



The Pernicious Perversion of Parole

A 70-year battle between Congress and the president

By George Fishman

Key Points

- The Department of Homeland Security may temporarily “parole” aliens into the U.S. only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.
- In 1952, Congress granted the Executive Branch this power, which “should be surrounded with strict limitations ... in emergency cases, such as the case of an alien who requires immediate medical attention ... and a witness or for purposes of prosecution.”
- Beginning in 1956, both Democrat and Republican presidents have used the parole power “to circumvent Congressionally-established immigration policy”, bringing in hundreds of thousands of aliens over the years. Each succeeding administration (other than the Trump administration) has used the parole power to achieve an illegitimate power grab.
- Congress has unsuccessfully tried to rein in the abuse of parole, even setting up our current refugee admission program in 1980 to prevent the executive branch from setting refugee policy through abuse of the parole power.
- The Trump administration tried on a number of occasions to rein in parole abuse, shutting down the Obama administration’s international entrepreneur and Central American Minors (CAM) programs. While a federal court blocked Trump’s termination of the entrepreneur program, another permitted the termination of CAM. The Biden administration has pulled DHS’s proposed regulation terminating the entrepreneur program and has restarted — and greatly expanded — CAM. CAM now allows certain groups of mostly illegal aliens from Guatemala, El Salvador, and Honduras, including those who have merely applied for asylum or U visa status, to procure parole for their unmarried minor children living back home.
- Late last year, the 5th Circuit Court of Appeals found that “DHS cannot ... parole aliens *en masse*; that [is] the whole point of the ‘case-by-case’ requirement” and that “DHS’s pretended power to parole aliens while ignoring the limitations Congress imposed on the parole power [is] ... *misenforcement*, suspension of the INA, or both.”
- Texas and other states have recently sued the Biden administration, asking a federal court in Texas to declare the CAM parole program unlawful. Texas’s challenge could shake the very foundations of the executive branch’s edifice of abuse of the parole power.
- Congress should pass Lamar Smith’s original parole reform provision from 1996, only permitting parole 1) for a medical emergency; 2) for organ donation to a family member; 3) to visit a family member whose death is imminent; 4) for an alien who has assisted U.S. law enforcement and whose presence is needed by the government or whose life is threatened; or 5) for criminal prosecution.

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Introduction

This June will mark the 70th anniversary of the enactment of the Immigration and Nationality Act of 1952, still America's foundational immigration law.¹ Tucked into the "McCarran Walter Act" was a provision that granted the attorney general the discretionary power to "parole" aliens into the United States: "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States."² Currently, all aliens granted parole must apply for employment authorization (8 C.F.R. § 274a.12(c)(11)) and aliens who have been paroled for at least one year are eligible for federal welfare benefits to the same extent as are legal permanent residents (8 U.S.C. §§ 1613(a), 1641(b)(4)).

As Jan Ting, professor at Temple University's Beasley School of Law and a former assistant commissioner of the Immigration and Naturalization Service, testified to Congress: "the parole authority ... as enacted and as intended by Congress. ... [does not] contemplate the availability of parole for broad categories of beneficiaries defined by nationality who would not qualify as refugees or for admission under established immigration admission policies."³

Yet, as Arnold Leibowitz (special counsel to the Senate Judiciary Committee's Subcommittee on Immigration and Refugee Policy and former special counsel to the Select Commission on Immigration and Refugee Policy) writes: "The phenomenon of mass parole began in 1956 when [President Eisenhower] interpreted very broadly the parole authority ... to permit [Hungarians] to enter *en masse* as refugees. [P]rior to 1956, the parole authority had been used only to benefit individual aliens."⁴ And as Professors Adam Cox of the University of Chicago Law School and Cristina Rodriguez of the New York University School of Law similarly conclude:

President[s] [have used] powers expressly delegated to [them] by Congress to advance [their] own immigration agenda [in a manner that] accomplish[ed] objectives Congress almost certainly did not intend and expanding or repurposing Congress's original design.

...

[Perhaps] the best twentieth-century example of [this] is the President's use of the parole power ... [to] serve[] as "the central tool of American refugee policy[.]"

...

In 1956, President Eisenhower seized on the then-obscure parole provision ... to admit temporarily 15,000 Hungarians ... despite the absence of congressional authorization.⁵

Parole has become routinely used "to circumvent Congressionally-established immigration policy [and] to admit aliens who do not qualify for admission under established legal immigration categories."⁶

The 1st Circuit Court of Appeals concluded that:

*The legislative history of the parole statute demonstrates clearly that Congress intended that such largesse be extended infrequently, where exigent circumstances obtained. ... [And it] demonstrates beyond cavil that **Congress consistently visualized parole as an indulgence to be granted only occasionally, in the case of rare and exigent circumstances, and only when it would plainly serve the public interest.** The historical record admits of no doubt on this score. ... [I]t cannot reasonably be argued but that the Congress has sown the seeds of the parole authority in such a scanty way as to plant a decidedly austere garden. [Emphasis added.]⁷*

Even the 9th Circuit agrees: "The legislative history of the parole provision indicates that Congress intended that temporary admission be granted infrequently."⁸

Yet, this practice has been adopted by pretty much every succeeding administration for the last 70 years (with, to its credit, the partial exception of the Trump administration). In essence, each succeeding administration has used the parole power in an illegitimate and extra-constitutional power grab. As Ting explains:

[T]here's been an ongoing tension between the executive branch and the Congress. The executive branch likes to use parole in a variety of different ways to solve whatever immediate political problem they're confronting, and I think Congress has clearly made multiple efforts to try and restrain the executive branch's use of — of parole power in trying to narrowly define and limit the executive branch's parole authority.⁹

This has been especially true in the realm of refugee policy, as Cox and Rodriguez conclude: From 1956 “forward, the parole provision became the central tool of American refugee policy — a tool that ... permitted the President to dominate refugee admissions policy.”¹⁰ They note that:

Prior to 1980, the Executive essentially set the federal government's priorities with respect to refugee admissions. Before Congress passed the Refugee Act of 1980, which incorporated the definition of refugee in international law into domestic law and created a full-blown asylum system to hear claims from potential refugees regardless of their national origin, the Executive mostly managed refugee crises on a case-by-case basis. The Administration selected refugees either through the overseas refugee program, through the exercise of the parole authority, or via ... withholding [of removal] claims. Through the decades of the Cold War, the Executive used these tools to admit large numbers of refugees fleeing communist persecution, as well as the governments of the Middle East, thus advancing through delegated power a particular vision of what constituted a worthy refugee in line with the President's prevailing foreign policy concerns.¹¹

This rogue use of parole has continuously undermined the Constitution's separation of powers between the legislative and executive branches. In 2003, F. James Sensenbrenner, Jr., chairman of the House Judiciary Committee, underscored to the Bush administration that:

*Article I, section 8, clause 4 of the Constitution provides that Congress shall have power to “establish a uniform Rule of Naturalization.” The Supreme Court has long found that this provision of the Constitution grants Congress plenary power over immigration policy. As the Court found in *Galvan v. Press* [in 1954], [that] “the formulation of policies [pertaining to the entry of aliens and their right to be here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.” And, as the Court found in *Kleindienst v. Mandel* [in 1972], “[t]he Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”¹²*

Now, Congress has by no means timidly accepted this as a fait accompli. Cox and Rodriguez write that “[a]t various points in history, members of Congress have declared that the Executive has stretched the parole power far beyond its intended meaning, and Congress has attempted several times to rein in this executive discretion.”¹³ Congress has modified the statutory definition of parole to drive home the point and in 1980 established our modern refugee regime with the goal of preventing the executive branch from using parole to usurp refugee policy. However, up until now, all of Congress's efforts have been to no avail. And to rub it in, administrations have loved to justify their rogue use of the parole power by citing the precedent of previous administrations' abuses. The score: presidents, 12; Congress, 0. We might need to invoke the slaughter rule.

Let us now take a detailed look at Congress' intent in creating the parole power, the misdeeds of succeeding administrations, and the legislative branch's attempts to rein them in.

The Immigration Act of 1952

The House Judiciary Committee's report on what was to be enacted as the “McCarran Walter Act” made clear that:

Having concluded that failure by an alien to meet the strict qualitative tests will disqualify him for admission to the United States, the committee is of the opinion that any discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action and that the discretionary authority should be surrounded with strict limitations. ... to permit the Attorney General to parole inadmissible

*aliens into the United States in emergency cases, such as the case of an alien who requires immediate medical attention before there has been an opportunity for an immigration officer to inspect him, and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or for purposes of prosecution.*¹⁴

The 1st Circuit, citing the language of the report, concluded that:

*We are fully persuaded that, as originally conceived by the enacting Congress, **parole was meant to be the exception rather than the rule. It was to be catalyzed only by the existence of an emergency (whether a personal emergency, such as an alien's medical needs, or a public emergency, such as a national need to have the alien present within the country).*** [Emphasis added.]¹⁵

The Immigration Act of 1965

The Immigration Act of 1965 for the first time established a visa category for refugees. Cox and Rodriguez note that “[a]s early as the 1965 amendments ..., it was clear that Congress was displeased with the Executive’s use of the parole power.”¹⁶ The committee reports accompanying the act make clear that the new preference category was designed to curtail the executive’s use of the parole power. The Senate Judiciary Committee report stated that:

*Inasmuch as definite provision has now been made for refugees, **it is the express intent of the committee that the parole provisions of the Immigration and Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation.*** The 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.** [Emphasis added.]¹⁷

The 1st Circuit read this report language to demonstrate that just “as originally conceived by the enacting Congress, parole was meant to be the exception rather than the rule,” and this “*same sort of inelastic fabric was rewoven in 1965*”¹⁸

The Ford and Carter Administrations and the Refugee Act of 1980

Peter Margulies, professor and director of the Immigration Law Clinic at Roger Williams University School of Law, writes that “in 1980 [Congress through the Refugee Act expressed] displeasure over expansive uses of [parole] discretion by the Executive Branch.”¹⁹ As explained by Arnold Leibowitz, this was occasioned by the mass use of parole at the chaotic conclusion of the Vietnam War:

*[T]he very broad use of executive parole authority ... led to the Refugee Act of 1980. ... In 1976, 130,000 refugees were evacuated from Indochina, most of whom were paroled and resettled into the United States. ... Using his parole authority, the president effectively avoided the strictures of immigration law and acted without formal congressional authorization. Congressional reaction was less than enthusiastic. The Refugee Act of 1980, therefore, recognized the continuation of an annual refugee flow and responded to the congressional desire for participation in the decision-making response if there were to be refugee admissions beyond a specified normal flow. It banned the use of the parole authority for mass admittance of refugees, although “a particular alien” may be paroled into the U.S. for “compelling reasons in the public interest.”*²⁰

Cox and Rodriguez note that the Refugee Act was also reacting to the misuse of parole regarding Cubans and Haitians:

Though Congress attempted to curtail the President’s use of the power by enacting a refugee preference regime in 1965, presidents continued to wield the ... power ... in order to admit large groups of noncitizens, including during refugee crises from Cuba, Haiti, and Vietnam.

