FRAGILE IMMIGRATION LEGALITY COLLAPSES IN THE TRUMP ERA

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I. INTRODUCTION

People often think of immigration legality in black and white terms—immigrants are "documented" or "undocumented"; they are present "legally" or "illegally." There has long been, however, a significant gray area of quasi-legality in the U.S. immigration system. This gray area expanded for decades due to diverging policies of the executive and legislative branches, which each play a role in the formation of immigration policy. The presidency of Donald Trump and its anti-immigration agenda exposed the vulnerability of this class of quasi-status immigrants who were long lawfully present in the country, but for whom Congress had not established a pathway to secure permanent legal status. Most of these immigrants had work permits, and many had U.S. citizen family members and had permanently settled in the United States. They were, nevertheless, subject to unpredictable enforcement and removal (deportation)[1] by the Executive. This Article explains the rise of quasi-status immigration and how the Trump administration was able to exploit it. It also offers solutions for the Biden administration and Congress to help remedy the system.

Part I of this Article provides necessary background information by describing three different immigration legal situations: (1) lawful status, (2) authorized stay or lawful presence, and (3) unlawful presence. These three legal terms of art are distinct from the more commonly used, but sometimes inaccurate, dichotomies of "documented" versus "undocumented" or "legal" versus "illegal." The second group, authorized stay or lawful presence, occupies a middle ground between secure legal status and no legal status and is therefore referred to here as "quasi-status."[2]

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[1] In this Article I use the precise legal term "removal" to describe what is more commonly referred to as "deportation." I use the term "deportation" only in reference to proceedings initiated prior to 1996. As scholar Peter Markowitz explains:

> Immigration removal proceedings, colloquially referred to as "deportation proceedings," are the primary mechanism by which the government expels noncitizens from the United States or prevents their admission under the Immigration and Naturalization Act ("INA"). Prior to 1996, there were two different types of such proceedings: "deportation proceedings" for noncitizens who had entered the United States and "exclusion proceedings" for noncitizens seeking admission. There is now a single type of proceeding—"removal proceedings"—which encompasses both situations.

Peter L. Markowitz, Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings, 43 HARV. C.R.-C.L.L. REV. 289, 289 n.2 (2008).

[2] The notion of quasi-status immigration has been identified previously in legal scholarship. *See, e.g.*, Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U.L. REV. 1115 (2015); Sara N. Kominers, *Caught in the Gap Between Status and No-Status: Lawful Presence Then and Now*, 17 RUTGERS RACE & L. REV. 57 (2016); David A. Martin, *Twilight Statuses: A Closer Examination of the Undocumented Population*,

The major features of quasi-status, as described in this Article, are: (1) having no pathway to permanent residency and U.S. citizenship; (2) having a significant number of non-citizens with the status residing in the United States for ten years or more; and (3) being easily revoked by the executive branch (without congressional action).

Part II of this Article explains the rise of the most common forms of quasi-status in the past two decades through early 2017, when President Trump took office, including: Temporary Protected Status ("TPS"), Deferred Action for Childhood Arrivals ("DACA"), prosecutorial discretion (administrative closure), Deferred Enforced Departure ("DED"), other deferred action, and stay of removal/order of supervision. More than a million non-citizens had TPS and DACA in 2017, while hundreds of thousands more were authorized to remain in the United States because their removal proceedings were administratively closed or were granted stays of removal or other deferred action.

Part III of this Article explains how, while more and more non-citizens were gaining quasi-statuses, pathways to permanent legal status and U.S. citizenship were declining. Cancellation of removal (formerly suspension of deportation), and registry—forms of relief that allowed certain non-citizens without lawful status to obtain green cards for decades—became more difficult to obtain. Furthermore, there were no significant congressional legalization programs for decades, which had previously been a common feature of the U.S. immigration system. Legislative reforms in the 1990s instead made it more difficult for people without status to obtain lawful status, especially if they had past immigration violations.

Part IV describes how the Trump administration was able to exploit these vulnerable immigrants with quasi-statuses as part of his anti-immigration policy agenda. The Trump administration rescinded TPS and DACA (triggering a complicated web of federal litigation over the legality of the programs and rescissions), almost completely ended the practice of administrative closure in immigration court, contracted other grants of deferred action, and revoked previously granted stays of removal and orders of supervision. These changes created disorder and uncertainty in the immigration legal system during the Trump presidency.

Finally, Part V offers potential solutions to remedy this volatile system which leaves hundreds of thousands of immigrants in an unacceptable state of vulnerability susceptible to capricious and discriminatory enforcement by the executive branch. These solutions include policy actions that can be taken by President Biden and by Congress. The Trump presidency revealed the precarious nature of a quasi-status immigration system that cannot be

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MIGRATION POL'Y INST. POL'Y BRIEF, June 2005, at 7. Geoffrey Heeren's article is the most comprehensive study describing what he calls "nonstatus," which includes parole, voluntary departure, extended voluntary departure, deferred enforced departure, temporary protected status, withholding and deferral of removal, deferred action, and administrative closure. I include many, but not all these "nonstatuses" in my typology of "quasi-status." I do not include parole or voluntary departure because these nonstatuses generally only authorize lawful presence for a short period of time. I also do not include withholding of removal in my typology of quasi-status because, although it often authorizes lawful presence for a long period of time, its grant is more secure and cannot be easily revoked by the Executive.

allowed to continue into the future. It will not be enough for the Biden (or any future presidential) administration to simply reverse Trump's immigration policies; the administration must also work to repair the system that made his destructive policies possible.

II. LAWFUL STATUS, AUTHORIZED STAY/LAWFUL PRESENCE, AND UNLAWFUL PRESENCE

A. LAWFUL STATUS

A non-citizen[3] has "lawful status" in the United States if the non-citizen holds a specific immigrant (permanent) or nonimmigrant (temporary) visa and is in compliance with the terms of that visa.[4] Persons designated as refugees or asylees also have lawful status.[5] Non-citizens with permanent lawful status are referred to as legal permanent residents ("LPRs") or more commonly as "green card" holders. Non-citizens seek LPR status through family-based (those with relatives with legal status in the United States),[6] employment-based (those with certain education or job skills),[7] or diversity lottery visas (those from countries with historically low levels of immigration to the United States).[8]

Family-based visas are either immediately available or divided into one of four preference categories with various wait times. Family-based visas are available without a wait (beyond processing times) for "immediate relatives" of U.S. citizens, which are spouses, parents, and unmarried children under the age of twenty-one.[9] Beyond the immediately available visas, the first family preference is for unmarried adult sons and daughters of U.S. citizens (twenty-one years of age or older), the second preference is for spouses and unmarried children (adults and those under twenty-one) of LPRs, the third preference is for married adult sons and daughters of U.S. citizens, and the fourth preference is for brothers and sisters of adult U.S. citizens.[10] Every year the government receives more family-based visa petitions than there are visas available in each of the four preference categories, which has created a backlog of people "approved for visas not yet available due to . . . numerical limits."[11] Each month, the U.S. Department of State releases a bulletin with visa wait times ranging from a little more than a year to more than twenty years depending on the preference category and home country of the intending immigrant.[12]

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[3] United States immigration law often uses the term "alien" to describe a person who is "not a citizen or national of the United States." Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2018) ("The term 'alien' means any person not a citizen or national of the United States."). This Article instead uses the more accurate term "non-citizen."

[4] 8 C.F.R. § 245.1(d)(1) (2020).

[5] *Id.* §§ 245.1(d)(1)(iii)–(v).

[6] INA §§ 201(a), 201(b), 203(a), 203(d), 203(h).

[7] *Id.* § 203(b).

[8] *Id.* §§ 201(e), 203(c).

[9] *Id.* § 201(b).

[10] *Id.* § 203(a).

[11] William A. Kandel, Cong. Rsch. Serv., R43145, U.S. Family-Based Immigration Policy 13 (2018).

[12] *The Visa Bulletin*, U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html (last visited July 27, 2020).

Similar to family-based visas, employment-based visas are also divided into preference categories. The first preference is for those with "extraordinary ability in the science, arts, education, business or athletics"; second preference is for those "holding advanced degrees . . . or . . . of exceptional ability"; third preference is for "skilled workers, professionals, and other workers"; fourth preference is for "certain special immigrants" including certain religious workers; and fifth preference is for investors who will invest at least $1.8 million (or less in economically disadvantaged areas) to create at least ten jobs in the United States.[13] The U.S. Department of State also publishes a visa bulletin each month, which lists visa wait times for employment-based visas. The wait times range from "current" (no wait) to more than ten years depending on the preference category and country of origin of the intending immigrant.[14]

Both refugees and asylees are unable or unwilling to return to their country of origin or nationality because of a well-founded fear of persecution based on their race, religion, nationality, membership in a particular social group, or political opinion.[15] The major difference between refugees and asylees is that refugees are "outside of the United States when they are screened for resettlement, whereas asylum seekers submit their applications while they are physically present in the United States or at a U.S. port of entry."[16] Refugees must adjust status after one year of arriving in the United States, and asylees are eligible to adjust one year after being granted asylum.[17] The cap on the number of refugees who can be admitted each year is set by the President and has ranged anywhere from more than 200,000 in 1980, to just 18,000 in 2020.[18] The cap is set at 62,500 for 2021.[19] There is no cap on the number of people who can be granted asylum each year, and in 2019, 46,500 individuals were granted asylum (including principal applicants, their spouses, and their minor children).[20]

Every year, 480,000 family-based,[21] 140,000 employment-based,[22] and 55,000 diversity-based visas[23] are available for non-citizens to immigrate to the United States. The family-based and employment-based caps are flexible and often more visas are available than the caps indicate. The number of

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[13] INA § 203(c); *New Rule Making Brings Significant Changes to EB-5 Program*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 23, 2019), https://www.uscis.gov/news/news-releases/new-rulemaking-brings-significant-changes-to-eb-5-program.

[14] *The Visa Bulletin*, *supra* note 12.

[15] INA § 101(a)(42).

[16] *Id.* § 208(a)(1); Brittany Blizzard & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL'Y INST. (June 13, 2019), http://www.migrationpolicy.org/article/refugees-and-asylees-united-states.

[17] INA § 209(a).

[18] *U.S. Annual Refugee Resettlement Ceilings and Numbers of Refugees Admitted, 1980-Present*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united (last visited May 19, 2021).

[19] *Id.*

[20] Jeanne Batalova, Mary Hanna & Christopher Levesque, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Feb. 11, 2021), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020.

[21] INA § 201(c).

[22] *Id.* § 201(d).

[23] *Id.* § 201(e).

family-based visas available often exceeds the cap of 480,000 because there is a mandated floor of 226,000 visas available in the family-based preference categories, and visas available for immediate family members are unlimited. Furthermore, the number of employment-based visas available each year includes unused family-based visas from the previous year, so it may exceed 140,000. In 2015, more than one million people became lawful permanent residents of the United States, including 678,978 through family-based visas, 144,047 through employment-based visas, 47,934 through diversity lottery visas, and 151,995 through refugee and asylee adjustment.[24] As these numbers demonstrate, the majority of immigrants become LPRs of the United States through family-based immigrant petitions.

There are also a wide range of "nonimmigrant" visas for non-citizens who wish to visit the United States temporarily for a particular purpose such as tourism, medical treatment, temporary work, or study. Some examples of common nonimmigrant visas are the tourist "B-2" visa, the student "F" visa, and the skilled and specialized employment "H-1B" visa.[25] These nonimmigrant visas expire and do not allow the holder to remain in the United States permanently. Almost all nonimmigrant visas allow the holder to adjust their status to LPR in the United States if an immigrant visa is available to them and they have remained in lawful nonimmigrant status.[26]

B. AUTHORIZED STAY/LAWFUL PRESENCE

Certain non-citizens are authorized to remain in the United States even though they do not have a lawful status and are considered "lawfully present."[27] The concept of lawful presence dates back to the 1952 Immigration and Nationality Act ("INA") with the creation of immigration "parole."[28] The parole power allows the President to authorize the entry of otherwise inadmissible non-citizens to the United States "for urgent humanitarian reasons or significant public benefit."[29] The parole power was historically used to admit entire classes of non-citizens.[30]

For example, in 1956, President Dwight D. Eisenhower used the parole power to admit fifteen thousand Hungarian refugees fleeing persecution from a brutal communist regime.[31] At the time, President Eisenhower foresaw the problem that these parolees would have no secure, permanent status after they entered the United States and urged Congress to pass

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[24] Ryan Baugh & Katherine Witsman, *U.S. Lawful Permanent Residents: 2015*, DEP'T HOMELAND SEC. OFF. IMMIGR. STATS.: ANNUAL FLOW REPORT, Mar. 2017, at 1, 4, https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2015.pdf.

[25] INA § 101(a)(15); 8 C.F.R. § 214.2 (2020).

[26] *See* INA § 245.

[27] *See Id.* § 212(a)(9)(B) (describing unlawful presence); U.S. CITIZENSHIP & IMMIGR. SERVS., ADJUDICATOR'S FIELD MANUAL, Ch. 40.9.2(a)(2)–(3) (outlining when a non-citizen is considered lawfully present).

[28] INA § 212(d)(5)(a).

[29] *Id.*

[30] Adam B. Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 502 (2009).

[31] Dwight D. Eisenhower, *White House Statement Concerning the Admission of Additional Hungarian Refugees*, AM. PRESIDENCY PROJECT (Dec. 1, 1956), https://www.presidency.ucsb.edu/documents/white-house-statement-concerning-the-admission-additional-hungarian-refugees.

legislation regularizing their status.[32] In 1958, Congress passed legislation granting the Hungarian parolees permanent lawful status given they met certain criterion.[33]

This early historical example demonstrates the tension between the immigration powers of the presidency and those of Congress. Under the parole power, President Eisenhower was able to authorize the parole of, and conferred lawful presence on, a large group of non-citizens, but he alone could not provide them lawful permanent residency which creates a pathway to U.S. citizenship. Fortunately, in this case, Congress passed legislation providing these parolees with a legal mechanism to seek permanent lawful status and eventually citizenship. If Congress had not passed this legislation, however, those parolees could have remained in the United States in a sort of legal purgatory, unable to gain lawful status despite long periods of lawful residency. Furthermore, because of the precarious nature of their lawful presence, if the parole authorization had been taken away before a pathway to lawful status was created, they would have been subject to deportation.

In another historical example, President Jimmy Carter paroled roughly 125,000 Cuban nationals into the United States during the Mariel Cuban Boatlift of 1980.[34] Most of these paroled Cubans were able to later obtain permanent residency through the 1966 Cuban Adjustment Act ("CAA"). Under the CAA, a Cuban national could adjust their status to permanent resident if they were paroled into the United States and present in the United States for a year or more.[35] In this case, President Carter was able to grant parole, which allowed Cubans to enter the United States and be lawfully present for the amount of time needed to obtain a green card under the CAA. Without the CAA, however, these Cubans would have been left without a way to obtain permanent legal status. While immigration authorities historically "granted parole en mass[e] to deal with humanitarian crises abroad or to advance the United States'[] foreign policy," Congress changed the parole statute in the 1990s to only allow parole to be granted on a "case by case basis."[36]

Still, the "government does not consider parole to be an immigration 'status,' and parolees have few rights."[37] In addition to parole, many non-citizens are authorized to lawfully remain in the United States but do not have a lawful status. While the mass-scale use of parole has declined, lawful presence has been conferred upon those with DACA, TPS, administratively closed removal proceedings, and others. Individuals with these quasi-statuses are authorized to stay in the United States but are not considered to

[32] *Id.*

[33] Carl J. Bon Tempo, Americans at the Gate: The United States and Refugees During the Cold War, 84 (2008).

[34] See Heather Reynolds, Irreconcilable Regulations: Why the Sun Has Set on the Cuban Adjustment Act in Florida, 63 FLA. L. REV. 1013, 1020–21 (2011).

[35] The original CAA of 1966 allowed Cubans to adjust status if they had been paroled into the United State and present two years, which was reduced to one year by a change in the law in 1976. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703.

[36] Heeren, *supra* note 2, at 1136.

[37] *Id.* at 1135.

have lawful status. These quasi-statuses of today and their legal bases are discussed in-depth in Part II.

C. UNLAWFUL PRESENCE

Finally, some non-citizens have neither lawful status nor are they lawfully present and are therefore considered unlawfully present. The modern-day concept of "unlawful presence" was introduced in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996.[38] Under IIRIRA, non-citizens are unlawfully present "after the expiration of the period of stay authorized by the Attorney General or [if they are] present in the United States without being admitted or paroled."[39] Under the IIRIRA, a non-citizen who is unlawfully present in the United States for more than 180 days but less than a year is inadmissible for three years, and a non-citizen unlawfully present for a year or more is inadmissible for ten years.[40] If a non-citizen is inadmissible, they are not legally allowed to enter or remain in the United States, unless an exception or waiver is available to them.

