 INA § 244(d).
56 INA § 244(h).
57 INA § 244(f).
58 INA § 244(c)(2).

In the Congressional debate on TPS, several members expressed concern that TPS would lead to permanent or indefinite US residence. Its supporters, in turn, argued that the measure would lead only to short-term admissions.[59] TPS's statutory framework—the limited periods of designation and extension, and the inability of beneficiaries to sponsor family members, to receive most public benefits, and to adjust status—evidences Congress' intent that TPS not become a long-term status. Yet, as prior "temporary" programs had proven, "extraordinary conditions" often lead to long-term displacement and instability. For this reason, TPS designations have often extended for protracted periods. For example, Somalia was designated for TPS in September 1991 for "extraordinary and temporary conditions" that made it unsafe to return,[60] but TPS has most recently been extended for Somalia through September 17, 2015. TPS has also frequently been extended after the conditions which led to the initial designation have subsided.[61] In addition, TPS covers stateless persons who last resided in the designated state.[62] In these and other cases, there may be no option for return.

Frequent TPS extensions ensure that its beneficiaries are not returned to dangerous or otherwise untenable situations and that designated states are not destabilized by large-scale repatriation. At the same time, TPS does not represent or necessarily lead to a durable solution.

Executive Discretion and Visas for Persons at Risk of Violence

The US Constitution vests responsibility for the faithful execution of the laws in the executive branch.[63] The US Supreme Court has held that the executive branch enjoys "absolute discretion" not to "prosecute or enforce, whether through civil or criminal process" based on "a complicated balancing of factors which are peculiarly within its expertise." [64] These factors include "whether a violation has occurred … whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."[65]

Federal immigration agencies exercise prosecutorial discretion consistent with their priorities and judgments on how best to enforce the law (Kerwin, Meissner and McHugh 2010). They have repeatedly affirmed that they do not prioritize the removal of persons at risk of violence or persecution in their home countries.

59 Of course, "temporary" does not technically mean short-term or preclude long-term admission: instead, it means fixed, limited and not permanent.
60 54 Fed. Reg. 46,805 (Sept. 16, 1991).
61 Of current TPS recipients, the most recent designation of TPS for El Salvador was March 9, 2001; for Honduras and Nicaragua January 5, 1999; for Somalia September 18, 2012; for Sudan and South Sudan May 3, 2013; for Haiti July 23, 2011; and for Syria October 1, 2013 (USCIS 2013c). However, several of these nations were initially designated for TPS well before their most recent designations, including El Salvador March 2, 2001; Honduras and Nicaragua December 30, 1998; Somalia September 16, 1991; and Sudan November 4, 1997 (Wasem and Ester 2011, 4). The new Republic of South Sudan was first designated on November 3, 2011 and Haiti was first designated on January 21, 2010 and re-designated on July 23, 2011.
62 INA § 244(a)(1)).
63 U.S. Const., Art. II, 3.
64 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).
65 Ibid.

While the INS had long exercised discretion not to pursue deportation in "non-priority" cases, it began to operate under more formal operating instructions in 1975 (Wadhia 2010). An INS memorandum in 2000 directed officers "to exercise discretion in a judicious manner at all stages of the enforcement process."[66] The memorandum identifies several factors to guide the exercise of discretion that are relevant to persons in need of temporary protection, among them conditions in the country of origin, likelihood of removal, future eligibility for immigration status, and better alternative uses of the law enforcement resources.

In 2007, the US Government Accountability Office (GAO) urged ICE to develop comprehensive guidance covering arrest and removal decisions, including guidance "dealing with humanitarian issues and aliens who are not investigation targets" (GAO 2007, 34). In 2007, ICE instructed its agents that they were expected to exercise discretion "at all stages of the enforcement process."[67] In 2010, ICE prioritized enforcement activities that furthered its national security and public safety mission.