With the Refugee Act of 1980, Congress directly responded to the executive-driven agenda in two ways. First, it added language to the parole provision requiring that the discretionary act serve compelling reasons in the public interest — an addition many in Congress (perhaps mistakenly) regarded as a means of “bring[ing] the admission of refugees under greater Congressional and statutory control.” Second, and more importantly, it created a scheme for overseas refugee

selection that expressly delegated power to the President to set the number of annual refugee admissions and to select the countries from which they would be accepted.

[T]he Executive continued its large-scale use of the parole power to respond to the Cuban refugee crisis that arose in the 1960s, and later to respond to the large refugee populations that came from Vietnam, as well as Haiti and Cuba, in the 1970s. Congress's dissatisfaction with this use of parole and its desire to exert more control over refugee policy helped prompt the passage of the Refugee Act of 1980. Indeed, the language requiring "compelling reasons in the public interest" for the parole power to be invoked did not exist when the parole provision was first adopted [in] 1952. Congress added the language ... in 1980 in large part to restrict the use of parole in refugee contexts, including with respect to the Executive's heavy reliance on the power to manage the Haitian exoduses.

[W]hen Congress ... creat[ed] a comprehensive regulatory scheme for the admission of refugees, the legislative history that accompanied the Act made clear that Congress sought to constrain the President's use of parole authority.²¹

What did Congress itself say? The Senate Judiciary Committee Report explained that the legislation's goal was "ending the years of ad hoc use of the parole authority, which has been implemented by custom rather than clearly defined by law."²² The Conference Report explained that the House amendment limited the use of parole to individual refugees and required that in utilizing parole, the attorney general must determine that "compelling reasons in the public interest ... require that the alien be paroled into the United States rather than be admitted as a refugee."²³

As Sen. Edward Kennedy, one of the architects of the legislation, later put it:

[A] concern in Congress was the use of the Attorney General's "parole authority". I felt that Congress had provided ample approval and constitutional justification for the authority. However, many disagreed, and the issue was of deep concern to many in Congress, especially in the House of Representatives. One of the principal arguments for the Act was that it would bring the admission of refugees under greater Congressional and statutory control and eliminate the need to use the parole authority.²⁴

The 1st Circuit has concluded that:

[P]lainly[, a] purpose of the Refugee Act [was] to eliminate the Attorney General's use of his parole authority as a regularly-travelled alternate route for entry into the United States.

...

The Refugee Act was intended to provide a procedure which would minimize the Attorney General's need to utilize his parole power as an informal vehicle to assure the admission of refugees.

The only conclusion which can sensibly be drawn ... is that Congress was attempting to restore the parole authority to the narrow uses for which it was originally intended, that is, "for emergent reasons or for reasons deemed strictly in the public interest," ... and not to perpetuate — or further encourage — its employment as a discretionary floodgate for the admission of an alien tide.

[T]here are clear indicia of a congressional desire to discourage any extravagant — or even generous — use of the Attorney General's parole authority in connection with both nonrefugee and refugee aliens. The statutory scheme and the annals of the Congress manifest a design to restrict the employment of parole within close confines. The Refugee Act itself was meant to provide an orderly system for the admission of refugees that would replace the erratic, oftentimes improvident, use of the Attorney General's parole authority for the same purpose. ... [The] statute [was] constructed to reduce both the haphazardness and the incidence of parole.

...

The Refugee Act of 1980 cannot sensibly be heard as a clarion call to parole on demand. [Emphasis added.]²⁵

Senator Kennedy observed that "the ink was hardly dry on this historic reform when the new law faced its first test: the massive influx of Cuban refugees to the United States, which began a few weeks after the Act became effective on April 1, 1980."

According to Kennedy, the Carter administration resorted once again to ad hoc use of the parole power — “to many, it was discouraging to see the new tools available to the government ignored” after Congress had worked many years on the act’s reforms.²⁶

Lauren Gilbert, professor at St. Thomas University School of Law, writes that:

President Carter’s decision in 1980 to parole into the United States over 100,000 Cubans who arrived during the Mariel boatlift [occurred shortly after] Congress had just passed the Refugee Act of 1980. ... The new law prohibited the Attorney General from paroling a refugee into the United States absent “compelling reasons in the public interest with respect to that particular alien.” Despite this prohibition, President Carter paroled large groups of Cubans (as well as many Haitian asylum seekers) into the United States in response to what was arguably an “unforeseen emergency,” but using parole as the mechanism seemed contrary to the letter and spirit of the recently-passed Refugee Act.²⁷

And Professors Stephen Legomsky at the Washington University School of Law and Cristina Rodriguez find that:

To the extent that the Refugee Act of 1980 was meant to be the exclusive vehicle for admitting refugees, it has achieved only partial success. ... [T]he grant of parole rather than refugee status [to Cubans in the Mariel boatlift and Haitians at the same time] seems contrary to both the language and the spirit of the 1980 Act.²⁸

The Immigration Act of 1990

Cox and Rodriguez write that:

In 1990, Congress further systematized the process of admitting noncitizens fleeing disaster by creating the Temporary Protected Status (TPS) designation, which authorizes the President to permit categories of noncitizens to remain in the United States on a temporary basis, provided they meet statutory criteria defining the types of calamities Congress deemed worthy of response through protection. The combination of [the Refugee Act and TPS] suggests that Congress sought to replace the nontransparent use of parole and other discretionary mechanisms with semi-supervised and controlled schemes of delegation that required the President to submit his recommendations to congressional committees and to consult with various agency heads in the process.²⁹

The Clinton Administration and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

The current language of the parole statute, with the limitation on its use “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit”, was added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA):³⁰

[The Secretary of DHS] 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 humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the [Secretary] have been served the alien shall forthwith return or be returned to the custody from which he was paroled.³¹

H.R. 2202, the bill introduced by Lamar Smith, chairman of the House Judiciary Committee’s Subcommittee on Immigration and Claims, and reported by the committee in 1996 proposed to modify the parole statute to read:

(B) *The Attorney General may parole an alien based on an urgent humanitarian reason ... only if—*

- (i) *the alien has a medical emergency and the alien cannot obtain necessary treatment in the foreign state in which the alien is residing or the medical emergency is life-threatening and there is insufficient time for the alien to be admitted through the normal visa process;*

- (ii) *the alien is needed in the United States in order to donate an organ or other tissue for transplant into a close family member; or*
- (iii) *the alien has a close family member in the United States whose death is imminent and the alien could not arrive in the United States in time to see such family member alive if the alien were to be admitted through the normal visa process.*

(C) *The Attorney General may parole an alien based on a reason deemed strictly in the public interest ... only if—*

- (i) *the alien has assisted the United States Government in a matter, such as a criminal investigation, espionage, or other similar law enforcement activity, and either the alien's presence in the United States is required by the Government or the alien's life would be threatened if the alien were not permitted to come to the United States; or*
- (ii) *the alien is to be prosecuted in the United States for a crime.*

(D) *The Attorney General may not use the parole authority under this paragraph to permit to come to the United States aliens who have applied for and have been found to be ineligible for refugee status or any alien to whom the provisions of this paragraph do not apply.*³²

The House Judiciary Committee Report explained that:

The text [of the parole statute] 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 [the parole statute], but also illustrates why further, specific limitations on the Attorney General's discretion are necessary.

Additionally, the Attorney General has not kept accurate records in the past of the way in which parole authority is used. Consequently, Congress has no way to effectively exercise its oversight authority over the use of parole. Without an effective control mechanism, the Attorney General can continue to use the parole authority to implement immigration policy without Congressional knowledge or approval.

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. In this case, the 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. ... Such use of the parole authority has not been authorized by Congress. Indeed, the Clinton Administration did not even attempt to consult with Congress in negotiating the Cuban migration agreement.

Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, such as life-threatening humanitarian medical emergencies, or for specified public interest reasons, such as assisting the government in a law-enforcement-related activity. 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.

...

*[The bill] restricts the use of parole authority to allow aliens to enter the U.S. to specific reasons that are strictly in the public interest or are matters of urgent humanitarian concern, such as for the prosecution of an alien, to obtain an alien's testimony in a criminal proceeding, or to permit an alien to visit a dying relative. **This section is intended to end the use of parole authority to create an ad hoc immigration policy or to supplement current immigration categories without Congressional approval.** [Emphasis added.]*³³

The title of H.R. 2202 containing this provision was removed from the bill on the House floor.

