



# Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term “Temporary” Residents and Strengthening a Centerpiece of US Humanitarian Protection

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## Executive Summary

Since 1990, the United States has offered hundreds of thousands of noncitizens who are unable to return to their countries of origin because of war or a natural disaster a vital form of humanitarian protection: temporary protected status (TPS). While a grant of TPS does not place a noncitizen on a path to permanent residence, TPS recipients receive protection against deportation and temporary permission to live and work in the United States. Nearly 25 years after the statutory creation of TPS, however, the use of the program has been the subject of some debate, largely because of concerns over whether TPS grants are truly “temporary.”

This paper examines the legal parameters of TPS and traces the program’s legislative history, exploring congressional intent behind its creation. While acknowledging that extended designations of TPS are often the result of long-running international crises, the paper argues that extended TPS designations are problematic for two reasons. First, they run contrary to congressional intent, which was to create a temporary safe haven for individuals unable to return home due to emergency situations. Second, continued grants of TPS status effectively lock TPS beneficiaries into a “legal limbo,” rendering them unable to fully integrate into life in the United States.

This paper considers several administrative and legislative “fixes” to align the TPS program with the goal of providing temporary protection to certain individuals that do not meet the refugee definition, while also ensuring

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that long-term immigrants in the United States are fully able to integrate into the fabric of the country. It considers:

- Amending the US definition of a “refugee” to enable more would-be TPS beneficiaries to qualify for asylum;
- Creating a new form of subsidiary protection for individuals who cannot return home but do not meet the refugee definition;
- Permitting TPS holders who have resided in the United States for a certain number of years to adjust to lawful permanent resident (LPR) status;
- Easing the ability of TPS holders to take advantage of existing pathways to permanent residence; and
- Implementing repatriation programs to assist former TPS holders in returning to their countries of origin.

This paper argues for the adoption of two of the above proposals. It asserts that the best way to realign the TPS statutory regime with congressional intent and the United States’ tradition of promoting full integration of long-term immigrants is to allow persons who have held TPS status for more than ten years to adjust to LPR status, while implementing a repatriation program for those with shorter-term grants of TPS that have ended.

## Introduction

The United States has long positioned itself as a global leader in responding to humanitarian emergencies and sheltering those who are forced to flee their countries of origin. In 2012, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported that the United States accepted just over 66,000 refugees for third-country resettlement, more than twice the number accepted by all other third countries of resettlement combined (UNHCR 2013, 163). That same year, the United States granted asylum to 29,484 individuals who sought refugee classification after arriving in the country (Martin and Yankay 2013, 1). It also authorized the admission of up to 70,000 refugees in FY 2013,<sup>2</sup> and an additional 70,000 in FY 2014.<sup>3</sup>

However, US refugee law is ill-equipped to serve as a protection mechanism for the vast majority of individuals fleeing violent or unsafe conditions at home, even when they make it into the United States. US political asylum law is closely modeled after the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. It stipulates that to be granted asylum, a foreign national must demonstrate past persecution or a well-founded fear of future persecution on account of one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social

<sup>2</sup> 77 Fed. Reg. 61507 (Oct. 10, 2012).

<sup>3</sup> 78 Fed. Reg. 62415 (Oct. 21, 2013).

group.<sup>4</sup> An individual seeking asylum must also show that he or she has an “individualized” fear—one that is particular to him or her as an individual—rather than generally applicable to all nationals of a particular country (Seltzer 1992, 779). As a result, individuals who are not themselves individual targets of persecution, but who may have very real fears of return, are excluded from the definition (Martin, Schoenholtz, and Waller Meyers 1997, 545).

Recognizing that there are often compelling reasons for granting protection to individuals who might not otherwise meet the strict refugee definition, US presidents since President Eisenhower have granted temporary protection to foreign nationals in the United States who are unable to return to their home countries because of extraordinary circumstances, such as war or natural disaster.<sup>5</sup> In 1990, Congress expressly codified this practice by creating Temporary Protected Status (TPS).<sup>6</sup> Yet, nearly 25 years after Congress created TPS, the use of the program has been the subject of some debate. In particular, critics charge that the US government has used TPS to grant extended periods of legal status to otherwise unauthorized immigrants, in contrast with Congress’s intent that the program be used only for temporary protection (Krikorian 2012).

Finding a long-term solution to this challenge is vitally important at this juncture since the demand for TPS is likely to grow in the coming years. Several scholars have noted that displaced migrants are just as likely to be fleeing war, generalized violence, or famine as individually-targeted persecution (Millbank 2000). One recent report predicts an uptick in political instability around the globe in the coming years (Brown, 2013). Meanwhile, as the world adapts to climate change and global warming, an increasing number of refugee-triggering events will likely be environmental, rather than man-made, catastrophes (Ota 2012, 515). In this context, many individuals fleeing harm will be unlikely to qualify for refugee status or political asylum under US law because they will not be able to prove that they have been individually targeted for persecution or would be targeted on account of a protected ground. For this reason, TPS stands positioned to play a growing role in providing humanitarian protection in the future.

## **Temporary Protected Status on the Ground: Where Did It Come From and What Does It Do?**

Under the Immigration Act of 1990, the secretary of the US Department of Homeland Security (DHS)<sup>7</sup> is authorized to designate certain countries for TPS when:

- (A) [T]here is an ongoing conflict within [a] state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their potential safety; or
- (B) (i) [T]here has been an earthquake, flood, drought, epidemic, or other environmental

4 INA § 208(b)

5 H.R. Rep. No. 100-627, at 6 (1988).

6 Pub. L. No. 101-649 (1990).

7 The 1990 Immigration Act originally delegated to the attorney general the ability to designate certain countries for TPS when they met the aforementioned criteria. This authority was transferred to the DHS secretary through the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected; (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state; and (iii) the foreign state officially has requested the designation; or

(C) [T]here exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Secretary finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.<sup>8</sup>

TPS status is granted to all nationals of a particular country based on the country's conditions, rather than the situation of a particular individual (as with asylum). Thus, TPS functions as a "blanket" form of relief for those who have left a particular nation (Wasem and Ester 2010, 2).