Deferred enforced departure, a formal expression of executive discretion, has been used to extend safe haven and work authorization to those who fear return based on conditions in their country of origin. In 1990, President George H.W. Bush awarded DED to Chinese students following the repression at Tiananmen Square.[68] President Clinton granted DED to Haitians found to have a "credible fear" of persecution and who were soon to become eligible for LPR status under the *Haitian Refugee and Immigration Fairness Act of 1998*.[69]

DED has also been used in tandem with TPS to protect long-term "temporary" populations. Liberia received a TPS designation in March 1991. After TPS expired in September 1999, roughly 10,000 Liberians were granted DED, which was ultimately extended through September 2002 (Wasem and Ester 2011, 6). On October 1, 2002, the United States re-designated Liberia for TPS. The designation was extended to October 1, 2007. At that point, the Bush administration granted DED to Liberians who had received TPS. DED has been continuously extended for Liberians since that time. Most recently, President Obama extended DED through September 30, 2014 due to "compelling foreign policy reasons,"[70] which include the potentially deleterious effects of returning Liberians on social cohesion and post-war reconstruction efforts.

Deferred action—another stylized exercise of executive discretion—likewise provides work authorization and temporary protection from removal. It can be granted to noncitizens who are too young, too old or have serious disabilities; have close family connections in the United States; committed minor infractions that prevent them from receiving LPR

66 Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service (INS), to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel," HQOPP 50/4, November 17, 2000.

67 Memorandum from Julie L. Myers, Assistant Secretary of U.S. Immigration and Customs Enforcement, to All Field Office Directors and All Special Agents in Charge, "Prosecutorial and Custody Discretion," November 7, 2007. http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07.

68 Executive Order 12711 (April 11, 1990).

69 Pub. L. No. 105-277, US Statutes at Large 112 (1998): 2681.

70 "Presidential Memorandum, Deferred Enforced Departure for Liberians," March 13, 2013. http://www.whitehouse.gov/the-press-office/2013/03/15/presidential-memorandum-deferred-enforced-departure-liberians.

status; cannot be removed; or can assist in investigating or prosecuting criminal conduct.[71]

The Deferred Action for Childhood Arrivals (DACA) program represents the most recent and ambitious use of executive discretion. DACA applies to "DREAMers;" e.g., unauthorized persons who entered the United States as children, most of whom have few connections to their country of birth.[72] To qualify for DACA, applicants must:

- have been under the age of 31 as of June 15, 2012;
- have entered the United States prior to age 16;
- have resided continuously since June 15, 2007;
- apply within the United States;
- not have committed a felony, significant misdemeanor or three or more misdemeanors; and
- be in school, a high school graduate, a General Education Development (GED) recipient or an honorably discharged veteran.

DACA provides temporary protection from removal and work authorization for a two-year period, with the possibility of renewal. Administration officials have repeatedly argued that the removal of DREAMers does not represent an appropriate use of DHS's limited enforcement resources.

The Secretary of DHS can also grant parole to non-citizens residing in the United States who have not been "admitted" or "paroled," but whose cases raise substantial humanitarian considerations. "Parole-in-place" is subject to the same standards and limitations as humanitarian parole. However, USCIS has recently demonstrated a willingness to allow group membership to weigh "heavily" in parole determinations. While recognizing that parole should be used "sparingly" and granted on a case-by-case basis, a recent USCIS policy memorandum concluded that it would be an "appropriate exercise of discretion" to grant parole-in-place to the "spouse, child or parent of an Active Duty member of the US Armed Forces, an individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the US Armed Forces or the Selected Reserve of the Ready Reserve" (USCIS 2013d).

Visas for Persons at Risk of Violence

US law provides special immigrant visas to children who have been abused, neglected or abandoned.[73] To qualify, a child must be declared a dependent of a juvenile court or be placed by such a court in the custody of a state agency or department, or a court-appointed

71 Memorandum from Prakash Khatri, CIS Ombudsman, to Dr. Emilio T. Gonzalez, Director of USCIS, "Recommendation from the CIS Ombudsman to the Director, USCIS," April 6, 2007. http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf .

72 "DREAMers" refers to persons brought to the United States as children who would be eligible for legal status under the Development, Relief, and Education for Alien Minors Act (the "DREAM" Act).

73 The Violence Against Women Act (VAWA) allows the qualifying family members of abusive US citizens or LPRs to petition for a family-based visa without the knowledge or cooperation of the abuser. It also allows for cancellation of removal and adjustment to LPR status of "inadmissible or deportable" persons who have been "battered or subjected to extreme cruelty" by a US citizen or LPR spouse or parent, or who have a child who has suffered abuse by the spouse or parent.

individual or entity.[74] In addition, the child must not have a viable option for reunification with one or both parents due to abuse, neglect or abandonment.[75] The court must also find that it is not in the child's best interests to be returned to his or her country of birth.[76] In addition, DHS must consent to granting the special immigrant visa and to the juvenile court's decision on child custody and placement.[77]

The United States also offers two non-immigrant (temporary) visas to persons who, although not refugees, nonetheless have experienced or are at risk of violence. The "T" nonimmigrant visa is available to survivors of severe forms of human trafficking, who were trafficked to a US port-of-entry or into the United States, complied with reasonable requests to assist in trafficking investigations and prosecutions, and would suffer extreme hardship and unusual and severe harm if returned.[78] The law sets a ceiling of 5,000 visas per year for principal beneficiaries, which does not count visas granted derivatively to spouses, sons, daughters, or parents.[79] A T visa holder can adjust to LPR status after three years of continuous presence or after a continuous period of presence during a completed investigation or prosecution for trafficking.[80] He or she must also have been a person of good moral character during this period, have assisted in the investigation or prosecution of trafficking, would suffer "extreme hardship involving unusual and severe harm" if removed, or have been younger than age 18 when trafficked.[81]

The "U" non-immigrant visa is available to survivors of crime who have experienced substantial physical or mental abuse, possess information on criminal activity, and have been, are being or will likely be helpful in the detection, investigation or prosecution of an enumerated crime.[82] To qualify, applicants must obtain certification from a US law enforcement agency regarding their assistance in an investigation or prosecution. U non-immigrant visas can extend for up four years, with the possibility of renewal. Recipients can adjust to LPR status after three years of continuous physical presence. The law sets a ceiling of 10,000 U visas per year, not counting derivative family members, although there is no limit on the number of visas that can be approved.

In 2012, the United States approved 17,543 U visas and 536 T visas (USCIS 2013f). USCIS has approved the maximum number of U visas (10,000 for primary beneficiaries) over each of the last five years (USCIS 2013e).

74 INA § 101(a)(27)(J)(i).
75 Ibid.
76 INA § 101(a)(27)(J)(ii).
77 INA § 101(a)(27)(J)(iii).
78 INA § 101(a)(15)(T)(i). Congress established T and U visas through the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, US Statutes at Large 114 (2000): 1464.
79 INA § 245(l)(4). The US Department of State (DOS) reports that in FY 2012, it issued 1,595 U visas and 517 T visas. See: DOS. 2013."Classes on Nonimmigrants Issues Visas (Including Crewlist Visas and Border Crossing Card), Fiscal Years 2008-2012." *Report of the Visa Office*. Washington, D.C.: DOS. http://www.travel.state.gov/pdf/FY12AnnualReport-TableXVIA.pdf . DOS-issued visas are likely for the derivative family beneficiaries of U and T visa recipients.
80 INA § 245(l).
81 INA § 245(l)(1).
82 INA § 101(1)(15)(U).

Recommendations

The United States should expand its capacity to admit limited numbers of* de facto *refugees and others who are at substantial risk of persecution, danger or harm in their home or host countries.

One of the most glaring deficiencies in the US refugee protection system is its paucity of tools and its limited ability to admit *de facto* refugees and imperiled non-refugees whose admission would serve the nation's interest (Fitzpatrick 2000, 280). Humanitarian parole is granted primarily for medical emergencies, to visit sick family members, or to attend funerals. In a typical year, only a very small (albeit unknown) number of persons granted parole are fleeing refugee-like conditions.