Still, immigration legality is fluid—those with lawful status can lose that status; those considered unlawfully present can later become lawfully present or even gain lawful status. As the U.S. Supreme Court noted in the landmark case *Plyler v. Doe*, "the illegal alien of today may well be the legal alien of tomorrow."[41]

III. THE RISE OF "QUASI-STATUS" IMMIGRATION

This Article identifies several groups of "quasi-status" immigrants—those who have been authorized to legally remain in the United States for a significant period of time but who do not have a lawful status and pathway to citizenship—including those with: TPS, DACA, prosecutorial discretion (administrative closure), DED, other deferred action, and stay of removal/order of supervision. This list includes the most common forms of authorized presence in the U.S. immigration system but is not exhaustive as there are many ways in which one might be authorized by the federal government to remain in the United States but not hold a specific lawful status. Some non-citizens with lawful presence have not been in the United States for a significant period of time (defined as more than ten years by this Article) and are therefore not the main focus of this Article. For example, some non-citizens with TPS from a country that was recently designated may only have been present in the United States for a short period of time, while others from countries that have been re-designated many times may have been present for decades.

The following section defines and explains the various forms of quasi-status immigration and how more and more non-citizens gained these fragile

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

[39] INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii).

[40] IIRIRA § 301, 110 Stat. at 3009–576.

[41] Plyler v. Doe, 457 U.S. 202, 207–08 (1982).

statuses over the past decades leading up to 2017 when Donald Trump became President. It explains how immigrants came to live many years, and even decades, under these quasi-statuses without a clear, secure pathway to permanent lawful status and U.S. citizenship.

A. TEMPORARY PROTECTED STATUS

TPS offers non-citizens from designated countries who are physically present in the United States humanitarian protection from removal (deportation) and a work permit for a period of time authorized by the Secretary of the Department of Homeland Security ("DHS"). Created by Congressional statute in 1990, TPS protection is granted based on an armed conflict, civil unrest, or natural disaster in the affected home country.[42] TPS replaced what was previously known as Extended Voluntary Departure ("EVD"), which allowed the Attorney General to temporarily delay the deportation of a non-citizen if the situation in their home country was unstable or dangerous.[43] Unlike TPS, EVD had no statutory basis. Between 1960 and 1989, EVD was granted to nationals of Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Vietnam, Laos, Lebanon, Ethiopia, Uganda, Iran, Nicaragua, Afghanistan, and Poland.[44] EVD was eliminated after TPS was created in 1990.[45]

TPS is a humanitarian protection that complements U.S. refugee and asylum law, which is "ill-equipped to serve as a protection mechanism for the vast majority of individuals fleeing violent or unsafe conditions at home."[46] U.S. refugee and asylum law is not able to protect many individuals because the international treaty definition of "refugee" incorporated into U.S. law requires a showing of feared persecution specifically based on one of five protected grounds: religion, nationality, particular social group, race, or political opinion.[47] Those individuals who fear generalized violence, war, or natural disasters are not necessarily protected under U.S. refugee and asylum law even if they face life-threatening conditions in their home countries.

An initial designation of a country for TPS is made by the Secretary of DHS for six to eighteen months, which can be subsequently extended, terminated, or re-designated. Nationals from the following countries had TPS protection in the United States in early 2017: Liberia, Somalia, Sudan, Sierra Leone, Nicaragua, Honduras, El Salvador, Haiti, South Sudan, Syria,

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[42] INA § 244(b)(1).

[43] AM. IMMIGR. COUNCIL, TEMPORARY PROTECTED STATUS: AN OVERVIEW 5 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/temporary_protected_status_an_overview_0.pdf.

[44] Andrew I. Schoenholtz, The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven, 15 NW. J.L. & SOC. POL'Y 1, 5 (2019).

[45] See *Id.*

[46] Claire Bergeron, Temporary Protected Status After 25 Years: Addressing the Challenge of Long-Term "Temporary" Residents and Strengthening a Centerpiece of US Humanitarian Protection, J. MIGRATION & HUM. SEC. 22, 23 (2014).

[47] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees Art., 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.

Guinea, Nepal, and Yemen.[48] More than 400,000 people from these thirteen countries held TPS in the United States.[49]

Observers have noted that, ironically, Temporary Protected Status is neither "temporary" nor a "status."[50] This Article describes TPS as a "quasi-status" because even though it authorizes certain non-citizens to remain in the United States for many years or even decades (when a country's designation is continually extended), its protection can easily be rescinded, its holders have restricted ability to travel, and there is generally no pathway to residency and citizenship for TPS holders (at least without a separate immigrant petition available to them).

While no pathway to residency and citizenship was created in the statute that established TPS, certain non-citizens with TPS have been able to adjust to LPR status if they have a separate immigrant visa available to them. TPS holders who were admitted or paroled and were continuously lawfully present (by virtue of having TPS and/or another status) would be able to adjust to LPR if, for example, a family- or employment-based visa[51] became available to them. TPS holders who entered without authorization or were out of status when granted TPS, however, were for many years unable to adjust to LPR even if a separate immigrant petition became available to them. Being "inspected and admitted or paroled into the United States" and maintaining lawful status is required to adjust status to LPR under the INA.[52] Those who had a lawful entry, but fell out of status, would be able to pursue permanent residency in the United States only through a U.S. citizen immediate relative petition (which is an exception to the maintaining lawful status requirement).[53]

Those with TPS who had to leave the country for consular processing (to apply for permanent residency abroad) because they did not qualify for adjustment of status (to apply for a green card in the United States) automatically triggered three- or ten-year bars[54] if they accrued more than 180 days of unlawful presence before they departed the United States. This meant that many TPS holders were left with no way to become lawful permanent residents within or outside of the United States.

In 2012, however, a precedential Board of Immigration Appeals ("BIA") decision, *Matter of Arrabally and Yerrabelly*, first opened a pathway for TPS holders without a lawful entry to adjust status to LPR.[55] This case involved two Indian nationals who departed from the United States under a grant of advance parole while awaiting employment-based adjustment of status applications.[56] Upon return, the United States Citizenship and Immigration Service ("USCIS") found that they no longer qualified for adjustment of

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[48] Jill H. Wilson, Cong. Rsch. Serv., RS20844, Temporary Protected Status: Overview and Current Issues 3–4 (2020) [hereinafter TPS].

[49] TPS, *supra* note 48, at 5.

[50] See generally Ava Segerblom, Temporary Protected Status: An Immigration Statute that Redefines Traditional Notions of Status and Temporariness, 7 NEV. L.J. 664 (2007).

[51] *See supra* Part II.A.

[52] INA § 245(a), 8 U.S.C. § 1255(a).

[53] INA § 245(c).

[54] *See infra* Part III.D.

[55] Matter of Manohar Rao Arrabally & Sarala Yerrabelly, 25 I. & N. Dec. 771, 771 (B.I.A. 2012).

[56] *Id.*

status because their departure had triggered the ten-year bar because of previous unlawful presence.[57] In opposition to USCIS's position, the BIA found that although the couple did leave the United States, an "alien's departure under a grant of advance parole is qualitatively different from other departures, because it presupposes both that he will be permitted to return to the United States thereafter and that he will, upon return, continue to pursue the adjustment of status application he filed before departing."[58]

Matter of Arrabally and Yerrabelly was significant for TPS holders without a lawful entry because it gave them a way to leave the United States and return without triggering the three- or ten-year bars.[59] Once a TPS holder with advance parole leaves and returns, they are paroled back into the United States which then qualifies them for adjustment of status (as a non-citizen who has been admitted or paroled) without triggering any of the unlawful presence bars. This adjustment, however, still required a separate available immigrant visa to the TPS holder. After this BIA decision, TPS holders without a lawful entry were able to travel from the United States on advance parole and then return to adjust status if they had an immediate U.S. citizen relative willing to petition for them.[60] This strategy, however, was generally only viable for immediate relatives of U.S. citizens because of the family-based preference, and most other visas require a non-citizen to have been continuously lawfully present and not to have worked unlawfully to adjust status to LPR.[61]

A year after *Arrabally and Yerrabelly*, in 2013, another major decision gave TPS holders without an admission or parole a pathway to adjust status. In *Flores v. USCIS*, the Sixth Circuit Court of Appeals found that the plain language of the TPS statute indicates that a grant of TPS alone constitutes an admission for adjustment purposes.[62] Specifically, the court looked to INA § 244(f)(4) which states:

> (f) Benefits and Status During Period of Temporary Protected Status.—During a period in which an alien is granted temporary protected status under this section—(4) for purposes of adjustment of status under section [245] and change of status under section [248], the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

The court reasoned that Congress's clear intent was to provide a pathway for those with TPS to adjust status and were "afforded with an exception

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[57] *Id.* at 773.

[58] *Id.* at 778.

[59] 8 C.F.R. § 245.2(a)(4)(ii)(B) (2020).

[60] Charles Kuck, *The New TPS Adjustment: Are You Eligible*?, IMMIGR. DAILY (July 19, 2012), http://www.ilw.com/articles/2012,0719-Kuck.shtm.

[61] AM. IMMIGR. COUNCIL, COURT DECISIONS ENSURE TPS HOLDERS IN SIXTH AND NINTH CIRCUITS MAY BECOME PERMANENT RESIDENTS 1 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/court_decisions_ensure_tps_holders_in_sixth_and_ninth_circuits_may_become_permanent_residents.pdf; *Guidance for Practitioners on Adjustment of Status for TPS Recipients in the Sixth and Ninth Circuits,* CLINIC (Nov. 15, 2017), https://cliniclegal.org/ resources/guidance-practitioners-adjustment-status-tps-recipients-sixth-and-ninth-circuits.

[62] Flores v. U.S. Citizenship & Immigr. Servs., 718 F.3d 548, 553 (6th Cir. 2013).

under the TPS statute which operates as an inadmissibility waiver."[63] This decision meant that those with TPS residing under the jurisdiction of the Sixth Circuit, which covers Michigan, Ohio, Kentucky, and Tennessee, could adjust status to LPR without an admission or parole before being granted TPS and without traveling on advance parole if an immediate family member was able to petition for them. In 2017, the Ninth Circuit made a similar decision in *Ramirez v. Brown*.[64] The Court also looked to INA § 244(f)(4) and found that because it stated that non-citizens with TPS maintained non-immigrant status for purposes of adjustment under INA §245, it must mean that all requirements under that section were met, including the admission/parole requirement.[65] The Eleventh Circuit, however, made a different determination and found that TPS was not an admission for adjustment under § 245(a).[66] TPS holders without another lawful admission or parole residing in this jurisdiction (Alabama, Georgia, and Florida) would not be able to adjust status from TPS unless they traveled on advance parole.[67] Because of these developments in the Sixth and Ninth Circuits, however, many people with TPS were able to adjust status to LPR without traveling on advance parole.[68] At the same time, those throughout the country without an available immigrant visa were often stuck for years or even decades in immigration limbo.

In addition to the ability to lawfully leave and re-enter the United States and adjust status without a separate lawful entry in some jurisdictions, TPS also began to take on other lawful status-like characteristics. In 2014, the Central American Minors program ("CAM") was created by the Obama administration in response to the unaccompanied child migrant crisis at the southern border in 2014.[69] The number of unaccompanied child migrants apprehended at the southern border surged from less than four thousand in 2011 to more than fifty thousand in 2014 in response to widespread gang violence in Guatemala, Honduras, and El Salvador.[70] CAM allowed children of parents lawfully present in the United States, including those with TPS, the opportunity to apply for refugee status in their home countries to enter the United States as refugees or under parole.[71] This is significant because generally lawful status (refugee or LPR status) is needed to petition for a relative to lawfully enter the United States.

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[63] *Id.* at 552.

[64] Ramirez v. Brown, 852 F.3d 954, 956 (9th Cir. 2017).

[65] *Id.* at 958–59.

[66] Serrano v. U.S. Att'y Gen., 655 F.3d 1260, 1265 (11th Cir. 2011).

[67] In 2020, the Third Circuit (covering the states of Pennsylvania, New Jersey, Delaware, and the Virgin Islands) also found in *Sanchez v. Secretary United States Department of Homeland Security,* 967 F.3d 242 (3rd Cir. 2020), that a TPS recipient did not meet the admitted and inspected or paroled requirement for adjustment of status.

[68] In 2020, the Eighth Circuit (covering the states of Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Missouri, and Arkansas) also found in *Velasquez v. Barr*, 979 F.3d 572 (8th Cir. 2020), that a TPS recipient was considered admitted and inspected for purposes of adjustment of status.

[69] In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors—CAM), U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/CAM (last visited August 2, 2020).

[70] Peter J. Meyer et al., Cong. Rsch. Serv. R43702, Unaccompanied Children from Central America: Foreign Policy Considerations 1 (2016).

[71] In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors—CAM), supra note 69.

The number of TPS-designated countries grew over time from just three countries in 1991 to thirteen countries in 2017, with many of those countries having been designated for more than fifteen years.[72] The number of people with TPS reached 325,000 in January 2017.[73] At the beginning of 2017, hundreds of thousands of people in the United States held TPS, which was becoming more and more similar to a lawful status yet was nonetheless vulnerable to termination by the Executive.

B. DEFERRED ACTION FOR CHILDHOOD ARRIVALS

DACA offers certain non-citizens who entered the United States as minors, and who are not in lawful status, a renewable two-year protection from removal and work authorization. The DACA program was first authorized in 2012 by the Obama administration under a DHS administrative memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."[74] The memorandum stated that, in the exercise of prosecutorial discretion, DHS would not pursue removal of certain young immigrants, specifically those who came to the United States under the age of sixteen, had been residing in the United States at least five years, had met certain educational requirements, did not have a significant criminal record, and who were under the age of thirty-one.[75] According to DHS in the memo, "these individuals lacked the intent to violate the law and [their] . . . review of pending removal cases [was] already offering administrative closure to many of them."[76] Like TPS holders, DACA holders are considered lawfully present, are issued a work permit, and are able to travel on advance parole.

DACA was introduced after the more than ten-year failure of Congress to pass a statute known as the DREAM Act, which was intended to protect undocumented young people who were brought to the United States as children from removal. In 2001, the DREAM Act was first introduced in the U.S. Senate and has since been introduced numerous times (in different versions) in both houses of Congress. A 2011 version of the bill:

> required that the [applicant] had arrived in the United States before the age of fifteen; been present in the United States for five years prior to passage of the bill; been a person of good moral character and have a clean record; ha[d] obtained a GED or high school diploma or ha[d]

[72] *Temporary Protected Status*, U.S. DEP'T JUST., https://www.justice.gov/eoir/temporary-protected-status (last visited August 2, 2020).

[73] Robert Warren & Donald Kerwin, A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti, 5 J. ON MIGRATION & HUM. SEC. 577, 577 (2017).

[74] Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Alejandro Mayorkas & John Morton, Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children 1 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [hereinafter DACA Memo].

[75] DACA Memo, *supra* note 74, at 1.

[76] DACA Memo, *supra* note 74, at 1.

> been admitted to an institution of higher learning; and be[en] thirty-five years of age or younger on the date of enactment.[77]

In the 2011 bill, an applicant who met these requirements would be granted conditional permanent residency for six years and could then have the conditions removed after military service or meeting certain education requirements.[78] DACA mimicked the major aspects of the DREAM Act, including the requirements of coming to the United States as a minor, having been in the United States for a significant period of time, being under a certain age, and meeting certain educational attainment. DACA, however, only provided temporary protection from deportation and no pathway to permanent residency or citizenship.

By 2017, nearly 700,000 non-citizens were protected under DACA in the United States. The vast majority of DACA holders are from Mexico, with El Salvador, Honduras, and Guatemala also having significant DACA-holder populations.[79] The 2012 BIA decision in *Matter of Arrabally and Yerrabelly* also allowed DACA holders to travel on advance parole and adjust status to LPR if they had a visa petition from an immediate relative petition available to them in the United States.[80]

DACA was not based in statute like TPS. Instead of congressional statute, DACA was based in the Executive's prosecutorial discretion power.[81] In November 2014, also using the prosecutorial discretion power, the Obama administration expanded the 2012 DACA memo and issued a supplemental memo titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents."[82] This memo "expand[ed] certain parameters of DACA and issu[ed] guidance for case-by-case use of deferred action for those adults who [had] been in this country since January 1, 2010, [were] the parents of U.S. citizens or lawful permanent residents, and who [were] otherwise not enforcement priorities."[83] The memo enhanced DACA's protections by removing the previous age cap, extending the DACA work permit from two to three years, and extending the cut off from when a DACA applicant had to be present in the United States from June 15, 2007, to January 1, 2010.[84] The new program created by the 2014 memo was referred to as Deferred Action for Parents of Americans ("DAPA"), and more than three million

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[77] Heather Fathali, The American DREAM: DACA, DREAMers, and Comprehensive Immigration Reform, 37 SEATTLE U.L. REV. 221, 238 (2013).

