



2019

The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven

Andrew I. Schoenholtz
Georgetown University Law Center, schoenha@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/2196>
<https://ssrn.com/abstract=3388878>

Northwestern Journal of Law and Social Policy, Forthcoming.

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Immigration Law Commons](#), and the [International Law Commons](#)

The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven

ANDREW I. SCHOENHOLTZ*

15 NW. J. L. & SOC. POL'Y. (forthcoming Nov. 2019)

Abstract

The humanitarian program Congress created in 1990 to allow war refugees and those affected by significant natural disasters to live and work legally in the United States has only partially achieved its goals. More than 400,000 individuals have received temporary protected status (TPS). In many cases, the crisis ended, along with temporary protection. In about one-third of the designated nationalities, including the largest groups, however, conflict and instability continued, making this humanitarian protection program anything but temporary. Unfortunately, Congress did not provide the Department of Homeland Security (DHS) with the tools it needed to address such long-term crises. That was purposeful—Congress worried that this temporary program would lead to permanent immigration. To constrain the program, Congress required a supermajority of the Senate for any nationality to be granted lawful permanent resident status as a group, which would place such individuals on a path to citizenship. Congress has never granted such group status to any TPS nationality.

Congress also worried that even temporary legal status for conflict refugees and other eligible humanitarian groups would act as a magnet and attract large movements to the U.S. For that reason, Congress required that eligible individuals had to already be in the U.S. when the DHS Secretary designated their nationality for TPS. Accordingly, Congress designed TPS in a way that did not protect ongoing arrivals fleeing a humanitarian emergency.

Congress should address both of these shortcomings. This article explains why and how it should do so. As DHS data shows, TPS has not acted as a magnet—even after DHS has opened up temporary protection for some new arrivals through re-designation. The data shows that it is not the policy that attracts people to the U.S., but rather a fear of death or very serious harm that principally motivates flight from conflict and significant violence. Accordingly, Congress can provide the same type of temporary protection to new arrivals fleeing an ongoing conflict as many nations do, including the United Kingdom and Canada, without worrying that TPS itself will act as a magnet.

Moreover, Congress did not know in 1990 that limiting access to lawful permanent resident status when a war does not end would effectively lead to long-term TPS programs. Given this result, Congress should look to ways to keep TPS temporary, including by facilitating return when conflict ends in a reasonable period of time, and enabling those who have become part of their American communities to be recognized as such when violence and instability is prolonged.

Congress will be more inclined to do this after it enacts legislation to address the problem of unauthorized immigration and creates a system that ensures that only authorized workers are employed by U.S. businesses—that is, when the U.S. has a functional system that meets the needs of employers with legal workers and controls future unauthorized immigration. Making TPS truly temporary and providing humanitarian protection to ongoing arrivals who flee conflict should be part of comprehensive immigration reform.

*Professor from Practice, Georgetown Law; Director, Center for Applied Legal Studies; Director, Human Rights Institute. The author wishes to thank Kristen Blosser, Nikki Endsley, Rachel Sumption and Sabiya Ahamed for their excellent and dedicated research, without which this Article could not have been written.

Table of Contents

Introduction.....	3
The Clash Between Humanitarian Protection and Immigration Control: The Origins of TPS	5
The Perception and Reality of Magnet Effects	14
How To Ensure That TPS Is Temporary	21
Can TPS Handle Arrivals from an Ongoing Humanitarian Crisis?.....	30
Conclusion	32

INTRODUCTION

Americans generally think of the great nineteenth-century Irish migration as economically motivated and associate those very large movements with the famous potato famine. Between 1846 and 1852, approximately 1.1 million Irish died as a result of the famine, and over 1 million fled the famine for the United States, Canada, Australia and Great Britain.¹ Were the Irish principally economic immigrants, or were they refugees fleeing a humanitarian and politically-affected disaster?²

¹ See CIARÁN Ó. MURCHADHA, *THE GREAT FAMINE: IRELAND'S AGONY 1845-1852*, at 180 (2011).

² See CHRISTINE KINEALY, *THIS GREAT CALAMITY: THE IRISH FAMINE, 1845-52*, at 299, 353, 357-358 (1994) (1847 “marked a watershed in Famine emigration . . . [which] had increasingly become the last refuge of a desperate population who believed that their only hope of survival lay outside of Ireland”; the [British] government’s “covert agenda and motivation” was “to facilitate various long-desired changes within Ireland” via “a variety of means, including emigration”; “This was a pervasive and powerful ‘hidden agenda’.”; “To achieve its ultimate aims, the government’s strategy was based on two underlying principles: that of issuing the minimal amount of relief consistent with political acceptability; and that of imposing the maximum possible burden on local resources in order to force a restructuring of Irish agriculture.”); JENNY EDKINS, *WHOSE HUNGER? CONCEPTS OF FAMINE, PRACTICES OF AID* 81 (2000) (“The covert [British] agenda included population control and the consolidation of land ownership and property. This was achieved when many people emigrated, smallholdings were eliminated, and large estates, which had gone bankrupt, sold. The famine was used to bring about social changes that benefited the ruling classes and consolidated their control.”); David Nally, *“That Coming Storm”: The Irish Poor Law, Colonial Biopolitics, and the Great Famine*, 98 *ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS* 714 (2008) (arguing “that the Great Famine was shaped by a regulatory order willing to exploit catastrophe to further the aims of population reform,” focusing on the development of the Irish Poor Law system and the “growing [political] perception that agricultural rationalization, fiscal restructuring, and population clearances were necessary to “ameliorate” and “improve” Irish society”); JOHN KELLY, *THE GRAVES ARE WALKING: THE GREAT FAMINE AND THE SAGA OF THE IRISH PEOPLE* 3, 26, 254, 335 (2012) (Irish reliance on the potato had its roots in the British demand for exports of food and manufactured goods from Ireland, but decline in British demand and competition from cheaper manufactured goods after the French wars negatively impacted Irish industry. Many lost their jobs, wages declined precipitously, and the textile industry was destroyed altogether. In response, many Irish turned to agriculture. Small

Fortunately for the Irish, the United States had not yet regulated the admission of newcomers into various categories and established quotas for different kinds of entry. The modern immigration system, in contrast, not only limits numbers and types of newcomers (e.g., family and employment-based immigration), but also draws a line between authorized or legal immigration and unauthorized or illegal immigration. Were the Irish to come to America's shores fleeing famine today, their immigration situation would be much like the women and children fleeing Central American violence—in need of humanitarian protection but without legal status to enter. Some would view them as “illegals.”

Those fleeing such extreme famine or civil conflict are not necessarily escaping persecution, but they do have a well-founded fear of death or serious harm.³ Today, failing or weak governments cannot protect many of their citizens from significant violence, including conflict, in various regions of the world.⁴ In such dangerous situations, the failure of states to live up to this central responsibility results in forced displacement. How should the United States treat people fleeing

plots of less productive land and little potential for additional monetary wages in industry led many agriculturalists to engage in subsistence farming, with the potato as their preferred crop because of its ability to thrive in less productive soil and its high nutritional content. Because of this reliance on the potato for sustenance (two thirds of the Irish population were dependent on the potato as a dietary staple), any decrease in the potato crop had devastating potential. In 1845, the first signs of the potato blight caused by the fungus *Phytophthora infestans* became apparent across much of Western Europe. A delayed British response to the crisis compounded Irish suffering, and poorly managed relief programs did not provide aid at the required levels. The British government attempted to institute a public works program to offer Irish laborers an opportunity to earn enough to purchase food, but wages could not keep pace with rising food prices, and the program failed. In 1847, Great Britain redirected public works program funding to create soup kitchens with the caveat that funding would be provided for only one year, and following that, the cost of relief would be funded by property taxes on Irish landowners via the Extended Poor Law. However, rather than providing relief, this law increased poverty and suffering because landowners evicted tenants to lower their property tax rates. The failures of British aid programs and increased homelessness led many Irish to flee their country, and in 1847, 215,000 Irish sailed to North America, while 150,000 headed to Britain.)

³ See SUSAN F. MARTIN, A NATION OF IMMIGRANTS 244 (2011) (explaining that individuals who flee generalized violence in the context of a civil war may have a well-founded fear of death, but nonetheless they do not qualify for protection as refugees because they have not been “specifically targeted”); DENNIS GALLAGHER ET AL., REFUGEE POLICY GRP., SAFE HAVEN: POLICY RESPONSES TO REFUGEE-LIKE SITUATIONS 74 (1987) (providing examples of conditions that may produce a “well-founded fear of injury, deprivation of human rights, and even death” in migrants).

⁴ See LOTHAR BROCK ET AL., FRAGILE STATES: VIOLENCE AND THE FAILURE OF INTERVENTION 52-53 (2012) (explaining that frequently the state is the source of threats to the population's security rather than a protector due to the security dilemma that is produced by the state's lack of a legitimate monopoly on force); Sabine Hassler, *Peacekeeping and the Responsibility to Protect*, 14 J. INT'L PEACEKEEPING 134, 151 (2010) (enumerating the typical characteristics of a failed state); FUND FOR PEACE, THE FRAGILE STATES INDEX 6-7, 11 (J. J. Messner, ed. 2017) (ranking 178 countries' levels of fragility by evaluating twelve political, social, and economic indicators along with numerous sub-indicators. Based on these indicators, countries are placed into one of eleven categories in terms of their overall levels of fragility. The eleven categories range from “Very Sustainable” to “Very High Alert”. The six countries in the “Very High Alert” category—the most fragile states of 2017—are: Sudan, Syria, Yemen, Central African Republic, Somalia, and South Sudan). The next most fragile states are the nine countries classified as “High Alert”. Of the 178 countries that are ranked in the index, 124 fall into warning or alert categories, while 54 are classified as “Very Sustainable,” “Sustainable,” “Very Stable,” “More Stable,” or “Stable”.

such insecurity and serious harm who arrive in this country? So far, U.S. law and policy makers have responded in a very mixed fashion to such humanitarian crises through a rather limited form of temporary protection.

In 1990, Congress enacted the major policy in place today, Temporary Protected Status (TPS), by balancing two goals that serve very different purposes. First, the TPS statute allows the federal government to provide a temporary legal status to nationals from countries where the Secretary of Homeland Security finds the existence of armed conflict, disaster, epidemic, or extraordinary conditions such that deportation is not safe for the individual or where the foreign state is not currently able to handle their return.⁵ Second, the law aims to prevent the grant of such a temporary legal status from subsequently encouraging large numbers of such nationals to migrate to the U.S.⁶ Unfortunately, the way Congress and the Executive have resolved the tension between protection and border control has limited the effectiveness of the humanitarian response to children, women and men displaced by serious violence that has disrupted their societies.

