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Maximiliano Gluzman

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PAROLE IN PLACE AS A SOLUTION FOR THE IMMIGRATION STATUS OF IMMEDIATE RELATIVES OF U.S. CITIZENS

MAXIMILIANO GLUZMAN[†]

INTRODUCTION

Spurred by the need to support his aging parents and younger siblings, *X* decided to immigrate to the United States in 1990. Unable to secure a visa to enter the United States, he entered the United States between ports of entry and quickly secured a low-paying job. While he could not spare a substantial part of his income to send to his family, the small amounts he could wire made an appreciable difference in their lives. *X* stayed in the United States and with time, he met and married *Y*, a U.S. citizen, with whom he had three children. With the exception of his irregular entry, *X* has had an exemplary life, eventually creating his own business, paying taxes, and putting his children through college. *X*'s children are now adults with their own families. *X* has never been the subject of a criminal investigation or charged with the violation of any rule. *X* remains, however, undocumented and at risk of deportation. In fact, unless major legislative or policy changes are enacted, *X*'s

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[†] Maximiliano Gabriel Gluzman is an Assistant Professor at Belmont University College of Law, where he teaches Legal Information and Communication and Immigration Law. Prior to joining Belmont, he practiced immigration law while based in Memphis, TN, representing individuals and families before the U.S. Citizenship and Immigration Services and the Executive Office for Immigration Review. As an immigration attorney, his work focused primarily on asylum, cancellation of removal for non-permanent residents, and bond proceedings. He also designed and conducted legal orientation presentations for detained asylum seekers. Before practicing immigration law, Professor Gluzman practiced business law, representing clients in corporate, labor, and administrative matters in his hometown of Buenos Aires, Argentina. Professor Gluzman received his first degree in law from Universidad del Salvador in Buenos Aires, Argentina, and earned an LL.M. degree from Vanderbilt Law School in Nashville, TN, where he was placed on the Dean's List.

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initial irregular entry will prevent him from changing his immigration status for the rest of his life. *X*'s wife and one of his adult children have both petitioned for a visa for *X* and both petitions have been approved years ago. However, *X*'s only way to take advantage of the visa approvals is to leave the country and remain in his home country for ten years. The Immigration and Nationality Act, ("INA"), allows U.S. citizens to request an immigrant visa for their spouses and–after reaching twenty-one years of age–for their parents.[1] Once the request is approved, beneficiaries outside the United States can request a U.S. consulate to issue an immigrant visa for them and use their visas to enter as legal permanent residents.[2] Certain beneficiaries already present in the United States can, however, avoid leaving the United States to obtain an immigrant visa by adjusting status to that of a legal permanent resident.[3] However, under INA § 245(a), persons who were not inspected and admitted or paroled into the United States cannot adjust their status without leaving the United States and obtaining a visa at a U.S. consulate; under INA § 212(a)(9)(B)(i)(II), persons who have been in the United States unlawfully for more than one year are subject to a ten-year admissibility bar upon departure.[4]

Because *X* entered without authorization, he must return to his country to obtain a visa rather than request a green card from within the U.S. territory. And because he has been in the United States for more than a year after having entered without authorization, he will not be granted a visa to reenter the United States for ten years after his departure.

This Article proposes adopting a policy of favorably considering individuals in *X*'s position for "parole in place," which would allow them to adjust their immigration status in the United States and obtain a green card without needing to leave the country for a decade. In part I, this Article discusses the origin, mechanics, and potential scope of the legal scheme affecting immigrants in *X*'s position. In part II, this Article discusses the statutory and regulatory attempts to mitigate the harsh consequences of such scheme–and their insufficiency. Part III examines the concepts of parole and parole in place and their evolution. Part IV addresses concerns related to the Executive's

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[1] *See* 8 U.S.C. § 1151(b)(2)(A)(i); 8 U.S.C. § 1154(a)(1)(A)(i).

[2] 8 U.S.C. § 1201(a)(1).

[3] 8 U.S.C. § 1255.

[4] 8 U.S.C. § 1182(a)(9)(B)(i)(II).

authority to implement the recommended policy. Part V outlines statutory, regulatory, and policy-based vehicles for the enactment of the proposed policy.

I. THE UNLAWFUL PRESENCE BARS

The primary path for legal immigration to the United States is based on family petitions.[5] U.S. citizens and legal permanent residents have the right to request an immigrant visa be granted to certain relatives.[6] Once a U.S. citizen or legal permanent resident's petition for their relative is approved, there is a waiting time (ranging from zero to more than twenty years, depending on whether the petitioner is a U.S. citizen or a permanent resident, the relationship between the petitioner and the beneficiary, and the beneficiary's country of origin) before a visa will be available for the beneficiary.[7] Once a visa is available for a beneficiary who is not present in the United States, he or she must obtain a Department of State issued immigrant visa through "consular processing."[8]

However, certain beneficiaries already present in the United States when a visa becomes available for them are eligible to become legal permanent residents through "adjustment of status."[9] INA § 245(a) establishes that an application for adjustment of status to that of a legal permanent resident will be granted to a noncitizen who: (1) has been "inspected and admitted or paroled into the United States"; (2) is eligible for an immigrant visa; (3) is admissible to the United States, and (4) has an immigrant visa available for them.[10]

On September 30, 1996, President Bill Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act

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[5] *Compare* 8 U.S.C. § 1151(c)(1)(A)(i); *with* 8 U.S.C. § 1151(d)(1)(A).

[6] 8 U.S.C. § 1154(a)(1)(A)(i).

[7] There is no waiting time for immediate relatives (spouses, parents of adults, and minor children) of U.S. citizens. Among the other categories, the wait time ranges from zero (for spouses and minor children of legal permanent residents) to approximately 25 years (for Mexican married adult sons and daughters of U.S. citizens). *Visa Bulletin for July 2022*, U.S. DEP'T OF STATE (July 2022), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-july-2022.html [https://perma.cc/JK92-YREM].

[8] *See Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing [https://perma.cc/332J-QQD8] (last visited Feb. 4, 2023).

[9] 8 U.S.C. § 1255(a).

[10] *Id.*

("IIRIRA") into law.[11] One of IIRIRA's chief goals was to reduce unlawful immigration.[12] To that end, IIRIRA established a series of measures to deter noncitizens from entering without authorization, including vesting immigration officials with the power to remove recently arrived noncitizens without a hearing, increasing border security, and revamping border control systems.[13] IIRIRA also established measures aimed to deter noncitizens, regardless of their means of entry into the United States, from unlawfully remaining in the country.[14] IIRIRA established that, generally, an alien who is present in the United States without being admitted or paroled, or an alien who remains in the United States after his authorization to stay in the United States has expired, accrues "unlawful presence."[15] An alien who has accrued unlawful presence for 180 days and departs voluntarily before immigration proceedings are commenced against them becomes inadmissible for three years.[16] An alien who has accrued unlawful presence for one year or more and departs is inadmissible for ten years.[17] These bars, which are triggered by departure, can be waived in a narrow set of circumstances.[18]

The combination of the INA § 245(a) requirement that a noncitizen have been admitted and the three and ten-year bars of INA § 212 (a)(9)(B)(i)(I) and (II) creates an insurmountable obstacle for immigrants who have entered without authorization and lived in the United States for more than 180 days, even if their immediate relatives' petitions have been approved.[19] Because noncitizens need to have been admitted or paroled to adjust status under INA § 245(a), those noncitizens cannot adjust status and must depart for consular process.[20] But departure from the United States (in order to travel to obtain a visa through consular process) triggers either the three- or ten-year

[11] Illegal Immigration Reform and Immigrant Responsibility Act, Pub L. No. 104-208, 110 Stat. 3009-546 (1996).

[12] Ellen G. Yost, *Immigration and Nationality Law,* 31 INT'L L. 589, 590 (1997).

[13] J. Ira Burkemper, *The Impact of the IIRIRA's Unlawful Presence and Overstay Provisions on Temporary Workers*, 76 No. 47 Interpreter Releases 1749, 1749 (1999).

[14] *Id.* at 1750.

[15] IIRIRA § 301(b)(1)(B)(ii).

[16] 8 U.S.C. § 1182(a)(9)(B)(i)(I).

[17] 8 U.S.C. § 1182(a)(9)(B)(i)(II).

[18] *See* 8 U.S.C. § 1182(a)(9)(B)(v).

[19] 8 U.S.C. § 1255(a); *see also* 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II).

[20] 8 U.S.C. § 1255(a).

bars.[21] This obstacle likely discourages a potentially vast number of U.S.-citizen relatives of immigrants from requesting a visa for their relatives in the first place because of the knowledge that, even if their petition is eventually approved, their relatives will not have a viable way to obtain permanent residency.[22]

While one of IIRIRA's goals was to "crack[ ] down on illegal immigration,"[23] one of the consequences of the three- and ten-years bars has been to increase the number of unlawful immigrants, either by preventing many otherwise eligible immigrants from obtaining a green card or by discouraging noneligible immigrants from returning to their countries.[24] The problems that the three- and ten-year bars would cause were forecast in the pre-IIRIRA congressional debate.[25] The House Report dissenting views particularly stated that "undoubtedly thousands of people are going to accidentally be caught by this provision when we pass this law and suddenly will be faced with not being able to reenter the United States for 10 years."[26] The report goes on further to acknowledge that "the 10-year ban on reentry will inevitably divide families . . . and inflict extreme hardship on U.S. citizens and permanent residents who will be forced to make the impossible choice of having their family divided until a visa is available or leaving the United States themselves to keep their families together." [27] The IIRIRA was met with considerable criticism.[28] This is because the IIRIA prevents U.S.-citizen relatives from effectively petitioning for their noncitizen relatives' residency, it has been chastised as "mark[ing] some [U.S.] citizens . . . as unworthy of forming an official American family with a foreigner."[29] Additionally, IIRIRA's draconian approach to this and other issues has been

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[21] 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II).

[22] Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis,* 6 J. MIGRATION & HUM. SEC. 192, 199 (2018).

[23] *Id.* at 192 (citing President William J. Clinton, Statement on Signing the Omnibus Consolidated Appropriations Act, 1997 (Sept. 30, 1996)).

[24] *Id.* at 199.

[25] H.R. REP. NO.104-469, pt. 1, at 528 (1996).

[26] *Id*.

[27] *Id*.

[28] *See* Donald Kerwin, *How Our Immigration Laws Divide, Impoverish, and Undermine American Families*, 76 No. 31 Interpreter Releases 1213, 1223 (1999) [hereinafter *How Our Immigration Laws Divide*].