In 2015, Sens. Charles Grassley, Jeff Sessions, and Mike Lee asked DHS to “explain ... how, for each of the Administration’s parole programs described in this letter, the program does not violate the congressional proscription on using parole ‘to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration policies.’”³⁴

DHS responded that:

*There is no “congressional proscription” as described in the question. The question references a statement in [the] House Report ... which accompanied H.R. 2202. ... That statement concerns a section of that bill ... which would have sharply limited the parole authority. ... Congress, however, did not enact this provision into law. Rather, in the conference committee ... the House generally receded to the much more limited changes in the Senate bill. ... The quoted language thus neither constitutes enacted law nor legislative history describing enacted law. On the contrary, it is a policy statement of the House Judiciary Committee that Congress as a whole — by rejecting the provision it supports — explicitly chose not to adopt.*³⁵

However, the Senate’s goal in 1996 mirrored that of the House. The Senate Judiciary Committee Report stated that its parole reform provision was intended to “reduce[] the abuse of parole” and “[t]ighten[] the Attorney General’s parole authority,”³⁶ and that “[t]he committee bill is needed to address ... the abuse of humanitarian provisions such as ... parole.” Thus, the current statutory language reflects a bicameral goal in 1996, as the 2nd Circuit recognized:

Congress, in IIRIRA, specifically narrowed the executive’s discretion ... to grant “parole into the United States”.

...

*IIRIRA struck ... the phrase “for emergent reasons or for reasons deemed strictly in the public interest” as grounds for granting parole into the United States and inserted “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” . . . The legislative history indicates that this change was animated by concern that parole . . . was being used by the executive to circumvent congressionally established immigration policy. [Emphasis added.]*³⁷

The 9th Circuit has come to a similar conclusion:

*In enacting IIRIRA ... Congress expressed concern that the Attorney General had been using parole “to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.” ... Congress responded in IIRIRA by narrowing the circumstances in which aliens could qualify for “parole into the United States”.*³⁸

As the 5th Circuit concluded in *State of Texas v. Biden* in December:

Throughout the mid-twentieth century, the executive branch on multiple occasions purported to use the parole power to bring in large groups of immigrants. ... In response, Congress twice amended [the parole statute] to limit the scope of the parole power and prevent the executive branch from using it as a programmatic policy tool ... in the Refugee Act of 1980 [and in IIRIRA].

...

*DHS cannot ... parole aliens en masse; that was the whole point of the “case-by-case” requirement that Congress added in IIRIRA.*³⁹

DHS was simply wrong. Commentators agree — a leading treatise on immigration law concludes that IIRIRA’s “limitation appears to have eliminated the use of parole for mass immigration purposes”⁴⁰

The George W. Bush Administration

In 2007, DHS implemented the Cuban Family Reunification Parole Program, which provided Cuban beneficiaries of approved family-based immigrant visa petitions with parole so that they wouldn't have to remain in Cuba to await the availability of numerically-limited immigrant visas:

*In furtherance of the U.S.-Cuba Migration Accords, the United States endeavors to provide a minimum of 20,000 travel documents annually to aspiring Cuban emigrants. ... In so doing, the United States offers a safe, legal, and orderly means of coming to the United States. To date, the majority of travel documents issued under the Migration Accords fall into one of three programs: family-based immigrant visas; refugee resettlement; and parole under the Special Cuban Migration Program, also referred to as the Cuban Lottery. ... **Two aspects of the existing array of migration programs limit the ability of the United States to effectively promote safe, legal, and orderly migration as an alternative to maritime crossings. First, with the exception of "immediate relatives" (e.g., spouse, unmarried child) of U.S. citizens (USCs), the number of family-based immigrant visas that are available in any given year is limited by statute. The statutory caps have resulted in long waiting periods before family members remaining in Cuba may rejoin the USCs and lawful permanent residents (LPRs) residing in the United States who petitioned for them.** ... Under the CFRP Program, USCIS may exercise its discretionary parole authority to permit eligible Cuban nationals to come to the United States to rejoin their family members. ... Granting parole to eligible aliens under the CFRP Program serves the significant public benefit of enabling the United States to meet its commitments under the Migration Accords as well as reducing the perceived need for family members left behind in Cuba to make irregular and inherently dangerous attempts to arrive in the United States through unsafe maritime crossings, thereby discouraging alien smuggling as a means to enter the United States. [Emphasis added.]⁴¹*

This is a pretty telling admission. The purpose of the program was to evade "statutory caps" — numerical limits deliberately put into place by Congress. I can hardly think of a better poster child for the abuse of parole to deliberately "circumvent Congressionally-established immigration policy."⁴² Lots of people all over the world have to wait a long time for certain family-sponsored immigrant visas to become available. Currently, the U.S. State Department reports that there are almost *four million* persons on the waiting lists.⁴³ Pursuant to the Bush administration's logic, DHS could on a whim decide to grant parole to all four million. And why stop at four million? After all, Gallup has found that more than 750 million people around the world would like to emigrate, with about 158 million naming the U.S. as their desired destination.⁴⁴

The Obama Administration

The Obama administration contemplated taking the abuse of parole to a whole new level. (In the end, it decided to instead take abuse of deferred action to a whole new level, but that is another story.⁴⁵) Early on in the administration, senior U.S. Citizenship and Immigration Services (USCIS) officials prepared a draft memo for USCIS's director suggesting that DHS amnesty millions of illegal aliens through its administrative powers.⁴⁶ Among the suggested steps was the use of parole to legalize aliens "who entered the U.S. as minors without inspection" or who have "lived for many years in the U.S." I recall that when I was the chief counsel of the immigration subcommittee, USCIS officials told us that the agency had rejected many of the memo's suggestions. However, a seemingly authentic draft DHS memo was later disseminated that among other proposals (including one resembling what was to become DACA (Deferred Action for Childhood Arrivals)), included one to use the parole power to allow for the immediate entry into the U.S. of over three million immigrants on extended family-sponsored green card waiting lists. I wonder where they could possibly have gotten that idea? (See preceding paragraph.)

The Central American Minors (CAM) Program

Following a surge of unaccompanied alien children (UAC) and families across the southern border beginning in the summer of 2014 that saw the number of UACs apprehended jump 945 percent to 68,541 from FY 2011 to 2014, and the number of families apprehended soar 361 percent to 68,445 from 2013 to 2014, the Obama administration announced the creation of a dual refugee/parole program for minors from Central America.⁴⁷ According to DHS, the CAM program "provides children in El Salvador, Guatemala, and Honduras with a safe and orderly alternative to the dangerous, irregular journey that some children are currently undertaking to the United States. ... [W]e are committed to protecting Central Americans at risk and expanding resettlement opportunities in the region."⁴⁸

CAM allowed adult aliens in the U.S. to apply for refugee status for their children residing in their home countries if the children were unmarried, under 21, and nationals of Guatemala, El Salvador, or Honduras if the adults were legal permanent residents or (most often) illegal aliens who had received deferred action (including through DACA), TPS, parole, deferred enforced departure,⁴⁹ or withholding of removal.⁵⁰

A State Department official admitted to immigration subcommittee staff in September 2014 that very few Central American minors whose parents submit refugee applications under CAM would be able to meet the statutory definition of a refugee (principally, having a well-founded fear of persecution).⁵¹ To avoid this inconvenient truth, the administration tagged on the parole aspect of CAM to allow it to bring in large numbers of aliens not qualifying as refugees (with the added benefit of not being constrained by the refugee program's statutory and other limitations).⁵² According to State Department and USCIS officials, a minor would have to show that they "faced harm" — but when questioned about the definition of this term, they could provide no concrete answer.

As my colleague Nayla Rush has written:

*[I]ndividuals from El Salvador, Guatemala, or Honduras who made it to the U.S. — illegally for the most part — can now have their extended family members flown to them with U.S. taxpayers' money. And those on the other side, who considered crossing here illegally, could be spared the trouble and given legal status. This seems to be th[e Obama] administration's idea of enforcing immigration laws.*⁵³

The Obama administration then announced that it would be expanding CAM.⁵⁴ The New York Times reported that:

*The White House ... announced a substantial expansion of a program to admit Central American refugees to the United States. ... "What we have seen is that our current efforts to date have been insufficient to address the number of people who may have legitimate refugee claims, and there are insufficient pathways for those people to present their claims," Amy Pope, a deputy Homeland Security adviser, said. ... She said the revisions showed a recognition that "the criteria is too narrow to meet the categories of people who we believe would qualify under our refugee laws, but they just don't have the mechanism to apply."*⁵⁵

Of course, Pope's statement neglects to mention that most beneficiaries of the expanded CAM program would not in fact be able to "qualify under our refugee laws" but would instead need to be paroled. House Judiciary Committee Chairman Bob Goodlatte stated at the time that "[o]nce again, the Obama administration has decided to blow wide open any small discretion it has in order to reward individuals who have no lawful presence in the United States with the ability to bring their family members here."⁵⁶

Federal litigation in the 9th Circuit has revealed that:

*As of July 13, 2017 ... [o]f the cases that have been issued decisions, 30% have been approved as refugees, 69% have been recommended for parole, and 1% were denied for both refugee status and parole. From its inception, the CAM Program granted parole broadly. Throughout its operation, the Program approved approximately 99% of beneficiaries who were interviewed and considered for parole.*⁵⁷

As Nayla Rush quipped, "This reminds me of a French television program that aired a long time ago in which kids participated in a singing competition. The "competition" was in name only; at the end of each show, the host would declare "everyone a winner". With CAM, almost everyone got an entry ticket into the United States."⁵⁸

International Entrepreneur Rule

Over the years, many entrepreneur visa bills were introduced in Congress. In 2013, I myself worked on one introduced by Rep. Darrell Issa (R-Calif.).⁵⁹ None of them have become law under either Democrat or Republican control of Congress. Thus, one of the parting gifts of the Obama administration was to publish a final rule using the parole power to create an entrepreneur program out of whole cloth:⁶⁰

The [International Entrepreneur] Final Rule ... applied to international entrepreneurs who can demonstrate that their parole into the United States ... would provide a significant public benefit to the United States ... indicated by, among

*other things, the receipt of significant capital investment from U.S. investors with established records of successful investments, or obtaining significant awards or grants from certain Federal, State or local government entities.*⁶¹

A few months earlier, on August 31, 2016, USCIS had published a notice of proposed rulemaking for the entrepreneur rule that laid out the Obama administration's views as to the "expansive" extent of the parole power:

The Secretary's parole authority is expansive. Congress did not define the phrase "urgent humanitarian reasons or significant public benefit," entrusting interpretation and application of those standards to the Secretary.