This article examines this tension with the aim of developing more robust solutions to the security needs of the displaced in finding a safe haven in the United States. This study carefully examines the actual uses of TPS and its predecessors to understand what they have and have not achieved in terms of this tension. The analysis considers whether TPS has proven to be a magnet attracting significant numbers of new arrivals. The study also discusses what it would take to keep TPS temporary and to create such a safe haven for ongoing arrivals from humanitarian crises. Finally, taking future controls of unauthorized immigration and work into account, this article proposes ways to ensure that all those with a well-founded fear of serious harm are protected and to make TPS truly temporary, including with respect to the repatriation of those who can return in safety to their home countries when conflict and other crises end in a reasonable period of time.

THE CLASH BETWEEN HUMANITARIAN PROTECTION AND IMMIGRATION CONTROL: THE ORIGINS OF TPS

Lawmakers constructed TPS out of dissatisfaction with the ad hoc use of a discretionary non-deportation policy developed by Attorneys General over a long period of time: Extended Voluntary Departure (EVD). Based on the general statutory authority to enforce the immigration laws,⁷ this vehicle enabled the Executive branch to stay the removal of different national groups in the United States, many of whose members did not qualify for asylum as persecuted refugees but who would not have been safe were they deported to their home countries due to political strife and conflict. EVD did not provide these individuals with legal admission or immigration status—only for a stay of deportation and work authorization if they were already in the United

⁵ 8 U.S.C. § 1254a(a)(1)(B) (2012).

⁶ See 136 CONG. REC. 27,131 (1990) (statement of Rep. Oakar (D-Ohio) asserting that arrival cut-off dates would eliminate the risk of a magnet effect).

⁷ See 8 U.S.C. 1103(a)(1) (1952).

States. To take advantage of EVD, eligible individuals were not required to appear before Immigration and Naturalization Service (INS) officials unless they desired to obtain a work permit.⁸ Though the incentive of a work permit did encourage many eligible individuals to make themselves known to INS officials, there were also many eligible individuals who did not take advantage of EVD until threatened with deportation, thus preventing INS from being able to estimate precisely how many individuals were covered under EVD at any one time.⁹

From 1960 through 1989, the Attorney General granted blanket EVD to nationals from at least fourteen different countries: Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Vietnam, Laos, Lebanon, Ethiopia, Uganda, Iran, Nicaragua, Afghanistan, and Poland.¹⁰ Starting in 1981 and throughout that decade, lawmakers asked the Attorney General to grant EVD to Salvadorans who had fled a civil war, but none did so.¹¹ Not surprisingly, the members who introduced the TPS provisions based them at least in part on EVD as a mechanism that protected people from deportation and provided them with work authorization.¹²

One additional extra-statutory device used by the Attorney General was Deferred Enforced Departure (DED). Alike in function and differing only in name, DED is a variation of EVD which is granted through presidential memoranda or executive orders and based on the power to conduct foreign relations.¹³ Like EVD, DED does not grant immigration status to individuals, but merely prevents removal from the United States and provides the opportunity to apply for employment authorization. DED was first used in 1990 by President Bush, Sr. to provide special protection to Chinese nationals in the United States in response to the Tiananmen Square Massacre as a way to avoid using EVD, since the Administration decided not to use that for

⁸ GALLAGHER ET AL., *supra* note 3, at 19.

⁹ *See id.*

¹⁰ *See* Peter C. Diamond, Comment, *Temporary Protected Status Under the Immigration Act of 1990*, 28 WILLAMETTE L. REV. 857, 864 (1992); Lynda J. Oswald, Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 158-59 (1986); Memorandum from Andorra Bruno et al., Cong. Research Serv., to Multiple Congressional Requesters 20-23 (July 13, 2012), <https://edsource.org/wp-content/uploads/old/Deferred-Action-Congressional-Research-Service-Report1.pdf>.

¹¹ Diamond, *supra* note 10; *see also* SERGIO AGUAYO & PATRICIA WEISS FAGAN, CENTRAL AMERICANS IN MEXICO AND THE UNITED STATES 40-42 (1988) (listing arguments by State and Justice Department officials opposing a grant of safe haven for Central Americans in the United States).

¹² *See* H.R. REP. NO. 100-627, at 4-8 (1988) (explaining that the purpose of the Temporary Safe Haven Act of 1988 was to provide a formal mechanism which would replace EVD and clearly establishing similarities between the proposed legislation and its predecessor by use of frequent comparisons. The legislators identified a “continuing and compelling” need to retain a form of “safe haven” protection for individuals who did not qualify for asylum, but nonetheless were unable to return safely to their home countries due to unanticipated crises. Though EVD had previously provided protection in analogous situations, the Committee also identified EVD as inherently flawed and recognized that the Temporary Safe Haven Act of 1988 responded to and redressed these concerns satisfactorily.).

¹³ U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 38.2(a) (2014); *see also* Congress Steps up Protection for Chinese Students, REFUGEE REP., July 28, 1989, at 9, 10 (quoting INS general counsel, Paul Virtue, who explained that when comparing DED with EVD, “[t]here is no distinction in practical effect with EVD.” He attributes the name change to the fact that “EVD was an unfortunate term” because it was confusingly similar to “voluntary departure”).

Salvadorans, despite Congressional pressure to do so. Subsequently, Presidents have authorized DED for Persian Gulf evacuees (1991), El Salvadorans (1992), Haitians (1997), and Liberians (1999 and 2007).¹⁴ Currently, nationals of Liberia are the only group authorized for DED. However, on March 27, 2018, a presidential memorandum was issued directing the Secretary of Homeland Security to begin a 12-month wind-down period and to take the necessary measures to officially terminate DED for Liberia on March 31, 2019.¹⁵

Neither EVD nor DED was codified in law.¹⁶ The lack of legal standards concerned many lawmakers.¹⁷ What legal standards did they put in place through TPS? The 1990 enactment defined the circumstances under which TPS could be designated by the Attorney General, the process for extending and terminating designations, and the legal status and limited benefits provided to eligible beneficiaries; imposed a supermajority requirement for a group's adjustment of status to lawful permanent status; and limited eligibility to those already present in the United States at the time of designation.

With respect to this last standard, the EVD and DED framework adopted by the TPS legislation provided temporary safety only to those already present in the U.S.—it did not protect those fleeing from the same ongoing humanitarian emergency who arrived in the United States after the Attorney General established the program for a particular nationality. Neither DED nor EVD had generally been available to members of those nationalities seeking admission to the U.S.; similarly, the TPS provisions explicitly provide that TPS is not available to those seeking admission only for the purpose of gaining TPS.¹⁸ Since none of these vehicles applied to individuals fleeing an ongoing crisis, the protection was only partial.¹⁹

¹⁴ AM. IMMIGRATION COUNCIL, EXECUTIVE GRANTS OF TEMPORARY IMMIGRATION RELIEF, 1956-PRESENT, at 7-9 (Oct. 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/executive_grants_of_temporary_immigration_relief_1956-present_final_0.pdf.

¹⁵ See Memorandum on Expiration of Deferred Enforced Departure for Liberians, 2018 DAILY COMP. PRES. DOC. 1 (Mar. 27, 2018).

¹⁶ See H.R. REP. No. 100-627, at 7 (explaining that while there is no explicit statutory basis for EVD, the authority to extend EVD is based on Section 242(b) of the Immigration and Nationality Act).

¹⁷ See *id.* at 8 (outlining the concerns of the Committee on the Judiciary regarding deficiencies in the EVD program and identifying as a flaw of the program the absence of regulation that specifically defines the “conditions under which safe haven may be granted”).

¹⁸ 8 U.S.C. § 1254a(c)(5) (2012).

¹⁹ The United States generally restricted EVD to nationals of the designated country who were present in the United States prior to a particular cut-off date. See *Update on EVD*, 65 INTERPRETER RELEASES 964, 965 (1988) (explaining that entry cut-off dates were intended by the INS to combat the pull of a magnet effect and listing entry cut-off dates for Poland, Afghanistan, and Ethiopia); see e.g., *INS Implements Instructions on Deportation to Poland*, 59 INTERPRETER RELEASES 85-86 (1982) (initial entry cut-off date for Polish EVD recipients was December 23, 1981); *INS Issues Instructions on Extended Voluntary Departure for Ethiopians*, 59 INTERPRETER RELEASES 456, 456-57 (1982) (updating entry cut-off date for Ethiopian EVD recipients). It appears that on at least one occasion, INS may not have established an arrival cut-off date when designating EVD. See *Update on EVD*, 65 INTERPRETER RELEASES 965 (1988) (explaining that EVD for Ugandans was announced on June 8, 1978 and expired September 30, 1986, but never had an entry cut-off date); see, e.g., *Deferred Departure for Ugandans Extended to*

So just which country condition circumstances did the TPS legislation cover? Section 244(b)(1) of the Immigration and Nationality Act set out three possible findings that Attorneys General and Secretaries of Homeland Security may use as the basis of a TPS designation or re-designation:

(A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

(B) the Attorney General finds that-

(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii) the foreign state officially has requested designation under this subparagraph; or

(C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

When Congress enacted TPS, civil wars in Central America dominated their focus. Supporters pointed to a long history since President Eisenhower of providing a temporary haven until it was safe to return or be deported:

Recognizing that in some circumstances an individual who cannot show persecution may nonetheless be subjected to great danger if forced to returned home, every Administration since and including that of President Eisenhower has permitted one or more groups of otherwise deportable aliens to remain temporarily in the United States out of concern that the forced repatriation of these individuals could endanger their lives or safety. Since 1960, this deferral of deportation, which has come to be known as "Extended Voluntary Departure" (or "EVD"), has been exercised for the benefit of aliens from 13 different nations.²⁰

October 31, 1984, 61 INTERPRETER RELEASES 330, 330 (1984) (providing text of INS Assistant Commissioner's cable to field offices regarding extension of Ugandan EVD). Uganda may not be the only such reported exception, but designations of EVD were not published in the Federal Register and sometimes originated in INS cables from the Central Office. Not all designations have been found in Interpreter Releases or elsewhere.

²⁰ H.R. REP. NO. 100-627, at 6.