[29] Kerwin, *supra* note 22, at 192 (quoting Jane Lilly Lopez, *Redefining American Families: The Disparate Effects of IIRIRA's Automatic Bars to Reentry and Sponsorship Requirements on Mixed-Citizenship Couples*, 5 J. MIGRATION & HUM. SEC. 236, 246 (2017)).

described as "circular[ ]."[30] To prevent unlawful immigration, IIRIRA makes it impossible for immigrants unlawfully present to gain lawful status.[31] However, given that the penalty for the unlawful presence is only triggered upon departure, it is merely avoided by remaining in the United States.[32] The law perpetuates a class of undocumented aliens who cannot become permanent residents but nevertheless remain in the country,[33] as they ordinarily are not a priority for deportation, which focuses on criminal or dangerous aliens across administrations.[34]

The three- and ten-year bars potentially affect a number that, while difficult to estimate, likely includes millions of noncitizens and their families. As of 2019, there were approximately 45 million foreign-born individuals in the United States.[35] Of those, approximately 11 million were unauthorized immigrants.[36] Among the unauthorized, approximately two thirds had been in the United States for more than ten years.[37] While there is no direct data on the percentage of unauthorized immigrants that entered without inspection, there is a correlation between country of origin and manner of entry, as most unauthorized immigrants from Central America and Mexico

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[30] *How Our Immigration Laws Divide*, *supra* note 28, at 1221.

[31] Kristi Lundstrom, *The Unintended Effects of the Three- and Ten-Year Unlawful Presence Bars*, 76 L. & CONTEMP. PROBS. 389, 391–92 (2013).

[32] *Id.* at 389–90.

[33] *Id.* at 396.

[34] Sec. Jeh Charles Johnson, *Policies for Apprehension, Detention and Removal of Undocumented Immigrants*, U.S. DEP'T OF HOMELAND SEC., 3–4, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/Z6U3-94X7]; U.S. IMMIGR. & CUSTOMS ENF'T, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report,* at 21, https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/2V6U-KT6H]; Sec. David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, DEP'T OF HOMELAND SECURITY, at 3, https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/WB7R-54X7].

[35] U.S. CENSUS BUREAU, *American Community Survey*, at 4, https://data.census.gov/cedsci/table?y=2019&d=ACS%201-Year%20Estimates%20Detailed%20Tables&tid=ACSDT1Y2019.B05002 [https://perma.cc/QQ6S-S74B].

[36] Randy Capps et al., *Unauthorized Immigrants in the United States,* MIGRATION POL'Y INST. 1 (Dec. 2020), https://www.migrationpolicy.org/sites/default/files/publications/mpi-unauthorized-immigrants-stablenumbers-changingorigins_final.pdf [https://perma.cc/8JV6-MNVJ].

[37] Mark Hugo Lopez et al., *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/ [https://perma.cc/TXE2-EJV3].

entered unlawfully, while most unauthorized immigrants from every other region overstayed a nonimmigrant visa.[38] Because approximately 7.3 million of the total 11 million unlawful immigrants in the United States are either from Mexico, El Salvador, Guatemala or Honduras,[39] it is safe to assume that a large percentage of unlawful immigrants have entered without inspection.[40]

Many of these immigrants have immediate relatives and they could, through their relatives' petitions, become legal permanent residents if they could overcome the ten-year bar. In 2018, 1.6 million unauthorized immigrants were married to U.S. citizens, and 675,000 were married to legal permanent residents.[41] Also in 2018, 4.4 million U.S.-born children had one or two unauthorized immigrant parents.[42] While it would be difficult to estimate a precise number, there are likely millions of undocumented noncitizens that could become permanent legal residents through family petitions if they were not affected by the unlawful presence bars and the requirement to have entered with inspection. For instance, in November 2021, the Congressional Budget Office estimated that legislatively granting parole in place (in a similar way to that proposed by this Article) to noncitizens present in the United States since 2011, effectively removing the consequences of unlawful presence, would increase the amount of legal permanent residents by three million.[43] Yet, these individuals are left without an effective route to gain legal permanent residence.

II. INSUFFICIENCY OF STATUTORY EXCEPTIONS AND WAIVERS

IIRIRA contained certain measures that ameliorated the negative impact of unlawful presence and the three- and ten-year bars.[44] Since the enactment of IIRIRA, the United States Citizenship and Immigration Services, ("USCIS"), has also issued a series of regulations with the same goal.[45] However, these have

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[38] *Id.*
[39] Capps et al., *supra* note 36, at 6.
[40] Lopez et al., *supra* note 37.
[41] Capps et al., *supra* note 36, at 9.
[42] *Id.*
[43] H.R. 5376, 117th Cong. (2021–2022); Estimated Budgetary Effects of Title VI, Committee on the Judiciary, H.R. 5376 (2021), https://www.cbo.gov/system/files/2021-11/hr5376_title_VI_Judiciary.xlsx [https://perma.cc/64LH-588Q].
[44] IIRIRA § 301(b).
[45] 8 C.F.R. § 212.7(a), (e).

been insufficient to address the negative impact IIRIRA has had on American families.

A. Situations in Which a Noncitizen Is Exempt from Accruing Unlawful Presence

INA included certain situations in which unlawful presence would not be accrued.[46] No unlawful presence is accrued, for the purposes of the three and ten-year bars, by minors under the age of 18.[47] Unlawful presence starts accruing, however, when minors turn 18.[48] Therefore, unless a minor departs the country or successfully adjusts before turning 18, they will not be able to adjust status under INA § 245(a) or consular process if they become eligible for a visa later in their life.[49]

INA § 212(a)(9)(B)(iii)(II) also excludes asylum applicants from accruing unlawful presence while their asylum applications are pending.[50] However, the exception does not apply to those who worked before being granted work authorization.[51] Under the current regulations, applicants are allowed to request work authorization 150 days after filing their applications for asylum, as long as there are no applicant-caused delays.[52] But because asylum applicants are not granted welfare benefits nor provided with free legal representation, asylum seekers are pushed to enter the unauthorized labor marker and therefore accrue

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[46] 8 U.S.C. § 1182(a)(9)(B).

[47] 8 U.S.C. § 1182(a)(9)(B)(iii)(I).

[48] *Id.*

[49] 8 U.S.C. § 1255(a). The exception benefits, however, those minors who were granted prosecutorial discretion under the DACA program before the before 180 or 365 days after their eighteenth birthday because DACA beneficiaries do not accrue unlawful presence. *Consideration of Deferred Action for Childhood Arrivals (DACA) Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions [https://perma.cc/62XP-7JKL] (Oct. 7, 2022). That small subset of DACA beneficiaries can, if eligible for an immigrant visa, leave the country and receive an immigrant visa from a U.S. consulate without incurring in the three- or ten-year bars. *Id.*

[50] 8 U.S.C. 1182 § (a)(9)(B)(iii)(II).

[51] *Id.*

[52] *See* Asylumworks v. Mayorkas, No. 20-CV-3815, 2022 WL 355213, at *12 (D.D.C. Feb. 7, 2022); *USCIS Stops Applying Certain EAD Provisions for Asylum Applicants*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/uscis-stops-applying-certain-ead-provisions-for-asylum-applicants [https://perma.cc/HHT2-46XF] (Sept. 21, 2022).

unlawful presence.[53] Nonresidents that, having entered the United States on or before May 5, 1998, were on such date spouses or unmarried children of legalized aliens are also excluded from accruing unlawful presence.[54] Given that the cut-off date for this class occurred nearly twenty-five years ago, it is safe to assume that those beneficiaries who were not ineligible for a green card on other grounds have taken advantage of their possibility to leave the United States and obtain an immigrant visa through consular processing.

The Violence Against Women Act ("VAWA") amended the INA to enact a number of protections for immigrant victims of domestic violence.[55] Certain battered spouses or children of U.S. citizens of legal permanent residents,[56] and their minor children are exempt from accruing unlawful presence as long as there is a "substantial connection," between the domestic violence and their violation of the nonimmigrant status or their entrance without inspection.[57] Because the connection between the unlawful presence and the domestic violence needs to be "substantial," this exception benefits only a small percentage of the victims of domestic violence.[58] Similarly, under INA § 212(a)(9)(B)(iii)(V), victims of severe human trafficking do not accrue unlawful presence if they demonstrate that the trafficking has been a central reason why they are unlawfully present in the United States.[59] Again, only a small subset of those who are prevented from adjusting their status due to the combination of the three- or ten-year bars and their unlawful entry are within the scope of this exception.[60]

While the exceptions included in the INA benefit a number of aliens, the vast majority of those unlawfully present after entering without being inspected and who have a visa pending cannot take advantage of them, given their narrow scope.

[53] Lori A. Nessel, *Deliberate Destitution As Deterrent: Withholding the Right to Work and Undermining Asylum Protection*, 52 S.D. L. REV. 313, 350 (2015).

[54] Immigration Act of 1990, Pub. L. No. 101-649, § 301 104 Stat. 4978; 8 U.S.C. § 1182 (a)(9)(B)(iii)(III).

[55] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 803, 807 127 Stat. 54.

[56] 8 U.S.C. § 1182(a)(9)(B)(iii)(IV).

[57] 8 U.S.C. § 1182(a)(6)(A)(ii); 8 U.S.C. § 1182(a)(9)(B)(iii)(IV).

[58] 8 U.S.C. § 1182(a)(6)(A)(ii).

[59] 8 U.S.C. § 1182(a)(9)(B)(iii)(V).

[60] *Id.*

B. Unlawful Presence Bar Waiver

IIRIRA included a waiver for the unlawful presence bars.[61] The waiver—whose grant is discretionary and unreviewable by any court—may be granted, after the bar is triggered by departure, upon the noncitizen showing that their U.S. citizen or lawful permanent resident parent or spouse would suffer extreme hardship if admission was denied to the noncitizen.[62]

While the waiver has benefitted thousands of families,[63] its scope is too narrow to include the vast number of noncitizens potentially subject to the unlawful presence bars. The waiver is available for the sons, daughters, and spouses of U.S. citizens or legal permanent residents, but it is not available for parents of U.S. citizens or legal permanent residents.[64] This not only prevents parents of U.S. citizen children from requesting the waiver, but also fails to protect said children from the hardship caused by their parents' inability to become legal permanent residents.[65] Furthermore, because the caselaw, without defining extreme hardship, establishes that it must be beyond the common results of removal,[66] hardship stemming from separation, financial difficulties, diminished economic and educational opportunities and inferior medical attention,[67] or difficulties adjusting to life in another country,[68] unless in tandem with additional hardships, does not warrant a finding of extreme hardship.[69] This further narrows the universe of aliens who could expect their petitions for a waiver be approved.

Additionally, because the extreme hardship requirement is insufficiently defined in the statute and the regulations, the

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[61] 8 U.S.C. § 1182(a)(9)(B)(v).