Congress should pass legislation that establishes a new non-immigrant "protection" visa that would be available to persons at substantial risk of persecution, danger or harm in their home or host countries. Like all temporary protection vehicles, the new visa would serve as a complementary form of protection, rather than a substitute for robust refugee and asylum policies. It would be available to members of particularly vulnerable and at-risk groups like:

- human rights activists;
- crusading journalists;
- orphans;
- children at risk of retaliation for resisting gang recruitment;
- the elderly in refugee-like situations;
- religious minorities;
- victims of gender-based violence;
- persons who cooperated with US military, law enforcement or intelligence agencies; and
- persons whose protection would serve US interests in promoting rights, the rule-of-law, and robust democratic institutions.

Like the T and U non-immigrant visas, the protection visa would be granted only in extreme circumstances, would be numerically limited (15,000 per year for primary beneficiaries), and would allow for adjustment of status after three years of continuous physical presence. The visa would also be available to "parolees" within the United States in need of more formal and potentially longer-term protection; US residents who meet the substantive criteria for TPS but are not from a TPS-designated nation; persons from TPS-designated states who arrive following the designation date and would be at extreme risk if returned; and the immediate family members of TPS beneficiaries who are abroad.

It would also cover internally displaced persons who would otherwise meet the refugee criteria if they were outside their nation of birth. US embassies and consular offices can already refer persons for refugee screening and, on occasion, they work to shepherd at-risk persons to safety in the United States. While it must be carried out with great discretion, a protection visa (as one of multiple protection options) would not invariably expose applicants to an unacceptable or a heightened level of risk. Some at-risk persons are sporadically pursued by government actors or by groups that the government cannot control. Others may be at risk only in certain geographic regions. In addition, persecutors—

whether state agents or their proxies—do not invariably operate in an efficient, systematic way. They often possess imperfect knowledge, limited resources, and multiple priorities. Targeted persons can, in turn, move, hide, disguise their identities, and take other steps to evade detection. In addition, interviews for protection visas and processing could take place at unofficial locations.

The DHS Secretary should also use his or her parole authority more consistently to admit persons on a case-by-case basis who are at risk of persecution and harm. Congress should also expand the criteria for parole to include de facto refugees who cannot avail themselves of the refugee determination process. An example of an appropriate, but currently unlikely candidate for parole would be a woman in a refugee camp who does not fall within a designated, refugee priority population, but who has been raped and remains (with her children) at substantial risk. A more generous parole standard would permit and encourage USCIS to grant parole to persons in such circumstances.

The United States should prioritize TPS-designated states for reconstruction and development assistance.

The US Department of State (DOS) reports that 10.3 million persons or two-thirds of the global refugee population live in protracted refugee situations, defined as those in which at least 25,000 persons from the same nation have sought protection outside their country of origin for at least five years (DOS 2013b).[83] The United States has recently made it a priority to develop durable solutions for six protracted refugee populations: the 1.7 million registered Afghanis in Pakistan, many of whom have lived in Pakistan since the Soviet occupation; 340,000 Somali refugees in the Dadaab and Kakuma camps in Kenya; 150,000 Burmese refugees in Thailand; more than 100,000 ethnic Bhutanese refugees in Nepal; 73,000 displaced Croatian and Bosnian citizens in Serbia; and Liberian refugees in West African nations (DOS 2013c).

The United States should likewise concentrate its relief, development, and diplomatic resources on TPS-designated states and relevant communities within those states, with the goal of allowing residents to stay and making voluntary repatriation a viable option for TPS beneficiaries.[84] In 2012, South Sudan was the only TPS-designated state among the top ten recipients of US foreign assistance (Epstein, Lawson and Tiersky 2013, 10).