Rep. Brooks (D-Tex.) summed up the purpose of temporary safe haven this way: “Individuals who have fled from El Salvador, Liberia, Lebanon, and Kuwait should not be required to return to their war-torn homelands until the political situation in those countries is stabilized.”²¹

Opponents focused on the immigration control aspect of the proposed law and referred to it as offering temporary safe haven to “illegals” from El Salvador, Lebanon, Liberia and Kuwait. According to Rep. McCollum (R-Fla.), “[The temporary safe haven provisions] keep lots of illegals here indiscriminately for extended periods of time.”²² The previous year, Rep. McCollum argued that “by and large the Salvadorans who are in this country are here for economic reasons.”²³

Referring to temporary safe haven as an amnesty, Rep. Smith (R-Tex.) said:

What we are dealing with here is just another amnesty program for another specific country. We seem to be piling on more special interest legislation on top of more special interest legislation tonight. Mr. Chairman, this is a situation where we have amnesty now provided for the third time just passed in H.R. 4300. Amnesty is not the right way to determine our immigration policy. Amnesty is not the right way to be fair to those who have been law abiding, and we should not reward lawbreakers to the detriment of the law abiders.²⁴

Rep. McCollum tried to persuade his colleagues to vote against temporary safe haven by arguing that the then-existing asylum laws for persecuted refugees were sufficient and that as conditions can change quickly, it made no sense to grant:

amnesty to a bunch of illegals who are here from four for five countries and picking them out for 3 years. I am not telling you these are bad people, but I am telling you that if they are in fear and you want to protect them because they are in fear of getting persecuted if they go back to their native countries, that you are talking about laws already on the books designed to protect that. Instead what you are going to do is lock the hands of the administration and say absolutely under no conditions for 3 years are you going to let these people go. As I said earlier, last year when this was out here on the floor for debate, China and Nicaragua were included. Conditions have changed in less than a year. They are not included this time. Suppose things change in these

²¹ 136 CONG. REC. 27,129 (1990).

²² *Id.*

²³ 135 CONG. REC. 25,831 (1989).

²⁴ 136 CONG. REC. 27,129. Some members today continue to view TPS through the lens of amnesty. For himself and Representatives Steve King (R-Iowa), Gohmert (R-Tex.) and McCaul (R-Tex.), Rep. Brooks (R-Ala.) introduced the TPS Reform Act of 2017, H.R. 2604, 115th Congress § 1 (May 23, 2017), which would make unauthorized immigrants ineligible for TPS. “This legislation provides the needed reform for what has become a long-running amnesty program.” *Brooks Introduces Legislation to Reform TPS Program*, CONGRESSMAN MO BROOKS (May 24, 2017), <https://brooks.house.gov/media-center/news-releases/brooks-introduces-legislation-reform-tps-program>

countries in less than a year. This is not good public policy. This is bad public policy. We need to let the existing laws work. They do work, and we have absolutely no business going forward with the kind of proposal that is in the bill today, to lock in 3 years of amnesty for four special countries for all the Illegals who are here and not do that same thing for everybody. It is ridiculous. It is absurd.²⁵

Rep. Gray (D-Pa.) responded by characterizing the intended beneficiaries as war refugees:

Mr. Chairman, I rise in opposition to the McCollum amendment. Should this amendment pass, some 14,000 nonimmigrant Liberians would face the threat of detention and deportation to a country where there is no water, there is no electricity, there is no government and practically no hope. Mr. Chairman, some 5,000 Liberian civilians have lost their lives in recent months as a result of the anarchy that has descended upon their country. There is a three-sided civil war there. In addition, tens of thousands have been displaced and hundreds of thousands have had to flee to neighboring countries. The promises of the Department of Immigration and Naturalization Services to provide safe haven to the 14,000 Liberians stranded in this country have not borne fruit. As a result, there are now as many INS policy responses to Liberians as there are INS offices. The promised safe-haven status provided by the July 27 INS policy memo has not been implemented. What is needed now is the force of law to protect these people. They need to be removed from the whim of procedural discretion and administration lethargy. This is a matter of human compassion. Mr. Speaker and my colleagues, we are not asking that these people be given permanent resident status in this country. We are not asking that they be allowed to live indefinitely in this country. We are simply asking that they be spared detention and deportation until the war in their land subsides. No one knows how long that will be. But the Moakley amendment provides a 3-year grace period in this bill.²⁶

The debate between Reps. McCollum and Gray ultimately focused on the difference between war and persecuted refugees:

Mr. Chairman, asylum is not always fairly administered. There have been numerous examples of how it has been unfairly administered to Salvadorans and others. Second, not everyone who needs protection meets the strict standard of asylum which is "well-founded fear of persecution." In the case of Liberians, we are not talking about a well-founded fear of persecution which is the direct text of the law; we are talking about going back to a country where there is a three-sided civil war. People are being butchered. So therefore the asylum method that the gentleman talks about really does not apply to many of these people.²⁷

²⁵ 136 CONG. REC. 27,129.

²⁶ *Id.* at 27,130.

²⁷ *Id.* (statement of Rep. Gray).

Rep. McCollum asserted that war refugees were already protected under asylum law: “If there is no well-founded fear of persecution, then maybe they ought to go back. If they are having a three-sided civil war over there, there is a well-founded fear of persecution.”²⁸ As a matter of law, while some war refugees are persecuted on account of a protected characteristic such as political opinion or ethnicity, those who are simply trying to flee fighting, which often constitute the majority in civil wars, are not eligible for asylum. Whether or not Rep. McCollum understood that or simply opposed any expansion of humanitarian protection is not clear from this debate. Rep. Morrison (D-Conn.) explained this gap in law:

The gentleman from Florida suggests that we have rules to deal with these problems. We do not. We do not have a set of rules to deal with just what the gentleman from Pennsylvania said, not individualized persecution but warfare or famine or some other form of pestilence or violence in the country. This provision not only specifies four countries to be protected but establishes a standard rule to be applied in future cases in other countries.²⁹

Had the Attorney General exercised his discretion in the 1980’s to apply EVD to additional countries, such as El Salvador, Liberia, Lebanon and Kuwait, Congress might not have enacted TPS, but many members believed that legal standards set by statute would ensure a more consistent application of this non-deportation protection. Rep. Oakar explained how a temporary safe haven law would address the ad hoc nature of extended voluntary departure, particularly in its implementation:

An orderly, systematic procedure for providing temporary protected status for nationals of countries undergoing war, civil war, or other extreme tragedy is needed to replace the current ad hoc haphazard procedure. The current procedure for extended voluntary departure is so arbitrary and discretionary that aliens are reluctant to come forward. In the case of the Lebanese, this fear is compounded by the fact that Lebanese nationals in many areas of the country are placed into deportation hearings once they apply for extended voluntary departure or deferred departure. These are the same Lebanese nationals whose cases are supposed to be viewed sympathetically by the Immigration and Naturalization Service because of an INS directive last October to that effect. I ask unanimous consent that the telex be entered into the RECORD.

U.S. IMMIGRATION AND NATURALIZATION, Washington, DC, October 12, 1989. While there is still no blanket policy to grant deferred departure to nationals of Lebanon in the United States who have overstayed, the civil strife in Lebanon continues. This is to reaffirm that officers should, on a case-by-case basis, view sympathetically requests for deferred departure

²⁸ *Id.*

²⁹ *Id.* at 27,131.

where such requests are based upon compelling humanitarian need. This is a lesser standard than a fear of persecution based on race, religion, nationality, membership in a social group, or political opinion. One-third of the population of Lebanon is displaced (one million people) and 15 percent have suffered casualties. The United States Government recently withdrew Embassy personnel from Lebanon, the first time an American presence has been absent since World War II. A travel ban for American passport holders has been in effect for three years. The cease-fire called on September 23, 1989, has already been breached. However, there are some places of relative safety within Lebanon. These circumstances should be kept in mind when assessing individual requests for deferred departure from Lebanese nationals. GERALD L. COYLE, Acting Commissioner.”³⁰

....

Some immigration lawyers have told me that the Extended Voluntary Departure Program is administered so badly that [there are officials] . . . at the INS, ranging from people in docketing to a regional INS Director, who had not heard of the October INS directive to treat Lebanese applications for extended voluntary departure sympathetically and who had no idea which department within the regional INS Office would handle such a request. This problem is not confined to one office. I have heard this complaint from attorneys from many different areas of the country. As a result, immigration lawyers are reluctant to advise Lebanese nationals to apply for extended voluntary departure, because they have no assurance that their clients will be treated sympathetically.”³¹

Rep. Oakar went on to explain that she, along with twelve other Members of Congress, asked the Attorney General to grant Extended Voluntary Departure to Lebanese but were told that doing so “would set a bad precedent for people from other strife-torn countries.”³² She concluded that “[b]ecause the Justice Department is opposed to helping these people, the only solution is legislative.”³³

But perhaps the most contested issue concerned the potential effects of this Congressional policy. Some political leaders were concerned that granting temporary safe haven would act as a magnet to attract unqualified individuals who might not otherwise have been inclined to immigrate to the United States, and would also result in increased numbers of unauthorized entrants.³⁴ There was

³⁰ *Id.* at 27,130.

³¹ *Id.* at 27,130-31.

³² *Id.* at 27,131.

³³ *Id.*

³⁴ See *Temporary Safe Haven Act of 1987: Hearing Before the Subcomm. on Immigration, Refugees, and Int’l L. of the H. Comm. on the Judiciary*, 100th Cong. 24 (1987) [hereinafter *Temporary Safe Haven Hearings*] (statement of Delia Combs, Assistant INS Commissioner) (expressing the incumbent Administration’s belief that enacting

additional concern that immigrants would manipulate this relief provision to become a vehicle for economic advancement, in opposition to the humanitarian intent behind safe haven provisions.³⁵ The government also feared that grants of temporary protection would establish precedent which would lead other countries in similar circumstances to expect comparable treatment.³⁶

In contrast, Rep. Oaker argued that temporary safe haven “would not act as a magnet, because it is designed only for those people who are here now. Our Nation should act humanely toward those who are stranded at our doorstep. We cannot, in good conscience, send these people home to face their death.”³⁷

The author of the safe haven provisions, Rep. Moakley (D-Mass.), focused on the deadly civil war in El Salvador, which “is the size of my State of Massachusetts. Over 70,000 civilians have been killed in the last decade. It is only human that people who live in fear will flee, seeking safety for their children and families. How can we deny their human needs and our moral obligations?”³⁸

Senator DeConcini (D-Ariz.), who worked alongside Rep. Moakley for nearly a decade to obtain safe haven for Salvadorans, emphasized that the United States had a humanitarian responsibility towards those who fled civil war in El Salvador because of the United States’ own role in the conflict. In support of TPS, he stated, “I do not believe that we should return these individuals to a country immersed in a civil war in which we are actively involved.”³⁹

Rep. Moakley addressed the various objections by opponents:

The opponents of this measure argue like chicken little, that the sky is falling, and that if we enact this measure America will be overrun by people who somehow pose a

temporary safe haven legislation will “encourage unqualified aliens who entered subsequent to the qualifying date to engage in fraud in order to establish eligibility for the relief.”)