[62] *Id.*

[63] *Number of Service-Wide Forms Fiscal Year To Date*, U.S. CITIZENSHIP AND IMMIGR. SERVS., (2020), https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf [https://perma.cc/7UTW-W23E].

[64] 8 U.S.C. § 1182(a)(9)(B)(v); SARAH B. IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW AND FAMILY § 12:21 (2022).

[65] Capps et al., *supra* note 36, at 10.

[66] *In re* Ngai, 19 I. & N. Dec. 245, 246–47 (B.I.A 1984). *See generally In re* Cervantes-Gonzalez, 22 I. & N. Dec. 560, 568 (B.I.A. 1999); *In re* Pilch, 21 I. & N. Dec. 627, 632–33 (B.I.A. 1996); *In re* Ige, 20 I. & N. Dec. 880, 883 (B.I.A. 1994); *In re* Kim, 15 I. & N. Dec. 88, 89–90 (B.I.A. 1974); *In re* Shaughnessy, 12 I. & N. Dec. 880, 883 (B.I.A. 1994).

[67] *In re* Ige, 20 I. & N. Dec. at 883.

[68] *In re* Pilch, 21 I. & N. Dec. at 632.

[69] *See In re* Anderson, 16 I. & N. Dec. 596, 596 (B.I.A 1978) (holding that political and economic conditions do not warrant relief unless accompanied by other factors such as age, health, and family ties).

outcomes of petitions for waivers are contradictory and difficult to predict.[70] The INA does not define what extreme hardship is.[71] However, the Board of Immigration Appeals, ("BIA"), has held that extreme hardship is "not a definable term of fixed and inflexible content or meaning" and that it "cannot be stated in a hard and fast rule," but that it "necessarily depends upon the facts and circumstances peculiar to each case."[72]

In fact, courts have acknowledged that inconsistent decisions are expected in this context, as the Ninth Circuit notes:

> It would not be helpful to compare at length the fact patterns of other cases that have found the presence or absence of 'extreme hardship.' It is difficult to compare situations of extreme hardship. . . . For each case the INS cites in support of its determination of no extreme hardship in the instant case, there are cases with similar fact patterns that go the other way.[73]

Given the lack of sufficient statutory or precedential guidance, there are significant discrepancies between adjudicators, which make the location where the application will be processed "[t]he greatest factor in predicting whether a given waiver will be approved."[74]

The lack of predictability for a petition for a waiver makes the process of requesting a waiver for the ten-year bar substantially impracticable. The three- and ten-year bars are not triggered by the unlawful presence but by departure from the United States subsequent to the unlawful presence.[75] As a consequence, the waiver—as originally enacted—could not be requested before departure from the United States.[76] This situation put the potential beneficiaries of the waiver in an extremely difficult situation: being unlawfully in the United

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[70] Lee O'Connor, *Representing the Unlawfully Present Part I*, 08–09 Immigr. Briefings 1.

[71] *See* Immigr. & Naturalization Serv. v. Jong Ha Wang, 450 U.S. 139, 144 (1981).

[72] *In re* Hwang, 10 I. & N. Dec. 448, 451–52 (B.I.A 1964).

[73] Saldana v. I.N.S., 762 F.2d 824, 829 (9th Cir. 1985), *amended*, 785 F.2d 650 (9th Cir. 1986); O'Connor, *supra* note 70, at 16 n.32 (2008) (citing *Saldana*, 762 F.2d at 829).

[74] Laurel Scott and Elizabeth Cannon, *I-601 Waivers and Extreme Hardship: Strategies for Writing a Convincing Narrative for an Application for Waiver of Grounds of Inadmissibility*, IMMIGR. DAILY, https://www.ilw.com/articles/2007,0717-scott.shtm [https://perma.cc/H7PU-3DA4] (last visited Feb. 4, 2023).

[75] 8 U.S.C. § 1182(a)(9)(B)(i).

[76] Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pts. 103, 212).

States and having a spouse or parent that would suffer extreme hardship in their absence, but only being able to request the waiver by departing, facing the risk of separation from their spouse or parent upon denial of the waiver request. In the best case, potential applicants had to wait overseas for the waiver to be processed and approved–a process that can take more than a year.[77] In the worst case, the waiver would be denied, and they would be separated from their families for ten years.[78]

C. Provisional Waiver

To provide noncitizens with level of certainty that they would be allowed to return to the United States after leaving and to address the issue of family separation during the pendency of the unlawful presence waiver, in 2013 USCIS devised a process to obtain a provisional, pre-departure waiver.[79] The process allows the noncitizen to request and obtain a provisional waiver for an unlawful presence bar before triggering the bar by leaving the country.[80] Upon the approval of the provisional waiver, the noncitizen can then depart, triggering the bar whose waiver has been pre-approved, and return to the United States with an immigrant visa after consular processing.[81] The waiver, available at its inception in 2013 only to spouses and minor children of U.S. citizens, became available for spouses and minor and adult children of U.S. citizens and legal permanent residents in 2014.[82]

Being that the provisional waiver is an administrative creation, the substantial requirements for the waiver are the same ones enumerated in INA § 212(a)(9)(B)(v) for the "traditional" waiver explained above. Therefore, while this program successfully has addressed some of the issues that made the waiver impracticable in its original form, it still cannot

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[77] *Id.*

[78] 8 U.S.C. § 1182(B)(i)(II).

[79] Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pts. 103, 212).

[80] Mahdis Azimi & David N. Schaffer, *It's All in the Details: A Review of the 2014 Immigration Executive Order*s, 27 DCBA BRIEF 28, 28 (2015).

[81] *Id.*

[82] *Id.*; *see also* Jeh Charles Johnson, *Expansion of the Provisional Waiver Program*, U.S. DEP'T OF HOMELAND SEC. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver_0.pdf [https://perma.cc/K64Q-GLXG].

provide a full solution to the problems caused by the unlawful presence bars. First, those without a United States Citizens ("USC") or Legal Permanent Resident ("LPR") spouse or parents are still prevented from adjusting their status, even if they have been in the United States for decades, have committed no infractions except those related to the unlawful presence, and have U.S.-citizen sons and daughters that could petition for them.[83] Furthermore, the waiver does not benefit those who, having a USC or LPR parent or spouse, cannot meet the high, and many times unpredictable, requirement of showing extreme hardship to their qualifying relatives.

D. Parole in Place for Military Family Members

Under INA § 245(a), noncitizens who have not been inspected and admitted can still adjust status to that of a legal permanent resident if they have been paroled. The Attorney General may parole, without admitting, noncitizens into the United States.[84] Because parole can be granted not only to noncitizens at the border, but also to noncitizens that are within the United States without having been previously admitted,[85] DHS has enacted a program to help immediate relatives of U.S. military personnel avoid the harsh consequences of unlawful presence by paroling said relatives while in the United States, thereby allowing them to adjust status without departing for a consular interview and without triggering the unlawful presence bar.[86] Because this Article proposes the extension of such system beyond the relatives of military personnel, the system will be discussed in depth in the next section.

III. PAROLE AND PAROLE IN PLACE

A. Parole Before IIRIRA

Through a grant of parole, DHS may allow, without admitting, aliens into the United States.[87] Under INA § 212(d)(5)(A), the Attorney General may "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent

[83] *See* 8 U.S.C. § 1182(a)(9)(B)(v).
[84] 8 U.S.C. § 1182(d)(5)(A).
[85] *See infra* Section IV.A.
[86] 8 U.S.C. § 1255(a); 8 U.S.C. § 1182(a)(9)(A)(i).
[87] 8 U.S.C. § 1255(a).

humanitarian reasons or significant public benefit any alien applying for admission to the United States."[88] Parolees have not been admitted; on the contrary, they are deemed to be applicants for admission.[89] In 1960, Congress expressly authorized the Executive to parole under INA § 212(d)(5)(A) certain refugees.[90] Even after a system to allow the conditional entrance of refugees was included in the amendments to the INA enacted in 1965,[91] the Executive continued using parole to allow refugees, including most of the 130,000 refugees evacuated from Vietnam only in 1976.[92] Refugees from Cuba and other countries were also paroled into the United States.[93] In practice, the parole power was exercised without any procedural or numerical constraints.[94]

The enactment of the Refugee Act of 1980[95] did not change such practice. The Refugee Act limited the parole authority by preventing the Attorney General from paroling "an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee."[96] However, two weeks after the Refugee Act was published on March 17, 1980, the events that started the Mariel boatlift crisis took place.[97] More than 100,000 Cuban nationals would arrive during the boatlift, forcing the government to use the parole authority. [98] Initially, the government applied an unwritten policy of detaining every arriving Cuban that was not prima facie eligible for admission.[99] This policy also affected Haitian immigrants which had also been

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[88] 8 U.S.C. § 1182(d)(5)(A).

[89] 8 U.S.C. § 1225(a)(1).

[90] Fair Share Refugee Act, Pub. L. No. 86-648, § 1, 74 Stat. 504, 504 (1960).

[91] *See* An Act to amend the Immigration and Nationality Act, and for other purposes, Pub. L. No. 89-236 §§ 201(a), 203(a)(7), 79 Stat. 911, 911, 913 (1965).

[92] Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 30 (1981).

[93] *Immigration Parole*, CONG. RSCH. SERV., 2, 6 (Oct 15, 2020), https://fas.org/sgp/crs/homesec/R46570.pdf. [https://perma.cc/WKG2-C76R].

[94] *See* 125 CONG. REC. 23190, 23232 (Sept. 6, 1979) (statement of Sen. Ted Kennedy).

[95] Refugee Act of 1979, Pub. L. No. 96-212, 74 Stat. 102 (1980).

[96] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

[97] KATHLEEN DUPES HAWK ET AL., FLORIDA AND THE MARIEL BOATLIFT OF 1980: THE FIRST TWENTY DAYS 32 (2014).

[98] Deborah M. Levy, *Detention in the Asylum Context*, 44 U. PITT. L. REV. 297, 305 (1983).