Pursuant to the law, an initial designation of a country for TPS must be for no less than six months, and no more than 18 months, though TPS may be subsequently extended, or a country may be re-designated.<sup>9</sup> To qualify for a grant of TPS, a noncitizen in the United States must demonstrate that he or she has been continuously physically present in the United States since the effective date of the most recent designation of his or her country of origin for TPS, and that he or she has continuously resided in the United States since a date designated by the DHS secretary. An applicant must also register for TPS in the timeframe outlined by the DHS secretary and must be admissible as an immigrant.<sup>10</sup>

Individuals who would otherwise qualify for TPS but who are inadmissible under section 212 of the Immigration and Nationality Act (INA) generally may seek a waiver of their ground of inadmissibility. No waiver is available, however, for those who are inadmissible by virtue of having committed two or more "crimes involving moral turpitude," most controlled substance offenses, and certain national security offenses. In addition, individuals who have committed one felony or two or more misdemeanors, as well as those who have engaged in the persecution of others, are statutorily barred.<sup>11</sup>

Noncitizens who are granted TPS receive work authorization and protection against deportation.<sup>12</sup> They may also apply for advance parole, which gives them the ability to travel outside the United States and be readmitted.<sup>13</sup> Furthermore, noncitizens' time in TPS status is not counted as "unlawful presence" for the purposes of subsequent immigration applications.<sup>14</sup>

A grant of TPS, however, does not lead to any permanent immigration status in the United States. There is no legislation permitting TPS holders to adjust their status to that of lawful permanent residents (LPRs); in fact, the 1990 Immigration Act expressly prohibited the enactment of such legislation unless affirmatively approved by a three-fifths supermajority of the Senate.<sup>15</sup>

8 INA § 244(b)

9 INA § 244(b)

10 INA § 244(c)

11 INA § 244(c)

12 INA § 244(a)

13 INA § 244(f)

14 INA § 244(f)

15 INA § 244(h)

Since the enactment of the 1990 law, 19 countries have been designated for TPS (Wasem and Ester 2010, 3; USCIS 2014). Eight countries—El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria—are currently designated (USCIS 2014). According to the most recent designations and extensions of TPS in the *Federal Register*, an estimated 340,310 people currently hold TPS.<sup>16</sup> US Citizenship and Immigration Services (USCIS) also estimates that an additional 9,000 Syrians may be eligible for TPS as a result of the US government's 2013 decision to re-designate Syria and advance the date from which eligible applicants must show that they have been continuously physically present to June 17, 2013.<sup>17</sup>

## TPS Legislative History: In Search of a Safe Haven Statute

Although the Immigration Act of 1990 marked the first time that TPS was codified in US law, the United States had, for decades before 1990, granted noncitizens displaced by humanitarian crises or environmental disasters a form of protection known as extended voluntary departure (EVD) (Frelick and Kohnen 1995, 341). EVD provided an administrative mechanism that essentially amounted to an exercise of prosecutorial discretion by the attorney general in deciding that individuals from certain countries would not be pursued for removal. Though the attorney general ultimately decided whether to grant EVD, recommendations for grants of EVD originated with the secretary of state, who would notify the attorney general that the situation in a particular country warranted suspending deportations (Seltzer 1992, 784-85). Between 1960 and 1990, the attorney general granted EVD to nationals of 16 countries, including Iran, Poland, Afghanistan, Ethiopia, and Uganda. The length of the deferral granted ranged from eight months, for Iran (April to November 1979) to 15 years, for Lebanon (February 1976 to February 1991) (Frelick and Kohnen 1995, 341). Following the 1989 Tiananmen Square Massacre, President George H.W. Bush granted a similar administrative reprieve from deportation, known as deferred enforced departure (DED) to certain Chinese nationals (Frelick and Kohnen 1995, 342).

By the early 1980s, however, concerns were mounting over the discretionary nature of EVD and its perceived uneven application to different countries (MacPherson 1985). In particular, immigrant advocates expressed concerns over the Reagan administration's refusal to grant EVD to nationals of El Salvador, despite growing evidence of political instability and violence in that country (ACLU 1984, 6-7). Between 1981 and 1984, groups and individuals ranging from the United States Catholic Conference, the Archbishop of Washington, DC, the Immigration & Refugee Program of the Church World Service, the American Civil Liberties Union (ACLU), and United States Senator Edward Kennedy (D-MA) lobbied for the extension of EVD to Salvadorans (ACLU 1984, 6-7). Executive branch officials generally asserted that Salvadorans in the United States were adequately protected

16 An estimated 212,000 of those beneficiaries are from El Salvador (78 Fed. Reg. 32418 (May 30, 2013)), while 64,000 are from Honduras (78 Fed. Reg. 20123 (Apr. 3, 2013)), and 58,000 are from Haiti (79 Fed. Reg. 11808, March 3, 2014)). There are approximately 3,000 TPS recipients from Nicaragua (78 Fed. Reg. 20128 (Apr. 3, 2013)) and 2,600 from Syria (78 Fed. Reg. 36223 (Jun. 17, 2013)). The numbers from Sudan (78 Fed. Reg. 1872 (Jan. 9, 2013)), South Sudan (78 Fed. Reg. 1866 (Jan. 9, 2013)), and Somalia (78 Fed. Reg. 65690 (Nov. 1, 2013)) are all under 500.

17 78 Fed. Reg. 36223 (Jun. 17, 2013).



from persecution by US asylum law, and that most Salvadorans were coming to the United States for economic rather than political reasons (ACLU 1984, 11). Those lobbying for EVD for Salvadorans charged that the decision not to grant EVD was politically motivated. They alleged that the true reason for the United States' withholding of EVD was that the Reagan administration generally supported the right-leaning Salvadoran government (Perl 1983).