³⁵ See *id.* (explaining the fear that the proposed legislation would encourage economic migrants from Central America and other regions); Letter from William French Smith, Attorney Gen., to the House of Representatives (July 19, 1983), reprinted in *Temporary Suspension of Deportation of Certain Aliens: Hearing on H.R. 4447 Before the Subcomm. on Immigration, Refugees, and Int’l L. of the H. Comm. on the Judiciary*, 98th Cong. 84-86 (1984) (expressing fear that granting EVD to El Salvador would encourage migration of other “illegal immigrants” and would produce greater competition for social services and in the employment market); see, e.g., *Recent Activity on Relief Bills for Salvadorans and Nicaraguans*, 64 INTERPRETER RELEASES 795-96 (1987) (Senator Simpson expressed concern that El Salvador President Duarte’s 1987 request for an EVD extension was inappropriately based on “economic hardship factors,” and had already prompted similar requests by the Dominican Republic and Guatemala).

³⁶ See Alice Jackson Smith, Note, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, 28 VA. J. INT’L L. 509, 524-25 (1988).

³⁷ 136 CONG. REC. 27,131 (1990).

³⁸ *Id.*

³⁹ *Id.* at 35,611.

threat to our well-being. This is ludicrous and inhumane. By its specific terms, only people already here today are entitled to temporary protected status. And these are good people, decent people, law-abiding people who are committed to the safety of their families. By its terms, this measure denies protection to anyone convicted of criminal activity, or who would be inadmissible to the United States under our immigration laws. By its terms, this measure provides no Federal benefits to those it protects. By its terms, this measure requires those who are covered to register with the proper authorities. In addition, this measure establishes a statutory framework for future uses of safe haven protection. It ends the current ad hoc approach to dealing with people in need.⁴⁰

By a vote of 285 to 131 with 17 abstentions, the supporters of temporary safe haven provisions defeated the amendment proposed by Rep. McCollum.⁴¹

The discussion cited above makes clear that one of the principal purposes behind enacting TPS and granting a “temporary safe haven” to those in need was rooted in humanitarianism. However, lawmakers also emphasized other goals of this statutory form of relief. Senator DeConcini argued that TPS creates a “registration system” that can “facilitate the return of Salvadorans when the period of temporary protection status expires.”⁴² This important point was consistently raised in discussions surrounding safe haven legislation. In a hearing on the Temporary Safe Haven Act of 1987, a precursor to what would later become TPS, both Doris Meissner, future Commissioner of the Immigration and Naturalization Service from 1993 until 2000, and Representative Fish (R-N.Y.) spoke to this issue as an improvement on EVD.⁴³ That TPS would provide a way to track beneficiaries is significant because there was “no systematic enumeration or tracking of EVD recipients” prior to this and consequently, there was no reliable way to locate individuals once temporary protection expired.⁴⁴ In this way, legislators established TPS not only as a humanitarian provision but also with the goal of facilitating return and enforcement of the immigration laws when temporary protection was no longer needed.

THE PERCEPTION AND REALITY OF MAGNET EFFECTS

⁴⁰ *Id.* at 27,132.

⁴¹ *Id.* at 27,132-33.

⁴² *Id.* at 35,611.

⁴³ *Temporary Safe Haven Hearings*, *supra* note 34, at 36, 155 (1987).

⁴⁴ *Id.* at 36.

To reduce the risk of a TPS designation creating a magnet effect that results in greater cross-border movements, then, Congress limited this legal status to those already in the United States at the time that the DHS Secretary announces the designation.⁴⁵ If and when the designation is extended, it only covers those who are in the U.S. before the initial cut-off date. The limited way in which the Secretary can address any on-going humanitarian emergency is to advance the eligibility cut-off date through re-designation. This mechanism does not address continuing humanitarian flows, but it does allow those who entered the U.S. after the initial designation but before the re-designation to register for TPS. It has been used as such with respect to eight of the 22 countries designated since the statute became effective in 1990.⁴⁶

How can policymakers know whether TPS acts as a magnet—the major concern raised by those opposed to the creation and implementation of the current law and the reason that the statute imposes an eligibility cut-off date? How many new arrivals enter the United States following designations, re-designations, and extensions? If the data is available, the most promising approaches that might answer that question are through analyses of (1) TPS enrollment and (2) border inadmissibility determinations and apprehensions following designations, re-designations and extensions data of TPS nationalities. Each approach is discussed below, and based on available data, analyzed.

As currently designed, TPS is limited to individuals from a country already in the United States when the Secretary of Homeland Security announces a new designation. The national from that country who arrives the day after the designation date is not eligible for this benefit. On 17 occasions, TPS has been re-designated with respect to eight countries: Haiti, Liberia, Sierra Leone, Somalia, South Sudan, Sudan, Syria, and Yemen. If the designation of TPS encourages new arrivals to come to the U.S. in order to gain this special benefit, enrollment following re-designation provides some, though not perfect, information about possible new arrivals. In fact, the purpose of re-designation is to protect such new arrivals. Of course, it is also possible that those who could have registered for TPS upon designation but did not may have registered for the first time during the re-designation enrollment period. While this metric is not perfect, the analysis may still be revealing. What happened in terms of additional registrations following these re-designations?

The table below sets out the DHS estimates of TPS beneficiaries following subsequent re-designations. In the cases of Liberia, Somalia, South Sudan, Sudan and Syria, re-designations occurred more than once. The estimated number of beneficiaries is not reported until the DHS

⁴⁵ See Bill Frelick & Barbara Kohlen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUD. 339, 344 (1995) (hypothesizing that “the cut-off dates and registration deadlines eliminate any potential ‘magnet effect’ that would draw people to the United States because of the availability of TPS”).

⁴⁶ Three of the 22 countries—El Salvador, Liberia, and Sierra Leone—were designated more than once. See Duration of TPS Table, *infra* pp. 19-20; *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last visited Jan. 4, 2019) (information available under “Countries Currently Designated for TPS” and “Countries Previously Designated for TPS”).

takes its next action to extend, re-designate, or terminate TPS. Not surprisingly, rather small numbers of Liberians, Sierra Leoneans, Somalis, South Sudanese, Sudanese, Syrians, and Yemenis⁴⁷ manage to make it to the United States—a tiny fraction of the total number of refugees in the world from each of these countries. Given that it is too difficult logistically for such refugees to reach the U.S., it is hard to imagine that policymakers are concerned that TPS has any potential magnet effect for nationals who largely remain in their region or at most try to reach Europe. Even simply looking at the number of these nationals who registered following re-designation for TPS makes it clear that the original designations did not result in attracting a sizeable flow of refugees from these countries. No doubt that made it politically feasible for the Attorney General and the Secretary of Homeland Security to re-designate South Sudan, Sudan and Syria three times and Liberia and Somalia twice.

⁴⁷ See, e.g., Extension of the Designation of Yemen for Temporary Protected Status, 83 Fed. Reg. 40,307, 40,307-08 (Aug. 14, 2018). The numbers reported in this table are found in the Federal Register announcements subsequent to the designation or re-designation, which may be located using n.46.

DHS Estimates of TPS Beneficiaries for Re-designated States

	Initial Designation (as reported in first extension)	Re-designation (as reported in first extension of re-designation)	Second Re-designation (as reported in first extension of re-designation)	Third Re-designation (as reported in first extension of re-designation)
Haiti	47,000	60,000	N/A*	N/A*
Liberia I	5,000	8,000	10,000	N/A*
Liberia II	2,400	3,792	N/A*	N/A*
Sierra Leone	4,000	5,000	N/A*	N/A*
Somalia	N/A**	250	270	N/A*
South Sudan	<10	<20	50	70
Sudan ⁴⁸	4,000	1,500	648	600
Syria	2,600	5,000	5,800	7,000
Yemen	1,000	1,250	N/A*	N/A*

* No subsequent re-designations

** Extension does not provide an estimate of current beneficiaries

Policymakers view Haitians differently, of course, because of the proximity of Haiti to the United States and the long history of Haitian immigration to the U.S., including significant legal immigration. To assess any possible effect of the Haitian TPS designation in January 2010⁴⁹ and the subsequent 2011 re-designation on additional flows, we first examine the registration numbers. The table below sets out the DHS estimates of Haitian TPS beneficiaries identified at the time of the re-designation in 2011 as well as the extensions in 2012, 2014, 2015, and 2017:

⁴⁸ See Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47,228, 47,230 (Oct. 11, 2017). While the most recent DHS estimates in the 2017 Termination of the Designation of Sudan for Temporary Protected Status indicate 1,040 Sudanese TPS beneficiaries, the author has learned from discussions with DHS officials that this number actually represents all individuals who have received TPS following the initial designation and subsequent re-designations unless that status was withdrawn by DHS.

⁴⁹ See Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3,476 (Jan. 21, 2010).

DHS Estimates of Haitian TPS Beneficiaries

May 19, 2011	47,000
Oct. 12, 2012	60,000
March 3, 2014	51,000
Aug. 25, 2015	50,000
May 24, 2017	46,000

The initial TPS designation was made a mere eight days after the January 2010 earthquake that killed approximately 230,000, affected three million people, and significantly destroyed infrastructure across the island nation.⁵⁰ When the initial 18-month designation was made, the devastating effects of the earthquake were evident, but the amount of time Haiti would remain in a state of crisis remained unknown. As reported in the re-designation eighteen months later in 2011, 47,000 Haitians successfully registered for TPS in 2010.⁵¹ According to the May 2011 re-designation of Haiti, UNICEF reported that 1.6 million people were displaced from their homes, including 800,000 children.⁵² In addition, severe cholera outbreaks, including about 200,000 known cases, threatened to spread nationwide.⁵³ The Secretary of DHS decided to re-designate Haiti in order to enable individuals who were lawfully admitted to the U.S. after the earthquake through humanitarian parole or temporary visas to remain legally under TPS.⁵⁴

About 13,000 additional individuals present in the U.S. by January 12, 2011 registered after the DHS Secretary re-designated Haiti in May 2011 for a total of 60,000 TPS beneficiaries.⁵⁵ Many of these new registrants may have come from the targeted group who had arrived lawfully during the first year following the earthquake.⁵⁶ Of course, some of those 13,000 additional registrants

⁵⁰ Extension and Redesignation of Haiti for Temporary Protected Status, 76 Fed. Reg. 29,000, 29,000-01 (May 19, 2011).

