# Comments

## EXTENDING THE CONSTITUTION TO REFUGEE-PAROLEES

*Since 1975 the parole authority has been utilized to admit over 160,000 Indochinese refugees into the United States. The Supreme Court has ruled that parolees have no inherent rights under the Constitution. This Comment rejects the application of the Court's rulings to aliens paroled into the country as members of mass refugee groups—such as the Indochinese. Finding that the refugee-parolees are clearly distinguishable from the parolees contemplated by the Court, the author contends that refugee-parolees are entitled to some constitutional rights. The Comment concludes by calling for judicial and congressional action to expand the constitutional status of refugee-parolees to one equivalent to permanent resident aliens.*

### INTRODUCTION

In the spring of 1975 South Vietnam wavered on the brink of capitulation before the communist onslaught. Concern grew within the United States government for the safety of American citizens and dependents still living in Indochina.[1] There was also fear for the safety of those Indochinese citizens considered to be potential victims of communist reprisals because of their connections with the United States government.[2] The United States successfully evacuated almost 55,000 of these Indochinese.[3]

They were not, however, the only victims of the communist victory. With the defeat of the anti-communist regimes in South Vietnam,

1. *See Hearings on Indochina Refugees Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 4, at 56-58 (1975) (statement of Ambassador L. Dean Brown, Director, Interagency Task Force, Department of State).
2. *Id.*
3. *Id.*

Cambodia, and Laos, thousands of Indochinese refugees fled their homelands. After the fall of Saigon, the United States plucked over 69,000 Indochinese from the sea.[4] These refugees became people without a country. Faced with a decision between returning the refugees to Indochina or accepting responsibility for them, the United States chose the latter.[5]

On April 21, 1975, President Ford directed the Attorney General to invoke the parole authority[6] to admit into the United States over 130,000 refugees evacuated by the government from Indochina.[7] This was not the end of the refugee problem. The exodus from Indochina has continued. Thousands continue to flee the communist oppression. Refugee camps in Thailand are swelled.[8] Several thousand refugees have begun a nomadic existence on the small boats used to escape Indochina.[9] Governments in and about Indochina have refused to let these "boat people" even temporarily enter their countries.[10] As a last resort, some of the boat people have attempted the perilous three-month voyage to Australia to seek refuge.[11] The rest continue to drift about, searching for a haven while nearly every government in the world absolutely refuses to aid them.[12]

Out of concern for these helpless refugees, the United States has sought to continue its refugee program. President Ford ordered the

4. *Id.*

5. *Id.*

6. Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970). [the Immigration and Nationality Act is hereinafter cited as I. & N. Act]. The section gives the following description of the parole authority:

> The Attorney General may in his discretion parole into the United States temporarily under such condition as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

7. Gardner, *Congress Nears Final Action on Vietnam Aid*, 33 CONG. Q. WEEKLY REP. 835, 839 (1975).

8. On July 15, 1977, 79,846 refugees were in refugee camps in Thailand. The majority, 67,536, was Laotian, with 10,971 from Cambodia and 1,339 from Vietnam. San Diego Union, Jul. 16, 1977, pt. A, at 1, col. 2. Refugees continue to arrive in Thailand at the rate of 500 a month. Los Angeles Times, Jun. 2, 1977, pt. I, at 12, col. 1.

9. San Diego Union, Jul. 4, 1977, pt. A, at 1, col. 3.

10. *Id.*

11. Los Angeles Times, Jun. 27, 1977, pt. I, at 18, col. 1.

12. San Diego Union, Jul. 4, 1977, pt. A, at 1, col. 3. The United States government has been working hard to encourage other countries in Asia to aid the boat people, but the governments in Japan, Taiwan, and other Asian States have steadfastly refused to allow the refugees to have even a temporary haven in their countries. Only Australia and a few Western European countries have allowed the refugees to emigrate. *Id.*

parole of 11,000 more Indochinese in 1976.[13] President Carter has directed that another 15,000 refugees be paroled beginning in late 1977.[14] These latest parolees are to include 7,000 of the boat people.[15]

These three successive paroles of mass Indochinese refugee groups have raised many new legal questions regarding the Indochinese refugee-parolees.[16] The most significant issue concerns the constitutional status of these individuals, which is the subject of this Comment.