The TPS-designated Central American and Caribbean states, as well as Guatemala, a major source of unaccompanied migrant children, should be a particular priority. In FY 2012, DOS contributed $148 million in economic support to Haiti, and targetted development assistance of $46.3 million to Guatemala, $46.3 million to Honduras, $23.9 million to El Salvador, and $9.4 million to Nicaragua (DOS 2013a, 159, 161). In addition, DOS provided $141 million for global health initiatives to Haiti and the US Agency for International Development (USAID) added $25 million (ibid., 155, 157). The United States provided far less for health initiatives to Guatemala ($17.6 million), Honduras ($9 million), and Nicaragua ($2.9 million) (ibid.).

83 Of course, it is best to address potential destabilizing conditions before they lead to wide-scale displacement.
84 The United States should also condition development assistance on adherence to human rights benchmarks (Yakoob 1999, 628).

The United States also supports the creation of "accountable, democratic rule of law institutions" through the Central America Regional Security Initiative and the Caribbean Basin Security Initiative (ibid., 94). Promotion of the rule of law in TPS-designated states should be a top-tier priority since rule of law deficiencies drive substantial numbers of residents of these nations, including unaccompanied children, into international migration streams (UNHCR 2014, 98, 106).[85]

The United States should work to establish regional migration and development agreements that include, as necessary, temporary protection and voluntary return programs.

Mexico, Guatemala, Honduras and El Salvador continue to experience high levels of emigration due to violence, human rights violations, family separation and privation. Similarly, U.S. Coast Guard interdictions of nationals from Caribbean states remain at high levels (USCG 2014), and four years after its devastating earthquake, Haiti remains the poorest country in the Hemisphere and ranks among the world's lowest scoring nations on the UN Human Development Index (UNDP 2013, 146).

The United States should make it a diplomatic priority to pursue regional migration and development agreements for North and Central America, and for the Caribbean. Such agreements would identify the conditions leading to involuntary migration, develop coordinated responses to them, identify individuals and groups that are particularly in need of protection (like unaccompanied minors), and work toward temporary and durable solutions for displaced populations.[86] The Regional Conference on Migration, a multi-lateral process with 11 member states from North and Central America, constitutes an obvious forum for dialogue and increased cooperation in addressing these challenges. However, there is no similar regional consultative process for Caribbean states.

Under such agreements, the United States would work closely with migrant sending states, local communities of origin, and diaspora groups on development, institution building and voluntary return initiatives. The Concerted Plan of Action of the International Conference on Central American Refugees (CIREFCA) provides a model for coordinated regional action. A centerpiece of the plan, which led to the repatriation of El Salvadorans, Nicaraguans and Guatemalans from camps in the region, was to build health care, transportation, water systems, educational, housing and other infrastructure in communities of origin (Martin, Schoenholtz and Meyers 1998, 565). In other contexts, states have provided financial support to temporary protection recipients who returned home.[87]

The United States should also remain in contact with temporary protection beneficiaries in

85 Between 2011 and 2013, the number of apprehensions of unaccompanied children seeking to enter the United States more than doubled to 41,890 (UNHCR 2014, 16).

86 Temporary protection agreements can be difficult to negotiate due to the lack of consensus on the conditions that trigger protection, the rights to which beneficiaries are entitled, and different state definitions of refugee. Regional temporary protection systems may be more viable given the sense of shared risk and community (Yakoob 1999, 631-632).

87 Switzerland, for example, provides financial assistance to TP recipients but only upon their return to their communities of origin (Yakoob 1999, 627). The United Kingdom, the Netherlands and other European nations sponsored "exploratory returns" for Bosnian refugee to allow families to assess the viability and safety of return (Hansen, Randall, Martin, Schoenholtz and Weil 2000, 809).

order to facilitate their voluntary return (Fitzpatrick 2000, 299).[88] Community supervision programs have proven effective in ensuring that persons in removal proceedings do not abscond (Meissner and Kerwin 2009, 54). Such programs could be used effectively with forced, temporary migrant populations that wish to return to their countries of origin.

The United States should allow long-term recipients of temporary protection to adjust to LPR status.