⁵¹ *Id.* at 29,002.

⁵² *Id.* at 29,001.

⁵³ *Id.*

⁵⁴ *Id.* at 29,002. See also *Secretary Napolitano Announces the Extension of Temporary Protected Status for Haiti Beneficiaries*, U.S. DEP'T OF HOMELAND SEC. (May 17, 2011), <https://www.dhs.gov/news/2011/05/17/secretary-napolitano-announces-extension-temporary-protected-status-haiti> ("Many of these individuals were authorized to enter the United States immediately after the earthquake on temporary visas, humanitarian parole and through other immigration measures").

⁵⁵ See Extension of the Designation of Haiti for Temporary Protected Status, 77 Fed. Reg. 59,943, 59,945 (Oct. 1, 2012).

⁵⁶ While admissions track events rather than individuals, the number of admissions is so significantly larger than the 13,000 new TPS enrollees that it could easily account for the size of the higher number of registrants, at least those who entered on non-immigrant visas. See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2012 YEARBOOK OF IMMIGRATION STATISTICS 68 (2013),

may have already been in the U.S. when Haiti was initially designated in 2010, but simply did not register at that time for good cause⁵⁷ or for the reasons that research shows that otherwise eligible beneficiaries do not—fear of providing DHS with residence information that could facilitate deportation; cost; and inability to take time off work.⁵⁸

By 2014, the total declined to 51,000⁵⁹ and then to 50,000 in 2015.⁶⁰ In the six-month extension announced in May 2017, DHS reported that only 46,000 Haitians were registered for TPS as of May 2017.⁶¹ That was the last report of current TPS beneficiaries from Haiti.⁶² Based on the total number of beneficiaries, then, the designation, re-designation and extensions of Haiti did not attract large flows to the United States in order to obtain this legal immigration status.

https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2012.pdf (showing 99,161 and 98,865 Haitian non-immigrant admissions for FY 2011 and FY 2012, respectively).

⁵⁷ 8 C.F.R. § 244.2(f)(2) (2018) identifies several groups, including those who had legal non-immigrant status at the time of the initial designation, who may file their initial applications following a subsequent extension.

⁵⁸ CECILIA MENJÍVAR, FRAGMENTED TIES: SALVADORAN IMMIGRANT NETWORKS IN AMERICA 88-89 (2000) (explaining that some Salvadoran immigrants distrusted TPS legislation because they believed it was intentionally designed with the purpose of eliciting information that would later be provided to immigration enforcement); Frelick & Kohonen, *supra* note 45, at 349 (1995) (suggesting that fear of deportation following TPS termination is the greatest disincentive for eligible applicants); *Designations of Temporary Protected Status and Fraud in Prior Amnesty Programs: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 106th Cong. 11 (1999) (statement of Paul Virtue, INS Gen. Counsel) (“by applying for TPS many applicants were identifying themselves to the INS as being people who were unlawfully present in the United States. So once the TPS period expires they may be targeted for removal.”).

⁵⁹ Extension of the Designation of Haiti for Temporary Protected Status, 79 Fed. Reg. 11,808, 11,810 (Mar. 3, 2014).

⁶⁰ Extension of the Designation of Haiti for Temporary Protected Status, 80 Fed. Reg. 51,582, 51,584 (Aug. 25, 2015). Among the reasons why the number of TPS beneficiaries declines over time are adjustment to another legal status, death, ineligibility due to a subsequent event, and return to the home country. *See* David North, *Leaving TPS Doesn't Necessarily Mean Going Home* 4-6 (Ctr. for Immigration Studies, 2015), <https://cis.org/sites/cis.org/files/north-TPS.pdf>.

⁶¹ Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. 23,830, 23,831 (May 24, 2017).

⁶² The termination notice did not provide an estimate of current beneficiaries. Based on discussions with DHS officials, the author has learned that the 58,500 Haitian beneficiaries reported are an estimate of the number who had received TPS following the initial designation and subsequent re-designation and never had that status withdrawn by DHS. That estimate does not reflect the decline in the number of former beneficiaries who do not re-register because of cost, adjustment to another legal status, death, ineligibility, return, or other reasons. According to a July 2018 report, only “recently” did USCIS begin to withdraw TPS status for those who obtained U.S. citizenship. U.S. CITIZENSHIP & IMMIGRATION SERVS., I-821 TEMPORARY PROTECTED STATUS, CURRENT APPROVED INDIVIDUALS WITH A VALID I-765, EMPLOYMENT AUTHORIZATION DOCUMENT (A12 OR C19 CLASSIFICATION) BY BENEFICIARY STATE AND COUNTRY OF CITIZENSHIP AS OF JULY 16, 2018, at 13 n.8 (2018), https://www.uscis.gov/sites/default/files/I-821_TPS_Current_Approved_Individuals_with_a_Valid_I-765_EAD_A12_or_C19_Classification_by_Beneficiary_State_and_Country_of_Citizenship_as_of_July_16_2018.pdf; Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2,648, 2,649 (Jan. 18, 2018).

Nonetheless, is it possible that Haitians attracted by the TPS designation and re-designation came in large numbers during this period? Two other metrics to gauge the degree to which the Haitian TPS designation, re-designation and extensions might have acted as a magnet are the number of Haitians presenting themselves at ports of entry (POEs) without a visa and the number of Haitians apprehended in between the ports of entry.⁶³

During the sixteen-month period between the initial designation and re-designation, DHS reported that relatively small numbers of Haitians presented themselves at ports-of-entry without a visa, including some who sought asylum. Haitians determined by DHS to be inadmissible at ports-of-entry in this immediate period following the designation in January 2010 numbered 2,959 for all of FY 2010 (which included almost five months before the initial designation) and decreased to 1,746 in FY 2011, which also includes the four months after the May 2011 re-designation.⁶⁴ In any case, that number declined further in FY 2012 to 1,239. As the following chart shows, the number of Haitians determined to be inadmissible over a six-year period ranged from 968 in FY 2015 to 6,974 in FY 2016:

Haitians Determined Inadmissible at Ports of Entry FY 2010-2016

2010	2011	2012	2013	2014	2015	2016
2,959	1,746	1,439	1,562	1,097	968	6,974

The second metric, Haitians apprehended in between ports of entry, also involve relatively small numbers. In fact, Haitians are not even among the top ten nationalities identified for FY 2010-2016 in the DHS Immigration Enforcement Actions report for FY 2016.⁶⁵ As the chart below shows, Haitians apprehended both in between the ports of entry by Customs and Border Protection and away from the border by Immigration and Customs Enforcement ranged from 1,113 to 1,992 during FY 2010-FY 2016.⁶⁶

⁶³ One other metric that could be somewhat relevant is the number of Haitians interdicted on the high seas. Until recently, the U.S. Coast Guard shared that information with the public on their website. Unfortunately, that information is no longer publicly available. Nonetheless, it is clear that large numbers of Haitians did not try to reach the United States by boat in response to the TPS designation and re-designations: “The Coast Guard interdicted 1,377 Haitians in FY2010 and 677 in FY2011 as of May 12, 2011.” RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 1 (2011); *see also* Zsatiq L. Ferrell, U.S. Coast Guard Freedom of Information Specialist, to Niels Frenzen (June 15, 2017), https://migrantsatsea.files.wordpress.com/2017/06/2017-06-15_uscg-foia-rspns_amio-data-fy-1982_2017-02-01_2017-cgfo-02153.pdf (response to a 2017 FOIA request showing total aggregated numbers for all nationalities).

⁶⁴ BRYAN BAKER, DHS OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 6 tbl.3 (2017). https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.

⁶⁵ BRYAN BAKER, DHS OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 4 tbl.1 (2016), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.

⁶⁶ OFFICE OF IMMIGRATION STATISTICS, 2016 YEARBOOK OF IMMIGRATION STATISTICS 93 tbl.34 (2017), <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf>.

Haitians Apprehended Between Ports of Entry and in the Interior FY 2010-2016

2010	2011	2012	2013	2014	2015	2016
1,768	1,351	1,492	1,992	1,810	1,124	1,113

All of these metrics—TPS registrations, inadmissibility, and apprehensions—demonstrate that the designation, re-designation and extension of TPS for Haitians did not act as a magnet.

HOW TO ENSURE THAT TPS IS TEMPORARY

Congress authorized the protection of nationals on a temporary basis so that such individuals in the United States would not be returned to a crisis in their home countries when it was not safe to do so or when their return would exacerbate the humanitarian problems in their home country. When drafting the TPS legislation, Congress understood that some conflicts may extend over many years. Among the three types of TPS designations, environmental disasters and “extraordinary and temporary” conditions require a finding of “temporariness” for TPS designation, but armed conflicts do not require such a finding.⁶⁷ In any case, Congress did not define “temporary.”

As the table below shows, TPS at times has ended after a few years. The most recent examples concern Guinea and Sierra Leone, which were designated November 21, 2014 due to the largest Ebola virus disease outbreak since the virus was discovered that began in January 2014. By the designation date, over 2,400 had died and there were over 6,700 reported cases. The DHS Secretary extended TPS once (May 21, 2016), but on September 26, 2016, the Obama Administration announced that the Ebola virus had subsided and the conditions in Sierra Leone and Guinea no longer supported its designation of TPS. The final extension for six months (until May 21, 2017) provided for an “orderly transition.”⁶⁸ TPS ended in less than four years with regards to the conflicts and strife in Kuwait, Lebanon, Guinea-Bissau, Kosovo, Angola and Rwanda.

⁶⁷ See INA § 244A(b)(1), 8 U.S.C. § 1254a(b)(1) (2012); for an in-depth and illuminating discussion of the three types of TPS, see Benjamin M. Haldeman, Note, *Discretionary Relief and Generalized Violence in Central America: The Viability of Non-Traditional Applications of Temporary Protected Status and Deferred Enforced Departure*, 15 CONN PUB. INT. L.J. 185 (2016).

⁶⁸ While the DHS Secretary treated Liberia the same way as Sierra Leone and Guinea regarding the Ebola virus outbreak, that country has had a complex and lengthy TPS history, dating back to its original designation in 1991 following the outbreak of civil war. See *Temporary Protected Status*, U.S. DEP’T OF JUSTICE (Nov. 2018), <https://www.justice.gov/eoir/temporary-protected-status> (providing Liberia’s numerous TPS notices). When TPS expired September 28, 1999, the Attorney General provided DED for Liberians, which was extended to September 29, 2002. The Attorney General re-designated Liberia for TPS, which lasted from October 1, 2002 until October 1, 2007. TPS termination was followed by DED once again, which was ultimately extended through March 31, 2019 for Liberians here since October 2002. JILL H. WILSON, CONG. RES. SERV., RS20844, TEMPORARY PROTECTED STATUS: OVERVIEW AND CURRENT ISSUES 8-9 (2018).