Partly in hopes of remedying these concerns, in July 1987, Congressman Romano Mazzoli (D-KY) introduced the Temporary Safe Haven Act of 1987,<sup>18</sup> which was later re-introduced the following year as the Temporary Safe Haven Act of 1988.<sup>19</sup> The purpose of the bill, as outlined in the 1988 House Judiciary Committee report recommending its passage, was to “replace the practice known as Extended Voluntary Departure, under which aliens from countries experiencing turmoil are allowed to remain temporarily, with a more formal and orderly mechanism for the selection, processing and registration of such individuals.”<sup>20</sup> The report noted that while the committee was convinced of the need to provide temporary protection or “safe haven” status to individuals who were fleeing danger but would not meet the definition of a refugee, it was concerned about “glaring deficiencies” in the EVD program.<sup>21</sup> These included the fact that: (1) the Immigration and Naturalization Service (INS) did not maintain figures on the number of persons granted EVD; (2) the INS could not effectuate the removal of those whose EVD status was terminated because it did not track their location; (3) the conditions under which a “safe haven” was granted, extended, or terminated by the INS did not appear in any regulation, and were only conveyed to Congress and the public via press releases; and (4) there was nothing in the administrative EVD grants to prohibit “terrorists, drug traffickers, intelligence agents, and even Nazis” from being eligible for EVD.

The Temporary Safe Haven Act of 1988 called for the creation of a new authorization to remain temporarily (ART) status, which the attorney general could bestow upon noncitizens from designated countries.<sup>22</sup> A country could be designated when the attorney general determined that the foreign state was unable to accept the return of its nationals because of an ongoing armed conflict, a natural disaster, or other “extraordinary or temporary conditions.”<sup>23</sup> Individuals granted ART would be protected against deportation and have the ability to apply for work authorization, but they would not be eligible for public benefits.<sup>24</sup> While the bill ultimately failed to pass during the 100th Congress, its text formed the backbone of the new provision authorizing TPS in the Immigration Act of 1990.

During the 101st Congress (1989-1990), bills were introduced in the House to stay the deportations and allow work authorization for several discrete groups of foreign nationals,

18 H.R. 4379, 100th Cong. (1987).

19 H.R. 2922, 100th Cong. (1988).

20 H.R. REP. NO. 100-627, AT 4 (1988).

21 H.R. REP. NO. 100-627, AT 5 (1988).

22 H.R. 2922, 100th Cong. (1988).

23 Ibid.

24 Ibid.

including Salvadorans and Nicaraguans,<sup>25</sup> Lebanese,<sup>26</sup> and Chinese nationals.<sup>27</sup> These bills also called for the creation of a new “Temporary Protected Status,” which would include temporary work authorization and protection against deportation for nationals of designated countries.<sup>28</sup> The concept of TPS was eventually incorporated into the House’s version of the larger Immigration Act of 1990, which called for the creation of a new TPS status and the designation of four countries for three-year TPS grants: El Salvador, Lebanon, Liberia, and Kuwait.<sup>29</sup> The companion bill in the Senate contained no such provision.<sup>30</sup> The final version of the Act signed into law on November 29, 1990 authorized the creation of TPS but designated only El Salvador, and only for 18 months.<sup>31</sup>

Absent from almost all of the congressional debates surrounding the creation of TPS was any reference to how to treat TPS recipients when TPS status was perpetually extended. The House-Senate Conference report on the final Immigration Act of 1990 contains no mention of the subject.<sup>32</sup> Following the passage of the Immigration Act of 1990, however, it soon became clear that the lack of legal mechanisms “resolving” the immigration status of those granted long-term TPS posed a serious problem. Writing on the new TPS program in 1995, Bill Frelick and Barbara Kohnen noted the scope of the problem and proposed a solution:

What happens when the AG [attorney general] extends TPS year after year rather than terminating the policy? Recipients of TPS begin to build their lives outside their country while still unsure whether the INS will eventually retract temporary protection. If the INS plans to continue extending TPS, then it should be recognized that dangerous conditions in the home country have not been of a temporary nature and that TPS recipients have built up equities in their respective communities. At some point, perhaps after TPS has been extended for a period of three years, the INS should have the flexibility to adjust their status. (Frelick and Kohnen 1995, 357)

Four years later, at a House subcommittee hearing on extending TPS status to Nicaraguans and Hondurans, Congresswoman Sheila Jackson Lee called on Congress to create an “alternative method for encouraging TPS recipients to return home after TPS expires.”<sup>33</sup> Nevertheless, neither an adjustment mechanism for long-term TPS beneficiaries nor a repatriation assistance mechanism for individuals whose TPS status has been terminated has ever been put into place.

25 H.R. 45, 101st Cong. (1989).

26 H.R. 3267, 101st Cong. (1989).

27 H.R. 2929, 101st Cong. (1989).

28 H.R. 3267, 101st Cong. (1989); H.R. 2929, 101st Cong. (1989); H.R. 45, 101st Cong. (1989).

29 H.R. 4300, 101st Cong. (1990).

30 S. 358, 101st Cong. (1990).

31 Pub. L. No. 101-649 (1990).

32 H.R. REP. NO. 101-955 (1990).

33 *Designations of Temporary Protected Status and Prior Amnesty Programs: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 106th Cong., 1st sess. (March 4, 1999) (Statement of Rep. Sheila Jackson Lee).

## Problems with the TPS System and Why a Fix Is Needed

Critics of the TPS regime contend that the program is not temporary. Indeed, as the list of currently designated TPS countries demonstrates, TPS designations and extensions may stretch years or even decades. Of the eight designated TPS countries, two—Honduras and Nicaragua—were first designated on January 5, 1999 (USCIS 2014). To qualify for TPS under the most recent designations, Honduran and Nicaraguan noncitizens must show that they have been continuously residing in the United States since December 30, 1998.<sup>34</sup> Thus, by virtue of the program’s requirements, any individual from Honduras or Nicaragua who holds TPS has now been residing in the country for more than 15 years. El Salvador is similarly situated, having been first designated for TPS on March 9, 2001 (USCIS 2014).

The cycle of continuous designations, re-designations, and re-extensions of TPS status for certain countries is not inherently at odds with the goal of providing a “safe haven” for foreign nationals unable to return to their countries of origin because of humanitarian emergencies. After all, while the Immigration Act of 1990 mandated that no initial designation of TPS could last for longer than 18 months, there is no such strict time limit on the length of humanitarian crises. A country may legitimately be unable to ensure the safe and orderly repatriation of its nationals until many years after the initial humanitarian crisis that triggered a grant of TPS has been resolved.