[78] H.R. 1842, 112th Cong., § 4 (2011).

[79] *Deferred Action for Childhood Arrivals Tools*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles (last visited Aug. 2, 2020).

[80] See *supra* Part II.A. for a comprehensive discussion of the *Matter of Arrabally and Yerrabelly*.

[81] For an in-depth analysis of prosecutorial discretion in immigration law, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

[82] Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Thomas S. Winkowski & R. Gil Kerlikowske, Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children and with Respect to Certain Individuals who are the Parents of U.S. Citizens or Permanent Residents 1 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.

[83] *Id.* at 3.

[84] *Id.* at 3–4.

people in the United States were expected to be eligible for it.[85] Like DACA, DAPA provided a renewable work permit and protection from removal to those eligible for the program.

The month after the announcement of DAPA and expanded DACA, Texas and twenty-five other states filed suit in the District Court for the Southern District of Texas claiming that the executive prosecutorial discretion policies would "substantially increase the number of undocumented immigrants in the Plaintiff States."[86] The states alleged in the suit that this increase in unlawful immigration would cause states to "expend substantial resources on law enforcement, healthcare, and education."[87] Furthermore, the suit alleged that the states would have to pay for drivers' licenses for the individuals with DAPA and expanded DACA who would be issued federal work permits, which would be a significant burden.[88] The states also argued that the Obama administration's DAPA and expanded DACA violated the Administrative Procedure Act ("APA") because it did not undergo the required notice-and-comment procedure and the actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[89] Furthermore, the suit claimed that that DAPA and expanded DAPA were a violation of the President's obligations under Article II Section 3 of the Constitution, which requires him to "take Care that the Laws be faithfully executed."[90]

The district court granted a preliminary injunction, which blocked the implementation of DAPA and expanded DACA policies nationwide.[91] The court ultimately found in favor of the plaintiff states and held, "DAPA is a 'legislative' or 'substantive' rule that should have undergone the notice-and-comment rule making procedure." Furthermore, it found that the "DAPA program clearly represents a substantive change in immigration policy . . . . It does more than 'supplement' the statute; if anything, it contradicts the INA."[92]

The government appealed this decision to the Fifth Circuit Court of Appeals. The government defended the programs by arguing that the President's actions were a valid exercise of his prosecutorial discretion and that the plaintiff states did not have standing to challenge DAPA and expanded DACA. The Fifth Circuit upheld the injunction based on the procedural issue (that the Obama administration had not undergone the proper notice-and-comment procedure) and on the substantive claim that DAPA was contrary to the INA and could therefore not go forward. The court

[85] Randy Capps et al., Deferred Action for Unauthorized Immigrant Parents Analysis of DAPA's Potential Effects on Families and Children 1 (2016), https://www.migrationpolicy.org/sites/default/files/publications/DAPA-Profile-FINALWEB.pdf.

[86] Complaint for Declaratory and Injunctive Relief at 23, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2014) (No. B-14-254), https://www.aila.org/infonet/dist-ct-texas-v-us-12-03-14.

[87] *Id.* at 24.

[88] *Id.* at 25.

[89] *Id.* at 27–28.

[90] *Id.* at 26.

[91] Order of Temporary Injunction, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. B-14-254), http://www.aila.org/infonet/dist-ct-state-of-texas-v-usa-02-16-15.

[92] Texas v. United States, 86 F. Supp. 3d 591, 670 (S.D. Texas 2015).

found that "[b]ecause the government is unlikely to succeed on the merits of its appeal of the injunction, the motion for stay and the request to narrow the scope of the injunction [is denied]."[93]

The U.S. Supreme Court then heard the case in *United States v. Texas* in April 2016. In June 2016, an equally divided Supreme Court upheld the Fifth Circuit decision and issued no decision of its own.[94] The Supreme Court left the original district court injunction in place and those eligible for DAPA and expanded DACA were not able to apply for the programs. Under the decision, the original DACA program continued.

At the beginning of 2017, hundreds of thousands of immigrants were protected by DACA and were lawfully present in the United States with work permits yet were vulnerable to rescission of that quasi-status by the Executive.

C. PROSECUTORIAL DISCRETION (ADMINISTRATIVE CLOSURE)

In addition to DACA, the executive branch utilizes prosecutorial discretion on a case-by-case basis during removal proceedings in a process known as "administrative closure." The U.S. Supreme Court has found that the government has a great deal of discretion in the removal context and that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."[95]

When a removal case is administratively closed in immigration court, "it is indefinitely removed from the docket of an Immigration Judge or the [BIA] until one or both parties ask for it to be [reopened]."[96] For a case to be administratively closed as an exercise of prosecutorial discretion, DHS must agree to the closure. Having a removal case administratively closed does not grant a non-citizen lawful status or necessarily even lawful presence or a work permit. If that person had a pending application for relief at the time of administrative closure (for example, an application of asylum), the non-citizen may be considered lawfully present and qualify for a renewal work permit based on that application while the case is closed.[97]

During the Obama administration, the government regularly utilized this form of prosecutorial discretion/administrative closure for cases for non-citizens in removal who were not deemed an enforcement priority. The administration found this practice increasingly important as the immigration court case backlog grew rapidly. According to a report by the U.S. Government Accountability Office, the immigration court case backlog was 212,000 cases in 2006, and the median time a case was pending was 198 days. By 2015, that backlog had reached 437,000 cases with a median

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[93] Texas v. United States, 787 F.3d 733, 743 (5th Cir. 2015).

[94] *See generally* United States v. Texas, 136 S. Ct. 2271 (2016).

[95] Arizona v. United States, 567 U.S. 387, 396 (2012).

[96] *Prosecutorial Discretion: A Statistical Analysis*, AM. IMMIGR. COUNCIL (June 11, 2012), https://www.americanimmigrationcouncil.org/research/prosecutorial-discretion-statistical-analysis.

[97] *See* 8 C.F.R. §§ 274a.12(c)(8)–(10) (2020).

pending time of 404 days.[98] In 2017, the backlog had reached more than 600,000 cases.[99]

During the second half of the Obama administration, administrative closure was regularly utilized to remove non-priority cases from the immigration court's docket in light of the backlog. Before 2012, the number of cases administratively closed did not exceed 9,000 per year.[100] In 2012, 15,477 cases were administratively closed per year. By 2016, that number reached 48,285.[101] The DHS, part of the executive branch, "joined in motions to administratively close cases that did not fall within its enforcement priorities."[102] Those enforcement priorities were outlined in two important memos.

The first key prosecutorial discretion memo was issue by John Morton, and often referred to as the "Morton Memo," which stated:

> Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.[103]

The 2011 Morton Memo described a long list of factors that DHS would use to consider whether to exercise prosecutorial discretion in an individual's case, including length of presence in the United States, circumstances of arrival in the United States, educational attainment, military service, lack of criminal history, ties to the community, and U.S. citizen or resident family members, among other factors.[104] The memo stated that although these factors were important, the list was "not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider

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[98] U.S. Gov't Accountability Off., GAO-17-438, Immigration Courts: Action Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges 22 (2017).

[99] *New Report on Immigration Courts Backlog Reveals Administration's Efforts to Undermine Asylum System*, HUM. RTS. FIRST (Oct. 17, 2017), https://www.humanrightsfirst.org/press-release/new-report-immigration-court-backlog-reveals-administration-s-efforts-undermine-asylum.

[100] AM. IMMIGR. COUNCIL, PRACTICE ADVISORY: ADMINISTRATIVE CLOSURE AND MOTIONS TO RECALENDAR 6 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_administrative_closure_and_motions_to_recalendar.pdf.

[101] *Id.* at 6.

[102] *Id.* at 2.

[103] Memorandum from John Morton, Dir. of U.S. Immigr. & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (Jun. 17, 2011) https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[104] *Id.* at 4.

prosecutorial discretion on a case-by-case basis."[105] Factors that would be considered especially negative were risks to national security, serious felons, known gang members, or those with a long record of immigration violations.[106]

In 2014, a new memorandum was issued by DHS titled "Policies for Apprehension, Detention and Removal of Undocumented Immigrants," which described enforcement priorities in three tiers rather than as a long list of factors to consider.[107] The first priority was "threats to national security, border security, and public safety;" the second priority was "misdemeanants and new immigration violators;" and the third priority was "other immigration violations."[108] Those in the first and second priority categories were extremely unlikely to have their cases closed under this guidance, but those in the third preference, namely those without criminal records or recent immigration violations, would be more likely to be granted administrative closure.

Under the Obama administration, a great number of cases were administratively closed under its exercise of prosecutorial discretion—around 2,400 cases per month by the end of 2016.[109] By early 2017, hundreds of thousands of immigrants were living in the United States with administratively-closed removal proceedings, many of those considered lawfully present and with work permits but were nonetheless subject to those cases being reopened with a change in the executive branch.

D. DEFERRED ENFORCED DEPARTURE

DED is, like TPS described above, a "temporary, discretionary, administrative stay of removal granted to aliens from designated countries."[110] But unlike TPS, "DED emanates from the President's constitutional powers to conduct foreign relations and has no statutory basis."[111] DED is granted through an executive order or proclamation rather than by designation of the Secretary of DHS.

DED was first granted to Chinese nationals in 1990 by President George H.W. Bush after the massacre at Tiananmen Square.[112] DED has also been granted to "Persian Gulf evacuees (1991), Salvadorans (1992), Haitians (1997), and Liberians (1999 and 2007)."[113] In early 2017, when President Trump took office, Liberians were the only foreign nationals who still had

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[105] *Id.* at 4.

[106] *Id.* at 5.

[107] Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Thomas S. Winkowski, Acting Dir. of U.S. Immigr. & Customs Enforcement, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter Winkowski Memo].

[108] Winkowski Memo, *supra* note 107, at 3–4.

[109] HUM. RTS. FIRST, TILTED JUSTICE: BACKLOGS GROW WHILE FAIRNESS SHRINKS IN U.S. IMMIGRATION COURTS 6 (2017), https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf; Joshua Breisblatt, *Data Shows Prosecutorial Discretion Grinds to a Halt in Immigration Courts*, IMMIGR. IMPACT (July 24, 2017), https://immigrationimpact.com/2017/07/24/data-shows-prosecutorial-discretion-grinds-halt-immigration-courts.

[110] U.S. IMMIGR. & NATURALIZATION SERVS., *supra* note 27, at Ch. 38.2(a).

[111] *Id.*

[112] Exec. Order No. 12711, 55 Fed. Reg. 13897 (Apr. 13, 1990).

[113] Schoenholtz, *supra* note 44, at 6.

DED designation. Roughly four thousand Liberian nationals in the United States had DED status in early 2017.

E. OTHER DEFERRED ACTION

While DACA, which began in 2012, became the largest deferred-action program by far by 2017, "deferred action has been [granted] on both a case-by-case and categorical basis for the last few decades."[114] Under federal regulations, deferred action is simply "an act of administrative convenience to the government which gives some [removal] cases lower priority."[115] On a case-by-case basis, DHS can decide that a removable non-citizen can nonetheless remain in the United States and be considered lawfully present. If the deferred action recipient shows an "economic necessity for employment," they can be granted work authorization during the period of deferred action.[116] There is no set time period for general grants of deferred action, but DHS can review and terminate a grant in its discretion at any time.[117] This process is distinct from the process of administrative closure described earlier, which only takes place in the context of Immigration Court.

In addition to general case-by-case specific deferred action, other non-DACA deferred action is granted on a categorical basis, including those with pending U visa and Violence Against Women Act ("VAWA") petitions. U visas, created by congressional statute in 2000, are for non-citizen victims of certain serious crimes in the United States who have assisted law enforcement. These visas, which create a pathway to permanent residency, are capped annually at ten thousand, which soon created a large backlog of cases.[118] In response, DHS allowed those who established a prima facie U visa case to be granted deferred action while their case pends.[119] As U visa cases pend for years, many non-citizens were living for years with deferred action waiting for approval of their U visa. Similarly, deferred action can be granted to those who establish prima facie eligibility for VAWA petitions. The VAWA program was first authorized by congressional statute in 1994 and allows abused non-citizen spouses, children of citizens, and non-LPRs to apply for permanent residency.[120] After a VAWA petition is approved, an applicant is granted deferred action while they wait for the process of permanent residence to be approved.[121]

Still, there were fewer non-DACA deferred action grants when compared to DACA grants. In 2015, for example, only 31,531 work permits

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[114] Heeren, *supra* note 2, at 1149.
[115] 8 C.F.R. § 274a.12(c)(14) (2020).
[116] *Id.*
[117] Ben Harrington, Cong. Rsch. Serv. R45158, An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others 2 (2018).
[118] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533–35.
[119] 8 CFR § 214.14(d)(2).
[120] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.
[121] William A. Kandel, Cong. Rsch. Serv. R42477, Immigration Provisions of the Violence Against Women Act (VAWA) 6 (2012).

were approved for non-DACA deferred action, compared to 514,678 for DACA recipients.[122]

F. STAY OF REMOVAL/ORDER OF SUPERVISION

A stay of removal instructs DHS not to physically remove a non-citizen from the United States despite that person having a removal order. A stay can be issued by DHS, an immigration judge, the BIA, or a federal court.[123] There is an automatic stay during the first thirty days after an immigration judge's order of removal and while a case is on direct appeal of an immigration judge's decision with the BIA.[124] Furthermore, there is an automatic stay of removal for motions to reopen "in absentia" orders based on lack of notice or exceptional circumstances. There is no automatic stay for all other motions to reopen. When a case is pending before a federal court of appeals, there is no automatic stay of removal; however, the federal court has discretion to grant one during the appeal.

A stay may also be granted by DHS for humanitarian reasons, even if the non-citizen does not have an appeal of their removal order pending. Some humanitarian reasons a stay might be granted include: "compelling humanitarian equities, such as being the primary caregiver for a disabled individual, having U.S. citizen family dependents, suffering from severe health problems, or having long-term residency and community ties."[125] Once a non-citizen is granted a stay of removal, they are considered lawfully present (even if they have an order of removal). Usually, a stay of removal will be granted for one to two years.

If a person is present in the United States for more than ninety days after their final order of removal has not been executed, they can be granted an "order of supervision."[126] The order of supervision requires the non-citizen to be monitored by and regularly check in with officials from DHS and Immigration and Customs Enforcement ("ICE"). Once a person has an order of supervision (also referred to as an "OSUP"), they can be granted work authorization.[127]

In the "latter Obama years, ICE granted stays of removal for some people who were ordered removed by an immigration judge on or after January 1, 2014, but who did not meet the narrowed enforcement priorities."[128] These narrowed enforcement priorities were part of the November 20, 2014

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[122] *Number of Approved Employment Authorization Documents, by Classification and Basis for Eligibility*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 10, 2019), https://www.uscis.gov/sites/default/files/document/data/4._eads-by-basis-for-eligibility_Formatted_4-10-19.pdf.

[123] 8 C.F.R. § 241.6 (DHS authority); 8 C.F.R. § 1003.6 (BIA authority); 8 C.F.R. § 1003.23(b)(1)(v) (IJ authority).

[124] *See* 8 C.F.R. § 1003.6(a) (stating that, with certain exceptions, orders relating to immigrants shall not be carried out while an appeal with the Board of Immigration Appeals is pending).

[125] Am. Immigr. Laws. Ass'n, Cogs in the Deportation Machine: How Policy Changes by the Trump Administration Have Touched Every Major Area of Enforcement 7 (2018), https://www.aila.org/infonet/aila-report-cogs-in-the-deportation-machine.

[126] 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.5(a).

[127] See Shoba Sivaprasad Wadhia, Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases, 6 COLUM. J. RACE & L. 1, 8 (2016).

[128] RANDY CAPPS ET AL., REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP 54 (2018), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationEnforcement-FullReport_FINALWEB.pdf.

prosecutorial discretion "memorandum [that] appli[ed] . . . to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or *subject to removal orders* who have not been removed from the United States as of the effective date."[129]

Like other quasi-statuses, many non-citizens were living years—or even decades—with stays of removal, orders of supervisions, or both. Most of these individuals had no criminal record, and had U.S. citizen family members and work permits. They did not fear being removed as long as they continued regular check-in appointments with ICE.[130] Nonetheless, changes in presidency created changes in removal priorities. Those with stays of removal, orders of supervision, and final orders of removal were the most vulnerable of those with quasi-statuses. As soon as a change in ICE policy occurred, these individuals lost a right to a removal hearing with an immigration judge, except in limited circumstances,[131] and faced removal from the United States.