[99] *Id.*

arriving to Florida by boat since the early 1970s.[100] Haitian detainees initiated a class action,[101] leading a federal district court to invalidate the informal policy that the government had been applying.[102] As a consequence, the government published regulations to govern the entry of the asylum seekers arriving by sea.[103] Those regulations were based on the INA § 212(d)(5)(A) parole authority.[104]

Parole was also at the center of the "wet foot/dry foot policy" involving Cuban nationals.[105] After the dissolution of the Soviet Union, the ensuing financial crisis in Cuba led the Castro government to allow Cubans to leave the island.[106] Thousands of Cubans sailed on boats and rafts to the Florida coast, leading to the implementation of the "wet foot/dry foot" policy.[107] Under the "wet foot/dry foot" policy, Cuban nationals apprehended at sea would be returned to Cuba, while those who reached the U.S. territory would be paroled under INA § 212(d)(5)(A) and allowed to adjust status pursuant to the Cuban Adjustment Act of 1966.[108]

Cuban nationals were also paroled into the United States under the Special Cuban Migration Program, known informally as the "Cuban Migration Lottery," which stemmed from the 1994 U.S.-Cuba Migration Accord and was applied during the 1994, 1996, and 1998 fiscal years.[109]

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[100] Louis v. Nelson, 544 F. Supp. 973, 978 (S.D. Fla. 1982), *aff'd in part*, *rev'd in part sub nom.* Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *on reh'g*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

[101] *Id.* at 973, 984.

[102] *See* Jean v. Nelson, 711 F.2d 1455, 1463–64 (11th Cir. 1983), *on reh'g*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

[103] Levy, *supra* note 98, at 305–06.

[104] *Id.* at 304, 306–07.

[105] Lindsey Meyers, *U.S.-Cuba Immigration Through the Lens of Executive Regulatory Policy: Understanding the Recent End to a Half Century of Special Immigration Regulations for Cuban Nationals*, 33 GEO. IMMIGR. L.J. 91, 102–03.

[106] The Associated Press, *Protesters Battle Police in Havana: Castro Warns U.S*, N.Y. TIMES (Aug. 6, 1994), https://www.nytimes.com/1994/08/06/world/protesters-battle-police-in-havana-castro-warns-us.html [https://perma.cc/957T-5NA5]; Meyers, *supra* note 105, at 102–03.

[107] Meyers, *supra* note 105, at 103.

[108] *Id.* at 102–03.

[109] Ruth Ellen Wasem, *Cuban Migration to the United States: Policy and Trends*, CONG. RSCH. SERV. (June 2, 2009), https://sgp.fas.org/crs/row/R40566.pdf [https://perma.cc/AHE9-5PGH].

B. IIRIRA Changes to the Parole Statute

The use of parole to allow the entrance of large amounts of Cuban and Haitian immigrants into the country was criticized.[110] The Report of the Committee on the Judiciary of the House of Representatives on the Immigration in the National Interest Act of 1995, an antecedent of IIRIRA, reflects this criticism[111]:

> The text of section 212(d)(5) is clear that the parole authority was intended to be used on a case-by-case basis to meet specific needs, and not as a supplement to Congressionally-established immigration policy. In recent years, however, parole has been used increasingly to admit entire categories of aliens who do not qualify for admission under any other category in immigration law, with the intent that they will remain permanently in the United States. This contravenes the intent of section 212(d)(5), but also illustrates why further, specific limitations on the Attorney General's discretion are necessary.
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> . . . .
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> An example of a recent abuse of the parole authority stems from the September 1994 migration agreement negotiated by the Clinton Administration with Cuba. To implement this agreement, the Administration is using the parole authority to admit up to 20,000 Cuban nationals annually. The paroled Cubans will eventually be entitled to adjust to permanent resident status [under the Cuban Adjustment Act].
>
> . . . [T]he use of parole to fulfill the terms of the Cuban migration agreement is a misuse and intentionally admits, on a permanent basis, aliens who are not otherwise eligible for immigrant visas. . . .
>
> Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons . . . . It should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.[112]

Such objections to the use of parole led to an attempt to curtail the government's authority to grant parole. The Immigration in the National Interest Act bill, one of the antecedents of IIRIRA, proposed limiting the ability to parole noncitizens.[113] Under the proposed statute, parole would be

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[110] H.R. REP. NO. 104-469, at 140–41 (1995).

[111] *Id.*

[112] *Id.*

[113] *Id.* at 78.

granted only for "humanitarian" and "public benefit" reasons.[114] Under the proposed changes, "humanitarian" reasons were to be limited to the need of otherwise unavailable or urgent medical treatment, organ donation for close family members, and visits of dying close family members.[115] "Public benefit" reasons were to be limited to the situations of noncitizens helping U.S. law enforcement and whose presence would be required by the U.S. government or whose life would be threatened outside the United States, and to citizens brought into the United States to be prosecuted for crimes.[116] The proposed changes included prohibiting the government to parole noncitizens who had applied for, and denied, refugee status, or whose circumstances would not be included within the adopted definitions of "humanitarian" or "public interest" reasons.[117] The proposed legislation included, however, a new visa category "to provide for a limited number of humanitarian visas each year at the discretion of the Attorney General."[118]

The Committee's dissenting views, however, criticized the proposed amendment, stating that the parole authority under the then-current INA § 212(d)(5)(A) provided the Attorney General with "appropriate flexibility to deal with compelling immigration situations."[119] When finally enacted, IIRIRA merely replaced the phrase "for emergent reasons or for reasons deemed strictly in the public interest" with "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[120] IIRIRA did not define or otherwise limit the scope of "urgent humanitarian reasons" and "significant public benefit."[121]

C. *Parole After IIRIRA*

After IIRIRA, the use of parole continued to be used to fulfill various immigration and foreign policy goals.[122] Aimed to undermine the Cuban policy of outsourcing medical personnel overseas, the Cuban Medical Professional Parole Program allowed Cuban nationals who were medical professionals, were

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[114] *Id.*
[115] *Id.*
[116] *Id.* at 77–78.
[117] *Id.* at 78.
[118] *Id.* at 141.
[119] *Id*. at 538.
[120] Pub. L. No. 104-208, 110 Stat. 3009–689, 546 Sec. 602.
[121] *See id.*
[122] *See generally* CONG. RSCH. SERV., *supra* note 93.

working or studying in a third country under the authority of the Cuban government, and were not barred from admission into the United States, to present themselves at a U.S. Embassy and request parole under INA § 212(d)(5)(A).[123] Once paroled into the United States, they were able to obtain legal permanent status under the Cuban Adjustment Act.[124] The program was active from 2006 to 2017, when it was discontinued after U.S. and Cuban governments' efforts to normalize their relation.[125]

Parole has also been used to keep family unity on several opportunities in which backlogs in the availability of visas prevented family reunification. The INA puts a yearly cap on family immigrant visas, with the exception of those granted to immediate relatives of U.S. citizens.[126] For the other categories, beneficiaries have to wait for a visa to be available for them, sometimes for more than twenty years.[127] To address this issue in the context of Cuban immigration, in 2007 DHS announced the Cuban Family Reunification Parole Program.[128] This program allowed Cuban nationals who resided in Cuba, were the beneficiaries of an approved family petition, and for whom a visa was not available yet, to request parole under INA § 212(d)(5)(A).[129] The program's goal was to curb dangerous migration by sea from Cuba and to allow the United States to receive the quota of Cuban immigrants stipulated in the U.S.-Cuba Migration Accords of 1994.[130] The program suspended due to staff reductions in the U.S. embassy in Havana after a

[123] *Cuban Medical Professional Parole Program*, U.S. DEP'T OF STATE (Jan. 26, 2009), https://2009-2017.state.gov/p/wha/rls/fs/2009/115414.htm [https://perma.cc/CDP3-DRV2].

[124] Cuban Adjustment Act of 1966, ("CAAL"), Pub. L. No. 89-732, 80 Stat. 1; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107.

[125] *Cuban Medical Professional Parole (CMPP) Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/humanitarian-parole/cuban-medical-professional-parole-cmpp-program [https://perma.cc/3U65-5AP9] (last visited Feb. 4, 2023).

[126] 8 U.S.C § 1153(a).

[127] 8 U.S.C. §§ 1151(c), 1152(a); *Visa Bulletin for August 2022*, U.S. DEP'T OF STATE (July 1, 2022), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-august-2022.html [https://perma.cc/WV78-H8CY].

[128] Cuban Family Reunification Parole Program, 72 Fed. Reg. 65588 (Nov. 21, 2007).

[129] *Id.*

[130] *Id.*

suspected sonic attack on the embassy,[131] has been restarted in August 2022.[132]

Similarly, in 2014 a program was implemented to grant INA § 212(d)(5)(A) parole to Haitian nationals who resided in Haiti and were beneficiaries of certain approved family petitions.[133] The goal of the program was to advance the public interest by promoting "safe, legal, and orderly" immigration and help the reconstruction of Haiti after the 2010 earthquake.[134] While USCIS effectively discontinued the program in 2017,[135] it has announced that it will restart it upon the reopening of the USCIS office in Haiti, which is currently closed due to the Covid-19 pandemic.[136]

On a similar note, in 2016 USCIS announced the Filipino World War II Veterans Parole program.[137] Like the Cuban and Haitian family reunification programs, the Filipino World War II Veterans Parole program addresses the issue of the years- or decades-long wait for non-immediate relative beneficiaries of family petitions.[138] The program considers individual requests for parole from beneficiaries of family petitions by Filipino WWII veterans or their surviving spouses.[139] The notice announcing the program stated that the policy would both provide a significant

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[131] *Cuban Family Reunification Parole (CFRP) Program*, U.S. DEP'T OF STATE, https://cu.usembassy.gov/visas/immigrant-visas/cuban-parole-programs/cfrp-program/#:~:text=The%20State%20Department%20and%20the,its%20field%20office%20in%20Havana [https://perma.cc/5QLB-9XE7] (last visited Feb. 4, 2023); Gardiner Harris, *Tillerson Says U.S. May Close Cuba Embassy over Mystery Ailments*, N.Y. TIMES (Sept. 17, 2017), https://www.nytimes.com/2017/09/17/us/politics/tillerson-cuba-embassy.html?searchResultPosition=3 [https://perma.cc/XLP9-AJ5L].

[132] *The Cuban Family Reunification Parole Program,* U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/humanitarian-parole/the-cuban-family-reunification-parole-program [https://perma.cc/CHN5-JCSX] (Sept. 1, 2022).

[133] 79 C.F.R §§ 75581–82 (2014).

[134] *Id.*

[135] Steve Forester, *The Biden Administration Should Promptly Restart the Haitian Family Reunification Parole Program*, INST. FOR JUST. & DEMOCRACY IN HAITI (Feb. 11, 2011), http://www.ijdh.org/2021/02/projects/the-biden-administration-should-promptly-restart-and-improve-the-haitian-family-reunification-parole-program/ [https://perma.cc/B9WC-FJ4T].

[136] *The Haitian Family Reunification Parole Program,* U.S. CITIZENSHIP & IMMIGR. SERVS., (June 22, 2022), https://www.uscis.gov/humanitarian/humanitarian-parole/the-haitian-family-reunification-parole-hfrp-program [https://perma.cc/SW6N-GNQ9].