Duration of TPS⁶⁹

Designated Nationality	Date TPS Begins	Termination/Extension Date	Duration of TPS (nearest half year)
Kuwait	3/27/1991 DED 3/28/1992	3/27/1992 DED 12/31/1993	1 year 2 years of DED
Lebanon	3/27/1991	4/9/1993	2 years
Guinea	11/21/2014	5/21/2017	2.5 years
Guinea-Bissau	3/11/1999	9/10/2001	2.5 years
Kosovo Province	6/9/1998	12/8/2000	2.5 years
Angola	3/29/2000	Termination: 3/29/2003	3 years
Rwanda	6/7/1994	12/6/1997	3.5 years
Nepal	6/24/2015	Termination: 6/24/2019	4 years
Yemen**	9/3/2015	Extension Until: 3/3/2020	4.5 years
Sierra Leone I	11/4/1997	5/3/2004	6.5 years
Sierra Leone II	11/21/2014	5/21/2017	2.5 years
Montserrat	8/27/1997	2/27/2005	7.5 years
Syria**	3/29/2012	Extension Until: 9/30/2019	7.5 years
South Sudan**	11/3/2011	Extension until: 5/2/2019	7.5 years
Bosnia Hercegovina	8/10/1992	2/10/2001	8.5 years

⁶⁹ Compiled using information from *Temporary Protected Status*, U.S. DEP'T OF JUSTICE (Nov. 2018), <https://www.justice.gov/eoir/temporary-protected-status> (using the TPS notices for each country) and *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last visited Jan. 4, 2019).

Liberia I	3/27/1991 DED 9/29/1999	9/28/1999 DED 9/28/2002	8.5 years 3 years of DED
Liberia II	10/1/2002 DED 10/1/2007	10/1/2007 DED 3/31/2013	5 years 6.5 years of DED
Liberia III	11/21/2014 DED 5/21/2017	5/21/2017 3/31/2019	2.5 years 2 years
Haiti*	1/ 21/2010	Termination: 7/22/2019	9.5 years
Burundi	11/4/1997	5/2/2008	10.5 years
El Salvador I	11/29/1990 DED 7/1/1992	6/30/1992 DED 12/31/1994	1.5 years 2.5 years of DED
El Salvador II*	3/9/2001	Termination: 3/9/2019	18.5 years
Nicaragua*	1/5/1999	Termination: 1/5/2019	20 years
Sudan*	11/4/1997	Termination: 11/2/2018	21 years
Honduras	1/ 5/1999	Termination: 1/5/2020	21 years
Somalia**	9/16/1991	Extension Until: 3/17/2020	28.5 years

*In *Ramos v. Nielsen*, No. 18-cv-01554-EMC, (N.D. Cal. Oct. 3, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/ramos-v-nielsen-order-granting-preliminary-injunction-case-18-cv-01554-emc.pdf>, the U.S. District Court for the Northern District of California enjoined DHS from implementing and enforcing the decisions to terminate TPS for Sudan, Nicaragua, Haiti and El Salvador, pending further resolution of the case.

**No pending expiration of TPS

When TPS is actually temporary because the crisis ends in a timely fashion, the United States should develop practices to encourage beneficiaries to return to their home countries in ways that will help them reintegrate. Otherwise, the policy is open to the criticism that unless beneficiaries return when the crisis is over, the U.S. should not provide safe haven in the first place.⁷⁰ Facilitating voluntary return has long been central to the role that UNHCR has played for millions of conflict refugees. Bill Frelick and Barbara Kohlen explained why this should be part of the TPS toolkit more than two decades ago: “For TPS to be an effective form of *temporary* protection, the US government should encourage voluntary repatriation and reintegration as part

⁷⁰ See CTR. FOR IMMIGRATION STUDIES, A PEN AND A PHONE: 79 IMMIGRATION ACTIONS THE NEXT PRESIDENT CAN TAKE 5 (2016), https://www.cis.org/sites/cis.org/files/79-actions_1.pdf.

of a larger process of rehabilitation and reconstruction of societies emerging from conflict situations.”⁷¹

Experts and legislators have proposed various methods to achieve what UNHCR aims for when assisting refugees with repatriation. In a hearing on TPS before the House Committee on the Judiciary in 1999, Representative Sheila Jackson-Lee (Texas) suggested directly involving UNHCR to assist with repatriation of refugees after the termination of a TPS designation. She also discussed focusing the resources of the U.S. Agency for International Development (U.S. AID) to “support necessary small-scale infrastructure and development projects and... identify local, non-governmental organizations capable of delivering services at the grassroots level.”⁷²

The American Promise Act of 2017, introduced by Representative Nydia Velázquez (D-N.Y.), proposed changes to the reporting requirements when the DHS Secretary decides to terminate TPS for a given country. As part of these additional reporting requirements, the Secretary would analyze the country’s financial ability to provide for its repatriated citizens. The report would include the steps the country has taken to remedy the cause of its initial designation and a report on the financial and social impact the repatriated citizens would have on the country.⁷³ This information could work well in tandem with U.S. AID and other agencies developing targeted programs to facilitate repatriation upon the termination of TPS for any particular nationality.

Experts have specifically proposed that the U.S. government address the conditions that prevent safe repatriation by investing in effective rule of law and development programs in the countries of origin of TPS beneficiaries. As Donald Kerwin observes, “[p]romotion of the rule of law in TPS-designated states should be a top-tier priority since rule of law deficiencies drive substantial numbers of residents of these nations, including unaccompanied children, into international migration streams.”⁷⁴ Along with other experts, he also recommends the creation of regional migration agreements which use development and institution-building initiatives to encourage return of migrant groups.⁷⁵

Given the significant costs of the formal immigration removal system, experts have recommended financial incentives other than taxpayer-funded ones, including the use of both

⁷¹ Frelick & Kohnen, *supra* note 45, at 339.

⁷² *Designations of Temporary Protected Status and Prior Amnesty Programs: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 106th Cong. 6 (1999) (statement of Rep. Sheila Jackson Lee).

⁷³ American Promise Act of 2017, H.R. 4253, 115th Cong. (2017). The Act defines “provide for its repatriated citizens” as “a country’s ability to provide safety, and social safety net services, including preventive healthcare services, and housing.”

⁷⁴ Donald Kerwin, *Creating a More Responsive and Seamless Refugee Protection System: The Scope, Promise and Limitations of US Temporary Protection Programs*, 2 J. ON MIGRATION & HUM. SEC. 44, 64 (2014).

⁷⁵ *Id.*; see Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 558-566 (1998).

employee and employer Social Security contributions.⁷⁶ TPS beneficiaries pay Social Security taxes as wage earners, yet those who work for less than ten years are generally not eligible to collect Social Security retirement benefits. In 1998, this author, along with two other colleagues, suggested that Congress consider using such funds to incentivize repatriation when the crisis resulting in TPS designation ended after a few years and TPS was terminated.⁷⁷ That recommendation continues to make sense—individuals who earned wages and made Social Security contributions would receive a meaningful portion of those contributions once they returned to their home country “in safety and dignity,” the UNHCR global standard for refugee repatriation. The employer contributions for such repatriating TPS wage earners could be used to target the communities to which these former TPS beneficiaries return in an effort to ensure safety and livelihood opportunities.

Together with the Departments of State and Homeland Security and with the advice of UNHCR, Congress should carefully consider and then create the best options to facilitate voluntary repatriation when TPS is terminated in a reasonable period of time. Such programs recognize the humanitarian nature of temporary protection. Successful repatriation practices in connection with crises that end in a timely fashion will contribute to ensuring that TPS becomes truly temporary and allow the United States to be generous in providing such protection to all those who cannot safely return to their countries.

When the cause of a humanitarian crisis abides, TPS can provide truly temporary safety. But what about long-lasting conflicts and serious violence? As the chart above shows, about one-third of the designated nationalities have been eligible for temporary protection for over ten years. In fact, Somalia has the longest continuous TPS designation from 1991 until 2020, a period of more than twenty-eight years.

While Congress did not limit TPS in overall duration, the supermajority of the Senate requirement to adjust status effectively means that the Executive branch only has the option to continue extending TPS designation indefinitely as humanitarian crises become protracted. During these extended periods, children are born, school and work relationships are developed, businesses are built, and families become integrated into communities. The longer TPS beneficiaries contribute to Social Security and Medicare, the more inequitable it becomes to deny them core benefits in a society that they have been allowed to join.

In 1987, Senator Barbara Mikulski proposed a bill to adjust the status of Polish EVD holders to lawful permanent residents and recognized the struggles that those with temporary protection face when they flee protracted conflict. What she said then about Polish EVD holders applies equally to TPS beneficiaries today:

Almost all of these [Poles] have been in the United States more than 5 years. Many now have children that were born in the United States. Since coming to this country,

⁷⁶ Martin et al., *supra* note 75, at 575.

⁷⁷ *Id.*

these Poles have been productive members of the American community. They are committed to bettering the economic and social status of themselves or their children. There is no future for them in Poland. Their only future is here.⁷⁸

A 2017 study of the three countries with the largest number of TPS beneficiaries (El Salvador, Honduras, and Haiti) provided data about the significant U.S. ties established over time.⁷⁹ This group of 302,000 beneficiaries includes parents of 273,200 U.S. citizen children. More than one-quarter of these TPS beneficiaries, some 68,000, were childhood arrivals. About half are homeowners. High percentages of the two largest TPS nationalities, Salvadorans and Hondurans, have lived in the United States for 20 years or longer. These very strong ties to the United States underscore the problems with legislation that aimed to be temporary but that did not include viable alternatives when DHS officials determined that conditions in the home country did not permit the safe return of its nationals.

Experts have recognized that TPS traps long-term beneficiaries in a legal limbo by making it especially difficult to achieve a legislative path to an appropriate legal immigration status, such as lawful permanent resident (LPR) status.⁸⁰ When DHS determines that nationals cannot be returned to their home country in safety after several years and there is no indication that the situation will change, what should the United States government do? To address this problem, legislators and experts have proposed durable solutions after a set term of years with TPS status if there is no end in sight.⁸¹ Such a statutory change would end the requirement of a Senate supermajority for TPS beneficiaries to adjust to permanent residence.