There are reasons, however, to be wary of the use of TPS for long-term grants of immigration status. First, the program’s legislative history indicates a clear congressional intent for TPS to be used for temporary, short-term designations of status. Second, extended grants of TPS run contrary to the policy goals of fostering integration and full membership within American society for long-term foreign residents. Lacking many of the benefits that come with LPR status, long-term TPS beneficiaries effectively find themselves locked in “legal limbo” as *de facto* members of American society who are offered less than full membership.

### *Long-Term Grants of TPS Status Run Contrary to Congressional Intent*

Although there is scant evidence in the Congressional Record indicating that Congress actively considered how TPS beneficiaries would be treated if they were perpetually granted TPS, there is ample evidence indicating that Congress intended TPS designations to be temporary. First, supporters of EVD (and later TPS) for Salvadorans emphasized that Salvadoran nationals were not seeking permanent protection in the United States. The ACLU’s 1984 publication *Salvadorans in the United States: The Case for Extended Voluntary Departure* noted that “all sources agree that the Salvadorans are interested in returning to El Salvador as soon as it is safe for them to do so. These sources include the UNHCR, US officials and Salvadoran refugees themselves” (ACLU 1984, 67).

On the floor of the House, the debate over TPS centered almost immediately on concerns that the program could be used to grant “indefinite” stays of deportation, and supporters adamantly emphasized the temporary nature of the program. On October 2, 1990, Congressman William McCollum (R-FL), introduced an amendment to the House’s

34 64 Fed. Reg. 526 (Jan. 5, 1999).



immigration bill that called for the elimination of provisions in the Immigration Act of 1990 authorizing the creation of TPS.<sup>35</sup> McCollum's key concern was that the "Moakley provisions," so-named for their insertion into the bill by Congressman John Joseph Moakley (D-MA), were "bad policy," because "[t]hey keep lots of illegals here indiscriminately for extended periods of time."<sup>36</sup> In response, supporters of TPS emphasized the temporary nature of the program, noting that proponents "were not asking that these people be given permanent resident status" or "be allowed to live indefinitely in this country," but "that they be spared deportation until war in their land subsides."<sup>37</sup> The McCollum amendment ultimately failed in the House by a vote of 131-285.<sup>38</sup>

Even after the defeat of the McCollum amendment, supporters continued to emphasize the *temporary* nature of TPS. Key backers of TPS, including Congressman Moakley in the House and Senator Kennedy in the Senate, characterized the program as "temporarily suspending deportation"<sup>39</sup> and granting a "temporary safe haven."<sup>40</sup> Speaking about the program during the Senate's final vote on the version of the bill agreed to by both chambers during conference, Senator Dennis DeConcini (D-AZ) emphasized that the creation of TPS and designation of El Salvador for TPS protection could actually assist the Immigration and Naturalization Service (INS) in ultimately removing Salvadorans once their TPS status was ended. He noted that the program facilitated the creation of a "registration system" which would provide "a means by which the United States can maintain accurate records of Salvadorans in this country . . . (and) facilitate the return of Salvadorans when the period of temporary protection expires."<sup>41</sup>

It is also significant that the final version of the bill to emerge from the House-Senate conference process drastically cut back on the length of initial TPS designations (and on the countries designated for such status) in the original House bill. The version of the bill that came out of conference provided that the attorney general had the authority to grant TPS for no longer than 18 months and designated only El Salvador for the new status.<sup>42</sup> While the conference report emphasized that the language limiting initial TPS designations to 18 months should not be interpreted as preventing the attorney general from extending El Salvador's initial TPS grant,<sup>43</sup> the mere fact that the initial time frame for the program was cut in half underscores congressional concerns over long-term TPS grants.

### ***Long-Term Grants of TPS Status Lock Beneficiaries into Legal Limbo***

Continuous grants of TPS with no mechanism for permanent adjustment lock TPS holders into quasi-permanent "limbo" status, whereby they are effectively treated as long-term

35 136 CONG. REC. 27129 (1990).

36 Ibid.

37 136 Cong. Rec. 27130 (1990).

38 Roll No. 402, 136 Cong. Rec. 27133 (1990).

39 136 Cong. Rec. 35124 (1990).

40 136 Cong. Rec. 35610 (1990).

41 136 Cong. Rec. 35611 (1990).

42 H.R. REP. NO. 101-955 (1990) (CONF. REP.).

43 Ibid.

residents in the United States but denied many of the legal protections that the United States normally grants to such residents. Unlike LPRs, for example, TPS holders may not sponsor family members for immigration to the United States.<sup>44</sup> They are also ineligible for most federal public benefits (Silverman, Joaquin, and Klapel 2010).

Perhaps most significantly, the US government has long taken the position that grants of TPS are not considered “admissions” or “paroles” for the purposes of adjustment of status under INA § 245(a) (Silverman, Joaquin, and Klapel 2010). In 2013, however, the US Court of Appeals for the Sixth Circuit rejected this view, holding that the plain language of the TPS statute indicates that TPS holders should be treated as “admitted or paroled” for the purposes of adjusting status as the immediate relatives of US citizens.<sup>45</sup> Nevertheless, USCIS has chosen not to apply this decision to applicants residing outside the jurisdiction of the 6th Circuit (USCIS 2013). Thus, outside of the 6th Circuit, unless a TPS beneficiary initially entered the United States through a form of lawful admission (for example, entering with a non-immigrant visa), he or she is ineligible to apply for adjustment of status even if he or she has a qualified US citizen or permanent resident relative, or US employer, willing to file a sponsorship petition.