*The authority has been exercised on behalf of individuals on an ad hoc basis, as well as through policy guidance or regulations identifying classes of individuals to be considered for parole through individualized case-by-case adjudications. For example, parole has long been used on an ad hoc basis for individuals with serious medical conditions who need to come into the United States for medical treatment, individuals subject to prosecution or who are required to testify in court, individuals cooperating with law enforcement agencies, volunteers offering assistance in response to natural or other disasters, and foreign officials and other dignitaries who are inadmissible but seek to attend events in the country. ... Parole has also long been exercised on a case-by-case basis with respect to individuals falling within certain designated parameters, as defined through regulation or policy guidance. ... DHS has provided guidance on the case-by-case exercise of the parole authority ... including, for example, on behalf of certain Cuban nationals, certain individuals seeking to enter the Commonwealth of the Northern Mariana Islands (CNMI), and certain family members of U.S. military personnel. [Emphasis added.]*⁶²

Yes, correct, there is ample precedent for the abuse of parole.

As required by the Administrative Procedure Act, the final rule responded to comments the agency had received on the proposed rule.⁶³ DHS noted that:

*A commenter asserted that the rule created a new visa category which is under the exclusive purview of Congress, and therefore an illegal extension of authority by the executive branch. Another commenter ... questioned whether the proposed exercise of parole authority is supported by legislative history, is consistent with the INA's overall statutory scheme, and whether "significant public benefit parole" as outlined in this rule is "arbitrary and capricious."*⁶⁴

DHS's riposte:

*DHS disagrees with the comment asserting that the proposed rule would effectively create a new visa category, which only Congress has the authority to do. ... Congress expressly empowered DHS to grant parole on a case-by-case basis, and nothing in this rule uses that authority to establish a new nonimmigrant classification. ... DHS further disagrees with the comment that this rule is inconsistent with the legislative history on parole. Under current law, Congress has expressly authorized the Secretary to grant parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit. The statutory language in place today is somewhat more restrictive than earlier versions of the parole authority, which did not always require case-by-case review and now includes additional limits on the use of parole for refugees. ... But the statute clearly continues to authorize the granting of parole. **Across Administrations, moreover, it has been accepted that the Secretary can identify classes of individuals to consider for parole so long as each individual decision is made on a case-by-case basis according to the statutory criteria.** ... This rule implements the parole authority in that way. [Emphasis added.]*⁶⁵

CNMI Visa Waiver Program

Among a number of CNMI-specific parole programs, in 2009, DHS announced that it would favorably consider, on a case-by-case basis, parole into the CNMI (in 2012 extended also to Guam) for Russian temporary visitors for business or pleasure based on the economic benefit such workers and visitors would provide to the U.S. territory.⁶⁶

By the way, when Congress wants to authorize parole to be used on a categorical basis, it says so. The "Northern Mariana Islands Long-Term Legal Residents Relief Act" grants DHS the ability to "authorize deferred action or parole, as appropriate, with work authorization" for certain aliens pending the adjudication of their applications for CNMI resident status.⁶⁷

Parole in Place

As the parole statute talks in terms “parole into the United States [of] any alien applying for admission to the United States,” one might assume that only aliens outside of the U.S. can be paroled. Well, that would have been a valid assumption, until IIRIRA. As the House Judiciary Committee report explained:

[The bill replaces] the definition of “entry” with a definition for “admission”... the entry of an alien into the United States after inspection and authorization by an immigration officer.

...

This ... is intended to replace certain aspects of the current “entry doctrine,” under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings. ... Hence, the pivotal factor in determining an alien’s status will be whether or not the alien has been lawfully admitted.

...

Currently, aliens who have entered without inspection are deportable. ... Under the new “admission” doctrine, such aliens will not be considered to have been admitted, and thus, must be subject to a ground of inadmissibility, rather than a ground of deportation, based on their presence without admission. (Deportation grounds will be reserved for aliens who have been admitted to the United States.)⁶⁸

What does this have to do with the ability to parole into the U.S. aliens already here? In 1998, the Immigration and Naturalization Service’s general counsel explained that:

[A]liens who are present in the United States without having been admitted or paroled are now deemed to be applicants for admission. ... Before [IIRIRA]... aliens who had entered the United States without having been inspected were amendable to deportation, rather than to exclusion, proceedings. ... Congress has [also] now provided for an expedited removal proceeding. ... The Service may invoke this procedure if an alien “who is arriving in the United States” is inadmissible. ... The consequence of these two [provisions] is that there are now two categories of applicants for admission, those who are arriving aliens, and those who are not. ... [A]liens who were once deportable for having entered without inspection are now considered in law to be applicants for admission. ... As [such], they are within the scope of the statutory parole authority.⁶⁹

OK, I don’t think the authors of IIRIRA had this result in mind, called “parole in place”, that aliens already in the U.S. are eligible for parole. But, to be fair, it is the upshot of IIRIRA’s reboot of the entry doctrine. IRIRA dramatically altered the meaning of “admission” without at the same time modifying the language providing that parole applies to “any alien applying for admission to the United States”. The INS reached the legally appropriate conclusion.

Haitian Family Reunion Program

In 2014, USCIS established the Haitian Family Reunion Program (HFRP):

*The rebuilding and development of a safe and economically strong Haiti is a priority for the United States. While progress has been made since the 2010 earthquake that devastated parts of the country, Haiti continues to face significant development challenges. ... **With the exception of “immediate relatives” of U.S. citizens (USCs) (i.e., parent, spouse and unmarried child(ren) under 21 years of age) ... the number of family-based immigrant visas that are available in any given year is limited by statute. ... These statutory limits have resulted in long waiting periods before family members remaining in Haiti may join the U.S.C. and lawful permanent resident ... family members in the United States who petitioned for them.** ... USCIS will exercise its discretionary parole authority to permit certain eligible Haitians in Haiti to join their family members in the United States up to approximately two years before their immigrant visas become available, thereby promoting family unity. By expanding existing legal means for Haitians to immigrate, the HFRP Program serves a significant public benefit by promoting safe, legal, and orderly migration to the*

*United States. Furthermore, it supports U.S. goals for Haiti's long-term reconstruction and development. ... HFRP Program beneficiaries will be eligible to [work and] contribute to Haiti's post-earthquake reconstruction and development through remittances. [Emphasis added.]*⁷⁰

“[T]he number of family-based immigrant visas that are available in any given year is limited by statute. ... These statutory limits have resulted in long waiting periods.” Sound familiar?

Filipino World War II Veterans Parole Policy

In 2016, USCIS established the Filipino World War II Veterans Parole Policy (FWVP):

*More than 260,000 Filipino soldiers enlisted to fight for the United States during World War II. Estimates indicate that as many as 26,000 ... became U.S. citizens. As U.S. citizens or lawful permanent residents (LPRs), these veterans may petition for certain of their family members to come to the United States. Estimates indicate that there are approximately between 2,000 to 6,000 Filipino American World War II veterans still alive in the United States today, many of whom greatly desire to have their family members in the United States during their final days. With the exception of “immediate relatives” ... **the number of family-sponsored immigrant visas that are available in any given year is limited by statute. ... These statutory limits have resulted in long waiting periods before family members may join the petitioning U.S. citizens or LPRs in the United States and become LPRs themselves. For certain Filipino American family members, this wait can exceed 20 years.** ... In many cases, paroling these family members may ... allow them to provide support and care for elderly veterans USCIS will consider individual requests for parole submitted for certain relatives who are the beneficiaries of approved family-based immigrant visa petitions filed by Filipino veterans or their surviving spouses. ... USCIS believes that the parole of qualified applicants ... would generally yield a “significant public benefit.” Additionally, considering the advanced age of World War II Filipino veterans and their spouses, and their increased need for care and companionship, grants of parole under the FWVP policy would often address urgent humanitarian concerns.*⁷¹

Again, sound familiar?

Military Family Members

In 2013, DHS issued guidance encouraging the use of parole for (generally, illegal alien) spouses, children, and parents of active duty members of the U.S. Armed Forces, those in the Selected Reserve of the Ready Reserve, and veterans:

- *[Service members and veterans] face stress and anxiety because of the immigration status of their family members in the United States.*
- *Military preparedness can potentially be adversely affected if [they] worry about the immigration status of their spouses, parents and children.*
- *Similarly, our veterans, who have served and sacrificed for our nation, can face stress and anxiety because of the immigration status of their family members in the United States.*

...

*The fact that the individual is [such] a spouse, child or parent ... ordinarily weighs heavily in favor of parole in place.*⁷²

Baseball and apple pie? Five years earlier, legislation to in part legalize such military family members, H.R. 6020, was introduced in the House of Representatives by Zoe Lofgren, the Chairwoman of the Judiciary Committee's immigration subcommittee. The bill never made it to the House floor, even under Democrat control. The dissenting views in the House Judiciary Committee report stated that:

This bill is opposed by the American Legion. The National Commander of the American Legion stated that:

On behalf of 2.7 million members of the American Legion ... [we] unequivocal[ly] oppos[e] ... granting amnesty to those residing illegally in the United States. ... H.R. 6020 would reward non-citizen law breakers and undocumented immigrants with a short cut to citizenship that is nothing less than an official pardon for illegal acts: an amnesty. ... Non-citizen service members' relatives who have entered the U.S. illegally or overstayed a visa or who may be fugitives from justice deserve no special adjustment. ... No special pardon, no reprieve from lawlessness, no exoneration for bad behavior is given to ... their family because one wore the uniform of the United States military. ... The American Legion remains adamantly opposed to the granting of pardons to illegal aliens.

...

This bill creates a perverse incentive for persons to intentionally enter the military for the express purpose of procuring amnesty. ... This is not what service to our country is all about.⁷³

In any event, putting aside the merits of the legislation, Congress did not choose to pass it. Once again, circumvention of congressionally established immigration policy.