The effects of civil war, armed conflict, environmental disaster and generalized violence often persist for years. In addition, relief, development and reconstruction initiatives typically extend beyond the time-frames for temporary protection recommended by international entities and set forth under US law. Recipients of long-term, temporary protection often develop family, work, religious and other permanent bonds to the United States. After a period, many do not want to return to their countries of origin and the United States does little to encourage or prepare them to do so.

Like refugee status, temporary protection is not a durable solution (Fitzpatrick 2000, 299). Instead, extensions of TPS and other forms of temporary protection can keep recipients in a legal limbo, without benefits, the ability to integrate, or a path to permanent legal status (Bergeron 2014). In addition, the longer persons reside in the United States, the more they contribute to federal benefit programs like Social Security and Medicare, and the more inequitable it becomes to deny them core benefits (Segerblom 2007, 671).

For these reasons, Congress should pass legislation to allow certain long-term recipients of temporary protection to adjust to LPR status.[89] It can do so in at least three ways. First, since 1929, the United States has allowed long-term residents to legalize their status through "registry" (Kerwin 2010). Congress has regularly advanced the date by which non-citizens must have entered to qualify. The *Immigration Reform and Control Act of 1986* moved forward the registry date to January 1, 1972, which allowed more than 72,000 residents to legalize (ibid., 2). To be eligible for registry, long-term residents must have exhibited good moral character, not be ineligible for citizenship, and not be inadmissible or deportable for terrorist activities.

Congress should pass legislation that would advance the registry date to January 1, 1999 and move this date forward automatically by one year each year thereafter. This would allow persons who have resided continuously in the United States for at least 15 years and who meet the other statutory requirements for registry to adjust to LPR status.

Second, Congress should pass broad immigration reform legislation that expedites the path to legal status for long-term recipients of temporary protection by crediting time in protected status toward qualifying years for the purposes of earned legalization. It should also allow recipients of temporary protection (in whatever form(s)) and their immediate family members to adjust to LPR status after 10 years.

Third, US law also provides for "cancellation of removal," a form of equitable relief

88 Some commentators have proposed that TPS beneficiaries be required to report regularly to immigration officials (Martin, Schoenholtz and Meyers 1998, 571).

89 Temporary protection recipients can secure permanent status in Scandinavian nations and Switzerland when it becomes apparent that their stay is no longer temporary (Segerblom 2007, 677, 681).

from removal (deportation), for long-term, unauthorized residents with strong ties to the United States and strong claims to remain. Immigration judges have the discretion to grant cancellation (which brings LPR status) to unauthorized persons who have resided continuously in the United States for 10 years, have demonstrated good moral character, have not been convicted of certain offenses that would make them inadmissible or deportable, and whose removal would "result in exceptional and extremely unusual hardship" to their US citizen or LPR spouse, parent or child.[90] As it has done for other populations, Congress should allow temporary protection recipients to apply affirmatively for cancellation of removal to USCIS (e.g., without waiting to be placed in removal proceedings) if they have resided in the United States for 10 years, have exhibited good moral character, and have strong equitable claims to remain.

Some argue that temporary protection programs will lose political and public support if they lead to permanent status. This assumption deserves to the challenged. The US refugee resettlement program, which has admitted three million persons since 1975, has enjoyed broad, bi-partisan support over the years. Like refugees, long-term recipients of temporary protection are at risk of danger and harm, need a durable solution, and enjoy strong equitable ties to the United States.

The United States should allow for more public input into the TPS determination process.

TPS has numerous advantages and strengths. It has proven to be a flexible, timely and generous tool for offering protection to groups that the United States and (often) the country of origin agree should not return home. In 2011, more than 330,000 TPS beneficiaries resided in the United States (Wasem and Ester 2011, 4). The streamlined TPS application process affirms the applicants' nationality, date of entry and continuous presence, while avoiding the complexity and length of time required to adjudicate asylum applications (Fitzpatrick 2000, 285). In addition, TPS has not generated the political acrimony of other US immigration programs.