Allowing large numbers of noncitizens to remain in the United States indefinitely in quasi-permanent legal status runs contrary to the United States’ historic commitment to fully integrating immigrants who have cultivated strong ties with the country and resided in it for extended periods of time. Since its earliest laws regulating immigration, the United States has classified all noncitizens as either “immigrants” or “non-immigrants.” “Immigrants” are those noncitizens who have been granted lawful permanent residence,<sup>46</sup> which bestows heightened protection against deportation and may be renewed indefinitely. Individuals who hold LPR status can typically apply for US citizenship after five years. In contrast, “non-immigrants” are noncitizens who are admitted “for such time, and under such conditions as the Attorney General may prescribe.”<sup>47</sup> A fundamental characteristic of non-immigrants is that their stay in the United States is temporary; all non-immigrants must, at the end of their authorized period of admission, agree to depart.<sup>48</sup> US law does not generally provide “in between” status that is short of lawful permanent residence for individuals who plan to reside in the United States indefinitely.

The United States also has a long history of allowing groups of noncitizens who fled violence or chaos abroad by entering the country in “temporary” status to adjust to LPR status. In 1934, Congress passed a law that allowed noncitizens who had entered the United States prior to July 1, 1933, and who demonstrated that they were in the country as “*bona fide* political or religious refugee[s]” to become LPRs.<sup>49</sup> Prior to the country’s enactment of a comprehensive refugee law in 1980, Congress frequently passed laws granting LPR status to individuals who had been initially “paroled” into the United States following a war or political uprising (Kerwin 2010, 4-5). For example, in 1958, Congress enacted a law that ultimately enabled an estimated 30,752 Hungarians who had been paroled into

44 INA § 203(a)

45 *Flores v. USCIS*, 718 F.3d 548, 552 (6th Cir. 2013).

46 INA § 201

47 INA § 214

48 8 C.F.R. § 214.1

49 Pub. L. No. 73-299, 48 Stat. 926 (1934).

the country following the 1956 Hungarian revolution to adjust status (*ibid.*). Similarly, the 1966 Cuban Adjustment Act has granted lawful permanent residence to more than one million Cuban parolees (*ibid.*).

US law governing the status of asylees and refugees also reflects a concern for integrating long-term residents. Neither the Refugee Convention nor the Protocol requires countries to grant permanent legal status to individuals who are deemed “refugees” under international law (McAdam 2005, 503). Yet US law allows asylees and refugees to apply for lawful permanent residence after one year of residing in the United States.<sup>50</sup>

Each of these legalization laws reflected particular congressional concerns with respect to particular groups of noncitizens. But a common theme throughout them is that the United States has granted LPR status to individuals based on their “integration into American society and their contributions to our national future” (Motomura 2010, 236). The 1969 INS statistical yearbook exemplified this pattern through its explanation of the rationale behind the Cuban Adjustment Act:

It is true that in the beginning most Cubans hoped and confidently expected that they would be going home soon. As the years passed, this hope faded. Their children went to American schools and adopted the American way of life as their own. The parents and breadwinners wanted to earn their own way, and many were qualified to make real contributions to our society. But in order to get the jobs that they could splendidly fill, they often found that they needed to be permanent residents or citizens of the United States. As parolees, they could not be either. (INS 1969, 9)

In the 1982 Supreme Court case *Plyler v. Doe*,<sup>51</sup> Justice Brennan raised the possibility that unauthorized immigrant children denied the opportunity to attend public school in the United States could easily become part of a “permanent caste” of undocumented residents, equivalent to an “underclass.”<sup>52</sup> Although a far different group than unauthorized children, long-term TPS beneficiaries nonetheless raise similar public policy concerns. In particular, they raise the question of whether it is in the nation’s best interests to host a large group of “quasi” permanent residents who, by virtue of their long residence, have become integrated into the fabric of US society, yet because of their legal status, cannot fully participate in it.

## **Making Them Permanent: Proposals to Place Those in the TPS System on the Path to Permanent Status**

### ***Amending the Current Refugee Definition***

One way to solve the “legal limbo” problem that long-term TPS holders face would be for the United States to amend its definition of a refugee so that individuals fleeing political violence or an environmental disaster could qualify for asylum status, which provides a pathway to permanent residence. Though the beneficiaries of TPS have long been recognized

<sup>50</sup> INA § 209(a)

<sup>51</sup> 457 U.S. 202 (1982).

<sup>52</sup> 457 U.S. 202, 219 (1982)

as “*de facto* refugees” (Frelick and Kohnen 1995, 341), they have generally not qualified for asylum status in the United States because they have been unable to demonstrate that they meet two of the criteria required for a grant of refugee status under US asylum law: that they have been persecuted or have a well-founded fear of persecution (the persecution prong) and that their well-founded fear is on account of their race, religion, ethnicity, membership in a particular social group, or political opinion (the nexus prong).

A major problem with proposals to amend US asylum law to encompass situations where individuals are fleeing generalized political violence or environmental catastrophes is that US asylum law hews closely to the definition of a “refugee” put forth in the 1951 Refugee Convention and the 1967 Protocol. International organizations, including and most critically UNHCR, have generally taken the position that individuals fleeing generalized political violence or environmental catastrophes do not meet the Convention definition of a refugee (UNHCR 2011, ch.V, para. 164). Some scholars argue that customary international law norms have shifted the definition of a refugee and that it may now include those who are fleeing environmental disasters or political turmoil (Worster 2012, 106-07). This argument, however, has yet to gain widespread acceptance in the international law community.

### *Complementary Protection*

An alternate approach would be to create a new form of “subsidiary” legal status, modeled after protection in the European Union (EU). Since 2004, European Union member states have granted “subsidiary protection” to individuals who do not qualify for refugee status but who demonstrate that they cannot return to their countries of origin due to a “real risk of suffering serious harm” (Fullerton 2011, 108). EU directives define three specific types of harm as “serious harm:” (1) the death penalty or execution; (2) torture or inhuman or degrading treatment or punishment; and (3) a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict (European Union 2011). The directives also provide that member states may adopt more generous criteria for granting subsidiary protection status, which a number of states have done. (ECRE 2009). Finland and Sweden, for example, grant subsidiary protection to persons who are outside of their countries of origin and who are unable to return because of environmental disasters (Mayer 2011, 383). Lithuania grants the status to individuals who have fled widespread violence that is *not* necessarily the result of an armed conflict (European Migration Network 2010, 8).