The Trump Administration

Despite the fact that the unbridled use of parole redounds to the benefit of the executive branch, the Trump administration tried to curtail parole abuses on a number of occasions. Shortly after taking office, President Trump issued an executive order stating in part that:

The Secretary [of Homeland Security] shall take appropriate action to ensure that parole authority under section 212(d) (5) of the INA ... is exercised only on a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole.⁷⁴

DHS Secretary John Kelly then issued a memo stating that:

The statutory language authorizes parole in individual cases only where, after careful consideration of the circumstances, it is necessary because of demonstrated urgent humanitarian reasons or significant public benefit. In my judgment, such authority should be exercised sparingly. 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.⁷⁵

CAM Continued

On August 16, 2017, DHS announced the termination of CAM through a Federal Register notice, stating that: “Following the issuance of the Kelly Memo, DHS conducted a review of the CAM Parole Program. ... DHS’s review determined that [the] program provided parole very broadly and not in accordance with the statu[t]e and the President’s Executive Order.”⁷⁶

The termination was challenged, and a federal magistrate judge in California denied the plaintiffs’ motion to enjoin DHS from terminating CAM. The judge found that:

There is “a rational connection between facts found and conclusions made” by DHS. ... The facts found were that the CAM Parole Program was granting parole to virtually all beneficiaries who were interviewed. The conclusion made was that doing so was not in keeping with the new administration’s view of the parole statute and its policies on immigration. Whether the court agrees or disagrees with the government’s conclusion, it is “not empowered to substitute [its] judgment for that of the agency,” ... and it cannot say that the agency’s actions were arbitrary or capricious.

DHS has expressed its view that the better interpretation of the statutory language of the parole statute is that it “appears to strongly counsel in favor of using the parole authority sparingly and only in individual cases where, after careful con-

sideration of the circumstances, parole is necessary because of demonstrated urgent humanitarian reasons or significant public benefit.” ... Congress reemphasized this [very] view of parole when it amended the parole statute [in IIRIRA] to restrict the government’s discretion to approve parole “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” ... The court cannot say that DHS’s view — that the parole statute counsels in favor of awarding parole sparingly — is legally erroneous, or that its decision to terminate a program that awarded parole broadly was based on a flawed legal analysis.⁷⁷

I should note, however, that the government did not argue that CAM was *ultra vires* — beyond what is permitted by law or the Constitution. As we shall see, this will be a recurring theme of Trump administration efforts to curtail parole abuse. The government will argue in memos, regulations, and in the court that its actions constitute *permissible* (even preferable) interpretations of the parole statute or *permissible* (even preferable) discretionary policy choices — not that they are actions the government was compelled to take as the only legally permissible course. Maybe arguing the former position was the most promising argument to make before hostile federal courts, maybe. But it left open the ability of future administrations to simply turn the parole engine right back on (which, as we shall see, the Biden administration was all too happy to do).

International Entrepreneur Rule Continued

On July 11, 2017, DHS published a final rule delaying until March 14, 2018, the effective date of the Obama entrepreneur rule, stating that:

DHS decided to delay the effective date ... to further consider [the rule] in light of E.O. 13767. ... Additionally, DHS will issue a Notice of Proposed Rulemaking soliciting public comments on the proposal to rescind the [entrepreneur rule]. The delayed effective date will provide an opportunity for the notice and comment rulemaking to take place.⁷⁸

DHS had not first published a proposed delay rule allowing for public comment, arguing that it had good cause under the Administrative Procedure Act (APA) to forego notice and comment (and inviting comment on the final rule). On December 1, 2017, the U.S. District Court for the District of Columbia vacated the delay rule, finding that “[E]ach of [DHS’s] explanations might be good reason to promulgate the Delay Rule, but none justifies finalizing it without notice and comment. The Rule is therefore procedurally defective [under the APA].⁷⁹

To ensure compliance with the court order, DHS began accepting applications for foreign entrepreneurs requesting parole under the entrepreneur rule. On May 29, 2018, it issued a proposed regulation to terminate the Obama administration’s rule:

After review ... the [entrepreneur] parole program should be removed, and [DHS] is soliciting public comments on its proposal to do so.

*[T]he Department believes **that th[is] extraordinary use of the Secretary’s discretionary parole authority ... is unwarranted and inadvisable.** ... First, this sort of complex and highly structured program contemplated in the IE Final Rule is **best left to the legislative process rather than an unorthodox use of the Secretary’s authority to “temporarily” parole, in a categorical way,** otherwise inadmissible aliens into the United States for “significant public benefit.” ... Second, the ... Rule constitutes **an extraordinary use of the Secretary’s parole authority,** prescribing specific, detailed eligibility criteria and requiring exceptionally complex adjudications. Third, the ... Rule does not provide durable immigration solutions and in turn inadequately promotes the required investment and the jobs that depend on them. ... Fourth ... use of the agency’s present resources must be prioritized in light of the current Administration’s priorities [and] should not continue to be expended on this program, especially given the sort of difficult, complex, resource-intensive adjudications that [it] requires. ... Finally, **the Secretary is permitted to decide to exercise her discretionary parole authority ... more narrowly than her predecessor(s).** The Secretary has elected to do so here for the reasons described herein and in the interest of the efficient, effective implementation of the current statutory scheme, which already prescribes conditions under which certain entrepreneurs and investors may obtain lawful immigration status ... and in certain instances lawful permanent resident status in the United States.*

...

*The Department believes that **parole ... is not an appropriate legal mechanism to establish and implement a complicated program for entrepreneurs and business startups that requires complex and time consuming adjudications.***

...

*The ... Rule's interpretation of significant public benefit, with its myriad and exceptionally detailed eligibility requirements relating to qualifying investments and start-up entities, amounted to **an unconventional codification of significant public benefit parole criteria**. ... The ... Rule focused too narrowly on the potential economic benefits that foreign entrepreneurs may bring, without giving sufficient attention to the existing statutory scheme wherein Congress has already provided pathways for certain entrepreneurs to come to the United States to start and grow their business.*

...

[R]emoving the ... Rule would be more congruent with the overall statutory scheme.

*Congress could create a new visa classification to provide legal immigration status to foreign nationals seeking to remain and start businesses in the United States using venture capital or other U.S.-sourced funding. DHS believes **this would be a more appropriate means for doing so** because Congress is uniquely well-positioned to balance the many competing and complex policy priorities in attracting and retaining foreign entrepreneurs and promoting investment and innovation in the United States. ... DHS is proposing to defer to Congress on whether, and if so how to best create a specific immigration pathway that addresses the unique and varied characteristics of foreign entrepreneurs through the legislative process. [Emphasis added.]⁸⁰*

CNMI

On September 3, 2019, DHS announced that it was terminating Russian participation in the CNMI visa waiver program:

[DHS] has decided to terminate the 2009 and 2012 policies concerning the exercise of discretionary parole authority for Russian nationals. ... [It has] concluded that the policy should be terminated, for numerous reasons ... [including that] the parole authority has been exercised far [more] expansively than originally intended. For Guam, parole accounted for approximately 99 percent of all Russian visitors in 2012 and 85 percent of all Russian visitors in 2017. Similarly, parole accounted for approximately 90 percent of all Russian visitors to the CNMI in 2010 and 82 percent of all Russian visitors in 2017.⁸¹

HFRP and FWVP Parole Programs Continued

On August 2, 2019, USCIS Acting Director Ken Cuccinelli announced the agency's intention to terminate HFRP and FWVP:

Under these categorical parole programs [HFRP and FWVP], individuals have been able to skip the line and bypass the proper channels established by Congress. With the termination of these programs, these individuals will no longer be permitted to wait in the United States for their family-based green card to become available, consistent with the rules that apply to the rest of the world. USCIS is committed to exercising this limited authority in a manner that preserves the integrity of our immigration system and does not encourage aliens to unlawfully enter the United States.⁸²

On December 28, 2020, DHS announced that:

USCIS undertook a review of existing categorical parole programs. USCIS is announcing the termination of HFRP and FWVP programs.

...

*Consistent with Secretary Kelly's February 20, 2017 implementing memorandum, USCIS has determined that, **as a matter of policy, the HFRP and FWVP programs do not meet DHS's obligation to narrowly exercise its parole authority.***

...

DHS believes the existing broad presumption that there are significant public benefit or urgent humanitarian reasons to consider parole for new applicants who meet the specific preestablished criteria under the HFRP and

FWVP programs is inconsistent with the Executive Order and Secretary Kelly's implementing guidance directing that the policy of DHS is to exercise its parole authority narrowly.

...

DHS has determined Haiti has made significant progress recovering from the 2010 earthquake and subsequent effects. ... In light of these determinations, DHS has determined that the HFRP program no longer serves a significant public benefit for new applicants.

...

*DHS has determined that the FWVP program is inconsistent with the policy decision to narrowly exercise DHS' parole authority in making determinations of significant public benefit. With regard to urgent humanitarian concerns, DHS has no data substantiating that the admission of participants in the FWVP program routinely addresses an urgent humanitarian concern. An eligible alien may request parole even if the veteran and spouse the alien is petitioning to support are both deceased. ... **For these reasons, DHS believes that new FWVP program applications are more appropriately adjudicated through an individual application instead of a categorical program with a presumption of a significant public benefit or urgent humanitarian concern.***

...