[137] 81 C.F.R § 28097.

[138] *Id.*

[139] *Id.*

public benefit and, in the case of ailing veterans and/or their spouses, address urgent humanitarian concerns.[140]

The parole authority has also been used to facilitate the reunification of Central American families through the Central American Minors Refugee and Parole Program.[141] Initiated in 2014, the program is open for qualifying relatives of citizens of Honduras, Guatemala, and El Salvador who are lawfully present in the United States.[142] Under the program, relatives are initially screened for refugee status.[143] Those not found eligible as refugees are considered for parole under INA § 212(d)(5)(A).[144] Of those, approximately 99% were granted parole in the 2014–2017 period.[145] The program, suspended during the President Donald Trump administration,[146] has been relaunched in 2021.[147]

Parole has also been used to promote the significant public benefit of "enhanc[ing] entrepreneurship, innovation, and job creation" through the International Entrepreneur Parole.[148] The program was designed to allow foreign entrepreneurs who cannot qualify for any of the statutory visas to invest in the United States and oversee their businesses.[149] The program, implemented through the addition of 8 C.F.R. § 212.19, establishes extensive criteria for foreign entrepreneurs to show that, through rapid business growth and job creation, their parole would bring significant public benefit.[150] To be considered for parole, applicants must show that they meet the program's definition of an entrepreneur.[151] Additionally, the applicants

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[140] *Id.*

[141] S.A. v. Trump, 363 F. Supp. 3d 1048, 1066 (N.D. Cal. 2018).

[142] *Id.* at 1054.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] Termination of the Central American Minors Parole Program, 82 Fed. Reg. 38,926 (Aug. 16, 2017).

[147] Off. of the Spokesperson, *Joint Department of State and Department of Homeland Security Rollout of the Application Process for the Central American Minors (CAM) Program*, U.S. DEP'T OF STATE (Sept. 13, 2021), https://www.state.gov/joint-department-of-state-and-department-of-homeland-security-rollout-of-the-application-process-for-the-central-american-minors-cam-program/ [https://perma.cc/ALX9-WM3N].

[148] International Entrepreneur Rule, 82 Fed. Reg. 5238, 5238 (Jan. 17, 2017) (to be codified at 8 C.F.R. pts. 103, 212, 274a).

[149] AUSTIN T. FRAGOMEN, JR. ET AL., 2 IMMIGR. L. & BUS. § 18:48 (2d ed. 2022).

[150] International Entrepreneur Rule, 82 Fed. Reg. 5239, 5238 (Jan. 17, 2017) (to be codified at 8 C.F.R. pt. 212).

[151] 8 C.F.R. § 212.19(b)(2)(ii)(A).

must show that they have either received private funding,[152] government awards in excess of certain amounts,[153] or that the enterprise has "substantial potential for rapid growth and job creation."[154] Similar criteria are used to decide whether a previously paroled entrepreneur is eligible for additional periods of parole.[155] The section reiterates that DHS will adjudicate the applications "in its sole discretion on a case-by-case basis" upon determination that the grant of parole will provide a significant public benefit and that the applicant "merits a favorable exercise of discretion."[156] DHS must consider, in exercising discretion, "all evidence."[157] In recent times, the parole authority has been used to allow entrance to Afghans and Ukrainians fleeing armed conflict. More than 70,000 Afghans had been paroled into the United States by January 2022.[158] Similarly, the *Uniting for Ukraine* program establishes a process for Ukrainian citizens living in Ukraine prior to the Russian invasion and their immediate family members to request parole into the United States.[159] Those eligible must have a U.S.-based sponsor file a statement of financial support and must undergo medical and security checks to be allowed to travel to the United States, where they are to be considered for parole at the port of entry.[160] The program is expected to be one of the means by which the United States will receive up to 100,000 Ukrainians, as pledged by President Joe Biden shortly after the Russian invasion.[161]

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[152] 8 C.F.R. § 212.19(b)(2)(ii)(B)(1).

[153] 8 C.F.R. § 212.19(b)(2)(ii)(B)(2).

[154] 8 C.F.R. § 212.19(b)(2)(iii).

[155] 8 C.F.R. § 212.19(c).

[156] 8 C.F.R. § 212.19(d)(1).

[157] *Id.*

[158] U.S. DEP'T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY OPERATION ALLIES WELCOME AFGHAN EVACUEE REPORT DECEMBER 2021, at 7 (2022), https://www.dhs.gov/sites/default/files/2022-03/DMO-OSEM%20-%20Department%20of%20Homeland%20Security%20Operation%20Allies%20Welcome%20Afghan%20Evacuee%20Report.pdf [https://perma.cc/9H87-4CW8].

[159] *Uniting for Ukraine*, U.S. DEP'T OF HOMELAND SEC. (Sept. 16, 2022), https://www.dhs.gov/ukraine [https://perma.cc/LW6S-NMWH].

[160] *Id.*

[161] *President Biden to Announce Uniting for Ukraine, a New Streamlined Process to Welcome Ukrainians Fleeing Russia's Invasion of Ukraine*, U.S. DEP'T OF HOMELAND SEC. (Apr. 27, 2022), https://www.dhs.gov/news/2022/04/21/president-biden-announce-uniting-ukraine-new-streamlined-process-welcome-ukrainians [https://perma.cc/Q2UD-QNK7].

D. Parole in Place for Military Family Members

In 2007, DHS started granting parole to relatives of members of the armed forces who were in the country without having been inspected or admitted.[162] In May 2007, Specialist Alex Jimenez was abducted near Amiriyah, Iraq.[163] At the time of his disappearance, his wife Yaderlin Hiraldo, a noncitizen, was in removal proceedings.[164] Although Specialist Jimenez's petition for an immigrant visa for Ms. Hiraldo had been approved, she was not able to adjust her status because, having entered unlawfully, she had not been admitted or paroled; if removed, she faced being subject to the ten-year unlawful presence bar.[165]

Jimenez's story was made public and Senator John Kerry wrote a letter on behalf of Ms. Hiraldo to DHS Security Secretary Michael Chertoff.[166] Secretary Chertoff ordered parole in place be granted to Ms. Hiraldo, who could then adjust her status and avoid being ordered deported.[167] (Unfortunately, Specialist Jimenez was killed and his body was found 14 months after his disappearance).[168] After Ms. Hiraldo, other military relatives were granted parole in place.[169] Finally, on November 15, 2013, the DHS Office of the Director issued a memo amending the USCIS Adjudicator's manual to clarify the parole in place policy

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[162] *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 15, 2013) [hereinafter *Parole in Place Memo*], https://www.uscis.gov/sites/default/files/document/memos/2013-1115_Parole_in_Place_Memo_.pdf [https://perma.cc/EQ25-GT4B].

[163] *2 of 3 Missing U.S. Soldiers May Be Alive*, ABC NEWS (Feb. 9, 2009, 10:26 PM), https://abcnews.go.com/International/story?id=3192089 [https://perma.cc/RKG2-HDKL].

[164] Associated Press, *Missing Soldier's Wife Gets Green Card,* FOX NEWS (Jan. 13, 2015, 3:27 PM EST), https://www.foxnews.com/story/missing-soldiers-wife-gets-green-card [https://perma.cc/8QMV-TATK].

[165] *Immigration Problems of US Military Members, Veterans, & Their Families: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., & Int'l Law*, 110 Cong. 7–8 (2008) (Statement of Margaret D. Stock).

[166] *Id.* at 4.

[167] *Missing Soldier's Wife Gets Green Card, supra* note 164.

[168] Michael Robert Patterson, *Alex Ramon Jimenez & Byron Wayne Fouty*, ARLINGTON NAT'L CEMETARY (July 6, 2022), https://www.arlingtoncemetery.net/group-burial-iraq-july-2007.htm [https://perma.cc/2CCU-2LH4].

[169] Stock, *supra* note 165, at 1; *see also* Letter from Hon. Janet Napolitano, Sec. of Homeland Security, to Hon. Zoe Lofgren, U.S. HOUSE OF REPRESENTATIVES (Aug. 30, 2010), http://cmsny.org/wp-content/uploads/Napolitano-Letter-08.30.101.pdf [https://perma.cc/86R8-RNE7].

for military family members.[170] The memo acknowledged that uncertainty regarding their relatives' immigration situations caused "stress and anxiety" to U.S. service members, potentially affecting military preparedness.[171] The memo also acknowledged "support and care" owed to military veterans.[172] While reaffirming that a grant of parole in place is discretionary, the memo stated that parole should be "an appropriate exercise of discretion" for spouses, children, or parents of active or former members of the Armed Forces, Selected Reserve, or Ready Reserve.[173]

Military parole in place has since been incorporated into the USCIS Adjudicator's Field Manual.[174] The procedure to request military parole is simple.[175] The noncitizen must file a designated form and include evidence of the relationship with the military relative, of the relative's military status, and of any other equities supporting the grant of parole in place.[176] Relatives of deceased military members must also submit evidence that they were in the United States at the time of the relative's death.[177] The Field Manual reiterates that, under INA § 212(d)(5)(A), a grant of parole remains discretionary.[178] However, it states that the fact that the noncitizen is a spouse, parent, son or daughter of a member (or previous member, if honorably discharged) of the U.S. armed forces or the Selected Reserve generally warrants a favorable exercise of the parole power "[a]bsent a criminal conviction or other serious adverse factors."[179]

The military parole in place program has been very successful.[180] For instance, 6,312 parole in place applications were granted in 2021[181] and 4,967 were granted in 2020.[182] The

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[170] *Parole in Place Memo, supra* note 162.

[171] *Id.* at 2.

[172] *Id.*

[173] *Id.*

[174] *Adjudicator's Field Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS., Ch. 21, (2022), https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf [https://perma.cc/6V3C-N9XJ].

[175] *Id.* § 21.1(c).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Margaret D. Stock, *Military Immigration Issues*, 30 GPSOLO 38, 41 (2013).

[181] *Number of Service-Wide Forms by Quarter, Form Status, and Processing Time, Fiscal Year 2021, Quarter 4,* U.S. CITIZENSHIP & IMMIGR. SERVS. (2022),

overwhelming support for the program has led Congress to endorse it at § 1758 of the National Defense Appropriation Act for the Fiscal Year 2020, which affirms the "importance of the parole in place authority of the Secretary of Homeland Security," and mandates the Secretary of Homeland Security to consider, on a case-by-case basis, whether granting a request for military parole in place would constitute a significant public benefit.[183]

After parole in place has been granted, beneficiaries become eligible for adjustment of status under INA § 245(a).[184] Notably, the grant of parole in place does not cure other grounds of inadmissibility, including inadmissibility based on current unlawful presence or unauthorized employment.[185] Consequently, only parolees who are immediate relatives of U.S. citizens (spouses and children of U.S. citizens of any age and parents of adult U.S. citizens), to whom such grounds of inadmissibility do not apply, can usually adjust their status after being paroled.[186] The next section analyzes whether the Executive has the authority to extend the aforementioned military policy to a wider set of families.