The specific benefits of subsidiary protection vary from country to country, but European Union directives set the minimum level of protection that states must provide. Under these directives, beneficiaries must receive residence permits that are valid for at least one year, and are renewable (European Union 2011). Individuals who hold subsidiary protection for five years become eligible to apply for long-term resident status (Council of the European Union 2011). Long-term residents receive a status that is somewhat comparable to lawful permanent residence in the United States. They may move freely within the EU, they may renew their residency indefinitely, and they are generally treated on par with EU citizens for purposes of accessing education, labor markets, and social security (European Union Commission 2014).

Not all of those granted subsidiary protection ultimately are able to apply for long-term resident status because a state may terminate an individual's subsidiary protection status before the person has held that status for five years. Under the EU directives, states may end subsidiary protection when the circumstances which led to the granting of the protection cease to exist or have changed so that protection is no longer required. (European Union 2011, Art. 16). States may also revoke an individual's subsidiary protection status if the person has committed fraud or a serious crime. (European Union 2011, Art. 19).

Prior to the issuance of the newest (2011) EU directive on subsidiary protection, EU directives treated beneficiaries of subsidiary protection differently than those who had been granted "refugee" status. Those with subsidiary protection faced greater restrictions on their ability to travel, work, access educational opportunities and vocational training, and receive social welfare and health care benefits (McAdam 2005, 506-14). One reason for this distinction was that legislators generally considered subsidiary protection to be less permanent in nature than refugee status (Pobjoy 2010, 221). After a number of scholars criticized this "protection hierarchy," asserting that it was not justified under international law, the EU issued a new directive which generally calls for equal treatment for refugees and those awarded subsidiary protection (European Union 2011).

Adopting a new legal regime that resembles subsidiary protection could address some of the weaknesses of the TPS program. By providing certain noncitizens who are unable to return to their home countries with a form of temporary legal status, the United States would address the immediate humanitarian needs of individuals whose countries have suddenly become engulfed in war or devastated by a natural disaster. By initially providing only a temporary legal status, the United States would also acknowledge that in certain circumstances, individuals initially unable to return home because of these circumstances may become able to do so at a future date. At the same time, the inclusion of a mechanism for granting permanent legal status to individuals who have held temporary status for extended periods of time would address the humanitarian concerns that arise when short-term crises become long-term ones.

Subsidiary protection is far from a perfect substitute for the current TPS regime, however. Unlike TPS, EU law provides that grants of subsidiary protection must be based on *individualized* threats of harm. Recital 26 of the most recent subsidiary protection directive specifies that "[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm" (European Union 2011). While a recent case from the European Court of Justice clarifies that an applicant for subsidiary protection need not demonstrate the level of individualized targeting that would be required for a grant of refugee status (Allard 2010, 320), the directive assumes that a grant of subsidiary protection will be tied to an assessment of personal circumstances.

Requiring an applicant to make an individualized showing of harm may work well in a system designed to grant longer-term humanitarian protection, but less well in a system designed to deal with the immediate migration needs of individuals displaced by sudden disasters.<sup>53</sup> TPS, as a temporary protection mechanism, is designed to grant protection to

53 Notably, a separate EU directive governs grants of temporary protection. Under this directive, EU



individuals who face “risks to which a population of a country or a section of the population is generally exposed.” In order to continue to protect individuals covered by TPS, it is not necessary to screen for an individualized threat of harm, as the protection is based on the general conditions of their country of origin. Moreover, by requiring applicants to make an individualized showing of harm, the subsidiary protection regime requires individualized hearings and a fairly lengthy adjudication process in which an applicant’s credibility and supporting documentation is assessed. (Wettergren and Wikstrom 2013, 569). A process like TPS, in contrast, generally does not require a lengthy hearing, as individuals may be approved or denied on the basis of more “objective” criteria. Given that the goal of TPS is to provide short-term humanitarian relief, there is merit to retaining a process that is relatively simple, straightforward, and can be implemented fairly quickly.

### *Adjustment of Status*

Another approach to resolving the extended TPS dilemma would be to amend current immigration law to provide a pathway to permanent residence for TPS holders. The most straightforward way to accomplish this would be for Congress to pass a new law that enables some class of TPS beneficiaries (for example, those who have held TPS status for a certain number of years) to apply for lawful permanent residence.

There is some precedent behind such a law. In 1987, Congress authorized granting temporary legal status to any noncitizen granted EVD during the five-year period ending November 1, 1987, thereby placing them on the path to gaining lawful permanent residence through the legalization provisions of the *Immigration Reform and Control Act of 1986 (IRCA)*.<sup>54</sup> Similarly, the 1997 *Nicaraguan Adjustment and Central American Relief Act (NACARA)* allowed Salvadoran nationals who had entered the United States on or before September 19, 1990, and either registered for benefits through the *American Baptist Churches v. Thornburgh (ABC)* class settlement, or applied for TPS by October 31, 1991, to apply for “special rule cancellation of removal,” a process through which they could be granted permanent residence.<sup>55</sup>

There are several obstacles to establishing an adjustment of status program specifically for long-term TPS holders. The congressional debate surrounding the 1990 Immigration Act indicates that many members of Congress opposed this idea. The Act itself prohibits Congress from enacting an adjustment program for TPS holders unless the program is approved by a three-fifths supermajority of the Senate.<sup>56</sup> Some scholars have pointed out, however, that members of the 101st Congress may have anticipated that long-term TPS holders would be able to take advantage of other adjustment of status mechanisms in US immigration law at that time, such as suspension of deportation, that are no longer available under current law (Martin, Schoenholtz, and Waller Meyers 1997, 577-78). Thus, a key

countries may grant temporary legal status for up to one year to third-country nationals in instances where there has been a “mass influx of displaced persons who cannot return to their country of origin” (EU Directive 2001/55/EC). Like TPS in the United States, “temporary protection” does not convey any form of permanent legal status, nor does it place beneficiaries on a path to obtaining permanent legal status.