IV. THE DECLINE OF PERMANENT STATUS AND CITIZENSHIP PATHWAYS

The rise of quasi-status immigration over the past two decades was accompanied by a decline in permanent status pathways for immigrants without lawful status. For example, cancellation of removal (formerly "suspension of deportation"), a form of relief available to immigrants without lawful status facing deportation, became significantly more difficult to obtain after 1997. Registry, another form of permanent relief for immigrants without lawful status, has not been widely utilized in more than twenty years. Furthermore, there have been no significant legislative immigration reforms in the past twenty years to regularize the status of undocumented immigrants. Past significant legislative programs included the CAA of 1966, Immigration Reform and Control Act ("IRCA") of 1986, Chinese Student Protection Act ("CSPA") of 1992, Nicaraguan Adjustment and Central American Relief Act ("NACARA") of 1997, and the Haitian Refugee Immigration Fairness Act ("HRIFA") of 1998.

In addition to pathways to permanent residency for those without status declining, congressional legislation also created roadblocks for those who might otherwise qualify for permanent residency. For example, in 1997, as part of IIRIRA, Congress enacted the three- and ten-year bans,[132] which barred some who had been in the country unlawfully from consular processing or applying for a visa at a consulate abroad to enter the United States as a legal permanent resident. Congress also enacted restrictions that made it more difficult for those who had been present in the United States

[129] Winkowski Memo, *supra* note 107, at 6 (emphasis added).

[130] Liz Robbins, *Once Routine, Immigration Check-ins Are Now High Stakes*, N.Y. TIMES (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html.

[131] Only in cases that show reasonable fear of persecution or torture.

[132] *See infra* Part III.D.1.

without authorization to gain asylum,[133] a secure legal status with a pathway to permanent residency and citizenship. While Congress has historically been active in creating pathways to permanent residency for those without lawful status, efforts for immigration reform have stalled in the past twenty years. The following sections describe legal pathways to permanent residency for immigrants without lawful status and their decline over the past two decades.

A. SUSPENSION OF DEPORTATION/CANCELLATION OF REMOVAL

"Suspension of deportation" was a form of relief available to non-citizens facing deportation in the United States starting with the Alien Registration Act of 1940.[134] Under this Act, the Attorney General could suspend a non-citizen's deportation—thus granting them permanent residency—if the citizen could demonstrate five years of continuous residence in the United States, good moral character, and that their deportation would lead to "serious economic detriment" to a U.S. citizen or lawful permanent resident spouse, parent, or minor child.[135] This original standard was relatively generous in that a short period of residence and a comparatively low hardship standard to qualifying relatives was required to qualify.

In 1952, Congress, believing the 1940 law was too liberal, heightened the standard for eligibility for suspension of deportation.[136] Congress changed the standard of hardship from "serious economic detriment" to "exceptional and extremely unusual" hardship to a qualifying relative.[137] Ten years later, Congress revised and bifurcated the standard. For those being deported under more serious grounds—including criminal grounds—a ten-year residency and an "extreme and exceptionally unusual" standard would be required, but those facing deportation under less serious grounds would only have to demonstrate "extreme hardship" to a qualifying relative and seven years of residency.[138]

The standard for suspension of deportation was changed for a final time in 1997, and the form of relief was re-named "cancellation of removal." Under the new cancellation of removal standard, the seven-year residency requirement increased to ten years; the applicant was also required to demonstrate good moral character.[139] Furthermore, the applicant could no longer claim hardship of removal to themself, but only to a qualifying relative—a U.S. citizen spouse, child, or parent—and those who were inadmissible on criminal grounds could not apply for cancellation of removal at all.[140] Most importantly, the level of hardship required to be granted cancellation of removal increased from the previous standard of "extreme

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[133] See Philip G. Schrag et al., Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum, 52 WM. & MARY L. REV. 651, 655 (2010).

[134] Alien Registration (Smith) Act of 1940, Pub. L. No. 76-670, § 20, 54 Stat. 670, 672.

[135] *Id.*

[136] William C.B. Underwood, Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases, 72 IND. L.J. 885, 889 (1997).

[137] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214.

[138] Act of October 24, 1962, Pub. L. No. 87-885, § 244(a), 76 Stat. 1247, 1247–48.

[139] 8 U.S.C. § 1229b(b)(1)(A).

[140] *Id.* § 1229b(b)(1)(D).

hardship" to "exceptional and extremely unusual hardship,"[141] and only four thousand cases per year could be granted.[142] Congress also prohibited judicial review of the hardship standard and other discretionary issues related to cancellation of removal.[143]

Since the passage of IRIIRA and creation of cancellation of removal, the "exceptional and extremely unusual hardship" standard has been interpreted by the BIA as "substantially beyond that which would ordinarily be expected to result from the alien's [deportation]."[144] Under this standard, "poor economic conditions and reduced employment and educational opportunities in the country of origin, standing alone, do not generally meet the statutory standard."[145] Of the hundreds of thousands of individuals who face removal each year, a great number meet the threshold requirements for cancellation of removal (ten years physical presence, qualifying relative(s), and good moral character/lack of criminal grounds of inadmissibility), but only a tiny fraction of those non-citizens (four thousand) are able to secure a grant of cancellation of removal because of the restrictive hardship standard. Furthermore, those "with a colorable claim to relief have no real assurances of a fair and accurate determination" because of the lack of judicial review of the administrative decision.[146]

B. REGISTRY

Registry is a form of relief in the INA that gives authority to the Attorney General to grant permanent residence to non-citizens who entered the United States before a specified date.[147] In addition to the required entry date to qualify for registry, an individual must not be subject to serious grounds of inadmissibility—like criminal grounds—and not be ineligible for citizenship.[148] Congress must advance the registry date (the executive branch cannot), however, it most recently advanced the date in 1986 from June 30, 1948, to January 1, 1972. Therefore, the last time registry was renewed, it could have been utilized to grant legal status to those with fourteen years of residence or more in the country. Today, that same date could grant status to those with forty-eight years or more in the country.

Historically, many immigrants gained legal status through registry. From 1929 to 1945, roughly 200,000 gained permanent residence through this form of relief.[149] Two years after the registry date was advanced in 1986, more than fifty thousand individuals became LPRs through the program.[150] In the

[141] *Id.*
[142] *Id.* § 1229b(b)(3).
[143] INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B).
[144] In re Gonzalez Recinas, 23 I. & N. Dec. 467 (B.I.A. 2002).
[145] Margaret Taylor, What Happened to Non-LPR Cancellation of Removal? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal, 2015 J.L. & POL. 527, 531.
[146] Underwood, *supra* note 136, at 894.
[147] INA § 249.
[148] *Id.*
[149] Donald M. Kerwin, *More Than IRCA: US Legalization Programs and the Current Policy Debate*, MIGRATION POL'Y INST.: POL'Y BRIEF, Dec. 2010, at 4, https://www.immigrationresearch.org/system/files/legalization-historical.pdf.
[150] *Id.*

past two decades, however, relatively few individuals each year have been granted relief through registry as the date has not been advanced in more than thirty years.

C. LEGALIZATION PROGRAMS

1. Immigration Reform and Control Act of 1986

IRCA was one of the most significant pieces of immigration legislation and the most sweeping legalization program of the twentieth century. IRCA has been referred to as a "three legged-stool" for having three main elements: border enforcement,[151] penalties for employers who hired unauthorized immigrants,[152] and a legalization program for undocumented immigrants.[153] The three elements of IRCA were meant to work together to solve the issue of unauthorized immigration. Stricter border enforcement and penalties for employers were meant to stem the flow of unauthorized immigrants, or "pull" factors, while the undocumented immigrants already in the country for a significant period of time would be able to secure a pathway to permanent residency and citizenship.[154]

IRCA had several distinct legalization programs.[155] The largest and most well-known legalization program under IRCA granted legal status to immigrants without lawful status who had been in the United States since or before January 1, 1982 (five years before the enactment).[156] Under the act, these non-citizens who had been continuously present—besides brief absences—since before 1982 were first granted a temporary legal status. In addition to showing continuous presence, applicants had to show that they were otherwise admissible and had not been convicted of a felony or three or more misdemeanors, among other requirements.[157] After receiving temporary status, individuals could apply for permanent residence, which could be granted as long as they remained admissible and had pursued a course of study to learn English, U.S. Government, and Civics.[158] An estimated 1.6 million people received permanent residence under this program.[159]

In addition to the five-year residence legalization program, IRCA had a program that granted permanent legal status to seasonal agricultural workers, known as the Special Agricultural Worker ("SAW") program. The SAW program provided a pathway to permanent residence for temporary agricultural workers who performed work in the twelve months before May

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[151] *See* Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3381–84.

[152] *See Id.* at 3360–80.

[153] Muzaffar Chishti et al., *At its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION POL'Y INST. (Nov. 16, 2011), https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives.

[154] *Id.*

[155] Evangeline G. Abriel, Ending the Welcome: Changes in the United States' Treatment of Undocumented Aliens (1986 to 1996), RUTGERS RACE & L. REV. 1, 5 (1998).

[156] INA § 245A(a), 8 U.S.C. § 1255A(a).

[157] *Id.* § 245A(a)(4).

[158] *Id.* § 245A(b)(1)(D).

[159] NANCY RYTINA, IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001, at Exhibit 1 (2002), https://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf.

1, 1986.[160] Finally, IRCA granted legal status to certain nationals of Haiti and Cuba who had resided in the United States since before January 1, 1982.[161]

2. Population-Specific Legalizations

Population-specific legalization programs had long been a feature of the U.S. immigration system. Major population-specific legalization programs include: the CAA of 1966,[162] CSPA of 1992,[163] NACARA of 1997,[164] and HRIFA of 1998,[165] among others.

Under the CAA, "Cubans and their accompanying spouses and children who have been admitted or paroled can adjust to LPR status after one year."[166] From "1960 [to] 2009, the United States granted LPR status to more than [one] million Cubans, mostly through the CAA."[167]

The CSPA granted permanent residence to Chinese nationals who arrived in the United States by April 11, 1990. The CSPA passed in reaction to the Chinese government's violent repression of the Tiananmen Square protests in 1989.[168] Under CSPA, more than fifty thousand individuals obtained permanent residency in the United States.[169]

The NACARA allowed certain Nicaraguan, Cuban, Salvadoran, Guatemalan, and former Soviet bloc nationals[170] to obtain permanent residence in the United States.[171] Under NACARA Section 202, Cubans and Nicaraguans could adjust status (obtain permanent residency) if they had been present before December 1, 1995, met certain requirements, and applied for the program before April 1, 2000. The legal mechanism provided for Salvadoran, Guatemalan, and former Soviet bloc nationals under Section 203 of NACARA was distinct because it allowed qualified applicants to apply for cancellation of removal rather than directly for adjustment of status, but under the more generous "suspension of deportation" standards.[172] These applicants had to be present from various dates, depending on their nationality. Salvadorans and Guatemalans also had to have applied for

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[160] INA § 210.

[161] *Id.* § 210(a)(2)(B).

[162] Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161.

[163] Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969.

[164] Larry M. Eig, Cong. Rsch. Serv., 98-3, The Nicaraguan Adjustment and Central American Relief Act: Hardship relief and Long-Term Undocumented Aliens 6 (1997), https://www.everycrsreport.com/files/19980715_98-3_08ea932ffbb5b70b21888bb84863bfba90bfba25.pdf.

[165] Haitian Refugee Immigration Fairness Act of 1988, Pub. L. No. 105-277, 112 Stat. 2681.

[166] Kerwin, *supra* note 149, at 5.

[167] *Id.*

[168] Evangeline Abriel, The Diversification of Protection Laws in the United States, 9 AM. U. INT'L L. REV. 1, 6 (1994).

[169] U.S. Dep't State, Offset in the Per-Country Numerical Level for China-Mainland Born Immigrants (Per Section 2(d) of Pub. L. 102-404) (2008), https://travel.state.gov/content/dam/visas/Statistics/FY07_AppC.pdf.

[170] Those covered under this statute were nationals of Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Latvia, Estonia, Lithuania, or Yugoslavia.

[171] Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, Title II, 111 Stat. 2160, 2193.

[172] See discussion of suspension of deportation standards *supra* Part III.A.

asylum, TPS for 1991, or benefits under the *ABC* Settlement.[173] Former Soviet bloc nationals were required to have filed an asylum application before 1991. Roughly 200,000 individuals became permanent residents through Section 203 of NACARA.[174]

Finally, under the HRIFA, Haitian nationals who were present and applied for asylum—or were paroled before December 31, 1995, and applied for the program before March 31, 2000—could adjust their status to permanent resident.[175]

3. Section 245(i)/LIFE Amendments

In 1994, Congress enacted Section 245(i) of the INA that allowed non-citizens to adjust status (seek a green card in the United States if they had an approved immigrant visa) even if they entered without inspection, overstayed a visa, or worked without authorization.[176] Under 245(i), intending immigrants had to pay a fee as a penalty (originally $650 which was later increased to $1000) in order to adjust status, and be otherwise qualified for adjustment.[177] The 245(i) provision was meant to be temporary and was set to expire in 1997, but it was then extended to 1998.[178] Because of 245(i), many more people were qualified for, and applied for adjustment of status—"[p]rior to 1995, the government typically had approximately 120,000 pending applications for adjustment of status;" by 1997, there were 699,000.[179] In 2001, 245(i) was reinstated by Congress with the Legal Immigration Family Equity ("LIFE") Act of 2000.[180] The sunset date for 245(i) was April 30, 2001, and any immigrant petitions filed after then are no longer eligible for the provisions of 245(i).[181] The 245(i) provision allowed many non-citizens who had a petition available to them, but who were not able to adjust status because of previous immigration violations, a pathway to residency and citizenship. For almost twenty years the provisions of 245(i) have not been reinstated.

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[173] "In late 1990, the Government entered into a settlement in *American Baptist Churches (ABC) v. Thornburgh* (760 F. Supp. 796 (N.D. Cal. 1991)), a class action alleging Government failure to apply nonpolitical standards in deciding asylum cases. In settling the *ABC* case, the Government agreed to allow tens of thousands of Salvadorans and Guatemalans who had come here without documents during the 1980s to reapply for asylum and to work and live here until their asylum applications were resolved. Approximately 190,000 Salvadorans and 50,000 Guatemalans were covered by the *ABC* settlement." EIG, *supra* note 164, at 1.

[174] Mary Giovagnoli, Using All the Tools in the Toolbox: How Past Administrations Have Used Executive Branch Authority in Immigration 1, 15 (Sep. 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Using_All_the_Tools_-_NACARA_090111.pdf.

[175] *Green Card for a Haitian Refugee*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-eligibility/green-card-a-haitian-refugee (last updated Nov. 27, 2017).

[176] INA § 245(i), 8 U.S.C. § 1255(i).

[177] Marisa S. Cianciarulo, Seventeen Years Since the Sunset: The Expiration of 245(i) and Its Effects on U.S. Citizens Married to Undocumented Immigrants, 18 CHAPMAN L. REV. 451, 462 (2015).

[178] *Id.* at 462–63.

[179] *Id.* at 463.

[180] *See* LIFE Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-324; Legal Immigration Family Equity Act of 2000, Pub. L. No. 106-553, 114 Stat. 2762A-142.

[181] LIFE Act Amendments, 114 Stat. 2763A-324.

D. IIRIRA REFORMS

1. Three- and Ten-Year Bars

The IIRIRA of 1996[182] was another one of the most significant pieces of immigration legislation in the past century and created substantial barriers to immigrants gaining legal status. It altered many aspects of immigration law, including the standard for suspension or deportation/cancellation of removal discussed earlier in this Article.[183] Another significant change for undocumented immigrants seeking permanent residency were the three- and ten-year unlawful presence bars included in IIRIRA.[184] Under this provision, those who had been unlawfully present more than 180 days or more than a year, and departed from the United States, would be inadmissible for three or ten years, respectively. This put many undocumented immigrants who qualified for a permanent immigrant visas in a catch-22; they had to leave the United States to consular process and obtain their residency, but as soon as they left, they would be inadmissible for many years.

"Unlawful presence waivers" provide some relief to those subject to the bar but are only available to those with a U.S. citizen spouse or parent. Furthermore, before 2013, those who wanted to apply for the waiver first had to leave the United States (triggering the bar), which gave them no guarantee they would be able to return. After 2013, those who qualified were able to apply for "state-side" waivers, knowing that it would be granted before leaving the United States for consular processing, which made the waiver much more attractive.[185]

But many undocumented immigrants who could not qualify for, or were not granted such a waiver, were stuck in a perpetual state of unlawful presence without a way to secure legal status due to the three- and ten-year bars.