In the 1957 case of *Leng May Ma v. Barber*,[17] the Supreme Court ruled that an alien admitted into the United States under the parole authority had not *entered* the country.[18] As a consequence of this holding, the Indochinese refugee-parolees stand to be denied significant constitutional[19] and statutory rights that attach to aliens only upon entry. The various other subgroups[20] of aliens are entitled to certain of these rights based upon the determination that these subgroups have entered the United States.

Should *Leng May Ma v. Barber*[21] be interpreted as applying to the Indochinese refugee-parolees? Should the Indochinese continue to be denied constitutional and statutory benefits based on the legal fiction of *entry*?[22] If not, to what rights should the refugee-parolees be

13. *Id.*
14. *Id.*, Jul. 16, 1977, pt. A, at 1, col. 2.
15. *Id.*
16. Members of political refugee groups which are admitted into the United States under § 212(d)(5) of the I. & N. Act will hereinafter be referred to as *refugee-parolees*, as distinguished from other parolees who will be referred to as *standard parolees*. Excepted from this classification of standard and refugee-parolees are those refugees allowed conditional entry into the United States under I. & N. Act § 203(a)(7), 8 U.S.C.A. § 1153(a)(7) (West Supp. 1977). These conditional entrants are discussed in Note, *Refugees Under United States Immigration Law*, 24 CLEV. ST. L. REV. 528 (1975). Standard parolees include all aliens paroled into this country not as members of a mass refugee group. *See* text accompanying notes 192-96 *infra*.
17. 357 U.S. 185 (1957).
18. *Id.* at 189.
19. Leng May Ma v. Barber, 357 U.S. 185, 187 (1957); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (parolees have no constitutional right to due process, but receive only that due process which Congress grants to them); Kaplan v. Tod, 267 U.S. 228 (1925); Wong Hing Fun v. Esperdy, 335 F.2d 656, 657 (2d Cir. 1964) (parolee is one who is "outside" the United States and is not entitled to assert rights under the Constitution). *See also* text accompanying notes 37-86 *infra*.
20. The subgroups of aliens include permanent resident aliens, nonimmigrant aliens, and undocumented aliens. *See* text accompanying notes 30-36 *infra*.
21. 357 U.S. 185 (1957).
22. The legal fiction of *entry* is that while the refugees are physically present

entitled? Must future refugee-parolee groups face this same dilemma? These are some of the major issues this Comment will address.[23]

## THE RIGHTS GAP BETWEEN PERMANENT RESIDENTS AND PAROLEES

### *The Plenary Power of Congress to Control the Admission of Aliens*

The Supreme Court has long held that an alien[24] seeking admission into the United States for the first time has no constitutional right of entry.[25] Thus, the alien is outside the reach of the Constitution and can assert no rights under it.[26] In essence, the Court has taken a hands-off policy toward aliens seeking admission and has abdicated power in this area of law to Congress,[27] noting that "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[28] The Court expounded this principle in *Shaughnessy v. United States ex rel. Mezei*,[29] noting that "[w]hatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned."

#### Entry

An alien's entitlement to constitutional protection is based upon his making an *entry* into the United States.[30] The degree of constitutional protection to which the alien is entitled is determined by the type of entry made by the alien. Three primary forms of entry may be made by an alien. First, an alien may be lawfully admitted for permanent residence.[31] An alien making this form of entry is generally entitled to the broadest protection afforded an alien by the Constitu-

within the United States, they are legally treated as if they were not within the country. *See id.*

23. *See generally* Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175 (1975), for a discussion of the use and misuse of the parole authority.

24. The term *alien* means any person not a citizen or national of the United States. I. & N. Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1970).

25. Kleindienst v. Mandel, 408 U.S. 753 (1972); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Turner v. Williams, 194 U.S. 279 (1904).

26. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Kaplan v. Tod, 267 U.S. 228 (1925).

27. *See* The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

28. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953).

29. *Id.* at 212.

30. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Leng May Ma v. Barber, 357 U.S. 185, 187 (1957).