54 Pub. L. No. 100-204 (1987).

55 Pub. L. No. 105-100 (1997).

56 INA § 244(h)

reason that may have been used to justify not creating an adjustment of status program for long-term TPS holders in 1990 may no longer be as valid today.

Congress could also opt to allow TPS holders to qualify for a larger legalization program aimed at changing the status of a broader category of non-LPRs. For example, the language of the Senate's 2013 "comprehensive immigration reform" bill (S. 744) makes clear that TPS holders would qualify to apply for the bill's "registered provisional immigrant status," the first step in a ten-year pathway to lawful permanent residence.<sup>57</sup> Allowing TPS holders to take advantage of the Senate's legalization framework would benefit TPS holders who meet the legalization program's other criteria (for example, being physically present in the United States as of December 31, 2011). However, it would not rectify the problem of how to treat future TPS-holders who hold temporary status for extended periods of time. Like stand-alone programs to legalize certain TPS holders, it is also unclear how a larger legalization program that included TPS holders could be reconciled with the requirements of INA § 244(h), the three-fifths Senate supermajority requirement for legislation permitting TPS holders to adjust status.

A variation on the option of creating a new law authorizing adjustment of status for TPS holders would be for the executive branch to re-characterize TPS as a type of admission or parole (or as a waiver of the grounds of inadmissibility that attach with entry to the United States without inspection). This would allow greater numbers of current TPS holders who would otherwise qualify for existing family-based and employment-based pathways to permanent residence to take advantage of those pathways.

Most TPS beneficiaries who initially entered the United States without permission are barred from applying for lawful permanent residence from within the United States. This is because current law provides that, subject to limited exceptions, noncitizens who entered the country without being "admitted or paroled" are ineligible for adjustment of status.<sup>58</sup> Instead, in order to gain permanent status, the law requires these individuals to depart the United States and apply for readmission at a US consulate abroad. For many noncitizens in this position, the process of leaving the country after having resided in it as an unauthorized immigrant triggers bars of inadmissibility of three or ten years.<sup>59</sup> This decade-long wait dissuades many otherwise-eligible noncitizens from applying for LPR status.

USCIS could alter this outcome for TPS holders who entered the country unlawfully but are the immediate relatives (spouse, minor child, or parent) of a US citizen in one of three

57 Border Security, Economic Opportunity, and Immigration Modernization Act. S. 744. 113th Cong. (2013). Section 2101(a) of the bill, which spells out the grounds of eligibility and ineligibility for registered provisional immigrant status, states that a noncitizen lawfully present in the United States in nonimmigrant status is *not* eligible to apply for registered provisional immigrant status, *other than an alien considered to be a nonimmigrant solely due to the application of section 244(f)(4)* (the portion of the INA dealing with TPS holders).

58 INA § 245(a)

59 The "three year bar" applies to individuals who depart from the country after having resided in it in unauthorized status for more than six months but less than one year. The "ten year bar" applies to individuals who depart from the country after having accrued one year or more of unauthorized presence. INA § 212(a)(9)(B). Waivers of the three and ten year bars are available, but only to noncitizens who show that if they were denied readmission, it would cause "extreme hardship" to US citizen or lawful permanent resident spouse or parent (INA § 212(a)(9)(B)(v)).

ways. First, USCIS could decide to apply the 6th Circuit's reasoning in the *Flores* decision to the entire country. Doing so would treat TPS holders who initially entered the country unlawfully as being eligible to apply for adjustment of status if they otherwise qualified to do so as the immediate relative of a US citizen.

Second, the administration could follow a recommendation set forth in an unpublished USCIS memorandum that was leaked to the public in 2010, in which the writers advised that USCIS could issue new guidance administratively granting TPS beneficiaries "parole-in-place" (Vanison, et al. 2010). "Parole-in-place," which USCIS grants to the family of members of the military, provides noncitizens with temporary protection against removal and allows individuals who entered the United States without authorization to be considered "paroled" for purposes of adjusting status. Based on having been "paroled," a parole-in-place beneficiary may move forward with an application to adjust status as the immediate relative of a US citizen (Stock 2011). Like applying the *Flores* precedent nation-wide, granting parole-in-place would allow far greater numbers of TPS holders to take advantage of existing channels for gaining lawful permanent residence.

Finally, a more incremental move would be for USCIS to issue formal guidance clarifying its position with respect to TPS holders who travel abroad and are readmitted. In a 1991 memorandum, the INS adopted the position that a TPS holder who had initially entered the country without inspection, but who, subsequent to a grant of TPS, left the country and returned with advance parole (e.g., parole approved before departure) would be considered "paroled" for purposes of the "admitted or paroled" requirement for adjustment of status (Virtue 1991). Until recently, however, USCIS took the position that TPS holders who traveled abroad with advance parole would still trigger the three and ten year unlawful presence bars if they had previously resided in the United States unlawfully. A potential sea change occurred in 2012, when the Board of Immigration Appeals issued *Matter of Arrabally*.<sup>60</sup> Rejecting USCIS's position that leaving the country pursuant to a grant of advance parole constituted a "departure" for purposes of INA § 212(a)(9)(B), the board held that a noncitizen with prior unlawful presence who left and returned pursuant to a grant of advance parole had not triggered the three and ten year bars and was still eligible for adjustment.

Like applying the *Flores* decision nationwide or granting "parole-in-place," USCIS could use the *Arrabally* decision to provide a path to permanent residence for one particular group of TPS holders: those who are able to apply for legal status by virtue of being the immediate relative (spouse, minor child, or parent) of a US citizen, but who initially entered the country unlawfully. For individuals in such a situation, traveling abroad and re-entering the country with advance parole could enable them to be considered "admitted or paroled" for purposes of adjustment of status.<sup>61</sup> Assuming that such a trip would not trigger the three and ten year bars (as would seem to be the case post-*Arrabally*), these TPS holders would not be barred from adjusting, even if they had previously resided in the United States unlawfully. However, USCIS has yet to issue formal guidance on how it will apply *Arrabally* to TPS holders. As a result, the potential benefits of the decision for TPS holders remain unclear.