In fact, prior to and since the enactment of TPS, Congress has provided such durable solutions for those temporarily allowed to stay in the U.S. during a humanitarian crisis, as this chart shows:

Adjustment of Status	Citation	Description
Immigration Reform and Control Act of 1986	Pub. L. No. 99-603, 100 Stat. 3359 (1986).	Adjustment to lawful permanent resident status for Haitian EVD recipients physically present in the US on or before December 31, 1980.

⁷⁸ 133 CONG. REC. 26,427, 26,499 (1987) (statement of Sen. Barbara Mikulski).

⁷⁹ 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, 578, 581-82, 588 (2017).

⁸⁰ Claire Bergeron, *Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term Temporary Residents and Strengthening a Centerpiece of US Humanitarian Protection*, 2 J. ON MIGRATION & HUM. SEC. 22, 29-31 (2014); Frelick & Kohnen, *supra* note 45, at 357-358.

⁸¹ Bergeron, *supra* note 80, at 35-37; Pia M. Orrenius & Madeline Zavodny, *Creating Cohesive, Coherent Immigration Policy*, 5 J. ON MIGRATION & HUM. SEC. 180, 190 (2017).

Foreign Relations Authorization Act, Fiscal Years 1988 and 1989	Pub. L. No. 100-204; 101 Stat. 1331 (1988).	Adjustment to lawful permanent resident status for all current EVD holders who were present in the US before July 21, 1984.
Nicaraguan and Central American Relief Act of 1997 (NACARA)	Pub. L. No. 105-100; 111 Stat. 2160 (1997).	Adjustment to lawful permanent resident status for Nicaraguan and Cuban nationals present in the US before December 1, 1995.
Haitian Refugee Immigration Fairness Act of 1998 (HRIFA)	Pub. L. No. 105-277, 112 Stat. 2681 (1998)	Adjustment to lawful permanent resident status for Haitian nationals present in the US before December 31, 1995.

Shortly before the creation of TPS, for example, Congress enacted legislation enabling nationals of countries who had entered the United States before July 21, 1984 and were provided Extended Voluntary Departure by the Attorney General anytime during the five-year period ending on November 30, 1987 to apply for “temporary permanent resident” status and then adjust to lawful permanent resident status after one year.⁸² This law provided adjustment of status for nationals from Afghanistan, Ethiopia, Poland, and Uganda. When introducing the legislation into the House of Representatives, Representative Chester Atkins (D-MA) lauded the bill’s provision of a durable solution, saying, “. . . With this bill, we are able to preserve for the United States a leadership role in resettling and giving safe haven to refugees escaping persecution or certain death in their own country.”⁸³

A decade later, Congress decided that certain Central Americans who had fled the civil conflicts in the last quarter of the twentieth century, including many denied asylum in the 1980’s, should be allowed to become lawful permanent residents after spending many years, including as TPS beneficiaries, in the United States. The Nicaraguan and Central American Relief Act of 1997 (NACARA) created permanent resident pathways for Nicaraguans, Salvadorans and Guatemalans.⁸⁴ Over time, DHS adjusted the status of over 67,000 individuals under NACARA.⁸⁵ Just one year later, Congress passed the Haitian Refugee Immigration Fairness Act (HRIFA), which enabled Haitians who had fled Haiti during the 1980’s and first part of the

⁸² Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 902, 101 Stat. 1331, 1339 (1987).

⁸³ 99 CONG. REC. 15,556, 15,564 (1987) (statement of Rep. Chester Atkins).

⁸⁴ Nicaraguan and Central American Relief Act of 1997, Pub. L. No. 105-100, § 201, 111 Stat. 2160, 2193 (1997).

⁸⁵ OFF. OF IMMIGRATION STATISTICS, 2006 YEARBOOK OF IMMIGRATION STATISTICS 19 tbl.6 (2007), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2006.pdf; see also OFFICE OF IMMIGRATION STATISTICS, *supra* note 66, at 19 tbl.6.

1990's to adjust status to lawful permanent residence.⁸⁶ From 1999-2016, more than 31,000 Haitians became lawful permanent residents under HRIFA.⁸⁷

While proposals focused on specific nationalities have been successful, general ones have not as of yet. In a House of Representatives hearing on the original TPS legislation, Doris Meissner, then of the Carnegie Endowment for International Peace, suggested a rolling registry program which would allow TPS holders to gain legal status if TPS protection extended for a period of ten or fifteen years.⁸⁸ After observing the inability of TPS to protect conflict refugees in protracted situations, other experts have suggested that Congress make long-term TPS beneficiaries eligible for regular adjustment of status or find other ways to provide a durable solution for those who cannot return home in safety.⁸⁹

In 2017 and early 2018 after the Department of Homeland Security administration announced the end of TPS designations for Sudan, El Salvador, Haiti, Nicaragua, and El Salvador, there was renewed legislative interest in providing durable solutions for conflict refugees and others protected under TPS.⁹⁰ Congresswoman Sheila Jackson-Lee's (D-TX) Save America Comprehensive Immigration Act of 2017 would have granted legal permanent resident status to TPS recipients who have been in the US continuously for the last five years.⁹¹ Congressman Carlos Curbelo (R-FL) introduced the Extending Status Protection for Eligible Refugees with Established Residency (ESPERER) Act of 2017, which would have allowed the Attorney General to adjust status for Haitians, Nicaraguans, Salvadorans, and Hondurans who have been in the United States since Jan. 13, 2011.⁹² Upon introducing the bipartisan bill, Curbelo said, "It is . . . imperative that we not forget the economic, cultural and other contributions that people living and working in the United States thanks to [TPS] are making to both to our nation and their native countries."⁹³

⁸⁶ Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, § 901, 112 Stat. 2681, 2681-40 (1998). Baby Doc Duvalier ruled during the 1980's with the assistance of the infamous Ton Ton Macoutes. In the early 1990's, a military regime ousted a democratically-elected President until the Clinton Administration forced the regime to step aside in 1994 and allow President Aristide to resume office.

⁸⁷ OFFICE OF IMMIGRATION STATISTICS, *supra* note 85, at 19 tbl. 6; *see also* OFFICE OF IMMIGRATION STATISTICS, *supra* note 66, at 19 tbl.6.

⁸⁸ *Temporary Safe Haven Hearings*, *supra* note 34, at 36-37 (statement of Doris Meissner).

⁸⁹ Bergeron, *supra* note 80, at 35-37; Kerwin, *supra* note 74, at 65-66.

⁹⁰ *See* HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10070, UPDATE: TERMINATION OF TEMPORARY PROTECTED STATUS FOR SUDAN, NICARAGUA, HAITI, AND EL SALVADOR: KEY TAKEAWAYS AND ANALYSIS (2018); *see also* WILSON, *supra* note 68.

⁹¹ Save America Comprehensive Immigration Act of 2017, H.R. 3647, 115th Cong. (2017).

⁹² Extending Status Protection for Eligible Refugees with Established Residency Act of 2017 (ESPERER Act of 2017), H.R. 4184, 115th Cong. (2017).

⁹³ Joanna Rodriguez, *Curbelo Leads Bipartisan Group of Lawmakers to Grant Legal Permanent Resident Status to TPS Migrants*, U.S. CONGRESSMAN CARLOS CURBELO, (Oct. 31, 2017), <https://curbelo.house.gov/news/documentsingle.aspx?DocumentID=1723> [<https://web.archive.org/web/20171108022146/https://curbelo.house.gov/news/documentsingle.aspx?DocumentID=1723>].

The American Promise Act of 2017, introduced by Representative Nydia Velázquez (D-NY) would have allowed nationals of TPS-designated countries who were granted or eligible for TPS after Oct. 1, 2017 and who have been continuously in the country for three years to apply for adjustment of status to legal permanent residency.⁹⁴ In supporting the bill, Congressman Lieu (D-CA) expressed concern about repatriating those protected for lengthy periods under TPS, including many with U.S. citizen children: “I am deeply troubled that the President may remove protected legal status for Salvadorans, Hondurans, Haitians and other TPS beneficiaries escaping conflict and natural disasters in their home countries. The President would be forcing families, many who have lived in the U.S. for nearly 20 years and have made significant contributions to the U.S. economy, to leave the country or work here unlawfully. Many of their children—nearly 275,000 of them—have known no other home than the United States. Deporting them is neither sensible nor compassionate. . . .”⁹⁵

In considering such legislative proposals, Congress should also look to other common law countries that permit those with humanitarian protection to settle as lawful residents. After five years of humanitarian protection (“limited leave”), those provided humanitarian protection in Great Britain are eligible to apply to settle indefinitely.⁹⁶ Once settled (“indefinite leave to remain”), such individuals are on a path to citizenship.⁹⁷ Both Canada and Australia also allow individuals with similar temporary humanitarian protection to become immigrants and ultimately citizens.⁹⁸

Congress should find ways appropriate to the humanitarian nature of TPS to keep it temporary, both by encouraging voluntary repatriation when the crisis ends in a reasonable period of time and providing a durable solution for conflict refugees and others when the crisis is prolonged.

⁹⁴ American Promise Act of 2017, H.R. 4253, 115th Cong. (2017).

⁹⁵ *Key Members of Congress Move to Preserve TPS, Protect Immigrants*, U.S. CONGRESSWOMAN NYDIA VELÁZQUEZ (Nov. 3, 2017), <https://velazquez.house.gov/media-center/press-releases/key-members-congress-move-preserve-tps-protect-immigrants>.

⁹⁶ UNITED KINGDOM HOME OFFICE, HUMANITARIAN PROTECTION VERSION 5.0, at 22 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/597377/Humanitarian-protection-v5_0.pdf.

⁹⁷ *Apply for Citizenship if You Have Indefinite Leave to Remain*, GOV.UK, <https://www.gov.uk/apply-citizenship-indefinite-leave-to-remain> (last visited Jan. 7, 2019).

⁹⁸ *See Application for Permanent Residence in Canada—Protected Persons and Convention Refugees*, GOV'T OF CANADA, (Nov. 20, 2018), <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/application-permanent-residence-canada-protected-persons-convention-refugees.html>; *Find Out if You're Eligible—Citizenship*, GOV'T OF CAN., (July 3, 2018), <https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/become-canadian-citizen/eligibility.html>; *Protection Visas (Onshore)*, AUSTRALIAN GOV'T, DEP'T OF HOME AFFAIRS (Nov. 23, 2018), <https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/onshore-protection>; *Become an Australian Citizen (by Conferral) Permanent Residents or New Zealand Citizens*, AUSTRALIAN GOV'T, DEP'T OF HOME AFFAIRS (Nov. 28, 2018), <https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/permanent-resident>.

CAN TPS HANDLE ARRIVALS FROM AN ONGOING HUMANITARIAN CRISIS?