31. The definition of an alien "lawfully admitted for permanent residence" is found in I. & N. Act § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1970).

tion.[32] Second, an alien may be admitted into the United States for nonimmigrant purposes.[33] Normally, nonimmigrants are admitted for the purpose of a temporary sojourn. Examples are tourism or study at a university. The third category of entrant aliens includes undocumented aliens.[34] These aliens generally enter the United States by crossing the border without inspection. Aliens in both the second and third entrant categories are entitled to protection of the Constitution but to a slightly lesser degree than that enjoyed by permanent resident aliens.[35] All three groups are entitled to greater constitutional protection than that enjoyed by parolees under existing law.[36]

*Rights of Resident Aliens*

Upon making an entry the permanent resident alien enjoys most of the rights and protections of citizens under the Constitution. The alien, as an individual under the Constitution, is entitled to protection under the Bill of Rights[37] and through the twin safeguards of due process and equal protection under the fifth and fourteenth amendments.[38] Permanent resident aliens are covered by the Civil Rights Act.[39]

In addition, the permanent resident alien enjoys a number of other significant constitutional rights. The permanent resident alien has the right to earn a livelihood;[40] he has the right to the same procedural safeguards as citizens in criminal prosecutions, civil litigation, and administrative proceedings;[41] and he has the right under the equal protection clause of the fourteenth amendment not to be unreasonably discriminated against in the areas of state employment,[42] wel-

32. *See* text accompanying notes 37-46 *infra*.
33. *See* I. & N. Act § 101(a)(15), 8 U.S.C.A. § 1101(a)(15) (West Supp. 1977), for definition of an alien admitted into United States for nonimmigrant purposes.
34. Leng May Ma v. Barber, 357 U.S. 185, 187 (1957); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1952).
35. *See* text accompanying notes 57-67 *infra*.
36. Leng May Ma v. Barber, 357 U.S. 185, 187 (1957); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1952).
37. Bridges v. Wixon, 326 U.S. 135, 148 (1945).
38. Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
39. 42 U.S.C. §§ 1981, 1983 (1970); 18 U.S.C. § 242 (1970).
40. Truax v. Raich, 239 U.S. 33 (1915).
41. Chew v. Colding, 344 U.S. 590 (1953).
42. Sugarman v. Dougall, 413 U.S. 634 (1973).

fare,[43] tuition grants to state universities,[44] admission to the state bar,[45] and commercial licenses.[46]

The area where the alien's constitutional rights are most severely restricted is deportation. Unless he becomes a naturalized citizen,[47] the resident alien has no vested constitutional right to remain in the United States. Like any other alien, he is subject to expulsion for certain designated types of misconduct.[48] Significantly though, the resident alien is still entitled to procedural due process in the expulsion proceedings.[49] This includes the right to a fair, impartial hearing.[50] Upon being expelled, the alien is generally entitled to be deported to a country of his choosing, provided that country will accept him and the Attorney General does not object.[51]

In the area of statutory rights, permanent resident aliens are entitled to qualify their relatives for preferential treatment in immigrating to the United States.[52] Statutory rights denied to permanent resident aliens include the right to vote in public elections[53] and the right to be employed by the competitive federal civil service.[54] Permanent resident aliens are also subject to exclusion proceedings upon attempting to re-enter the United States.[55]