IV. THE EXECUTIVE HAS THE AUTHORITY TO ENACT THE POLICY

In the absence of congressional action, every substantial immigration-related action in the last three presidencies has been initiated by the Executive and systematically challenged in court.[187] Therefore, this note would not be complete without

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https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf [https://perma.cc/Y96V-E2WH].

[182] *Number of Service-Wide Forms Fiscal Year to Date, by Quarter and Form Status, Fiscal Year 2020*, U.S. CITIZENSHIP & IMMIGR. SERVS., (2021), https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf [https://perma.cc/T2P7-83FQ]; Stock, *supra* note 180.

[183] 50 U.S.C. § 1758. For a dissenting voice, see *Immigration Needs of America's Fighting Men and Women: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., & Int'l L. of the Comm. on the Judiciary*, H.R., 110th Cong. 36–37 (2008) (statement of Senator Steve King).

[184] 8 U.S.C. § 1255(a).

[185] 8 U.S.C. § 1255(c).

[186] *Id.*

[187] *See* United States v. Texas, 579 U.S. 547, 548 (2016) (affirming injunction against President Obama's expansion of DACA and the enactment of DAPA programs); Washington v. Trump, 847 F.3d 1151, 1156–57 (9th Cir. 2017) (affirming injunction against President Trump's first "Muslim Ban" order); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 573, 606 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741, 756–57, 789 (9th Cir. 2017) (affirming injunctions against President Trump's second "Muslim Ban" order); Trump v. Hawaii, 138 S. Ct. 2392,

analyzing the potential challenges the proposed policy would face. The analysis will be limited to whether INA § 212(d)(5)(A) authorizes the Executive to implement, either through regulation or through policy, the proposed application of parole in place.

A. *Parole Can Be Granted to Noncitizen Who Are Inside the United States*

The power to grant parole to noncitizens who are already present in the United States has been analyzed in a 1998 legal opinion by the INS General Counsel's Office[188] and the 2013 USCIS memorandum that incorporated the military "parole in place" policy into USCIS's Adjudicator's Field Manual.[189] INA § 212(d)(5)(A) makes noncitizens "applying for admission" eligible for parole.[190] While under INA § 212(a)(6)(A)(i), noncitizens who entered without being inspected or paroled or who arrived outside a port of entry are inadmissible, INA § 235(a)(1)(A) establishes that such noncitizens are deemed "applicants for admission."[191] Therefore, those noncitizens who are in the United States without having been admitted may be granted parole.

The 1998 opinion also analyzed whether the INS's (currently DHS) authority to grant parole in place was limited by regulation only to those noncitizens classified as "arriving aliens."[192] Arriving aliens are "applicant[s] for admission coming or attempting to come" into the United States at a port of entry, or those interdicted at sea and brought to the United States.[193] 8 C.F.R. § 212.5, which regulates parole, only does it in reference to

2408–09 (2018) (reversing injunction of President Trump's third "Muslim Ban"); Innovation L. Lab v. Wolf, 951 F.3d 1073, 1095 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 617 (2020), and *vacated and remanded sub nom*. Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021), *and vacated as moot sub nom*. Innovation L. Lab v. Mayorkas, 5 F.4th 1099 (9th Cir. 2021) (affirming injunction against President Trump's Migrant Protection Protocols); Texas v. Biden, 20 F.4th 928, 1004 (5th Cir. 2021) *rev'd and remanded*, Biden v. Texas, 142 S. Ct. 2528 (2022) (affirming permanent injunction against President Biden's termination of Migrant Protection Protocols); Cook Cnty. v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020), *cert. dismissed sub nom.* Mayorkas v. Cook Cnty., 141 S. Ct. 1292 (2021) (affirming injunction against President Trump's Public Charge Rule).

[188] *Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens*, U.S. DEP'T OF JUST., IMMIGR. AND NATURALIZATION SERVS. Legal Op. No. 98-10 (INS), 1998 WL 1806685, at *3.

[189] *Parole in Place Memo, supra* note 162.

[190] 8 U.S.C. § 1182(d)(5)(A).

[191] 8 U.S.C. § 1182(a)(6)(A)(i); 8 U.S.C. § 1225(a)(1).

[192] U.S. DEP'T OF JUST., *supra* note 188, at *2.

[193] 8 C.F.R. § 1.2 (2011).

certain arriving aliens.[194] The 1998 opinion therefore raised the question of whether, pursuant to 8 C.F.R. § 212.5, the INS (currently DHS) was precluded from granting parole to non-arriving aliens.[195] The opinion concluded that the INS was not precluded from granting parole to non-arriving aliens for two reasons. First, because nothing in the regulations expressly prevents the INS from doing so and second, because the AG had delegated its full authority under the INA to the INS, with the exception of that delegated to EOIR, and the INA does not limit the parole authority to arriving aliens.[196]

Furthermore, congressional endorsement of the military parole program in the Defense Appropriation Act for the Fiscal Year 2020, including language that the Secretary of Homeland Security "shall" consider whether granting parole in place would "enable . . . family unity that would constitute a significant public benefit," leaves little doubt as to the statutory power of the Executive to grant parole to individuals already in the United States.[197]

B. Parole Can Be Granted to a Large Number of Noncitizens

A potential argument against the use of parole in place for the enactment of the proposed policy could be that INA § 212(d)(5)(A) must be used sparingly and must be limited to a very narrow set of situations.[198] As explained in Section III, this argument has been increasingly stated since the adoption of the Refugee Act of 1980.[199] But Congress, having debated the possibility of enacting such narrow standard, left the statutory language unchanged, in spite of the fact that the executive has used and still uses an expansive interpretation of its parole powers. Furthermore, Congress has not only acquiesced, but endorsed, an expansive interpretation of the parole power by

[194] 8 C.F.R. § 212.5(b)(c) (1952).

[195] U.S. DEP'T OF JUST., *supra* note 188, at *2.

[196] *Id.*

[197] National Defense Authorization Act For Fiscal Year 2020, Pub. L. No. 116-92, § 1758, 133 Stat. 1860 (2019).

[198] *See* Memorandum from John Kelly, Sec'y of Homeland Sec., to Kevin McAleenan, Acting Comm'r of U.S. Customs & Border Prot. et al., *Implementing the President's Border Security and Immigration Enforcement Improvement Policies* (Feb. 20, 2017).

[199] *See supra* text accompanying notes 95–104.

incorporating the military parole program in the Defense Appropriation Act for the Fiscal Year 2020.[200]

Under a restrictive view of the parole power, "[t]he parole provisions were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law."[201] Under this view, "urgent humanitarian reasons" are mostly those related to medical emergencies, while "significant public benefit" is mostly limited to noncitizens required to appear as witnesses.[202]

This understanding is based on an erroneous interpretation of the legislative history of the parole authority. Congressional records preceding several INA amendments have shown that legislators had concerns about the expansive use of parole for the admission of refugees; furthermore, several amendments to the INA have somehow narrowed the scope of parole.[203] However, while Congress has discussed limiting the parole authority to medical emergencies and law enforcement actions, it has refused to do so.

The parole authority, first legislated in the INA of 1952, was used to cope with the influx of Hungarian refugees caused by the 1956 Hungarian crisis, given that the 1952 INA included no refugee-specific statute.[204] While the Congressional debates leading to the Refugee Act of 1965 included proposals of narrowing the parole statute, legislators also underscored the importance of a flexible statute: In floor debate, Sen. Philip Hart cautioned that despite language in the House report addressing the past use of parole authority to admit refugees, and the attempt to exclude its application to large groups of refugees, he "would expect this general rule of thumb would not forego in all cases the use of [§ 212(d)(5) of the INA] for the conditional entry of refugees, if such were deemed in the national interest of our

[200] National Defense Authorization Act For Fiscal Year 2020, Pub. L. No. 116-92, § 1758, 133 Stat. 1860 (2019).

[201] Mason v. Brooks, 862 F.2d 190, 194 (9th Cir. 1988) (citing S. REP. NO. 748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 3328, 3335).

[202] *See* Brief of Indiana and Eighteen Other States as Amici Curiae in Support of Respondents at 8, Biden v. Texas, 142 S. Ct. 1098 (2022) (No. 21–954).

[203] CONG. RSCH. SERV., *supra* note 92, at 2–3.

[204] *Id.* at 2, n.6.

country."[205] Eventually, the 1965 Act left the parole language unchanged.[206]

Before the enactment of the 1980 Refugee Act, arguments about the appropriate extent of the parole authority also ensued, particularly in consideration of the extensive use of parole to admit refuges from Indochina, Cuba, Chile, Argentina, the Soviet Union, and other countries during the 1970s.[207] The Refugee Act eventually limited the administration's parole authority in the context of asylum by expanding INA § 212(d)(5) with the addition of subsection (B), under which,

> [t]he Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.[208]

However, the parole authority outside the realm of asylum was left unchanged.[209]

A similar discussion took place during the congressional debates leading to IIRIRA.[210] To curtail the executive's parole authority, one of the antecedents of IIRIRA proposed limiting the parole authority to "an urgent humanitarian reason" or to "a reason deemed strictly in the public interest."[211] The antecedent defined "urgent humanitarian reason" as one related to urgent or unavailable medical care, organ or tissue donation, or imminent death of a noncitizen's relative; and "reason[s] deemed strictly in the public interest" as those related to noncitizens collaborating with a law enforcement investigation or needed to be brought into the United States as criminal defendants.[212]

However, such proposed restrictions were met with resistance.[213] "The current law provides the Attorney General with appropriate flexibility to deal with compelling immigration situations. . . . In light of the proposed refugee cap, this provision unwisely ties the Administration's hand in an area where

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[205] S. REP. NO. 89-24196, at 24238–39.
[206] 8 U.S.C. § 1182(a).
[207] *See* Anker & Posner, *supra* note 92, at 30.
[208] Pub. L. No. 96–212, Mar. 17, 1980, 94 Stat 108.
[209] *Id.*
[210] *See supra* Part III.
[211] Immigration in the National Interest Act of 1995, 104 H.R. 1915 § 524.
[212] *Id.*
[213] H.R. REP. NO. 104–469, pt. 1, at 141 (1996).

flexibility is always needed to deal with unforeseen emergency migration circumstances."[214] The narrowing of the executive's authority effectively enacted by IIRIRA was much more modest, as it simply added that parole should be granted on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," but without defining these concepts.[215]

In sum, the legislative history does not support an interpretation under which Congress intended to narrow the parole authority to rare situations such as medical emergencies or to criminal proceedings-related scenarios. First, when a legislative amendment has been proposed, the United States Supreme Court has considered its rejection to interpret the statute in a way contrary to the amendment.[216] While debating what would eventually become IIRIRA, Congress had drafted a version of the parole language that expressly restricted parole to medical- and law enforcement-related situations; however, it finally enacted a much less restrictive amendment of the parole article, in tune with the opinions that claimed the need of flexibility in the parole context.[217] Second, the contemporaneous interpretation of a rule "must be given great weight," particularly when Congress acquiesces to such interpretation.[218] After IIRIRA was enacted, the government did not limit the use of parole to sparce, extreme situations.[219] On the contrary, it not only kept its parole policies unchanged but also added, shortly

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[214] *Id.* at 538.