2. One-Year Asylum Deadline

Finally, under IIRIRA, asylum-seekers were required to file for asylum within a year of their last entry into the United States.[186] While there were limited exceptions to this deadline for changed or extraordinary circumstances, many who were unlawfully present for more than a year after entering were left unable to apply for asylum, which offers a pathway to permanent residency and citizenship. This provision blocked many asylum-seekers from being able to secure lawful status in the United States.

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[182] IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[183] *See supra* Part III.A.
[184] *Id.*
[185] *See 601-A, Application for Provisional Unlawful Presence Waiver*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-601a (last updated June 30, 2020).
[186] INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B).

E. IMMIGRATION REFORM FAILURE

Previous general and population-specific legalization programs allowed millions of immigrants without lawful status to gain permanent residency who would not have been eligible otherwise. Since the 1990s, however, Congress has not passed any wide-scale legalization programs. Notable proposed programs that Congress failed to pass include the Development, Relief, and Education for Alien Minors ("DREAM") Act and the Agricultural Job Opportunity, Benefits, and Security ("AgJOBS") Act. Both acts have been proposed in various forms over the past two decades. The aim of the DREAM Act was to provide a pathway to permanent residency for young undocumented immigrants who were brought to the United States as minors and who met certain educational and moral character requirements.[187] The aim of the AgJOBS Act was to provide undocumented agricultural workers a pathway to permanent residency if they met certain requirements and continued to work in the agricultural field.[188] Both of these proposed pieces of legislation would have provided a pathway to citizenship for hundreds of thousands of immigrants without legal status, but have not been realized for political reasons.

V. QUASI-STATUS IMMIGRATION IN THE TRUMP ERA

The rise of quasi-status immigration and simultaneous decline of permanent pathways to lawful status and citizenship led to an extremely fragile, asymmetrical legal system that was ripe for abuse by an executive branch with an anti-immigration policy agenda. The following sections describe how each quasi-status was vulnerable and how the Trump administration exploited that vulnerability. They then explain additional ways the Trump administration made it more difficult for non-citizens without status to achieve permanent lawful status, exacerbating the problems of the undocumented immigrant community in the United States.

A. TEMPORARY PROTECT STATUS

TPS holders in the United States are vulnerable for several reasons. First, those with TPS are dependent on their home country being continuously reauthorized by the Secretary of DHS to be able to stay lawfully in the United States. Second, TPS can be stripped much more easily and with fewer due process rights than permanent residency can. For example, TPS can be stripped for a single felony or any two misdemeanor convictions, and the TPS applicant has the burden of demonstrating that they qualify for the TPS.[189] Third, TPS holders need to apply for permission (advance parole) to travel outside of the United States and may not be able to leave the United

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[187] See *supra* Part II.B for more information on the DREAM Act.

[188] Dianne Feinstein, *The Urgent Need for AgJOBS Legislation*, HILL (Apr. 25, 2017, 7:45 PM) https://thehill.com/homenews/news/11705-the-urgent-need-for-agjobs-legislation; *Summary of the Significant Provisions of the AgJobs Act*, AM. IMMIGR. LAWS. ASS'N (Sept. 24, 2003), https://www.aila.org/infonet/summary-significant-provisions-of-the-agjobs-act.

[189] TPS can be terminated with a felony conviction or any two misdemeanors. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status (last updated Jan. 29, 2021).

States and return if USCIS does not grant advance parole.[190] Finally, no automatic pathway to permanent residency or citizenship exists for TPS holders, leaving most in limbo and perpetually uncertain of their ability to remain in the United States.

1. Termination of TPS Authorizations

The Trump administration exploited the first and most obvious, vulnerability of TPS holders by terminating TPS authorizations for most of the countries that were designated when he entered office. In 2017, thirteen countries were designated for TPS, including: Liberia, Somalia, Sudan, Sierra Leone, Nicaragua, Honduras, El Salvador, Haiti, South Sudan, Syria, Guinea, Nepal, and Yemen. Three of these countries (Liberia, Sierra Leone, and Guinea) were still technically authorized for TPS when Trump took office in 2017, but the previous Obama administration had already decided to terminate the designations in 2016 (to take effect in 2017) as the "transmission of the Ebola virus [for which the countries were originally authorized] . . . no longer prevent[ed] nationals from returning [safely]."[191] Nationals from Liberia were still protected under DED.[192] Still, Liberia, Sierra Leone, and Guinea had only recently been authorized for TPS (in 2014[193]) and so they are not the focus of this Article as a "quasi-status."

In its first two years in 2017 and 2018, the Trump administration eliminated TPS for six of the remaining ten countries that were authorized for TPS. Notably, these six countries (Sudan, Nicaragua, Honduras, El Salvador, Haiti, and Nepal) represented the vast majority of TPS holders at the time (more than 400,000 out of approximately 411,000 individuals authorized at the time) and all of the TPS holders from countries that had been authorized for TPS for more than ten years (Sudan, Nicaragua, Honduras, El Salvador).[194]

During 2017, the acting Secretary of DHS, Elaine C. Duke, announced the termination of TPS for Sudan,[195] Nicaragua,[196] and Haiti,[197] which affected more than sixty thousand people, or roughly fifteen percent of the total TPS population in the United States at the time.[198] Sudan's TPS designation was

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[190] See *supra* Part II.A. for a discussion of TPS and advance parole.

[191] *Temporary Protected Status Designated Country: Sierra Leone*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sierra-leone (last updated Apr. 19, 2017).

[192] *See* discussion *infra* Part IV.D.

[193] *DHS Announces Temporary Protected Status Designations for Liberia, Guinea, and Sierra Leone*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 20, 2014), https://www.uscis.gov/archive/archive-news/dhs-announces-temporary-protected-status-designations-liberia-guinea-and-sierra-leone.

[194] TPS, *supra* note 48, at 5–6.

[195] Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47,228 (Oct. 11, 2017).

[196] Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636 (Dec. 15, 2017).

[197] *Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 20, 2017), https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti.

[198] Sudan was originally designated for TPS in 1997 and had re-designation dates in 1999, 2004, and 2013 in response to the ongoing civil armed conflict. Those who currently have TPS from Sudan have been present in the U.S. since at least 2013 but may have been present since as far back as 1997 (when it

to be terminated on November 2, 2018,[199] Nicaragua's on January 5, 2019,[200] and Haiti's on July 22, 2019.[201] DHS justified the Sudan TPS termination by stating:

> [T]he ongoing armed conflict and extraordinary and temporary conditions that served as the basis for Sudan's most recent designation have sufficiently improved such that they no longer prevent nationals of Sudan from returning in safety to all regions in Sudan. Based on this determination . . . termination of the TPS designation of Sudan is required because Sudan no longer meets the statutory conditions for designation.[202]

According to DHS, Nicaragua's termination was due to "substantial but temporary conditions caused in Nicaragua by Hurricane Mitch [in 1998] no longer exist[ing], and thus, under the applicable statute, the current TPS designation must be terminated."[203] Finally, DHS stated that Haiti was terminated because "temporary conditions caused by the 2010 earthquake no longer exist. Thus, under the applicable statute, the current TPS designation must be terminated."[204]

The terminations for Sudan, Nicaragua, and Haiti were most significant because of the amount of time these TPS holders had been residing in the United States. Nicaraguans with TPS had been residing in the United States for roughly twenty years or more, as had many TPS holders from Sudan. TPS holders from Haiti had been present in the United States for close to a decade at the time its termination was announced. This long period of U.S. residency meant that many of these TPS holders had U.S. citizen children and had established stable lives in the United States, which made this termination particularly devastating.

In January 2018, the administration continued its efforts to dismantle TPS protections by terminating TPS for the largest population of TPS holders—El Salvadorans. More than half of all TPS holders—almost 250,000 individuals—were nationals of El Salvador at the time of the announcement. According to DHS, "the Secretary determined that the original conditions caused by the 2001 earthquakes [when TPS was designated for El Salvador] no longer exist. Thus, under the applicable

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was first designated), or before. An estimated 774 people from Sudan had TPS in 2019. Nicaragua was originally designated for TPS in 1999 due to the destruction caused by Hurricane Mitch in 1998. An estimated 4,421 people from Nicaragua had TPS in 2019. TPS, *supra* note 48, at 5–6.

[199] *Temporary Protected Status for Sudan to Terminate in November 2018*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sep. 18, 2017), https://www.uscis.gov/news/news-releases/temporary-protected-status-sudan-terminate-november-2018.

[200] *Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua and Honduras*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 6, 2017), https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-protected-status-nicaragua-and.

[201] Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti, supra note 197.

[202] Temporary Protected Status for Sudan to Terminate in November 2018, supra note 199.

[203] Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua and Honduras, supra note 200.

[204] Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti, supra note 197.

statute, the current TPS designation must be terminated."[205] Under the announcement, El Salvador's TPS designation was set to end on September 9, 2019. Those with TPS from El Salvador had been present in the United States since at least 2001—almost twenty years at the time.

2. Lawsuits Challenge TPS Terminations

Starting in early 2018, a number of federal lawsuits challenged the TPS terminations by the Trump administration. The first suit, *NAACP v. DHS*, filed in the District Court of Maryland, argued that the decision to terminate TPS for Haiti was based on racial and ethnic discrimination in violation of the Equal Protection guarantee of the Due Process Clause of the Fifth Amendment.[206] The suit cited President Trump's comments from a January 2018 official meeting where he reportedly said that Haitians "all have AIDS" and asked, "Why do we need more Haitians?" and instead expressed a preference for immigrants from countries like Norway.[207] President Trump also reportedly stated in the same meeting that African immigrants were from "shithole countries."[208]

Also in early 2018, TPS recipients from El Salvador and Haiti filed suit in the U.S. District Court of Massachusetts in the case *Centro Presente v. Trump*, similarly arguing that the decision to terminate TPS for El Salvador and Haiti "was impermissibly infected by invidious discrimination on the basis of race, ethnicity, and/or national origin and therefore cannot stand."[209] Both suits claimed this discriminatory intent violated the Fifth Amendment Due Process Clause.[210] In yet another suit, *Saget v. Trump*, filed in the Eastern District of New York, Haitian TPS beneficiaries argued that the manner in which TPS was terminated was "arbitrary and capricious" and without proper procedure (undergoing a notice-and-comment period) and, therefore, was in violation of the APA.[211] Additionally, they argued that the termination violated the APA because it was made without "consideration of the extraordinary conditions that currently prevent Haitian immigrants from safely returning to Haiti" and DHS "adopted this new standard for reviewing TPS designations without sufficient explanation or justification."[212] The suit also claimed, like *NAACP v. DHS* and *Centro Presente v. Trump*, that the termination of TPS was based on racial animus in violation of the due process guarantees of the Fifth Amendment.[213]

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[205] *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for El Salvador*, U.S. DEP'T HOMELAND SEC. (Jan. 8, 2018), https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected.

[206] Complaint at 4, NAACP v. Dep't of Homeland Sec., 364 F. Supp. 3d 568 (D. Md. 2019) (No. 18 Civ. 239).

[207] *Id.* at 3.

[208] *Id.*

[209] Complaint at 2, Centro Presente v. Trump, 332 F. Supp. 3d 393 (D. Mass. 2018) (No. 1:18-cv-10340).

[210] *Id.*

[211] First Amended Complaint at 2, Saget v. Trump, 345 F. Supp. 3d 287 (E.D.N.Y. 2018) (No. 1:18-cv-01599).

[212] *Id.* at 37–38.

[213] *Id.* at 39.

In March 2018, the American Civil Liberties Union ("ACLU") led a class action lawsuit in the U.S. District Court for the Northern District of California arguing against the termination of TPS for all of the countries whose TPS protection had been terminated up to that point, including Sudan, Nicaragua, Haiti, and El Salvador. This lawsuit, *Ramos v. Nielsen*, became the central lawsuit challenging the termination of TPS for the countries of Sudan, Haiti, Nicaragua, and El Salvador. The suit argued that not only had these TPS holders been present for decades in the United States, but they were also parents to more than 200,000 U.S. citizen children.[214] The complaint stated that those with TPS from Sudan, Nicaragua, Haiti, and El Salvador "have homes, spouses, jobs, and other profound social ties to their communities that now entwine their lives with this country."[215] The suit argued that terminating TPS violated the constitutional rights of TPS holders' U.S. citizen children because they would be forced to choose between living with their parents or leaving the country, violating the "fundamental right [of families] to live together without [] government interference."[216]

The complaint also argued, like the earlier suits, that these TPS terminations violated the Fifth Amendment's Equal Protection guarantee of the Due Process Clause because: (1) "[they were] motivated by race- and national-origin-based [discrimination and animus]"; and (2) they were an "arbitrary, unexplained abandonment" of previous interpretations of the TPS statute.[217] Finally, the ACLU complaint argued that the arbitrary action violated the APA for its "unexplained departure from decades of consistent interpretation" and "fail[ing] to meet the minimum standards of considered judgment."[218]

DHS delayed making determinations on TPS from Honduras and Nepal until 2018, after the lawsuit in *Ramos v. Nielsen* was filed. On April 26, 2018, then-DHS Secretary Kirstjen Nielsen announced Nepal's TPS designation was to be terminated on June 24, 2019. The announcement stated simply that "conditions in Nepal no longer support its designation for TPS and . . . termination of the TPS designation of Nepal is required pursuant to the statute."[219] On May 4, 2018, she also announced that TPS would be terminated for Honduran nationals, which was to take effect on January 5, 2020.[220] Again, the DHS justification was simply that "conditions in Honduras no longer support its designation for TPS, [and] termination of the TPS designation of Honduras is required by statute."[221]

In October 2018, the Northern District of California issued a nationwide injunction in *Ramos v. Nielsen* which stopped DHS from terminating TPS

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[214] Class Action Complaint at 1, Ramos v. Nielsen, 336 F. Supp. 3d 1075 (N.D. Cal. 2018) (No. 3:18-cv-01554).

[215] *Id.* at 2.

[216] *Id.*

[217] *Id.* at 2–3.

[218] *Id.* at 3.

[219] Termination of the Designation of Nepal for Temporary Protected Status, 83 Fed. Reg. 23,705 (May 22, 2018).

[220] *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Honduras*, U.S. DEP'T HOMELAND SEC. (May 4, 2018), https://www.dhs.gov/news/2018/05/04/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected.

[221] Termination of the Designation of Honduras for Temporary Protected Status, 83 Fed. Reg. 26,074 (June 5, 2020).

for El Salvador, Haiti, Nicaragua, and Sudan.[222] The court held that there was "a substantial record supporting [the] claim that the Acting Secretary or Secretary of DHS, in deciding to terminate the TPS status of Haiti, El Salvador, Nicaragua and Sudan, changed the criteria applied by the prior administrations, and did so without any explanation or justification in violation of the [APA]."[223]

In addition, the court found that the plaintiff in the case "raised serious questions whether the actions taken by the Acting Secretary or Secretary was influenced by the White House and based on animus against non-white, non-European immigrants in violation of Equal Protection guaranteed by the Constitution."[224]

The court's injunction blocked DHS from immediately terminating TPS for El Salvador, Haiti, Nicaragua, and Sudan, stating that:

> TPS beneficiaries [] have lived in the United States for a significant number of years, some as many as twenty. TPS beneficiaries thus risk being uprooted from their homes, jobs, careers, and communities. They face removal to countries to which their children and family members may have little or no ties and which may not be safe. Those with U.S.-citizen children will be confronted with the dilemma of either bringing their children with them, giving up their children's lives in the United States (for many, the only lives they know), or being separated from their children.[225]

3. Preliminary Injunctions Stall TPS Terminations

In response to the Northern District of California Court's preliminary injunction in *Ramos v. Nielsen*, DHS published several Federal Register Notices, which eventually extended TPS for Sudan, Nicaragua, Haiti, and El Salvador through 2021.[226] Under the DHS regulations, those with TPS from these countries did not need to re-register as they had in the past, but their TPS designations would be automatically extended. Those with TPS would still be eligible to apply to travel outside of the United States and return on a grant of advance parole.

After the Honduras and Nepal TPS terminations, the ACLU brought another lawsuit against DHS, in the case *Bhattarai v. Nielsen*, in the Northern District of California in February 2019.[227] The suit made many of the same arguments as the previous TPS challenges; it argued that the TPS terminations were arbitrary and capricious in violation of the APA and that

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[222] Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1080–81 (N.D. Cal. 2018).
[223] *Id.* at 1080.
[224] *Id.* at 1080–81.
[225] *Id.* at 1084–85.
[226] Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 83. Fed. Reg. 59,403 (Nov. 4, 2019); Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for Sudan, Nicaragua, Haiti and El Salvador, 83 Fed. Reg. 54,764 (Oct. 31, 2018).
[227] *See generally* Class Action Complaint, Bhattarai v. Nielsen, No. 3:19-cv-00731-EMC (N.D. Cal. Feb. 10, 2019), ECF No. 1.

they violated the Fifth Amendment's due process guarantees. In March 2019, the court temporarily stayed the termination of TPS for Honduras and Nepal pending the outcome of the *Ramos v. Nielsen* case.