*Rights of Nonimmigrant Aliens*

Nonimmigrants are generally entitled to the same constitutional

43. Graham v. Richardson, 403 U.S. 365 (1971).
44. Chapman v. Gerard, 456 F.2d 577 (3d Cir. 1972).
45. *In re* Griffiths, 413 U.S. 717 (1973).
46. Takahashi v. Fish & Game Comm'n, 334 U.S. 419 (1948).
47. For the requirements of naturalization, see I. & N. Act § 316, 8 U.S.C. § 1427 (1970).
48. *Id.* § 241(a), 8 U.S.C.A. 1251(a) (West Supp. 1977).
49. The Japanese Immigrant Case, 189 U.S. 86 (1905).
50. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). For other procedural safeguards statutorily required in expulsion proceedings, see I. & N. Act § 242(b), 8 U.S.C. § 1252(b) (1970).
51. I. & N. Act § 243(a), 8 U.S.C. § 1253(a) (1970).
52. *Id.* § 203(a)(2), 8 U.S.C.A. § 1153(a)(2) (West Supp. 1977). A familiar relationship with a permanent resident also qualifies the immigrant for an exemption from the labor certification requirement. *Id.* § 212(a)(14), 8 U.S.C.A. § 1182(a)(14).
53. Voting qualifications are fixed by the states, subject to federal authority to prevent discrimination against citizens. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). Presently, no aliens can vote. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 1.38 (rev. ed. 1976). All aliens, including permanent residents, nonimmigrants, and undocumented parolees, are barred from holding publicly elected office as well; but this is a constitutional, not a statutory denial. U.S. CONST. art. I, § 2, cl. 2; *Id.* art. II, § 1.
54. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); 5 C.F.R. § 7.4 (1976). *See* Comment, *Federal Civil Service Employment: Resident Aliens Need Not Apply*, 15 SAN DIEGO L. REV. 171 (1977).
55. Rosenberg v. Fleuti, 374 U.S. 449 (1963). *See* Comment, *Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform*, 13 SAN DIEGO L. REV. 192 (1975).

rights as permanent residents.[56] Statutes, however, dictate some notable restrictions. Nonimmigrants are entitled to remain in the United States for a temporary period, at the end of which the alien must leave the country.[57] Conditions of stay, such as a bond, may be placed on the nonimmigrant to insure that he leaves the country within the time limit assigned to him.[58] The alien must maintain the nonimmigrant status under which he was admitted.[59] Finally, the nonimmigrant may not engage in employment without permission from the district director of the Immigration and Naturalization Service.[60] The nonimmigrant is subject to deportation rather than exclusion proceedings once he is within the United States.[61] In this last respect, nonimmigrant aliens receive treatment identical to that given permanent aliens.[62]

*Rights of Undocumented Aliens*

An alien who enters the United States without proper documents is generally entitled to the same constitutional rights enjoyed by permanent resident aliens.[63] There are, however, three major exceptions. The undocumented alien must have been resident in the country for "some time" in order to earn the protection of the Constitution.[64] The alien is not entitled to seek employment,[65] nor may he adjust his status to permanent resident without first obtaining the proper documents.[66] Like permanent residents and nonimmigrant aliens, the entrant undocumented alien is subject to deportation rather than exclusion proceedings.[67]

*Rights of Parolees*

All the basic constitutional rights that resident, nonimmigrant, and undocumented aliens possess are premised on the alien having

56. The major difference is that in most cases nonimmigrants are statutorily denied the right to work while permanent residents are constitutionally granted the right to work. Truax v. Raich, 239 U.S. 33 (1915).
57. The nonimmigrant who overstays his allotted period is subject to expulsion. I. & N. Act § 241(a)(2), 8 U.S.C. 1251(a)(2) (1970).
58. *Id.* § 214(a), 8 U.S.C. § 1184(a) (1970).
59. 8 C.F.R. § 214.1(c) (1976).
60. *Id.*
61. I. & N. Act § 241(a)(9), 8 U.S.C. § 1251(a)(9) (1970).
62. *See* text accompanying notes 47-51 *supra*.
63. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953).
64. Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950).
65. I. & N. Act § 212(a)(14), 8 U.S.C.A. § 1182(a)(14) (West Supp. 1977).
66. *See* note 205 *infra*.
67. I. & N. Act § 241(a)(2), 8 U.S.C. § 1251(a)(2) (West 1970).

made an *entry* into our country.[68] Parolees, however, by virtue of the Court's ruling in *Leng May Ma v. Barber*,[69] have made no entry. To make an entry, the parolee must adjust his status to that of permanent resident.[70] The grant of parole carries no constitutional rights with it.[71]