DHS believes the FWVP program is inconsistent with its narrower interpretation of the parole authority and the public policy goals supported by a narrow use of its parole authority (as described in Secretary Kelly's memorandum). [Emphasis added.]⁸³

Expedited Removal and the Detention of Arriving Aliens

IIRIRA mandates that before being expeditiously removed, aliens placed into expedited removal proceedings who express a fear of return to their home country be interviewed by asylum officers to determine whether they have a "credible fear" of persecution.⁸⁴ Importantly, the statute provides that regardless of whether such alien receives a positive or negative fear determination,⁸⁵ they must be detained pending the adjudication of their asylum claim or their removal.⁸⁵

However, Congress's command has been disregarded by every administration through misuse of the parole power. The Obama administration explained that:

*Longstanding regulations ... provide discretionary criteria and other guidance for the use of parole with respect to arriving aliens detained in the United States. ... Those regulations provide that parole from immigration custody generally would be "justified" on a case-by-case basis if an individual falls within one of several specific categories, including individuals with serious medical conditions, pregnant women, juveniles, or individuals whose "continued detention is not in the public interest" as determined by certain listed officials.*⁸⁶

On December 8, 2009, U.S. Immigration and Customs Enforcement (ICE) Director John Morton issued a memo ordering that:

*[W]hen an arriving alien found to have a credible fear establishes ... his or her identity and that he or she presents neither a flight risk nor danger to the community, [Detention and Removal Operations] should, absent additional factors ... parole the alien on the basis that his or her continued detention is not in the public interest.*⁸⁷

The Trump administration did not rescind the Morton memo, yet parole grants nevertheless dropped dramatically. This gave a federal court an opening to demand that DHS faithfully follow to the Morton memo (in the five ICE field offices that were the subject of the litigation):

Pointing to the fact that parole rates have plummeted from over 90% to nearly zero ... [Plaintiffs] assert that the Government is no longer following its own Parole Directive [the Morton memo,] ... that ... DHS is now engaging in systematic detention.

Defendants contest this characterization, claiming instead that ... they continue to implement the ICE Directive, and that parole remains available to asylum-seekers at the five Field Offices.

According to Plaintiffs, their detention is the direct result of the Field Offices' current departure from the protections of the Parole Directive in favor of de facto detention — an allegation that ... is robustly supported by statistics and other record evidence.

[T]he Government has ... conceded that ICE is required to follow the Directive when determining parole for asylum seekers who have established a credible fear of persecution. ... Plaintiffs here have provided ample evidence that, in the initial months of the current administration, nearly every application for parole from such individuals has been denied. This is in sharp contrast to the prior parole-grant rates, and ... indicates a likely departure from the policies and processes mandated by the Parole Directive.

The Court notes, moreover, that the dramatic departure in parole-grant rates from years past has not been explained in any way by Defendants. The Government ... does [not] indicate any ... change in circumstances that would lead to a shift in how the Parole Directive is being applied. ... Instead, in February 2017, then-DHS Secretary John Kelly stated that the Parole Directive “remain[s] in full force and effect,” and the Government represented the same to the Supreme Court just last year. ... Declarations submitted by Defendants in this case, moreover, also state that the Parole Directive remains in force. ... Defendants cannot claim that the ICE Directive remains fully in effect, and yet, at the same time, provide no explanation for the sudden shift in the day-to-day treatment of asylum seekers under the current administration.

...

The Court ... finds that Plaintiffs have demonstrated a likelihood of success on the merits of their Accardi⁸⁸ claim that Defendants are not abiding by their own policies and procedures.⁸⁹

Defendants are hereby ENJOINED from denying parole to any provisional class members absent an individualized determination, through the parole process, that such provisional class member presents a flight risk or a danger to the community ... based on the specific facts of each provisional class member's case [and] not be based on categorical criteria applicable to all provisional class members.⁹⁰

The Biden Administration

Prior to the Obama administration, according to the Humanitarian Assistance Branch (first within ICE and currently within USCIS) protocols for adjudicating humanitarian parole applications, “humanitarian parole is an extraordinary measure, to be used sparingly and not to circumvent normal visa-issuing procedures.”⁹¹ Even during the Obama administration, USCIS's own website stated that “[h]umanitarian parole is used sparingly to bring someone who is otherwise inadmissible into the United States for a temporary period of time due to a compelling emergency.”⁹² I can no longer find any such language on its website. In fact, the website emphasizes that “[n]o one factor determines the outcome” of a parole decision — even a factor such as national security concerns, a criminal history, prior participation in fraud, poor character, or a negative effect on a community in the U.S.⁹³

International Entrepreneur Rule Continued

On May 11, 2021, USCIS announced that it “is withdrawing the ... NPRM that would have removed the [international entrepreneur] parole program from DHS regulations.”⁹⁴

Haitian (HFRP) and Filipino (FWVP) Parole Programs Continued

USCIS has announced that it “will continue [the] HFRP ... program. DHS has reversed its 2019 announcement that it would terminate this program. [USICS] will continue the FWVP ... program. DHS has reversed its 2019 announcement that it would terminate this program.”⁹⁵

Detention of Aliens Continued

While not an essential part of the holding of the case, and thus technically dicta, the 5th Circuit found in *State of Texas v. Biden* in December that:

[DHS's] idea seems to be that [it] can simply parole every alien it lacks the capacity to detain.

...

DHS cannot ... parole aliens en masse; that was the whole point of the “case-by-case” requirement that Congress added in IIRIRA. ... So the Government’s ... parole [of] every alien it cannot detain is the opposite of the “case-by-case basis” determinations required by law.

*[T]he Government says DHS can ignore Congress’s limits on immigration parole and that Supreme Court precedent makes everyone (including the plaintiff States and the federal courts) powerless to say anything about it. The Government’s sole precedent for this proposition is *Town of Castle Rock v. Gonzales*. ... There, the Court held that “[t]he deep-rooted nature of law-enforcement discretion” can survive “even in the presence of seemingly mandatory legislative commands.” ... The Government reads this to mean that it can take the powers given to it by Congress (such as the power to grant immigration parole) while ignoring the limits Congress placed on those powers (such as the case-by-case requirement in [the parole statute]).*

*This argument is as dangerous as it is limitless. By the Government’s logic, *Castle Rock* would allow DHS to use the power to make, say, asylum decisions while ignoring every single limitation on those decisions imposed by the INA. And perhaps worse, the Government would have us hold that DHS’s pick-and-choose power is completely insulated from judicial review. That would make DHS a genuine law unto itself. And *Castle Rock* says no such thing[— it] is relevant only where an official makes a nonenforcement decision. ...”*

DHS’s pretended power to parole aliens while ignoring the limitations Congress imposed on the parole power [is] not nonenforcement; it’s misenforcement, suspension of the INA, or both. [Emphasis added.]⁹⁶

CAM Continued

On June 15, 2021, DHS Secretary Alejandro Mayorkas and Secretary of State Antony Blinken issued a joint statement that:

*Today, we are proud to announce the second phase of the CAM reopening, which will expand access to the program to a greater number of qualifying individuals. Eligibility to petition will now be extended to include legal guardians (in addition to parents) who are in the United States pursuant to any of the following qualifying categories: lawful permanent residence; temporary protected status; parole; deferred action; deferred enforced departure; or withholding of removal. **In addition, this expansion of eligibility will now include certain U.S.-based parents or legal guardians who have a pending asylum application or a pending U visa petition filed before May 15, 2021.** It will allow them to petition for access to the U.S. Refugee Admissions Program on behalf of their children who are nationals of El Salvador, Guatemala, or Honduras for potential resettlement in the United States. **These new changes will dramatically expand access to the CAM program.** ... We are firmly committed to ... providing a legal alternative to irregular migration. [Emphasis added.]⁹⁷*

On January 28, 2022, Texas and a number of other states filed suit in federal district court in Texas to enjoin the Biden administration from proceeding with this scheme:

[T]he crux of the CAM program is its use of the parole authority ... to allow the very same individuals who did not qualify as refugees to come into the United States.

...

[It] is an unlawful artifice of the Biden Administration’s imagination, never authorized by Congress. And to the extent that it facilitates the entry into the United States of illegal aliens’ family members based on the mere existence of an appli-

ation for speculative benefits, it is an extraordinarily disastrous program to employ in the middle of an unprecedented border crisis.

The CAM Program is illegal.

...

This Court should declare unlawful and enjoin the Biden Administration's unlawful program.

The INA does not explicitly or implicitly create any authority in the executive branch that includes the ability to create an entire program that categorically considers applicants for benefits as applicants for parole. ... If it did, there would be no limit on the number of aliens who could be brought into the United States. Any administration could circumvent all caps set on immigration levels by simply determining general categories that constitute a "significant public benefit" or a "urgent humanitarian reason," reviewing an application from each applicant, and paroling all applicants because the administration desires such a result. Such a result is directly contrary to the plain text and legislative history of the parole statute.⁹⁸

Conclusion

So, the states are doing what the Trump administration never did, challenging the very legality of categorical parole. Should the 5th Circuit agree, and remember what it has already found in *Texas v. Biden* — “DHS’s pretended power to parole aliens while ignoring the limitations Congress imposed on the parole power [is] ... misenforcement, suspension of the INA, or both.” — this challenge could shake the very foundations of the executive branch’s three-score-and-10-year expropriation of the power of the legislative branch through the parole power. Paraphrasing Bob Dylan: In the end, could Congress win the war after losing every battle?⁹⁹

Should the federal courts not rein in parole abuse, Congress should pass the House-passed parole reform that Lamar Smith proposed in 1996, only allowing for parole if:

- *an alien has a medical emergency and the alien cannot obtain necessary treatment in the foreign state in which the alien is residing or the medical emergency is life-threatening and there is insufficient time for the alien to be admitted through the normal visa process,*
- *an alien is needed in the U.S. in order to donate an organ or other tissue for transplant into a close family member,*
- *an alien has a close family member in the United States whose death is imminent and the alien could not arrive in the U.S. in time to see such family member alive if the alien were to be admitted through the normal visa process,*
- *an alien has assisted the U.S. Government in a matter, such as a criminal investigation, espionage, or other similar law enforcement activity, and either the alien's presence in the U.S. is required by the Government or the alien's life would be threatened if the alien were not permitted to come to the United States, or*
- *an alien is to be prosecuted in the U.S. for a crime.¹⁰⁰*

End Notes

¹ Pub. L. No. 82-414, 66 Stat 163 (June 27, 1952).

² *Id.* § 212(d)(5). The section also provided that:

[P]arole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

³ “Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration’s Central American Minors Refugee/Parole Program: Hearing Before the Subcommittee on Immigration and the National Interest of the Senate Committee on the Judiciary, 114th Congress (2015). Statement and response to a question by Jan Ting.