[215] Omnibus Consol. Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat 3009.

[216] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952). One of the issues in Youngstown was whether the President had the statutory authority to seize an industry when its activity was at risk of being halted due to labor conflicts. *Id.* at 585. In holding that such authority did not exist, the Court evaluated, among other reasons, that an amendment to the relevant statute granting the President authorization to seize companies in case of emergency had been proposed and rejected. *Id.* at 586.

[217] *See* Reply for the Petitioners at 16–17, Biden v. Texas, 21-954, 2022 WL 2347211 (June 30, 2022), 2022 WL 1180109 (citing H.R. REP. NO. 104-828, at 162 (1996) (Conference Report)).

[218] United States v. Bergh, 352 U.S. 40, 46–47 (1956); *see also* United States v. Clark, 454 U.S. 555, 564 (1982); Chemehuevi Tribe of Indians v. Fed. Power Comm'n, 420 U.S. 395, 410 (1975) (deference due to "longstanding administrative construction . . . enhanced by the fact that Congress gave no indication of its dissatisfaction with the agency's interpretation"); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("[T]he long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [practice has] been made in pursuance of its consent or of a recognized administrative power . . . .").

[219] *See supra* Section III.C.

after the enactment of IIRIRA, a number of policies that included noncitizens in situations far beyond the narrow interpretation of parole that Congress analyzed but did not enact.[220]

Furthermore, not only has Congress remained silent throughout the years in response to an expansive interpretation of the parole authority, but in 2019 endorsed the military family parole in place program, which is based on such an interpretation.[221] In fact, limiting the use of parole to situations in which entrance into the country is necessary for medical issues or for law enforcement would render parole in place unlawful, as their beneficiaries are already inside the United States territory.[222] By endorsing a program that paroles those who are already inside the United States, Congress confirms that the scope of the Executive's parole authority goes beyond such narrow situations.

Finally, parole can be granted to a large number of individuals given that nothing indicates that "case-by-case" must equal "a small number,"[223] particularly when the INA establishes no caps in connection with the parole authority.[224]

C. The Fact That Parole Must Be Granted on a Case-by-Case Basis Does Not Prevent the Executive from Enacting the Proposed Policy

An argument has been made that, given that parole must be granted on a "case-by-case" basis, the administration cannot exercise its parole authority in a general way, that is, creating categories of noncitizens deemed eligible for parole.[225] For

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[220] *Id.*

[221] National Defense Authorization Act, Pub. L. No. 116-92, 133 Stat. 1860 § 1758 (2019).

[222] 8 U.S.C. §§ 1255(a), 1255(c).

[223] Brief of Bipartisan Former Officials of the Dep't of Homeland Sec. et al. as Amici Curiae in Support of Petitioners at 5, Biden v. Texas, 142 S. Ct. 2528 (2022) (No. 21-954) (hereinafter Bipartisan Brief).

[224] *See* 8 U.S.C. § 1151(c).

[225] *See* Memorandum from John Kelly, Sec'y of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot. et al., *Implementing the President's Border Security and Immigration Enforcement Improvement Policies* (Feb. 17, 2017) (Kelly Memo) – ECF No. 33-5 at 2 (AR000022), 9 (AR000030) ("The practice of granting parole to certain aliens in pre-designated categories in order to create immigration programs not established by Congress, has contributed to a border security crisis, undermined the integrity of the immigration laws and the parole process, and created an incentive for additional illegal immigration."); *see also* Brief for Respondents at 28, Biden v. Texas, No. 21-954, 2022 WL 1097049 (Apr. 7, 2022) ("The requirement that a power must be exercised on a case-by-case basis

example, the Fifth Circuit held, in a decision later overturned by the United States Supreme Court, that a policy based on the parole of every noncitizen apprehended at the border that the government does not have the physical capacity to arrest would run against the "case-by-case" language in INA § 212(a)(5)(A).[226] Similarly, the District Court for the Northern District of California held that DHS's rescission of the Central American Minor Parole Program (in which parole was granted to virtually every applicant) based on a prior DHS interpretation that INA § 212(d)(5)(A) was to be granted "sparingly and only in individual cases" was not legally erroneous.[227]

However, while the "case-by-case" language merely prevents the administration from creating categories of noncitizens to which parole will be granted automatically, it does not prevent the administration from establishing general guidelines defining a parole policy.[228] Since the statutory enactment of the parole power and throughout its various modifications, every administration has designated specific classes of aliens to be favorably considered for parole, interpreting this as a valid exercise of the parole authority "so long as the parole of each alien within the class is considered as a discretionary, case-by-case basis."[229]

There is very little relevant case law on the matter (primarily because most challenges to the exercise of parole authority have been made to try to *compel* the government to grant parole in individual or class cases, generally by arguing that the government abused its discretion in denying or revoking

generally precludes the exercise of that power on a categorical basis" (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985)); FBI v. Abramson, 456 U.S. 615, 631 (1982).

[226] Texas v. Biden, 20 F.4th 928, 993–98 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *rev'd*, 142 S. Ct. 2528 (2022).

[227] S.A. v. Trump, 363 F. Supp. 3d 1048, 1064, 1079–83 (N.D. Cal. 2018).

[228] *See, e.g.*, Jeh Charles Johnson, *Families of U.S. Armed Forces Members and Enlistees*, U.S. DEP'T OF HOMELAND SEC. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf [https://perma.cc/YC22-S5H9].

[229] *Id.*; *see also* Biden v. Texas, 142 S. Ct. 2528, 2543 (2022). Case-by-case is defined as, "[o]n the basis of, or according to, each individual case; so as to consider each case separately, taking into account its individual circumstances and features." *Case-by-Case*, OXFORD ENG. DICTIONARY, https://www-oed-com/proxygt-law.wrlc.org/view/Entry/421463?redirectedFrom=case-by-case&print (last visited Feb. 16, 2022); *see* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999) (finding that statutory language "with respect to an individual" requires analysis "on a case-by-case basis").

parole).[230] However, the Supreme Court has endorsed an expansive interpretation of the Executive's parole power in *Biden v. Texas*, 142 S. Ct. 2528 (2022).

In *Biden v. Texas*, several states brought suit against the President Joe Biden administration's decision to terminate the Migrant Protection Protocols ("MPP").[231] MPP, also known as "Remain in Mexico," was a President Donald Trump administration program after which certain undocumented noncitizens at the Southern border were neither detained nor released into the United States but returned to Mexico to wait for their removal cases to be heard and decided.[232] The statutory authority the program was based on was INA § 235(b)(2)(C), which states that DHS "may return [an] alien [arriving on land from a contiguous territory] to that territory pending a [removal] proceeding."[233] After President Joe Biden announced that the program would be terminated, a number of states filed suit to enjoin the termination of the program.[234] The trial court granted the injunction[235] and the Fifth Circuit affirmed the decision.[236] The Fifth Circuit based its decision on a novel interpretation of the interaction of INA § 235(b)(2)(A) and INA § 235(b)(2)(C).[237] Under INA § 235(b)(2)(A), a noncitizen applying for admission who is not admissible "shall be detained" during their removal proceedings.[238] But if the government cannot detain all inadmissible applicants due to lack of space, the Fifth Circuit reasoned, the government must return the noncitizens it cannot detain to a continuous territory pursuant to INA § 235(b)(2)(C).[239] In reversing, the Supreme Court found, however, that the word "may" in INA § 235(b)(2)(C) made the return option discretionary, regardless of whether the government complies with the detention mandated by INA § 235(b)(2)(A).[240] Relevant to the issue of parole, the Supreme Court additionally reasoned that the option, used "to some extent" by every administration, of

[230] *See* Jean v. Nelson, 472 U.S. 846, 849 (1985).
[231] *Biden*, 142 S. Ct. at 2531.
[232] *Id.* at 2534–35.
[233] 8 U.S.C § 1225(b)(2)(C).
[234] *Biden*, 142 S. Ct. at 2531.
[235] *Id.*
[236] *Id.*
[237] *Id.* at 2537–38.
[238] 8 U.S.C. § 1225(b)(2)(A).
[239] *Biden*, 142 S. Ct. at 2538.
[240] *Id.* at 2541.

paroling noncitizens under INA § 212(d)(5)(A) "additionally makes clear" that returning noncitizens is not the only alternative to detention.[241] While the Supreme Court held that it did not have to decide whether the Biden administration was lawfully exercising its parole authority,[242] it implicitly rejected the dissenting opinion that forwarded the idea that "Congress twice amended [INA § 212(d)(5)(A)] to limit the scope of the parole power and prevent the executive branch from using it as a programmatic policy tool."[243] Furthermore, Justice Kavanaugh's concurring opinion stated, referring to the parole authority, that "[b]ecause the immigration statutes afford substantial discretion to the Executive, different Presidents may exercise that discretion differently. . . . For example, when there is insufficient detention capacity . . . DHS [can] choose[ ] to parole noncitizens into the United States [but] must reasonably explain why parole provides a 'significant public benefit.' "[244] Nothing in the Supreme Court decision or its concurrence seems to indicate that parole must be limited to a few, exceptional cases.

Furthermore, the Homeland Security Act of 2002 reinforces the government's authority to establish a parole policy.[245] Under 6 U.S.C. § 202(5), the government has the authority to "establish 'national immigration . . . policies and priorities.' "[246] The federal government can hardly assure uniform and predictable application of the parole power that the INA confers on it without providing its officers with instructions that define which situations are to be considered as involving "urgent humanitarian reason[s]" or "significant public benefit," and, in doing so, the federal government will necessarily create categories.[247] As long as parole is not granted automatically to every member of a category, the creation of these categories does not violate the "case-by-case" mandate, but merely establishes guidelines to decide each case individually.[248]

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[241] *Id.* at 2543–44.
[242] *Id.* at 2544.
[243] *Id.* at 2555 (Alito, J., dissenting) (citations omitted) (citing Texas v. Biden, 20 F.4th 928, 947 (5th Cir. 2021)).
[244] *Id.* at 2549 (Kavanaugh, J., concurring).
[245] *See* 6 U.S.C. § 202(5).
[246] Bipartisan Brief, *supra* note 223; 6 U.S.C. § 202(5).
[247] Bipartisan Brief, *supra* note 223, at 14–16.
[248] *See* Johnson, *supra* note 228.