After the court's decision in *Bhattarai v. Nielsen*, DHS also automatically extended TPS for Honduras and Nepal through January 4, 2020, like it had for El Salvador, Haiti, Nicaragua, and Sudan.[228]

The Eastern District of New York also issued a preliminary injunction in April 2019 in the *Saget v. Trump* suit, which enjoined the termination of TPS for Haiti (however, at this time its termination was already enjoined by the decision in *Ramos*).[229] *Centro Presente v. Trump* survived a motion to dismiss on July 23, 2018 and is now temporarily on hold pending the outcome in *Ramos*. *NAACP v. Trump* also survived a motion to dismiss on March 12, 2019.

Due to the ongoing litigation, the Trump administration was not able to completely gut TPS protections. Nonetheless, these protections were on legally precarious grounds during the Trump administration and there is still no comprehensive legislation to provide a secure pathway to residency and citizenship for those with TPS.

B. DEFERRED ACTION FOR CHILDHOOD ARRIVALS

DACA holders face most of the same vulnerabilities as TPS holders. First, their quasi-status can be revoked by the Executive, as DACA was based on a 2012 DHS enforcement memo and not a congressional statute. In this way, DACA holders are even more legally vulnerable than TPS holders. Because TPS is authorized by an underlying congressional statute, the legality of the program itself is not subject to dispute like DACA is. Second, DACA holders have the burden to prove they qualify for the status, which can be stripped easily for criminal convictions, including any felony, "significant" misdemeanor, or any three non-significant misdemeanors.[230] Third, DACA holders have limited ability to travel outside of the United States (and after 2017 cannot travel outside the United States at all on advance parole). Finally, like TPS holders, DACA holders have no set pathway to permanent legal residency and citizenship despite long periods of residency in the United States.

1. Rescission of DACA

Soon after taking office in January 2017, President Trump issued Executive Order No. 13768 titled "Enhancing Public Safety in the Interior of the United States."[231] The order marked a significant change from the previous Obama administration's enforcement priorities, which made those who were threats to national security or public safety, recent entrants, and those with criminal convictions a priority for removal.[232] Instead, President

[228] Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 83. Fed. Reg. 59,403 (Nov. 4, 2019).
[229] Saget v. Trump, 375 F. Supp. 3d 280 (E.D.N.Y. 2019).
[230] *See* DACA Memo, *supra* note 74, at 1.
[231] Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).
[232] *See* Winkowski Memo, *supra* note 107.

Trump's executive order stated that any removable non-citizen would be subject to enforcement.

In June 2017, then-DHS Secretary John Kelly issued a memorandum stating that all removable non-citizens would be subject to immigration enforcement with the exception of those covered under the June 15, 2012 memo that established the original DACA program.[233] This memorandum also officially rescinded DACA and DAPA programs, which had been the subject of the 2014 to 2016 deferred action litigation in the Fifth Circuit Court of Appeals during the Obama administration, but had never gone into effect.[234] That same month, the state of Texas, along with a number of other states, sent a letter to then-Attorney General Jeff Sessions stating that they believed Obama's 2012 DACA memorandum was unlawful and that they would legally challenge it if it was not rescinded by September 5, 2017.[235] According to the Texas Attorney General, "[j]ust like DAPA, DACA unilaterally confers eligibility for work authorization and lawful presence without any statutory authorization from Congress."[236]

On September 4, 2017, Sessions sent a letter to DHS stating:

> DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch. The related [DAPA] policy was enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit on the basis of multiple legal grounds and then by the Supreme Court by an equally divided vote.[237]

The next day, on September 5, 2017, Acting Secretary of DHS Elaine Duke issued the memorandum that officially rescinded DACA. According to the memorandum, the decision was based on Sessions's letter and the earlier Fifth Circuit Court of Appeals decision finding that Obama's 2014 expansion of deferred action programs (expanded DACA and DAPA) was unlawful.[238] The September 2017 memorandum stated that DHS would still adjudicate

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[233] Memorandum from John F. Kelly, Acting Sec'y, U.S. Dep't of Homeland Sec., to Kevin K. McAleenan et al., Recission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") (June 15, 2017), https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf.

[234] See *supra* Part II.B. for more on the DAPA and DACA litigation.

[235] *AG Paxton Leads 10-State Coalition Urging Trump Administration to Phase Out Unlawful Obama-Era DACA Program*, ATT'Y GEN. TEXAS (Jun. 29, 2017), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-10-state-coalition-urging-trump-administration-phase-out-unlawful-obama-era-daca.

[236] *Id.*

[237] Letter from Jefferson B. Sessions III, Att'y Gen., to Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec. (Sept. 4, 2017), https://www.justice.gov/opa/speech/file/994651/download.

[238] Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament et al., Recission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

DACA renewal requests and initial DACA applications that were already pending at the time.[239] It would also still adjudicate renewal applications for individuals whose current DACA status expired on or before March 5, 2018, as long as the renewal application was filed before October 5, 2017.[240] This meant that those who already had DACA that was to expire soon (within six months) would have one month to file for a final DACA permit (which would be valid for two additional years if approved). Finally, under the terms of the memorandum, DHS announced it would no longer adjudicate initial DACA applications and DACA recipients would no longer be eligible to apply to travel outside of the United States on advance parole.[241]

2. Lawsuits Challenge DACA Rescission

Soon after the DACA rescission, a number of lawsuits challenged the legality of that rescission in federal district courts in the Northern District of California (*Regents of the University of California v. Department of Homeland Security*),[242] Eastern District of New York (*Battalla Vidal v. Nielsen* and *State of New York v. Trump*),[243] District Court for Maryland (*Casa de Maryland v. Department of Homeland Security*), and the District Court for the District of Columbia (*NAACP v. Trump* and *Trustees of Princeton v. United States*).[244]

The major legal arguments made by all of these lawsuits were similar to those made in the TPS cases—the Trump administration's rescission of DACA violated the APA. One aspect of this administrative law argument was "procedural, alleging that DACA cannot be rescinded without notice-and-comment rulemaking."[245] The second argument was substantive, that under the APA, courts should "hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[246] These suits argued that the manner in which the Trump administration terminated DACA was arbitrary and capricious and therefore unlawful under the APA. Finally, the suits argued that the rescission was a violation of the Due Process Clause of the Fifth Amendment of the Constitution.

In the first case to challenge the rescission, *Regents of the University of California v. Department of Homeland Security,* the University of California

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[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020). A number of lawsuits that were filed in the Northern District of California challenging the rescission of DACA were consolidated under this suit. They included *State of California v. Department of Homeland Security*, *City of San Jose v. Trump*, *Garcia v. United States of America*, and *City of Santa Clara v. Donald Trump*. *Status of Current DACA Litigation*, NAT'L IMMIGR. L. CTR., https://www.nilc.org/issues/daca/status-current-daca-litigation/#_ftn3 (last updated June 7, 2019).

[243] Additionally, *State of New York v. Trump* was brought by seventeen attorneys general from various states including New York, Massachusetts, Washington, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia.

[244] Memorandum Opinion at 1, Trustees of Princeton v. United States of America, No. 1:17-cv-02325-JDB (D.D.C. April 24, 2018), ECF No. 70.

[245] Rachel F. Moran, Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals, 53 U.C. DAVIS L. REV. 1905, 1932 (2020).

[246] 5 U.S.C. § 706(2)(A) (2020).

argued that the DACA rescission violated the Due Process Clause of the Fifth Amendment and the APA.[247] The suit stated, "[T]he Dreamers face expulsion from the only country that they call home, based on nothing more than unreasoned executive whim. . . . It is hard to imagine a decision less reasoned, more damaging, or undertaken with less care."[248]

In January 2018, the California district court granted a preliminary injunction which required the government to allow those with DACA to renew their enrollment.[249] The court found, "plaintiffs are likely to succeed on their claims that: (1) the agency's decision to rescind DACA was based on a flawed legal premise; and (2) government counsel's supposed 'litigation risk' rationale is a post hoc rationalization and would be, in any event, arbitrary and capricious."[250]

The order specified that the government did not have to process applications for those who had never had DACA before or to continue to process DACA recipients' applications for advance parole.[251]

In February 2018, the U.S. District Court in New York issued a second preliminary injunction in the *Batalla Vidal v. Nielsen* and *State of New York v. Trump*.[252] The injunction referenced the earlier *Regents* injunction and issued the same, requiring the government to continue accepting DACA renewals, but not requiring the government to accept new DACA applications or advance parole applications for DACA recipients.[253] The court also found that the plaintiffs were likely to succeed on their argument that the way in which DACA was terminated was arbitrary and capricious in violation of the APA.[254] This was because it relied on the "erroneous legal conclusion that the DACA program [was] unlawful and unconstitutional,"[255] and "factually erroneous premise that courts have determined that DACA is unconstitutional."[256] Furthermore, the court stated that "DACA rescission cannot be sustained on the basis of Defendants' 'litigation risk' argument."[257]

In response to these injunctions, USCIS stated that it would accept requests to renew DACA and adjudicate them under the guidelines established in Obama administration's 2012 DACA memo.[258] It still, however, would not accept applications for advance parole to travel outside

[247] Complaint for Declaratory and Injunctive Relief at 5, Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018) (No. 3:17-cv-05211-WHA).

[248] *Id.* at 1.

[249] Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1037 (N.D. Cal. 2018).

[250] *Id.* at 1037.

[251] *Id.* at 1048.

[252] Order and Preliminary Injunction at 24, Batalla Videl v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018) (No.16-CV-4756-NGG).

[253] *Id.* at 53.

[254] *Id.* at 51.

[255] *Id.* at 24.

[256] *Id.* at 35.

[257] *Id.* at 39.

[258] *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction (last updated Aug. 24, 2020).

of the United States.[259] Therefore, the DACA program remained largely uninterrupted due to the litigation challenging the rescission.

The next court to consider the case, the Maryland court, found differently from the California and New York courts. It dismissed the plaintiffs' case and found that the rescission of DACA by the Trump administration was not unlawful. While it dismissed the complaint, it did grant a nationwide injunction barring DHS from using DACA recipients' information for enforcement purposes. The plaintiffs appealed to the Fourth Circuit Court of Appeals which then found the opposite, that DACA's termination was arbitrary and capricious in violation of the APA.[260] The Fourth Circuit made its decision in May 2019, when the nationwide preliminary injunction maintaining DACA had already been in place more than a year.

In April 2018, the District of Columbia court, combining its order to apply to *NAACP v. Trump* and *Trustees of Princeton v. United States of America*, granted yet another preliminary injunction of the DACA rescission but stayed its order for 90 days.[261] The 90-day stay was to allow the government to issue a more detailed explanation as to why it terminated DACA in 2017.[262] In response to the decision, on June 22, 2018, then-Secretary of DHS Kirstjen Nielsen issued a new three-page memorandum to respond to the court's order.[263] In the memorandum, she expressly did not "disturb the Duke memorandum's rescission of the DACA policy." The memo explains that the DACA program was contrary to law, and even if it wasn't illegal, there "[were], at a minimum, serious doubts about its legality."[264] Furthermore, Nielsen stated that the rescission reflected a policy decision that only Congress should grant legal status to DACA recipients and that DHS should only exercise prosecutorial discretion on a case-by-case basis.[265] The court reviewed Nielsen's supplemental memorandum and upheld its stay, requiring that DHS accept renewal applications, but not new applications, like the other injunctions.[266]

On November 5, 2018, the Trump administration filed for "certiorari before judgment" with the U.S. Supreme Court with regard to the California, New York, and District of Columbia DACA cases. This is the rare process by which the Supreme Court considers a challenge to a case before the appeals courts (in these cases pending before the Ninth, Second, and D.C. Circuits) have made their final judgments. In response, on June 28, 2019, the U.S. Supreme Court consolidated the *Regents*, *Batalla Vidal*, and *NAACP* cases and granted the government's petition for review before judgment.[267] Oral arguments were heard on the case on November 12, 2019.[268]

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[259] *Id.*

[260] Casa de Md., Inc. v. Dep't of Homeland Sec., 924 F.3d 684, 691 (4th Cir. 2019).

[261] NAACP v. Trump, No. 1:17-cv-02325-JDB (D.D.C. April 24, 2018), ECF No. 70.

[262] *Id.*

[263] Memorandum from Kirstjen M. Nielsen, Acting Sec'y, U.S. Dep't Homeland Sec. (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf.

[264] *Id.* at 2.

[265] *Id.* at 2–4.

[266] NAACP v. Trump, No. 1:17-cv-02325-JDB, at 2.

[267] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019).

[268] *See generally* Transcript of Oral Argument, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2019) (No. 18-587).

3. Texas Challenges the Legality of DACA

While the challenges to the rescission of DACA played out, Texas and several other states challenged the legality of DACA itself. In May of 2018, Texas and six other states filed a complaint in the U.S. District Court for the Southern District of Texas challenging the legality of DACA itself.[269] According to the lawsuit,

> [i]n 2012 and again in 2014, unilateral executive action by the Obama Administration created far-reaching, class-based 'deferred action' programs to grant to millions of unlawfully present aliens the legal classification of 'lawful presence' in this country and numerous attendant benefits—without congressional authorization. . . . This lawsuit does not call on this Court to resolve any of the challenges pending in California or elsewhere about the validity of executive action in 2017. Rather, this lawsuit challenges whether the 2012 executive action unilaterally creating DACA was itself lawful.[270]

The main legal challenges to the 2012 DACA executive order were that it violated the President's duty to "take Care that the Laws be faithfully executed" under Article II, Section 3 of the Constitution because it "unilaterally conferred lawful presence and work authorization on otherwise unlawfully present aliens."[271] It also claimed that the executive branch "used that lawful-presence 'dispensation' to unilaterally confer United States citizenship" because some DACA recipients were able to travel outside of the country on advance parole (and then later adjust status under a separate immigrant petition).[272] The lawsuit challenged the 2012 DACA memo on administrative grounds because it did not utilize the notice-and-comment procedure, and substantively violated the APA.[273] The suit asked the court to enjoin the government from "issuing or renewing any DACA permits in the future."[274]

On August 31, 2018, the Texas court in the case *Texas v. United States* rejected a motion for preliminary injunction to stop the DACA program.[275] Although the judge in the case, Andrew Hanen, thought that the plaintiffs were likely to be successful in their case that DACA was unlawful, he refused to issue an injunction in the case due to the pending federal court cases in California and New York.[276] In November 2019, a stay was issued in the case and remains in place.[277]

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[269] *See generally* First Amended Complaint for Declaratory and Injunctive Relief, Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018) (No. 1-18-cv-00068).
[270] *Id.* at 2–4.
[271] *Id.* at 5.
[272] *Id.*
[273] *Id.* at 72.
[274] *Id.* at 73.
[275] *See generally* Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018).
[276] *Id.*
[277] *DACA Litigation Timeline*, NAT'L IMMIGR. L. CTR., https://www.nilc.org/issues/daca/daca-litigation-timeline/ (last updated May 8, 2020).