⁴ Arnold Leibowitz, “The Refugee Act of 1980: Problems and Congressional Concerns”, 467 *The Annals of the American Academy of Political and Social Science* 163, 165 (1983).

⁵ Adam Cox and Cristina Rodriguez, “The President and Immigration Law Redux”, 125 *Yale L.J.* 104, 116-17 (2015).

⁶ [H.R. Rep. No. 104-469](#), part 1, at 141 (1996).

⁷ *Amanullah v. Nelson*, 811 F.2d 1, 6 (1st Cir. 1987).

⁸ *Mason v. Brooks*, 862 F.2d 190, 194 (9th Cir. 1988).

⁹ “Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration’s Central American Minors Refugee/Parole Program: Hearing Before the Subcommittee on Immigration and the National Interest of the Senate Committee on the Judiciary, 114th Congress (2015). Statement and response to a question by Jan Ting.

¹⁰ “The President and Immigration Law Redux” at 502.

¹¹ *Id.* at 505-06. The Obama administration Justice Department’s Office of Legal Counsel (OLC) cites Cox and Rodriguez’s article in “describing Congress’s response to its dissatisfaction with the Executive’s use of parole power for refugee populations in the 1960s and 1970s.” See “[The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others](#)”, OLC, U.S. Department of Justice, at 6 n.1 (November 19, 2014).

¹² Letter from F. James Sensenbrenner, Jr., chairman, House Judiciary Committee, to Robert Zoellick, ambassador, United States Trade Representative, at 1 (July 10, 2003) (found at [H.R. Rept. No. 108-224, part 2, at 46](#) (2003)). The quote from *Galvan* can be found at 347 U.S. 522, 531 (1954). The quote from *Kleindienst* can be found at 408 U.S. 753, 766 (1972) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)).

¹³ “The President and Immigration Law Redux” at 502.

¹⁴ H.R. Rep. No. 82-1365, at 51-52 (1952).

¹⁵ *Amanullah v. Nelson*, 811 F.2d at 6. In *Gutierrez v. Ilchert*, a federal district court in California concluded that:

Nor can this Court agree with the view that the legislative history suggests an intent that the INS exercise its discretion in a “tight-fisted” manner. ... [T]he legislative history [to the 1952 Act] indicates that Congress wanted to confer on the INS “broader discretionary authority ... to parole inadmissible aliens into the United States.”

702 F. Supp. 787, 791 (N.D. Calif. 1988) (citation omitted, emphasis added by *Gutierrez*). However, the House Judiciary Committee's report made clear that the adjective "broader" was meant to apply to the attorney general's authority in "emergency" cases regarding individual aliens (such as who require "immediate medical attention") and in cases "strictly in the public interest" regarding individual aliens (such as "a witness or for purposes of prosecution"). H.R. Rep. No. 82-1365, at 52. It was not meant to refer to parole as a device to bypass enacted immigration law.

¹⁶ The President and Immigration Law Redux" at 502-503.

¹⁷ S. Rep. No. 89-748 at 17 (1965). The House Judiciary Committee expressed similar sentiments. See H.R. Rep. No. 89-745 at 15-16 (1965). In 1979, the Committee reflected that "in 1965, Congress reiterated its original intent that the parole provision be used only for isolated, individual cases." H.R. Rep. No. 96-608 at 4 (1979).

¹⁸ *Amanullah v. Nelson*, 811 F.2d at 6.

¹⁹ Peter Margulies, "The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law", 64 Am. U. L. Rev. 1183, 1213 (2015).

²⁰ "The Refugee Act of 1980: Problems and Congressional Concerns", at 164-65.

²¹ The President and Immigration Law Redux" at 117.

²² S. Rep. No. 96-256 at 5 (1979).

²³ H.R. Rep. No. 96-781 at 20 (1980). The Senate bill had no comparable provision and the Conference Report adopted the House version. *Id.*

²⁴ Edward Kennedy, "Refugee Act of 1980", 15 Int'l Migration Rev. 141, 146 (1981).

²⁵ *Amanullah v. Nelson*, 811 F.2d. The Conference Report did state that "[t]he Conferees, in accepting the House limitation on the parole of refugees, recognize that it does not affect the Attorney General's authority under section 212(d)(5) ... to parole aliens who are not deemed to be refugees." H.R. Rep. No. 96-781 at 20. The court in *Gutierrez v. Ilchert* took this language to mean that:

[I]n the 1980 amendment [to the INA] Congress tightened the parole provisions with respect to refugees, requiring "compelling reasons in the public interest" before parole for those aliens would be allowed. Although this amendment was enacted while the INS parole policy was still lenient, Congress did not see fit to tighten the parole requirements generally, but only for refugees.

702 F. Supp. at 791. However, as the 1st Circuit stated, "there are clear indicia of a congressional desire to discourage any extravagant — or even generous — use of the Attorney General's parole authority in connection with both nonrefugee and refugee aliens." *Amanullah v. Nelson*, 811 F.2d at 12-14.

²⁶ Refugee Act of 1980 at 141-142.

²⁷ Lauren Gilbert, "Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform", 116 W. Va. L. Rev. 255, 281 n.146 (2013).

²⁸ Stephen Legomsky & Cristina Rodriguez, *Immigration and Refugee Law and Policy* at 886 (5th ed. 2009).

²⁹ The President and Immigration Law Redux" at 118.

³⁰ See § 602 of title VI of division C of Pub. L. No. 104-208.

³¹ INA § 212(d)(5)(A) (8 U.S.C. § 1182(d)(5)(A)).

³² H.R. 2202, § 523, 104th Cong. See H.R. Rep. No. 104-469, part 1, at 77-78.

³³ *Id.* at 174-75. The report also stated that:

While provisions exist in the law to admit refugees and aliens granted asylum, there are aliens of humanitarian concern to the U.S. that do not meet the definition of a refugee. The lack of a single, transparent category for the admission of such aliens has also contributed to the improper use of parole authority by the Attorney General. ... If a category existed in the law to provide for a limited number of humanitarian visas each year at the discretion of the Attorney General, migration agreements such as the recent agreement with Cuba could be negotiated without violating other existing provisions in immigration law.

Id. at 141.

Section 524, establishing a category for humanitarian immigrants, is intended to allow the admission of immigrants that may currently be admitted through improper application of the parole authority, but to place such admissions within the overall immigration ceilings established by Congress.

Id. at 175. This provision was not enacted into law.

³⁴ [Letter](#) from Sens. Charles Grassley, Jeff Sessions and Michael Lee to Jeh Johnson, Secretary, DHS, at 7 (November 3, 2015).

³⁵ “The Department of Homeland Security’s Response to Chairman Grassley’s November 3, 2015 Letter”, DHS at 1, (December 2015).

³⁶ S. Rep. No. 104-249 at 2 (1996).

³⁷ *Cruz-Miguel v. Holder*, 650 F.3d 189, 199, 199 n.15 (2nd Cir. 2011).

³⁸ *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007).

³⁹ [Texas v. Biden](#) at *18-19, U.S. App. LEXIS 36689, U.S. App. LEXIS 36689, 20 F.4th 928 (5th Cir. 2021),

⁴⁰ Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, and Ronald Wada, 5 *Immigration Law and Procedure* § 62.01[3] (2010).

⁴¹ 72 FR 65588, USICS, [Cuban Family Reunification Parole Program](#) (notice) (November 21, 2007).

⁴² H.R. Rep. No. 104-469, part 1, at 141.

⁴³ 3,969,573. See [“Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2021”](#), U.S. State Department.

⁴⁴ Neli Esipova, Anita Pugliese, Julie Ray, [“More Than 750 Million Worldwide Would Migrate If They Could”](#), Gallup, December 10, 2018.

⁴⁵ According to U.S. Immigration and Customs Enforcement (ICE), “deferred action” is “not a specific form of relief but rather a term used to describe the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority [removal] cases, potentially deferring action on [the] cases [of removable aliens] with a lower priority,” “such as [by] not placing an individual in removal proceedings.” [“Toolkit for Prosecutors”](#), ICE, DHS, at 4 (2011). & Continued Presence: Temporary Immigration Status for Victims of Human Trafficking (2010). Unlike parole, deferred action is generally not based on any specific statutory authority. See [Toolkit for Prosecutors](#) at 4.

⁴⁶ See “Administrative Alternatives to Comprehensive Immigration Reform”, memo from Denise Vanison, Policy and Strategy, USCIS; Roxana Bacon, Office of the Chief Counsel, USCIS; Debra Rogers, Field Operations, USCIS; and Donald Neufeld, Service Center Operations, USCIS, to Alejandro Mayorkas, Director, USCIS (undated).

⁴⁷ Information provided by U.S. Customs and Border Protection.

⁴⁸ [“U.S. Expands Initiatives to Address Central American Migration Challenges”](#), DHS press release, July 26, 2016.

⁴⁹ As described on USCIS’s website, [deferred enforced departure](#) “is in the president’s discretion to authorize as part of his constitutional power to conduct foreign relations. Although DED is not a specific immigration status, individuals covered by DED are not subject to removal from the United States for a designated period of time.”

⁵⁰ DHS cannot remove an alien to a country where the alien’s life or freedom would be threatened because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion. See § 241(b)(3) of the INA (8 U.S.C. § 1231(b)(3)).

⁵¹ Generally, per INA § 101(a)(42) (8 U.S.C. § 1101(a)(42)):

[A refugee is a] person who is outside any country of such person’s nationality ... and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

⁵² While the number of CAM refugee slots was limited by the refugee program’s annual ceiling (for FY 2017, a presidentially set ceiling of 5,000 for all Latin American/Caribbean countries, and for FY 2022, 15,000), the parole program has no such numerical limitation. See [“Proposed Refugee Admissions for Fiscal Year 2017: Report to the Congress”](#), U.S. Department of State, DHS, U.S. Department of Health and Human Services, at 23; and [“Proposed Refugee Admissions for Fiscal Year 2022: Report to the Congress 11”](#) (table 1), INA § 207 (8 U.S.C. § 1157),

⁵³ Nayla Rush, [“Expanded Central American ‘Refugee’ Program: Bring the Whole Family!”](#), Center for Immigration Studies, 2016.