<sup>60</sup> *Matter of Arrabally*, 25 I. & N. Dec. 771 (BIA 2012).

<sup>61</sup> INA § 245(a)

## **Making Them Temporary: Proposals to Assist in the Repatriation of Those Who Previously Had TPS**

An alternative—or complementary—mechanism for amending the current TPS regime is to put in place programmatic mechanisms that assist noncitizens whose TPS status has ended in voluntarily returning to their countries of origin. Early proposals on implementing a repatriation program focused on the role that international organizations—such as UNHCR, the International Organization for Migration (IOM), and US Agency for International Development (US-AID)—could play in assisting in the repatriation of those for whom TPS status had ended (Frelick and Kohnen 1995, 356). More recent proposals have suggested providing financial assistance to former TPS beneficiaries who agree to return, or withholding the social security taxes of TPS holders and then distributing them only upon return (Martin, Schoenholtz, and Waller Meyers 1997, 575).

Given UNHCR's and IOM's vast experience in the voluntary repatriation of refugees, the United States can and should draw upon the “best practices” of those organizations in structuring any future repatriation program for former TPS beneficiaries. For example, a number of scholars have examined UNHCR's repatriation initiatives and concluded that certain factors correlate with successful repatriation programs. These include the provision of comprehensive information to migrants at the outset about the conditions in their countries of origin and the proposed return program (Rogge 1994, 29), the extent to which migrants are allowed to “transfer economic self-sufficiency” (such as money earned and goods and tools accumulated in the country of asylum) to their countries of repatriation (Rogge 1994, 35), and the extent to which migrants are provided with the tools (such as, in rural areas, farming implements, seed, and land) to establish self-sufficiency following repatriation (Rogge 1994, 35). In addition, scholars have noted that successful repatriation depends on the rebuilding of key infrastructure developments that may have been damaged during the political or environmental turmoil that caused people to flee (Rogge 1994, 36).

For its part, UNHCR, in its *Handbook on Voluntary Repatriation and International Protection*, has adopted many of these “best practices” into its recommended guidance. For example, the Handbook states that UNHCR may promote repatriation by undertaking a “comprehensive information campaign” to educate displaced migrants about the conditions in their home countries (UNHCR 1996, Part 3.1). The agency may also facilitate “advance visits” for displaced individuals, to allow them to see first-hand the conditions in their countries of origin (UNHCR 1996, Part 4.2). Following in the footsteps of this practice, the United States could take measures to educate individuals whose TPS is ending on the conditions in their countries of origin. It could ease travel restrictions on TPS holders, by allowing TPS holders to travel in and out of the United States without having to apply for advance parole, or by lowering the standard for granting advance parole. Such steps would increase the likelihood that former TPS holders have “on-the-ground information” about their countries of origin and would be more likely to agree to return to them when their TPS status ends.

UNHCR's handbook on voluntary repatriation also promotes the issuance of “recovery or compensation” for movable and immovable property that refugees are unable to take with them when returning to their countries of origin (UNHCR 1996, Part 3.6). Similarly, UNHCR documents take the position that for a voluntary repatriation program to be successful,

there must be “rehabilitation” of critical infrastructure in the displaced individuals’ country of origin, such as the rebuilding of schools, clinics, water points, public facilities, and houses (UNHCR 2004, Part 1.8). Drawing off these key principles, the United States could develop a repatriation program for individuals whose TPS has ended that provides both direct aid to the returning migrants, and development aid for their countries of origin, factors that help ensure that returnees are able to return in safety and dignity.

### **Drawing the Line: Dual Proposals to Allow Some TPS Beneficiaries to Legalize, and Require Others to Return**

The best way to realign the TPS program with the congressional intent behind it and with overarching US policy goals would be for Congress to pass a law that enables individuals who have held TPS for extended periods of time to become permanent residents, while putting in place mechanisms that assist those whose TPS status has ended after shorter periods to return home. While it is tempting to focus on shorter-term administrative fixes that the executive branch could implement without congressional involvement, only a full-scale legislative reform will solve the “legal limbo” problem currently facing the majority of TPS holders. Similarly, only a legislative fix could put in place standardized mechanisms for dealing with future waves of noncitizens fleeing political violence or environmental catastrophes.

In addition, crafting a new law that allows some long-term TPS holders to adjust status after they have held TPS for a certain length of time would foster the full integration of noncitizens who have built up significant equities in the United States. Of course, such a policy will require drawing a line to determine the length of time in TPS status that is required for adjustment of status. Setting this line at ten years, so that individuals who have held TPS status for ten consecutive years are permitted to adjust status, would be internally consistent with other aspects of US immigration law.<sup>62</sup> It would also constitute a significant amount of time, during which TPS holders are likely to begin to put down roots in the United States and increasingly view themselves as US residents.

At the same time, the United States should take steps to ensure the repatriation of individuals who have not held TPS for ten years, but whose TPS has been ended because conditions in their country of origin have improved. Only by implementing repatriation for those whose short-term TPS has ended can the United States stay true to the initial intent of the TPS program—offering a “temporary safe haven” for individuals fleeing harm. A successful repatriation program could include withholding earnings (such as social security taxes) that would be paid to TPS holders upon their repatriation. It could also include implementing some of the “best practices” for repatriation developed by the international community, such as encouraging TPS holders to travel back and forth to their countries of origin when it begins to become safe to do so.

62 For example, under current law, unauthorized immigrants seeking adjustment of status in removal proceedings in the form of “cancellation of removal” must demonstrate that they have been present in the United States for ten years (INA § 240A(b)). Similarly, individuals who depart the United States after accruing more than one year of unlawful presence in the country are no longer inadmissible after they have resided outside the country for ten years (INA § 212(a)(9)(B)).



Undoubtedly, implementing any kind of a repatriation program for individuals whose TPS has been terminated will prove extremely controversial, as will allowing certain long-term TPS holders to adjust status. Yet, for the United States to maintain the integrity of the TPS program, both steps are necessary. Given that the number of individuals seeking a TPS safe haven is likely to only increase in the coming years, fixing the program at this juncture could not be more critical.

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