The parole grant may be restricted, with the parolee limited to residing in a specific geographic area.[72] The Attorney General may revoke the parole without either notice[73] of a hearing[74] if he feels the parole is no longer in the public interest or that the parolee had become excludable.[75] Revocation may occur without the Attorney General informing the parolee of the reasons for the revocation.[76] Upon revocation of parole the alien becomes subject to exclusion rather than deportation proceedings.[77] This consequence is significant, for exclusion proceedings carry even fewer procedural due process safeguards than deportation proceedings.[78] The alien is not entitled to a full procedural due process hearing to determine his admissibility but only to an essentially fair proceeding.[79]

In addition to narrower procedural safeguards, the substantive grounds for exclusion are broader than those for deportation.[80] Upon

68. Leng May Ma v. Barber, 357 U.S. 185 (1957).

69. *Id.*

70. *Id.* For adjustment of status procedures, *see* note 205 *infra*.

71. Kaplan v. Tod, 267 U.S. 228 (1925).

72. *See Hearings on Indochina Refugees, supra* note 1, at 100 (statement of James Greene, Deputy Commissioner, Immigration and Nationality Service).

73. 8 C.F.R. § 212.5(b) (1976).

74. *Id. Contra* United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958). The court found that a hearing on the revocation of the refugee-parolee's parole was constitutionally required. This case has presented the only exception to the rule that parole may be revoked without a hearing. *But see* text accompanying notes 169-76 *infra*.

75. 8 C.F.R. § 212.5(b) (1976) provides that "when in the opinion of the district director . . . neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he shall be restored to the status which he had at the time of parole . . . ."

76. *Id.*

77. I. & N. Act § 212(d)(5), 8 U.S.C. § 1182(a)(5) (1970). Upon revocation of parole, the alien is treated as if he were applying for admission and is therefore subject to exclusion rather than expulsion proceedings.

78. *Compare* 8 C.F.R. § 236.2 (1976) *with* I. & N. Act § 242(b), 8 U.S.C. § 1252(b) (1970).

79. *See* United States *ex rel.* Kordic v. Esperdy, 386 F.2d 232 (2d Cir. 1967). Not being entitled to a hearing means the alien may not produce witnesses, conduct cross examination, or avail himself of other advantages of a full administrative hearing.

80. *Compare* I. & N. Act § 212(a), 8 U.S.C. § 1182(a) (1970) *with id.* § 241(a), 8 U.S.C.A. § 1251(a) (West Supp. 1977). In Leng May Ma v. Barber, 357 U.S. 185 (1957), the Supreme Court held that a parolee, unlike an alien in an expulsion proceeding, could not invoke I. & N. Act § 243(h), 8 U.S.C. § 1253(h) (1970), which authorizes the Attorney General to withhold deportation of any alien "within

a finding that the parolee is excludable, the parolee has no right to administrative review if he has been excluded for reasons of disease, mental illness, or national security.[81] If the parolee's appeal for administrative review is rejected by the administrative board, the parolee can still seek judicial review by filing a petition for habeas corpus or declaratory judgment in a federal court.[82] But the court will address itself only to reviewing whether the administrative board committed a flagrant abuse of discretion.[83] Absent such a finding, the alien will be excluded and sent back to the country from which he came;[84] unlike the deported entrant alien, the parolee is not sent to the country of his choice.[85] Thus, the parolee faces a rather precarious existence in the United States.

Some rights have been specifically granted to or permitted the Indochinese refugee-parolees by Congress, such as the right to work[86] and its parallel duty to pay taxes.[87] By statute they may obtain

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the United States" to any country in which in his opinion the alien would be subject to physical persecution.

81. I. & N. Act § 235(c), 8 U.S.C. § 1225(c) (1970).

82. *See id.* § 106(a), 8 U.S.C. § 1105(a); Browell v. Tom We Shung, 352 U.S. 180, 184 (1956).

83. Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966); Wan Ching Shek v. Esperdy, 304 F. Supp. 1080, 1087 (D.C.N.Y. 1969).

84. I. & N. Act § 237(a), 8 U.S.C. § 1227(a) (1970).

85. *Id.* § 243(a), 8 U.S.C. § 1253(a).