⁵⁴ When accompanied by a qualified child, the following additional categories of applicants would also be eligible for parole or refugee status through CAM: 1) sons and daughters of U.S.-based lawfully present parents who are over 21 years old; 2) in-country biological parents of the qualified children; and 3) “caregivers” of qualified children who are also “related” to the U.S.-based lawfully present parents. See [“U.S. Expands Initiatives to Address Central American Migration Challenges”](#), DHS press release, July 26, 2016.

⁵⁵ Julie Hirschfeld Davis, “U.S. to Admit More Central American Refugees”, The New York Times, July 26, 2016.

⁵⁶ *Id.*

⁵⁷ *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1079 (N.D. Cal. 2018).

⁵⁸ Nayla Rush, [“Biden’s Plan for Central American Migrants: Fly Them Straight to the U.S.”](#), Center for Immigration Studies, 2021, at 4.

⁵⁹ H.R. 2131, § 102 of title 1, 113th Cong.

⁶⁰ [“International Entrepreneur Rule \(final rule\)”](#), 82 FR 5238, USCIS, DHS, January 17, 2017.

⁶¹ [“International Entrepreneur Rule: Delay of Effective Date \(final rule with request for comment; delay of effective date\)”](#), 82 FR 31887, USCIS, DHS, July 11, 2017.

⁶² [“International Entrepreneur Rule \(proposed rule\)”](#), 81 FR 60130, 60134, USCIS, DHS, August 31, 2016.

⁶³ 5 U.S.C. § 553(c).

⁶⁴ 82 FR 5244.

⁶⁵ *Id.*

⁶⁶ [“Rescission of Discretionary Parole Policies Relating to Nationals of the Russian Federation Seeking Entry Into Guam and/or the Commonwealth of the Northern Mariana Islands for a Temporary Visit for Business or Pleasure”](#), 84 FR 46029, DHS, September 3, 2019.

⁶⁷ Pub. L. No. 116-24, § 2 (2019).

⁶⁸ H.R. Rept. No. 104-469, part 1, at 225.

⁶⁹ Bo Cooper, general counsel, INS, U.S. Department of Justice, memo to the Executive Associate Commissioner for Policy and Planning, Executive Associate Commissioner for Field Operations, all Regional Counsels, all District Counsels, and all Sector Counsels, [“Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens”](#), Aug. 21, 1998, at 1-2, Legal Op. No. 98-10 (INS), 1998 WL 1806685.

⁷⁰ [“Implementation of Haitian Family Reunification Parole Program \(notice\)”](#), 79 FR 75581, 75582, USCIS, DHS, December 18, 2014.

⁷¹ [“Filipino World War II Veterans Parole Policy \(notice\)”](#), 81 FR 28907, 28908, May 9, 2016.

⁷² [“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 Inadmissi”](#), director, USCIS, memo, November 15, 2013, at 1-2.

⁷³ [“Dissenting views of Lamar Smith, Elton Gallegly, Ric Keller, Darrell Issa, and Steve King”](#), H.R. Rept. No. 110-912 at 33-34 (2008).

⁷⁴ Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements, found at 82 FR 8793, January 25, 2017.

⁷⁵ John Kelly, secretary, [“Implementing the President’s Border Security and Immigration Enforcement Improvements Policies”](#), DHS, memo to the acting commissioner, U.S. Customs and Border Protection; the acting director, ICE; the acting director, USCIS; and the acting general counsel, the acting assistant secretary for international affairs, and the acting under-secretary for management, February 20, 2017, at 9.

⁷⁶ [“Termination of the Central American Minors Parole Program \(notice\)”](#), 82 Fed. Reg. 38926, DHS, August 16, 2017.

⁷⁷ *S.A. v. Trump*, 363 F. Supp. 3d (citations and footnote omitted). See also *Palacios v. DHS*, 434 F. Supp. 3d 500 (S.D. Tex. 2020). The court did require DHS to provide a final adjudication for those individuals who had already been conditionally approved for parole and whose conditional approvals had been rescinded because of the program’s termination:

Program participants who received conditional approvals of parole (and made arrangements based on those approvals) had more serious reliance interests than individuals who never received approvals. The court holds that DHS’s failure to

take into account and address those more serious reliance interests when it mass-rescinded parole for those participants was arbitrary and capricious ... and must be set aside under the APA.

Id. at 1089. The court’s final order provided that:

The court denies the plaintiffs’ motion to enjoin DHS from terminating the CAM Parole Program going forward. ...

1. DHS’s decision to mass-rescind conditional approvals for the 2,714 beneficiaries conditionally approved for parole but who had not traveled to the United States is vacated.

2. DHS must continue the post-conditional-approval processing for the 2,714 beneficiaries under the policies and procedures for processing beneficiaries that it had in place before January 2017.

S.A. v. Trump, at 42-43, 2019 U.S. Dist. LEXIS 33286, 2019 WL 990680. Importantly, the court noted that:

4. Nothing in this order compels DHS to reach any particular outcome with respect to the processing of any individual beneficiary or prevents DHS from exercising its discretion with respect to the parole of any individual beneficiary.

5. Nothing in this order prevents DHS from reconsidering its decision to mass-rescind conditional approvals of parole, including the serious reliance interests of participants conditionally approved for parole.

Id. at 43.

⁷⁸ 82 FR 31887.

⁷⁹ *Nat’l Venture Capital Ass’n v. Duke*, 291 F. Supp. 3d 5, 20 (D.D.C. 2017).

⁸⁰ [“Removal of International Entrepreneur Parole Program \(proposed rule\)”](#), 83 FR 24415, 24416, USCIS, DHS, May 29, 2018.

⁸¹ [“Rescission of Discretionary Parole Policies Relating to Nationals of the Russian Federation Seeking Entry Into Guam and/or the Commonwealth of the Northern Mariana Islands for a Temporary Visit for Business or Pleasure \(notice\)”](#), 84 FR 46029, DHS, Sept. 3, 2019.

⁸² [“USCIS to End Certain Categorical Parole Programs”](#), USCIS, DHS, press release, August 2, 2019.

⁸³ [“Agency Information Collection Activities; Revision, of a Currently Approved Collection: Application for Travel Document. Removal of Instructions Regarding the Haitian Family Reunification Program and Filipino World War II Veteran Parole Program \(60-day notice\)”](#), USCIS, DHS, 85 FR 84362, 84363, December 28, 2020.

⁸⁴ INA § 235(b)(1)(A)(ii) (8 U.S.C. § 235(b)(1)(A)(ii)).

⁸⁵ INA § 235(b)(1)(B)(ii), (iii)(IV) (8 U.S.C. § 235(b)(1)(B)(ii), (iii)(IV)).

⁸⁶ 81 FR 60135.

⁸⁷ John Morton, assistant secretary, ICE, DHS, [“ICE Policy Directive: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture”](#), at 3, December 8, 2009, at 3.

⁸⁸ The Supreme Court ruled in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266, 268 (1954), that an agency must follow its own “existing valid regulations”, even when those regulations circumscribe the scope of discretion the agency could otherwise exercise. In *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), the Court clarified that this is true “even where [they] are possibly more rigorous than otherwise would be required [by law].” The court in *Damus* pointed out that “in the immigra-

tion context, the Second Circuit has explained that the *Accardi* doctrine’s ‘ambit is not limited to rules attaining the status of formal regulation,’ and that it can be applied to internal agency guidance.” *Damus v. Nielsen*, 313 F. Supp. 3d at 336.

⁸⁹ *Damus v. Nielsen*, 313 F. Supp. 3d 317, 323 (D.D.C. 2018).

⁹⁰ The court’s associated order. 2018 U.S. Dist. LEXIS 109843, 2018 WL 3232515.

⁹¹ [“Internal Controls for Adjudicating Humanitarian Parole Cases Are Generally Effective, but Some Can Be Strengthened”](#), U.S. Government Accountability Office, 2008, at 8.

⁹² USCIS [website](#).

⁹³ The USCIS [website](#) states that:

We exercise our discretion on a case-by-case basis, by evaluating positive factors in the record against any negative factors. Having an urgent humanitarian reason or a significant public benefit is a positive determining factor and it is evaluated against any negative factors present in a case. ... Some common discretionary factors that we evaluate include (but are not limited to) ...

- *Whether there is evidence of any national security concerns;*
- *Whether there is evidence of any criminal history or previous immigration violations;*
- *Whether there is evidence of any previous participation in fraud; ...*
- *Whether the beneficiary will have sufficient financial support while in the United States;*
- *Evidence of the beneficiary’s character;*
- *The effect of the beneficiary’s presence on a community in the United States; ...*

No one factor determines the outcome of the case. Each decision is based on all of the circumstances present in a case.

⁹⁴ [“Removal of International Entrepreneur Parole Program”](#), USCIS, DHS, 86 FR 25809, May 11, 2021, (proposed rule withdrawn).

⁹⁵ USCIS [website](#).

⁹⁶ *Texas v. Biden*, U.S. App. LEXIS 36689, 20 F.4th 928 (5th Cir. 2021).

⁹⁷ [“Joint Statement by the U.S. Department of Homeland Security and U.S. Department of State on the Expansion of Access to the Central American Minors Program”](#), DHS, U.S. State Department, June 15, 2021.

⁹⁸ [Complaint](#) at 4-5, *Texas v. Biden*, No. 2:22-cv-00014-M (N.D. Tex. Jan. 28, 2022),

⁹⁹ “There’s a lone soldier on the cross, smoke pourin’ out of a boxcar door. You didn’t know it, you didn’t think it could be done. In the final end he won the wars after losin’ every battle.” Bob Dylan, “Idiot Wind, *Blood on the Tracks*, Columbia Records, 1975.

¹⁰⁰ H.R. 2202, § 523, 104th Cong. (as reported by the House Judiciary Committee).