4. U.S. Supreme Court Considers DACA Rescission Cases

The U.S. Supreme Court issued its decision in the combined DACA recession challenge cases on June 18, 2020 in *Department of Homeland Security v. Regents of the University of California*.[278] A majority of the Court found, in a 5–4 decision, that DHS's decision to rescind DACA is reviewable under the APA and that that decision was arbitrary and capricious.[279] Chief Justice Roberts wrote the opinion of the majority. Roberts notes that the dispute in the case "is not whether DHS may rescind DACA. All parties agree that it may."[280] Instead, the primary dispute is "about the procedure the agency followed in doing so."[281] First, Roberts wrote that the creation and rescission of DACA is judicially reviewable because it was not just a "passive non-enforcement policy."[282] He also notes that in evaluating the rescission, the Court would only consider the Duke September 2017 memo and not the Nielsen June 2018 supplement, so their review is limited to the grounds the agency stated when it took action.[283]

Next, Roberts explains why the agency's actions under the Duke memo were arbitrary and capricious in rescinding DACA. The Duke memo reasoned that the "Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason," so the programs should therefore be terminated.[284] The Fifth Circuit's decision was based on the eligibility for benefits including a work permit, Social Security, and Medicare. However, the other central aspect to the program, forbearance of removal, was not included in the Fifth Circuit's holding of its illegality. Nonetheless, "the Attorney General neither addressed the forbearance policy at the heart of DACA . . . [even though] removing benefits eligibility while continuing forbearance remained squarely within the discretion of the Acting Secretary Duke."[285] Therefore, the decision to terminate both the benefits aspect and the removal forbearance aspect was "arbitrary and capricious."[286]

In addition to Duke's failure to explore alternatives to a complete rescission of DACA, she also did not consider whether there was reliance on the DACA memorandum.[287] If she considered this reliance interest, according to Roberts, "she might, for example, have considered a broader renewal period . . . for DACA recipients to reorder their affairs."[288] This failure to consider reliance interests at all made the manner in which DACA was rescinded arbitrary and capricious as well.[289]

Finally, Roberts considers the claim that the DACA rescission violates the equal protection guarantee of the Fifth Amendment. He ultimately holds

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[278] *See generally* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).
[279] *Id.* at 1915.
[280] *Id.* at 1905.
[281] *Id.*
[282] *Id.* at 1906.
[283] *Id.* at 1908–09.
[284] *Id.* at 1910.
[285] *Id.* at 1912.
[286] *Id.*
[287] *Id.* at 1913.
[288] *Id.* at 1914.
[289] *Id.* at 1913.

that such a claim cannot be established because "Latinos make up a large share of the unauthorized alien population" so any immigration relief program would be expected to disproportionately affect the group.[290] Furthermore, there was "nothing irregular about the history leading up to the September 2017 rescission," and the derogatory statement made by Trump about Latinos were not contemporaneous.[291]

Justice Sonia Sotomayor wrote a separate opinion in which she concurs in part with the majority opinion and dissents in part. Sotomayor agrees with the majority that DHS violated the APA in rescinding DACA.[292] However, unlike the majority, she would have "permit[ted] respondents' . . . equal protection claims [to proceed] on remand."[293] This is because Trump's derogatory statements about Mexican immigrants were directly related to "unlawful migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA."[294] President Trump's words create a perception of animus that "provides respondents with grounds to litigate their equal protection claims further."[295] Additionally, she "would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier."[296]

Justice Clarence Thomas wrote the dissenting opinion in the case. In his dissent, he states that "DACA fundamentally altered the immigration laws."[297] It did so, according to Thomas, because it "created a new category of aliens who, as a class, became exempt from statutory removal procedures, and it gave those aliens temporary lawful presence." Because of this, Thomas argues that DACA was required to undergo notice and comment, which it did not, and therefore, "DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties."[298] As there was not legally binding regulation, Thomas argues that DHS was not "required to spill *any* ink justifying the rescission of an invalid legislative rule, let alone that it was required to provide policy justifications beyond acknowledging that the program was simply unlawful from the beginning."[299] In Thomas's view, the majority opinion in the case would burden "all future attempts to rescind unlawful programs."[300]

Following the Supreme Court decision, on July 17, 2020, the Fourth Circuit Court of Appeals issued a mandate in *Casa de Maryland v. Department of Homeland Security* ordering the government to reinstate the program as it existed before it was rescinded, including accepting initial

[290] *Id.* at 1915.
[291] *Id.* at 1916.
[292] *Id.* at 1916–17.
[293] *Id.* at 1917.
[294] *Id.*
[295] *Id.*
[296] *Id.* at 1918.
[297] *Id.* at 1927.
[298] *Id.* at 1928.
[299] *Id.*
[300] *Id.*

DACA applications (for those who had never had DACA before).[301] Despite the clear court mandate, the Department of Homeland Security stated that it would "reject all initial requests for DACA and associated applications for Employment Authorization Documents."[302] It would instead only accept applications for DACA renewals and only renew those for one year as opposed to the previous two years.[303] By 2020, DACA remained alive but severely weakened with its future uncertain.

C. PROSECUTORIAL DISCRETION (ADMINISTRATIVE CLOSURE)

Non-citizens with administrative closure are even more vulnerable than those with DACA and TPS. First, like DACA and TPS, their quasi-status is based in executive authority (prosecutorial discretion), so it is not secure and can be revoked with a change in the executive branch. Second, it can be easily rescinded, even without a change in the executive branch (and can be taken away for any reason at all). In this way, prosecutorial discretion-based administrative closure is even more vulnerable than TPS and DACA because TPS and DACA are generally only revoked for a specified reason, like a criminal conviction or an end of a country protection designation. Third, those with administrative closure generally cannot travel outside of the United States as they are technically still in removal proceedings. Finally, those with administratively-closed removal proceedings have no pathway to permanent status and, in fact, need to have their removal proceedings reopened to even apply for a permanent status in the United States.

The Trump administration effectively ended the practice of administrative closure in immigration court. In January 2017, as one of his first actions as President, Trump issued Executive Order No. 13768 titled "Enhancing Public Safety in the Interior of the United States." This executive order effectively dismantled the system of enforcement priorities that had been established over time by the Obama administration.[304] The order stated that the executive branch will "[e]nsure the faithful execution of the immigration laws of the United States."[305] The new priorities replaced the Obama system of tiers of enforcement priorities, effectively making everyone an enforcement priority. A later memo only exempted those protected under DACA (which was later also rescinded in September 2017).[306]

As a result of new expansive enforcement priorities, in "the first five months of the Trump administration[,] prosecutorial discretion closures precipitously dropped to fewer than 100 per month from an average of

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[301] *DHS Limits DACA Despite Supreme Court Decision and Federal District Court Order*, WESTLAW TODAY (Jul. 30, 2020), https://today.westlaw.com/w-026-7931?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

[302] *Department of Homeland Security Will Reject Initial Requests for DACA as it Weighs Future of the Program*, U.S. DEP'T HOMELAND SEC. (Jul. 28, 2020), https://www.dhs.gov/news/2020/07/28/department-homeland-security-will-reject-initial-requests-daca-it-weighs-future.

[303] *Id.*

[304] Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

[305] *Id.*

[306] *See supra* Part II.B.

around 2,400 per month during the same five month period in 2016."[307] For an immigration judge to grant administrative closure as a grant of prosecutorial discretion, DHS must agree to that closure—"when DHS agrees to exercise prosecutorial discretion, it often agrees to do so via a joint motion to administratively close a case."[308]

In addition to administrative closure as a result of DHS's prosecutorial discretion power, an immigration judge had the power to administratively close removal cases in certain circumstances, even over DHS's objection. Under the precedent established in the 2012 BIA case *Matter of Avetisyan*, immigration judges could administratively close removal proceedings when there was a pending collateral matter such as, for example, the adjudication of an immigrant or humanitarian petition with USCIS.[309] Under *Avetisyan*, the judge was to consider the reason administrative closure was sought, the basis of any opposition to closure, the likelihood of success of the petition, expected duration of the closure, the relative responsibility of the parties in the delay, and the ultimate outcome of the case.[310]

In January 2018, then-Attorney General Jeff Sessions referred a BIA case to himself, *Matter of Castro-Tum*, and then held that immigration judges and the BIA did not have the general authority to administratively close cases in immigration court and could only administratively close cases when it was explicitly allowed in a regulation or a legal settlement.[311] This case affected the ability of immigration judges to administratively close cases for many in removal proceedings including those "awaiting adjudication of a relevant collateral matter such as an application with USCIS, who have deferred action, who have mental competency issues, or who are seeking an I-601A provisional waiver [for unlawful presence]."[312] Furthermore, in the *Castro-Tum* case, Sessions stated that those cases that were previously administratively closed without the requisite authority should be re-calendared (reopened).[313]

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[307] *Immigration Court Dispositions Drop 9.3 Percent Under Trump*, TRAC IMMIGR. (July 17, 2017), https://trac.syr.edu/immigration/reports/474.

[308] Practice Advisory: Administrative Closure and Motions to Recalendar, *supra* note 100.

[309] Matter of Avetisyan, 25 I. & N. Dec. 688 (B.I.A. 2012).

[310] *Id.*

[311] Matter of Castro-Tum, 271 I. & N. Dec. 27 (A.G. 2018).

[312] "For example, administrative closure was frequently granted to allow USCIS to adjudicate a pending petition or application that could lead to relief from removal, including, but not limited to: Petitions for Alien Relative (Form I-130); Petitions for Amerasian, Widow(er), or Special Immigrant, for those who are seeking adjustment under the [VAWA] or Special Immigrant Juvenile Status provisions (Form I-360); Applications to Register Permanent Residence or Adjust Status filed by "arriving aliens" where USCIS had sole jurisdiction (Form I-485); Refugee/Asylee Relative Petitions (Form I-730); Petitions to Remove Conditions on Residence (Form I-751); Applications for [TPS] (Form I-821); Applications for T Nonimmigrant Status (Form I-914); Petitions for U Nonimmigrant Status (Form I-918); and Applications for Naturalization pursued by a family member/spouse of a noncitizen in removal proceedings (Form N-400). In addition, administrative closure previously could be granted to await the results of a family court proceeding necessary for an award of Special Immigrant Juvenile Status or the results of a criminal court processing, including a direct appeal or post-conviction relief." AM. IMMIGR. COUNCIL, ADMINISTRATIVE CLOSURE POST-*CASTRO-TUM* 2 n.11 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf.

[313] Matter of Castro-Tum, 27 I. & N. Dec. 271, 272 (A.G. 2018).

The *Castro-Tum* decision exacerbated the quasi-status system by making it more difficult for those without status in removal proceedings to seek status from USCIS. The *Castro-Tum* decision was challenged in the Fourth Circuit in the case *Zuniga Romero v. Barr.*[314] In this case, the Fourth Circuit found that immigration judges do have the authority to administratively close cases and *Castro-Tum* was decided in error.[315] This decision only applies, however, to those under the Fourth Circuit's jurisdiction.

D. DEFERRED ENFORCED DEPARTURE

DED is similar to TPS and has most of the same vulnerabilities. Those with DED are dependent on their country being reauthorized by the Executive. When Trump took office in 2017, Liberians were the only nationals who still had DED designation. Roughly four thousand Liberian nationals in the United States had DED status in early 2017, when President Trump took office.

Those with DED, however, were the one quasi-status group that was protected and gained a path to permanent legal status during the Trump administration, providing an example of how a group that has a quasi-status can be provided a pathway to permanent residency. The Liberian Refugee Immigration Fairness ("LRIF") provision of the National Defense Authorization Act of 2020 provided a pathway to permanent residency for nationals of Liberia who had been continuously present since November 20, 2014.[316] Those who apply must otherwise be eligible for adjustment of status or a waiver and apply to adjust status before December 20, 2020. Many Liberians were able to take advantage of this program to gain legal status. Still, as only four thousand individuals from Liberia had DED, the number of people who qualify is small compared to the large quasi-status population.

E. OTHER DEFERRED ACTION

In addition to the administration's DACA policies, those with other grants of deferred action decreased substantially during the Trump administration. This was mainly due to the 2017 enforcement priorities memo which made almost all removable non-citizens a priority.[317] Deferred action was still granted, however, on a categorical basis for those who established prima facie eligibility for relief such as VAWA and U visas.[318]

F. STAY OF REMOVAL/ORDER OF SUPERVISION

As previously discussed, those with either a stay of removal, an order of supervision, or both are the most vulnerable of all immigrants with quasi-statuses discussed in this Article.[319] They already have a standing removal

[314] Zuniga Romero v. Barr, 937 F.3d 282 (4th Cir. 2019).
[315] *Id.* at 297.
[316] *Liberian Refugee Immigration Fairness*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-eligibility/liberian-refugee-immigration-fairness (last updated Jan. 4, 2021).
[317] *See* Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER WILLIAMS U.L. Rev. 353, 357–58 (2018).
[318] *See supra* Part II.E.
[319] *See supra* Part II.

order from an immigration judge, so if their stay of removal is revoked, they generally do not have a right to a hearing or appeal.[320] Furthermore, non-citizens in the United States under a stay of removal or an order of supervision must report to regular check-ins with ICE. At any of these check-ins, they can be detained and removed without notice or opportunity to make plans to return home. For this reason, they are constantly on ICE's radar for potential removal from the United States.

Like prosecutorial discretion in immigration court, the expanded enforcement priorities established in Trump's Executive Order No. 13768 and subsequent DHS enforcement priority memos put those with removal orders who had previously been protected by Obama's enforcement priorities at risk. Under the Obama administration's enforcement priorities, certain individuals with removal orders who either were not considered a priority, or whose removal presented significant humanitarian concerns, or both, were able to remain in the United States as long as they complied with the terms of their order of supervision.

As the most vulnerable quasi-status group, individuals with removal orders were the first group to be directly affected by the anti-immigrant policies of a Trump presidency. Soon after Trump took office, many immigrants with stays of removal, orders of supervision, or both, were detained at what they believed were (and had been for many years) routine check-ins with ICE. By April 2017, many individuals with removal orders who had been checking in with ICE for years reported being detained or told they must depart the United States.[321]

According to the Migration Policy Institute ("MPI") there were roughly ninety thousand individuals checking in regularly with orders of supervision by the end of the Obama administration.[322] Although statistics regarding the number of check-in arrests are unavailable, MPI reports that "[w]hen they occurred, check-in arrests often involved individuals with long-term U.S. residence and years-old removal orders."[323] According to the report by the MPI, "one attorney [in Houston] reported the arrest of 24 out of 25 clients checking in with ICE" under the Trump administration enforcement guidelines.[324] Due to the changing enforcement priorities, many of those who had been checking in for many years with stays of removal and orders of supervision were suddenly removed from the United States starting in early 2017 and continuing throughout the Trump presidency.

[320] Although in some circumstances they may be able to reopen their case.

[321] *See* Robbins, *supra* note 130; Shoba Sivaprasad Wadhia, *Immigration Enforcement Under Trump: A Loose Cannon*, HARVARD L. REV. BLOG (Feb. 21, 2018), https://blog.harvardlawreview.org/immigration-enforcement-under-trump-a-loose-cannon.

[322] CAPPS ET AL., *supra* note 128, at 3.

[323] *Id.* at 46.

[324] *Id.*

VI. POLICY PRESCRIPTIONS TO REMEDY THE QUASI-STATUS SYSTEM

The quasi-status immigration system is unsustainable and a danger to legal stability and social justice. Under the system, more and more immigrants are residing long-term in the United States, contributing to society, and building families and social networks. Despite this, they are not afforded sufficient rights or guarantees that they can remain here. The Trump presidency showed how a change in the Executive can lead to chaos and uncertainty in the immigration system.

A. PRESIDENTIAL ACTION

Under the quasi-status system, President Trump had a great deal of power to revoke the lawful presence of hundreds of thousands of immigrants, many of whom have been in the United States for decades. The recent litigation in TPS and DACA cases demonstrates that there are some limitations to the Executive's ability to revoke quasi-statuses. Specifically, the procedural and substantive requirements under the APA were able to at least stall some of the administration's plans to dismantle protections. Still, the APA will be unable to protect quasi-statuses over the long term. While only Congress can enact legislation that grants lawful status, a president can take certain actions to repair some of the damage that was done to those with quasi-status during the Trump administration and help create more opportunities for those with quasi-statuses to seek permanent residency.

1. Increase Use of Prosecutorial Discretion

The President has the authority to execute immigration law as they see fit—and "a principal feature of the removal system is the broad discretion exercised by immigration officials . . . [to] decide whether it makes sense to pursue removal at all."[325] A President's administration can increase the use of prosecutorial discretion in immigration court and increase the use of deferred action on a case-by-case basis. While this is not a permanent solution to the quasi-status system (and, in fact, perpetuates it further), it will allow many individuals who were put into jeopardy for removal during the Trump administration to have a chance to possibly regularize their status in the future.

Furthermore, the increased use of prosecutorial discretion in immigration court will help to remedy some of the backlog that developed during the Trump administration. As of August 2020, the backlog in immigration court reached 1,246,164 cases—its highest level ever and more than twice as large as it was just four years ago in 2016 (516,031 cases).[326] This is a direct result of the Trump administration's lack of enforcement priorities, which is unsustainable in the long run. Without the aggressive use of prosecutorial discretion by DHS in the future, the immigration court system will cease to be a functioning court system. The wait time for an

[325] Arizona v. United States, 567 U.S. 387, 396 (2012).

[326] *Backlog of Pending Cases in Immigration Court as of January 2021*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Feb. 12, 2021).

immigration court final hearing is now, on average, 796 days, or more than two years.[327] That wait is significantly longer in certain courts—for example, the average wait time in the Arlington, Virginia immigration court is 1,607 days (more than four years).[328] The wait time in San Antonio, Texas is 1,422 days and in New York City, New York, is 1,328 days.[329]

The court backlog problem was further exacerbated by the COVID-19 pandemic crisis in 2020 and 2021, as immigration courts around the country had to close and reschedule hearings en masse.[330] Although it is not yet known how many hearings will need to be rescheduled due to the COVID-19 pandemic, it was estimated that fifteen to twenty thousand cases per week had to be cancelled during the 2018–2019 government shut down.[331] Certainly tens of thousands, if not hundreds of thousands, of cases will have to be rescheduled due to the 2020 pandemic, which will only worsen the already critical court backlog problem.