TPS determinations should remain discretionary, flexible, and applicable to national and sub-national groups. However, it would not infringe on executive discretion or delay time-sensitive decisions to establish a more transparent and inclusive TPS determination process. In particular, DHS/USCIS should host quarterly, public hearings that would allow academics, diaspora groups, expatriates, NGOs, government officials, and others to submit materials and testify to country conditions in TPS-designated and TPS–eligible nations. These hearings would inform the DHS Secretary's exercise of discretion, provide DHS with an opportunity to explain the TPS process and standards to stakeholders, and increase the public's confidence in TPS decisions. It would not, as some commentators argue, insulate the process from diplomatic or political pressure. However, it would respond to concerns that TPS decisions often seem arbitrary and *ad hoc* (Fitzpatrick 2000, 286).

The DHS Secretary should allow certain persons from TPS-designated countries that enter after the initial designation period to secure protection.

TPS is not available to imperiled nationals of designated states who arrive after the designation date, including the immediate family members of TPS recipients. Some

90 INA § 240A(b).

commentators have proposed extending protection to those who arrive after the initial designation date in certain circumstances. Others propose granting TPS entirely on a case-by-case basis (not based on nationality) in order to cover persons in desperate need, while avoiding the magnet effect of moving forward the TPS cut-off date (Martin, Schoenholtz and Meyers 1998, 569).

The DHS Secretary should make more liberal use of his or her authority, as Secretary Napolitano did with Haiti in May 2011, to "re-designate" nations for TPS.[91] Re-designation should occur when the conditions giving rise to the initial designation persist and when desperate persons have arrived in the interim.[92] However, the Secretary will need to use this authority prudently in order not to encourage irregular migration.

Conclusion

The legislative expansion of US temporary protection programs and the effective use of current programs and legal authorities depend heavily on political will. As discussed, the executive branch enjoys broad discretion to offer temporary protection in different forms. The response to Haitian "refugees" in the early 1990s illustrates this point, and highlights the tools, challenges and competing goals in play in extending temporary protection to at-risk persons. On September 30, 1991, the Haitian military overthrew the democratically elected government of Jean-Bertrand Aristide and initiated a reign of killings, persecution and suppression of actual and suspected Aristide supporters. In response, tens of thousands fled Haiti by boat. The United States sought both to protect those fleeing for their lives and to deter large-scale, irregular migration from Haiti. Its hydra-headed response included:

- The rescue by the US Coast Guard of tens of thousands of Haitians at sea;
- "Credible fear" screening of Haitians by USCIS Asylum Officers at Guantánamo Naval Base;
- Parole of roughly 11,000 persons found to have a credible fear into the United States in order to pursue political asylum claims;
- Interdiction and summary return of Haitians pursuant to a May 24, 1992 Executive Order;
- Regular extensions of parole and work authorization for paroled asylum-seekers;
- Large-scale political asylum programs by NGOs;
- A refugee processing program within Haiti from 1992 and 1995;
- Passage of the *Haitian Refugee Immigration Fairness Act of 1998* (HRIFA) which allowed paroled Haitians who had not yet received political asylum to adjust to LPR status.
- DED to those eligible for HRIFA to ensure they would not be deported prior to the Act's implementation.

The interdiction and summary return of Haitians without refugee screening or interviews violated the right to non-*refoulement* guaranteed in Article 33 of the Refugee Convention. In addition, the United States should have provided refugee interviews and screening at

91 Of course, the creation of a non-immigrant visa for persons in refugee-like situations would allow additional persons in desperate need to arrive through legal channels.

92 Re-designation would also benefit those in the country who failed to register on time.

Guantánamo, obviating the need for political asylum adjudications and later Congressional action. At the same time, however, the United States made a substantial commitment—involving multiple federal agencies, all three branches of government, several US states, NGOs, and the creative use of its immigration authorities—to extend temporary and (ultimately) permanent protection to Haitians who were found to meet the "credible fear" standard in the months between Aristide's overthrow and the initiation of the summary return policy. If the convoluted and contradictory nature of the US response to this crisis reflects competing goals and pressures, it also underscores the indispensable ingredient in any temporary protection program: a genuine commitment to protect.

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