V. PROPOSED APPLICATION OF PAROLE IN PLACE

A. *Legislative, Administrative, or Policy-Based Approaches*

"Parole-in-place" as a means to alleviate the harsh consequences of the ten-year bar for those who entered without inspection could be adopted through legislation, regulation, or policy.[249]

The congressional gridlock in the face of an immigration system that has been universally deemed "broken"[250] has already been pointed out multiple times.[251] The persistence of this situation makes comprehensive immigration reform unlikely. An amendment to the INA to grant advance parole in place for certain groups of noncitizens who entered the United States without inspection may be somewhat more attainable, while still difficult given the gridlock that is currently paralyzing Congress in nearly all areas.[252] Congressmen on both sides of the aisle could choose to legislate parole in place and establish fixed rules rather than allow the Executive to regulate the matter via

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[249] For similar proposals, see Susan B. Dussault, *Who Needs DACA or the DREAM Act? How the Ordinary Use of Executive Discretion Can Help (Some) Childhood Arrivals Become Citizens*, 22 LEWIS & CLARK L. REV. 441, 478 (2018); Gary Endelman and Cyrus D. Mehta, *Parole in Place: The Secret Sauce for Administrative Immigration Reform*, INSIGHTFUL IMMIGR. BLOG (Nov. 18, 2013), http://blog.cyrusmehta.com/2013/11/parole-in-place-secret-sauce-for.html [https://perma.cc/9DL6-2RX7]; Daniel Hemel, *Candidate Kamala Harris Had a Plan to Help Dreamers. Why Not Use It?*, WASH. POST (Jan. 20, 2022), https://www.washingtonpost.com/outlook/2022/01/20/dreamers-harris-citizenship-executive-action/ [https://perma.cc/XW8N-SRJZ].

[250] *See, e.g.*, Keith Lewis, *'Badly Broken' Immigration System Harms Economy, Moral Authority: Mayorkas*, CQ ROLL CALL (Dec. 7, 2020); Jordan Carney, *Congress Opens Door to Fraught Immigration Talks*, HILL (Apr. 13, 2019), https://thehill.com/homenews/senate/438708-congress-opens-door-to-fraught-immigration-talks/ [https://perma.cc/3B8E-6PBF]; Statements of Kevin R. Johnson, Keynote to *Immigration in the Trump Era Symposium: Judicial Review and the Immigration Laws*, 48 SW. L. REV. 463, 474 (2019).

[251] *See, e.g.*, Benjamin D. Galloway, *Perpetual Congressional Inaction: State Regulation of Immigration in Response to Lack of Reform*, 65 MERCER L. REV. 795, 826 (2014); Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U. CAL. DAVIS L. REV. 343, 348 (2018); Ashley H. Atwell, *Banging Their Heads Against "The Wall": Partisan Politics, Federal Gridlock, and State, Local, and Judicial Reactions to A Lack of Federal Immigration Reform*, 77 UMKC L. REV. 457, 461 (2008).

[252] *See*, Jonathan Weisman, *Congress Ends "Horrible Year" with Divisions as Bitter as Ever,* N.Y. TIMES (Jan. 4, 2022), https://www.nytimes.com/2021/12/18/us/politics/congress-gridlock-democracy.html [https://perma.cc/RHC5-XWPC].

regulation or policy.[253] Absent congressional action, the government could add a new section to 8 C.F.R. 212 to introduce parole in place for certain noncitizens unlawfully present. The Department of Homeland Security could, alternatively, expand its parole in place policy beyond military families by adding instructions on the USCIS Policy Manual.

The proposed policy would be the same, regardless of the enacting authority, with the caveat that Congress could make the grant of parole mandatory if the petitioner meets the requirements, while any executive-initiated policy should keep the grant of parole in place discretionary and to be decided on a case-by-case basis.

Under the proposed policy, parole in place would (Congress) or could (Executive) be granted to noncitizens: (1) who are present without admission; (2) who are the beneficiaries of an approved family petition; (3) whose filing date for an immigrant visa is current; and (4) who are the immediate relatives of a U.S. citizen.

The policy could be tailored in several ways. For example, a deadline to file the request for parole in place could be established. In such case, the deadline should be set a number of years after the enactment of the policy in order to make it possible to file petitions to those who could have petitioned for their immediate relatives but have not done it yet it because obtaining a waiver under the current system would have been either impossible or impracticable.[254]

The policy could also incorporate a hardship requirement, which should not necessarily be as narrow as the "extreme hardship" requirement for the INA § 212(a)(9)(B)(v) waiver addressed above.[255] As explained above, the INA § 212(a)(9)(B)(v) waiver has the disadvantages of being limited to hardship for the noncitizen's U.S. citizen or legal permanent resident spouse or parent and of requiring an elusive "extreme hardship"

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[253] The Build Better Act would have granted parole to noncitizens who arrived without inspection or were paroled before January 1, 2011. H.R. 5376, 117th Cong. § 60001(b) (2021). However, the bill was later renamed, the "Inflation Reduction Act of 2022," and was passed without a parole section. *See generally* H.R. 5376, 117th Cong., 136 Stat. 1818 (2022) (enacted).

[254] Depending on the USCIS Service Center that the case is assigned to, a family petition can take from a few months to close to ten years to be approved. *See Check Case Processing Times*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://egov.uscis.gov/processing-times/ [https://perma.cc/RR8R-96SJ].

[255] 8 U.S.C. § 1182(a)(9)(B)(v).

standard.[256] The policy could incorporate a hardship element including hardship to the noncitizen's children or to the noncitizen. Additionally, the policy would not need to be limited to "extreme" hardship but could incorporate a better defined, less demanding degree of hardship.

The policy could also incorporate guidelines to determine whether the public interest would be served by paroling noncitizens by virtue of their contribution to their communities, measured by job stability, employment in one of the areas deemed "essential" during the Covid-19 lockdowns, entrepreneurship and employment creation, and participation in charitable and community organizations and activities.

B. *Impact of a Grant of Parole in Place for Eligible Noncitizens*

Upon a grant of advance parole, the beneficiaries would be eligible for adjustment of status[257] given that, under INA § 245(a), noncitizens that have been "inspected and admitted or paroled" are eligible to adjust status.[258] However, any other grounds of inapplicability would still apply. Of particular relevance is INA § 212(a)(6)(A)(i), which renders inadmissible any alien who "arrives in the United States at any time or place other than as designated by the Attorney General."[259] An isolated reading of the phrase may lead to the conclusion that noncitizens who arrived without inspection may remain inadmissible even after being paroled. However, when read in the context of subsection (a)(6)(A)(i) of INA § 212 (and in the context other grounds of inadmissibility included in the INA), it is clear that the ground applies only to those who are requesting admission at the border.[260] The subsection states that "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."[261] Understanding the second clause as preventing those included in it from being admissible at any other time or place than the moment of requesting admission at the border would read the

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[256] *Id.*
[257] 8 U.S.C. § 1255(a).
[258] 8 U.S.C. § 1255.
[259] 8 U.S.C. § 1182.
[260] 8 U.S.C. § 1182(a)(6)(A)(i).
[261] *Id.*

first clause of the subsection "superfluous."[262] Furthermore, understanding the clause as meaning "arrives *or has previously arrived*" into "the United States at any time or place other than as designated" would render "superfluous" other grounds of inadmissibility, such as the unlawful presence bars of INA § 212(a)(9)(B)(I) and (II) and the permanent bar of INA § 212(a)(9)(C).[263] Therefore, since applicants for parole in place are not requesting entry at the border, they are not inadmissible under the second clause of INA § 212(a)(6)(A)(i), regardless of whether parole in place has been granted.[264]

A grant of parole in place would remove the ground inadmissibility included in the first clause of INA § 212(a)(6)(A)(i), under which a noncitizen already present in the United States is inadmissible if he or she has not been "admitted or paroled."[265] Upon the grant of advance parole, the beneficiaries could adjust status without leaving the United States and without triggering the three- and ten-year inadmissibility bars.

A grant of parole would not, however, remove two impediments to adjustment of status that would still apply to many unauthorized immigrants: acceptance of unauthorized employment and unlawful immigration status.[266] Under INA § 245(c), noncitizens cannot apply for application of status if they engage in unauthorized employment prior to filing an application for adjustment.[267] Furthermore, under INA § 245(c), those who failed to maintain a continuous lawful status since their entry are ineligible to adjust. However, those who are children, spouses, and parents of U.S. citizens (in the case of parents, if the citizens are twenty-one years of age or older) are eligible to adjust status in spite of unauthorized employment or unlawful presence.[268] While parole in place removes the ground of inadmissibility based on being present without inspection or parole, it does not change the unlawful presence accrued since entrance by those who were not inspected or paroled ab initio.[269]

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[262] *Parole in Place Memo*, *supra* note 162, at 4–5.
[263] *See id.* (emphasis added); 8 U.S.C. § 1182(a)(6)(A)(i).
[264] 8 U.S.C. § 1182(a)(6)(A)(i).
[265] *Id.*
[266] 8 U.S.C. § 1255(c).
[267] *Id.*
[268] 8 U.S.C. § 1255(c); 8 U.S.C. § 1151(b)(2)(A)(i). INA § 245(c) also exempts other special immigrants from this provision.
[269] *Parole in Place Memo*, *supra* note 162, at 6.

Therefore, absent a legislative amendment of INA § 245(c), parole in place would not benefit those who have U.S. citizen children under twenty-one years of age unless they also have a U.S. citizen spouse, parent, or adult child.

CONCLUSION

The case of X's family is extremely common. Thousands of families live under the constant fear of the removal proceedings and deportation of a family member. Congress should deliver a solution for these families through a comprehensive reform of the INA that, among other changes, abrogates the most damaging effects of IIRIRA. However, the possibility of such a reform is remote. While limited in scope, the proposed policy would help a significant percentage of those noncitizens who currently have their families and their livelihoods in the United States without being able to become legal permanent residents. It would also grant the United States immediate relatives of those it would benefit the chance of living in their own country, with their relatives, and without the fear that the government will split their families, thereby fully enjoying their rights to "Life, Liberty and the pursuit of Happiness."[270]

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[270] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).