Western European countries have provided temporary protection to civil war refugees for many years.⁹⁹ The United Kingdom provides “humanitarian protection” to those who are at a real risk of serious harm, including in situations of general or indiscriminate violence.¹⁰⁰ EU policies and State practice address both large groups entering EU States during an emergency, as well as individuals. For many states, the latter occurs during individual asylum determinations. In those cases, officials decide whether an individual has a well-founded fear of persecution or is a conflict refugee. Differentiating it from asylum for persecuted refugees in connection with the Refugee Convention, the EU calls this “subsidiary” or “complementary” protection.

The issue of handling humanitarian arrivals during an on-going crisis arose early on in the development of the original TPS legislation. Initially, precursor bills offering temporary safe haven to Salvadorans did not contain entry cut-off dates.¹⁰¹ However, hearings on these bills revealed the opposition’s strong conviction that an entry cut-off date needed to be put in place to combat the magnet effect. In response to these concerns by opposition, Representative Sam Gejdenson (D-CT) expressed the view that entry cut-off dates are unlikely to eliminate flows of Salvadorans fleeing to the United States because they will continue to flee as long as there are dangerous conditions in their country.¹⁰² However, the fear of a magnet effect prevailed and ultimately eliminated the possibility that the original temporary safe haven legislation could deal with ongoing flows of people fleeing civil wars or natural disasters.

Under what circumstances might it be possible for the U.S. to offer protection to refugees fleeing ongoing civil strife? When Congress enacted TPS, the United States did not have effective controls of unauthorized cross-border movements or work. Today there are some 11-12 million unauthorized immigrants in the U.S. right now. Registered TPS beneficiaries number over

⁹⁹ See Meltem Ineli-Ciger, *A Temporary Protection Regime in Line with International Law: Utopia or Real Possibility?*, 18 INT’L COMMUNITY L. REV. 278, 279-85 (2016) (discussing early uses of temporary protection to safeguard individuals fleeing generalized violence in Bosnia and Kosovo and modern uses of temporary protection for Syrians in Turkey); Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INT’L J. REFUGEE L. 461, 462-66 (2005) (discussing the role of the European Union Qualification Directive in codifying subsidiary protection which was an existing state practice used to grant protection on an individual basis to those who are in need, but who fall outside the protection regime of refugee law); Alexandra McGinley, Note, *The Aftermath of the NATO Bombing: Approaches for Addressing the Problem of Serbian Conscientious Objectors*, 23 FORDHAM INT’L L.J. 1448, 1451, 1467 (2000) (explaining that temporary protection was granted to many Balkan refugees fleeing ethnic cleansing in the late 1990s due to the large numbers of individuals fleeing and the inability to process all claims individually and citing concern that TPS codification in Western Europe is simply an attempt “to avoid granting asylum status to victims of the Yugoslav wars”); Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary “Refuge” and Local Responses to Forced Migration*, 16 IMMIGR. & NAT’LITY L. REV. 407, 443-55 (1994) (describing the tendency to offer temporary protections in lieu of more durable protection under asylum for individuals fleeing Eastern Europe after the collapse of the Cold War).

¹⁰⁰ UNITED KINGDOM HOME OFFICE, *supra* note 96, at 12-15.

¹⁰¹ See, e.g., H.R. 4447, 98th Cong. (1983).

¹⁰² See *Temporary Suspension of Deportation of Certain Aliens: Hearing on H.R. 4447 Before the Subcomm. on Immigration, Refugees, and Int’l L. of the H. Comm. on the Judiciary*, 98th Cong. 60 (1984).

300,000 from ten countries,¹⁰³ including more than 180,000 who have been issued valid employment authorization documents by USCIS.¹⁰⁴ More than 400,000 individuals from those countries acquired TPS status at some point during the last three decades, including over 58,000 who became lawful permanent residents.¹⁰⁵ Even though the TPS population is small compared to the unauthorized population, it is very difficult politically for lawmakers to enact reforms needed to improve TPS before reforms are made to control unauthorized immigration in a meaningful way both at the border and in the interior.

For many years, Congress has funded tremendous capacity at and between ports of entry to control unlawful entry. It has been very easy, politically, for Congress to fund border control with very significant resources. Experts have analyzed the major strategies to control the unlawful entry of those mainly seeking a better economic life and found considerable successes with respect to this population, which until 2014 constituted the vast majority of those entering unlawfully across the southern border with Mexico. According to Edward Alden, one of the leading analysts:

“The new evidence suggests that unauthorized migration across the southern border has plummeted, with successful illegal entries falling from roughly 1.8 million in 2000 to just 200,000 by 2015. Border enforcement has been a significant reason for the decline — in particular, the growing use of “consequences” such as jail time for illegal border crossers has had a powerful effect in deterring repeated border crossing efforts.”¹⁰⁶

But unauthorized immigration cannot be controlled without addressing the major reason many immigrants overstay their visas or enter without inspection—the opportunity to work for a U.S. business. The Senate passed legislation in 2013 to comprehensively address unauthorized immigration and included the establishment of an effective worksite verification system. Ultimately, Congress is likely to enact such a law in the context of comprehensive immigration reform that provides a legal status for the 8 million unauthorized workers and their family members who are not U.S. citizens or otherwise in lawful immigration status. The worksite verification system will control access to the workplace such that only those with authorization to work can do so.

¹⁰³ WILSON, *supra* note 68, at 5.

¹⁰⁴ USCIS, *supra* note 62, at 13.

¹⁰⁵ *Id.* at 12 n.7. Those 58,000 TPS beneficiaries who became lawful permanent residents do not need a separate employment authorization document to work. *Id.*

¹⁰⁶ Edward Alden, *Is Border Enforcement Effective? What We Know and What It Means*, 5 J. ON MIGRATION & HUM. SEC. 481, 487-488 (2017). Alden carefully explains that these border deterrence strategies are not as effective with respect to asylum seekers fleeing violence from the Northern Triangle countries and those with family ties in the U.S. Moreover, he points out that in 2014, two-thirds of those added to the unauthorized population arrived with legal visas and overstayed. As I point out in this section, the most effective strategy to deter those who overstay their visas mainly to improve their economic lives is through worksite enforcement.

When that happens—and it may be many years from now—Congress will be in a position to consider a way to protect all those who flee conflict or need protection from other unsafe conditions in their home countries. Incorporating TPS into the individualized asylum process, as many developed democratic states do, would enable the United States to protect those fleeing ongoing humanitarian crises.¹⁰⁷ Once access to the workplace is effectively controlled, DHS will be able to ensure Congress that policies to protect refugees fleeing conflict and forced migrants who cannot return to a country devastated by a natural disaster can be temporary. When the conflict ends in a reasonable period of time, for example, DHS control over access to the workplace would limit the ability of those nationals who no longer have a protection need to support themselves through work—their work authorization would end, depriving them of access to jobs. To encourage those nationals to return to their home country, DHS could also offer repatriation incentives and take lessons from the playbook that UNHCR uses to encourage voluntary repatriation with dignity, as discussed above. When the conflict does not end in a reasonable period of time, then the best way to continue to provide safe haven to such refugees would be for Congress to provide them a longer-term immigration status, as Congress has done for persecuted refugees. Indeed, before the creation of TPS, that is precisely what Congress did for many national groups who could not return to conflict, as described above.

CONCLUSION

Since its inception in 1990, Temporary Protected Status has provided safe haven for more than 400,000 individuals from over twenty-two countries around the globe. Reforms are needed, however, so that it serves as a temporary measure to protect those who cannot return safely to their home countries and the United States extends such protection to all those who truly need it.

When a conflict or humanitarian crisis ends in a reasonable period of time, the United States should not only terminate TPS for that nationality but should encourage those individuals to return to their home countries voluntarily. UNHCR commonly provides financial incentives to help displaced people restart their lives back home and reintegrate after conflict has ended. The U.S. could do so by giving back to TPS workers who return home during the termination period their Social Security withholdings that they will otherwise never access in the form of benefits.

TPS is not the appropriate long-term safe haven measure in the case of protracted conflicts. Over time, people put down strong roots in their communities through work, family, education, and religious institutions. As many developed democratic countries have done, the United States should transition temporary protection to a more permanent status for individuals who cannot return home safely because of prolonged, serious violence.

Finally, justice demands that similarly situated conflict refugees be treated alike. Due to concerns that TPS would attract large numbers of new arrivals, Congress limited the 1990 law to

¹⁰⁷ See Martin et al., *supra* note 75, at 569-570; see also Frelick & Kohlen, *supra* note 45, at 355 (calling for a mandatory prohibition on return for conflict refugees, similar to *nonrefoulement* or withholding of removal for persecuted refugees).

those already in the United States when a country is designated by the Executive branch for safe haven status. As the above analysis of designations and re-designations has shown, those fears were not justified. The United States can provide temporary protection to all those who flee ongoing conflicts, not just those who happen to be on this side of the border at the right time. That line is too arbitrary when dealing with humanitarian crises. Imagine if developing countries acted that way during a major civil war in a neighboring country.

Moreover, the United States should work with regional neighbors who also provide safe haven to those fleeing serious violence to ensure that all states in the region play meaningful protection roles.¹⁰⁸ In addition, as the major power in the Americas, the United States should find significant ways to address the root causes of humanitarian flight in the region. Most people in the world want to stay in their home countries unless conflict or other serious violence prevents them from doing so; enabling weaker governments to protect their own citizens through rule of law programs is in the national interest of the United States in promoting stability in the region.

No doubt Congress can act more generously in terms of protecting all those who arrive in the U.S. seeking safe haven from a conflict once TPS can effectively live up to its name and serve as a temporary measure. When Congress addresses the situation of the 8 million undocumented workers and their families and puts in place a system that controls unauthorized work, TPS can and should be reformed to ensure temporary safe haven for all those who flee conflict. That is when the law created by Congress in 1990 will achieve its full potential as a robust humanitarian instrument that protects all those who have a well-founded fear of death.

¹⁰⁸ UNHCR, OPERATIONAL UPDATE: NORTH OF CENTRAL AMERICA SITUATION 1, 15 (2018), <http://reporting.unhcr.org/sites/default/files/NCA%20Situation%20-%20Operational%20update%20-%20Mid-Year%202018.pdf>. In the immediate region, the humanitarian crises in El Salvador, Honduras and Guatemala have resulted in significant arrivals in neighboring countries, including Costa Rica, Belize, Mexico and Panama, since 2014. As of mid-2018, UNHCR reports more than a 50% one-year increase in flight, including entire families, as well as very significant internal displacement in Honduras and El Salvador.