[327] *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog (last visited Aug. 13, 2020).

[328] *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/579 (last visited Aug. 13, 2020).

[329] *Id.*

[330] Tal Kopan, *Immigration Courts in 'Chaos,' with Coronavirus Effects to Last Years*, S.F. CHRON. (May 18, 2020), https://www.sfchronicle.com/politics/article/Immigration-courts-in-chaos-with-15276743.php.

[331] *Id.*

2. Renew TPS Designations and Maintain DACA

While the Trump administration acted to terminate TPS and DACA, it has so far been unsuccessful in most of its efforts because of the manner in which it did so. Still, these quasi-statuses, and especially DACA, are now holding on by a thread. Taking the legal decisions issued by the courts, a future President could work to comply with APA requirements and terminate the programs in a manner consistent with the APA. As of early 2021, DACA still remains in effect and in late 2020, DHS extended TPS for Sudan, Nicaragua, Honduras, El Salvador, Haiti, and Nepal through October 4, 2021.[332] President Biden's administration can re-designate TPS for Sudan, Nicaragua, Honduras, El Salvador, Haiti and Nepal. Because TPS is based in statute, it will be much easier for the Executive to continue this program. A President can also choose to continue the DACA program as it stands today. DACA is more vulnerable than TPS, however, because the legal basis for the program is based in prosecutorial discretion rather than in statute. For this reason, a President attempting to continue DACA could face legal challenges from states like Texas that claim the exercise of prosecutorial discretion and granting of work permits is unlawful.

3. Parole-in-Place for TPS and DACA Holders

Only Congress can create a true pathway to permanent residency and citizenship for DACA and TPS holders. Still, the President can take certain legal actions that would allow TPS and DACA holders to more easily access other immigrant visas (for example, family-, employment-, or diversity-based) for which they may qualify and that could lead to permanent residency and, eventually, citizenship.

The first way the President might do this is by granting humanitarian parole. Beginning under President George W. Bush, USCIS began granting what is known as "Parole-in-Place" ("PIP") to family members of U.S. military members.[333] PIP allowed spouses, parents, sons, and daughters of U.S. military personnel (either U.S. citizens or LPRs) to be "paroled" into the United States without ever leaving.[334] This meant that those without a lawful entry but who were physically present in the United States could adjust status to LPR through a petition from an immediate U.S. citizen relative if they were granted PIP first. Previously, these individuals would first have to leave the United States for consular processing, and in doing so trigger the three- and ten-year inadmissibility bars. The PIP program also included a deferred action program that allowed undocumented family members of U.S. military personnel to remain in the United States with work authorization.[335]

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[332] Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 85 Fed. Reg. 79208 (Dec. 9, 2020).

[333] Camilo Montoya-Galvez, *Senators Move to Protect Program for Immigrant Military Families that Trump May End*, CBS NEWS (Nov. 6, 2019), https://www.cbsnews.com/news/parole-in-place-senators-aim-to-protect-program-for-immigrant-military-families-that-trump-may-end.

[334] IMMIGRANT LEGAL RES. CTR., IMMIGRATION OPTIONS FOR MILITARY FAMILIES 1 (Sept. 2018), https://www.ilrc.org/sites/default/files/resources/immig_options_military_fams-20181001.pdf.

[335] *Id.* at 10.

The Obama administration formally outlined the legal justification for PIP in two memos issued in 2013 and 2016. In a November 15, 2013 policy memo, the Obama Administration cited INA § 212(d)(5)(A), which gives the Secretary of DHS the discretion, on a case-by-case basis, to parole non-citizens into the United States for "urgent humanitarian reasons or significant public benefit."[336] PIP, which allows a non-citizen to be paroled while already being physically present in the United States, was recognized by the General Counsel of the Immigration and Naturalization Service.[337] According to the 2013 memo, "[t]he basic authority for parole in place is INA § 212(d)(5)(A), which expressly grants discretion to parole 'any alien applying for admission to the United States.' INA § 235(a)(1), in turn, expressly defines an applicant for admission to include 'an alien present in the United States who has not been admitted.'"[338]

Importantly, PIP does not impact any other grounds of inadmissibility, and those applying for LPR status after a grant of PIP must be eligible to adjust except for the fact that they do not have a lawful entry or parole. The PIP program continued throughout the Trump administration; however, there were reports that the administration was circulating proposals to eliminate it.[339]

The same presidential authority that was used to authorize PIP for family members of U.S. military personnel could be utilized to grant PIP for DACA and TPS holders. During the 2019 Democratic presidential primary race, then-U.S. Senator Kamala Harris proposed such a plan for those with DACA. Under Senator Harris's plan, those with DACA could qualify to be granted PIP. Those who were granted PIP would be able to seek LPR status through an immediate U.S. citizen relative petition.[340] The same rationale could be used to grant PIP to those with TPS as well. After being granted PIP, those with TPS could be eligible for adjustment to LPR, especially as many TPS holders have U.S. citizen children who are twenty-one years old or approaching that age and would therefore be able to petition for them.

Senator Harris's proposal also included a provision whereby those with DACA would be able to more easily adjust status if any type of visa was available to them (not just a family-based visa through an immediate U.S. citizen relative).[341] Under this proposal, the President would issue a rule that those brought to the United States as children failed to maintain lawful status through "no fault of their own."[342] Under the INA, persons who failed to maintain lawful status through no fault of their own fit into an exception that

[336] U.S. DEP'T HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., PM 602-0091, POLICY MEMORANDUM 2 (2013), https://www.uscis.gov/sites/default/files/document/memos/2013-1115_Parole_in_Place_Memo_.pdf.

[337] *Id.*

[338] *Id.*

[339] Andrew Patterson, *Trump Administration Moves to Cut Protection for Military Families*, IMMIGR. IMPACT (Jul. 8, 2019), https://immigrationimpact.com/2019/07/08/trump-cut-protections-for-military-families.

[340] A New Roadmap to Citizenship for Dreamers: Kamala Harris' Plan to Forge a Roadmap to Citizenship by Executive Action, POLITICO, https://www.politico.com/f/?id=0000016b-4c56-df00-a9fb-6c7758440001 (last visited Aug. 15, 2020).

[341] *Id.*

[342] *Id.*

makes them eligible for adjustment of status even if they do not currently have lawful status.[343] This rule, combined with PIP, would be even more beneficial to those with DACA because they could qualify for adjustment of status under any type of family-, employment-, or diversity-based visa, assuming they qualified for the visa and were not subject to any other grounds of inadmissibility.

As a public relations matter, it should be emphasized that these policies would not give a special benefit to those with DACA, but rather would put those with DACA on the same playing field for legal visas as those who are outside of the United States who have never entered, or who were able to maintain lawful status within the United States. This leveling of the playing field, recognizing that DACA beneficiaries face challenges to adjustment through no fault of their own, could help to make the policy popular with the general public. While not all DACA and TPS beneficiaries would be able to benefit from these policies by the Executive, a significant number could, which would help to solve a great deal of the quasi-status immigration problem.

B. CONGRESSIONAL ACTIONS

Congress has the greatest power to solve the quasi-status problem. Congress can directly create pathways to permanent status and citizenship for those with DACA and TPS. Congress is also able to reform immigration law in a number of ways that will help to solve the quasi-status immigration problem.

1. Pathway to Citizenship for TPS and DACA Holders

One of the best solutions to the quasi-status immigration problem is to create a pathway to citizenship for DACA and TPS holders through congressional legislation. As previously mentioned, Congress has attempted to pass various versions of the DREAM Act since 2001.[344] One such bill, in 2010, passed the House of Representatives but fell only a few votes short of passing through the Senate.[345] With the political will necessary, a version of the DREAM Act can create a pathway to citizenship for those with DACA. The major aspects of the DREAM Act include the following requirements: having entered the United States as a minor a certain number of years earlier, meeting educational or military requirements, and not being convicted of certain crimes. The DREAM Acts have generally also required a certain period of conditional residence, after which the non-citizen can apply for a permanent resident status and then, generally five years later, can apply for U.S. citizenship.

Creating a pathway to citizenship for TPS holders will be more challenging due to provisions of the TPS statute. Even though "Congress did

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[343] INA § 245(c)(2), 8 U.S.C. § 1255(c)(2).

[344] *See supra* Part II.B.

[345] AM. IMMIGR. COUNCIL, THE DREAM ACT, DACA, AND OTHER POLICIES DESIGNED TO PROTECT DREAMERS (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf.

not limit TPS in overall duration, the statute provides two problematic ways to handle lengthy crises."[346] One way is for the executive branch to continue to designate a country for TPS, as it has done for decades for nationals of Nicaragua, Honduras, El Salvador, and Sudan, thus creating the quasi-status class of immigrants. Alternatively, there is a statutory mechanism to grant LPR status to TPS beneficiaries; however, it requires a supermajority (three-fifths vote) in the Senate.[347] For this reason, directly enacting a pathway to permanent residency and citizenship will be challenging for TPS holders. If this supermajority could be reached, however, some type of provision could be enacted by Congress to create a pathway to LPR status for TPS holders who have been lawfully present for more than a certain amount of time (for example, ten years). Scholars have also suggested that the supermajority provision could be challenged on the basis that members of the Congress that enacted the TPS statute may have anticipated that long-term TPS holders would be able to take advantage of other adjustment of status mechanisms in U.S. immigration law at that time, such as suspension of deportation, that are no longer available under current law.[348]

2. Renew Registry

For those without DACA or TPS, and most of those with quasi-statuses, a renewal of registry would be a viable solution to create a pathway to durable status. A renewal of registry would mean that non-citizens who have been continuously present in the United States for a certain amount of time, but who do not have legal status, would be eligible for adjustment to legal permanent resident. However, they would still be subject to almost all admissibility requirements, and likely other requirements. The last time Congress advanced the registry date was more than thirty years ago, in 1986. At that time, it advanced the date to January 1, 1972, requiring fourteen years of continuous residence to qualify. An equivalent registry advancement date today would be 2006. In the current political environment, advancing the registry date to 2006 seems untenable given that this is almost the same as the DACA continuous presence date, and also considering that a DREAM Act would apply to far fewer people than a general registry advancement and has not been able to pass through Congress in almost twenty years.

A registry date that is further in the past might be politically tenable, however. A continuous presence requirement of, for example, twenty years would limit the number of individuals who qualified and would grant status to those who have strong ties to the community, having been in the United States for at least two decades. Furthermore, a registry renewal with a twenty-year date would be a strong *ex post facto* screening method. A twenty-plus year history of paying taxes, working, avoiding significant criminal convictions, and meeting any other requirements over this period in the United States would be a strong indication that the immigrants who

[346] Schoenholtz, *supra* note 44, at 27.
[347] INA § 244(h).
[348] Bergeron, *supra* note 46, at 35.

qualified for registry would be productive and contributing members of U.S. society.

3. Renew 245(i)

Alternatively, a renewal of 245(i) (discussed in depth in Part III.C.3) could be a viable alternative to a general legalization program. Under 245(i), individuals would have until a certain date to apply for adjustment and would be able to do so despite an unlawful entry or unlawful status. This solution could be more tenable because it would require individuals to have another viable visa petition available to them and would only waive the lawful entry parole and continuous lawful status requirements. Furthermore, the provision would require individuals to pay a fine, which could increase revenue to support immigration services for more individuals.

4. Reform Cancellation of Removal

Cancellation of removal reform could also be a viable alternative to a more generalized legalization program. Cancellation of removal allows those with ten years of continuous residency who are also immediate relatives of U.S. citizens or lawful permanent residents to apply for LPR status. Expanding the use of cancellation of removal would allow those with strong ties to the community, through their long residence and close family ties to U.S. citizens, and permanent residents the ability to regularize their status. There are several ways cancellation of removal could be reformed to allow more individuals to qualify and mitigate the quasi-status problem. First and most importantly, the current cap on approvals of four thousand per year should be increased. Given the growing undocumented and quasi-status populations in the United States, the four thousand annual cap is not high enough to aid a significant number of individuals.

Additionally, the standard of hardship required for cancellation of removal should be changed. Cancellation of removal cases are currently judged under an "exceptional and extremely unusual hardship" which, by definition, excludes the vast majority of cases, even of those whose U.S. citizen immediate relatives (most commonly minor children) would face extreme hardship if they were removed. Reforming this standard to, for example, an "extreme hardship" standard, would help many non-citizens without lawful status the ability to regularize their status.

Finally, non-citizens should be allowed to affirmatively apply for cancellation of removal with USCIS if they qualify. Currently, cancellation of removal can only be pursued as a defense once an individual is put into removal proceedings. For this reason, many of those who would qualify for cancellation of removal do not get the chance to apply because they are never encountered by immigration and put into removal proceedings. The process for affirmatively applying for cancellation of removal could be similar to other humanitarian affirmative applications with USCIS (for example, for asylum, VAWA and NACARA).

5. Repeal Barriers to Adjustment (Three- and Ten-Year Bar, One-Year Asylum Deadline)

Finally, the quasi-status immigration system is perpetuated due to policies that make it more difficult for non-citizens to seek legal status generally. Some of these policies predate the Trump administration and others were recently imposed during his administration. There are many reforms that could be made, but the most pressing would be to end the three- and ten-year unlawful presence bars. These bars have not deterred unlawful immigration but instead have exacerbated the problem by blocking those who qualify for visas from seeking them. Finally, repealing the one-year deadline to apply for asylum would allow more individuals to seek protection in the United States and gain durable status.[349]

C. U.S. CITIZENSHIP ACT OF 2021

On February 18, 2021 the Biden administration formally introduced the U.S. Citizenship Act of 2021 and made its provisions public.[350] The proposed bill makes many of the legislative advances needed to remedy the quasi-status immigration system. The bill goes beyond just addressing those with quasi-statuses by also addressing undocumented immigration more generally. Most significantly, the bill would offer a pathway to citizenship for eligible undocumented immigrants present in the United States on January 1, 2021.[351] The status it would offer, Lawful Prospective Immigrant ("LPI"), would be renewable in six-year terms, and those with LPI would be eligible for lawful permanent residence after 5 years (assuming they meet a basic criminal background check and other requirements).[352] Furthermore, those with DACA and TPS (the largest quasi-status groups) would be immediately eligible for adjustment of status after meeting a similar criminal background check and other requirements.[353] Notably, the provision within the Act for those who entered as minors (the DREAM Act) expands eligibility to those who entered the U.S. before their eighteenth birthday, rather than sixteenth, and creates a streamlined provision for those who already have DACA status.[354] Those with TPS can adjust status under the Act if they have been present since January 1, 2017 and meet other basic requirements.[355]

The Act also addresses quasi-status immigration by repealing the one-year asylum deadline which would allow many more individuals to apply for asylum, a durable status that leads to citizenship.[356] It would also eliminate

[349] For a comprehensive discussion on the harms of asylum seekers not being granted durable status see Lindsay H. Harris, *Withholding Protection*, 50.3 COLUM. HUM. RTS. L. REV. 1 (2019).
[350] U.S. Citizenship Act, S. 348, 117th Cong. (2021).
[351] *Id.* § 1101–03.
[352] *Id.*
[353] *Id.* § 1101–04.
[354] *Id.* § 1101–03.
[355] *Id.* § 1104.
[356] *Id.* § 4301.

the three- and ten-year unlawful presence bars which would allow many more individuals to seek legal status who have past immigration violations.[357]

The bill does not include some of the targeted recommendations in this Article including reforming cancellation of removal and renewing 245(i) and registry. The LPI provision is so inclusive it would provide a pathway to residency and citizenship for those who would also benefit from these more limited reforms. Still, these more limited reforms could be considered alternatives to the LPI provision if it is not politically viable. The U.S. Citizenship Act of 2021 as proposed would largely solve the problem of quasi-status immigration; however, it still remains to be seen if it can meet Congressional approval.

CONCLUSION

The presidency of Donald Trump exposed the vulnerability of hundreds of thousands of immigrants who had been lawfully present in the United States for many years but who had no pathway to permanent residence or citizenship. Trump's administration was able to destabilize the entire immigration system because of these weaknesses and vulnerabilities. The immigration system of today makes it much more difficult for those without lawful status to gain lawful status than it did in the past, and it is especially unforgiving to those with past immigration violations. The following administrations must prioritize stabilizing immigration legality and creating policies that allow more non-citizens to achieve lawful status and eventually citizenship in the United States.

[357] *Id.* § 3104.