86. The Indochinese were originally permitted to work on an ad hoc basis. They were not to be released from the refugee camps "until a responsible volunteer agency has furnished assurances of housing and employment or care and support." H.R. REP. NO. 197, 94th Cong., 1st Sess. 8 (1975). The Indochinese were classified as employment-authorized on their I-94 entry documents. The 1976 amendments to the Immigration and Nationality Act, which were enacted after the parole of the Indochinese, exempt refugees admitted as conditional entrants under § 203(a)(7) from the labor certification requirement. I. & N. Act § 212(a)(14), 8 U.S.C.A. § 1182(a)(14) (West Supp. 1977). 8 C.F.R. § 212.8(b) (1977) presently exempts from labor certification those parolees who have been continuously present in the United States for at least two years. This new regulation confuses the status of parolees who have not been physically present for two years. Under the original ad hoc approach, these parolees were clearly exempt from labor certification. It is not clear if the regulation supercedes the ad hoc approach and denies these parolees the right to work. *See* note 205 *infra* for a discussion of labor certification and adjustment-of-status to permanent resident, and the possible effect of 8 C.F.R. § 212.8(b) upon these adjustment procedures. It should be noted that nonimmigrant or nonresident aliens are generally not permitted to seek employment while in the United States. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.6(b) (rev. ed. 1976).

87. *See* Treas. Reg. § 1.871-2(b) (1977), which states the broad application of what constitutes an alien who is present within the country for taxation purposes.

government benefits which were enacted to aid the Indochinese refugee-parolees.[88] The refugee-parolees may stay indefinitely—barring revocation of parole—without attempting to change status to that of permanent resident.[89]

Refugee-parolees have been granted certain other rights under international treaty,[90] but not under the Constitution. These include the rights of ownership of property,[91] freedom of association,[92] access

88. *See* note 155 *infra*. The state of California has also passed an act which enables refugee-parolees to qualify for resident status in the state educational system. Residency carries with it reduced tuition. Formerly, refugee-parolees were excluded by CAL. EDUC. CODE § 22855 (West Supp. 1977):

> A student who is an adult alien shall be entitled to resident classification if he has been lawfully admitted to the United States for permanent residence in accordance with all applicable laws of the United States; provided, that he has had residence in the state for more than one year after such admission prior to the residence determination date for the semester, quarter or term for which he proposes to attend an institution.

*Id.* § 22855.5 was added in 1976 to prevent refugee-parolees from being excluded from residency status. The new section reads as follows:

> A student who is an adult alien shall be entitled to resident classification if he is a refugee who has been granted parolee status or indefinite voluntary departure status in accordance with all applicable laws of the United States; provided that he has lived in the state one year.
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> This section shall be operative only until June 30, 1980, and as of that date is repealed.

89. To adjust status to permanent resident the refugee-parolees must follow the standard status or entry procedures set out in note 205 *infra*. The reason for requiring compliance with these procedures is the fact that a parolee is considered never to have entered the country by virtue of *Leng May Ma v. Barber* and is treated as if he was at the border applying for entry as a permanent resident. A parolee who is unable to adjust his status to that of permanent resident by the standard statutory procedure must remain a parolee indefinitely. The parolee cannot be returned to his homeland. *See* note 90 *infra*. It may be possible to deport a parolee to any third country that would accept him on the terms of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968).

90. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968), which incorporates the substantive provisions of the Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150. The Convention defines a refugee as any person who

> [o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Convention stipulates that any Contracting State that accepts a refugee into the State must accord the refugee the same treatment as is accorded to aliens generally. Most importantly, the Convention contains limitations for the expulsion or deportation of refugees: No refugee shall—except in the case of serious criminals or persons constituting a danger to the security of the country—be expelled or returned in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

91. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 art. 12 (1968).

92. *Id.* art. 15.

to courts,[93] welfare,[94] administrative assistance in diplomatic representation,[96] freedom of movement,[97] identity papers,[98] travel documents, [99] and transfer of assets.[100]

*The Need for Narrowing the Rights Gap Between Permanent Residents and Refugee-Parolees*

The dichotomy between the rights granted resident aliens and those granted refugee-parolees is illogical for three reasons. First, previous refugee-parolees have been stranded in this country permanently because few other countries possess the inclination or resources to absorb any significant number of the refugees.[101] Second, the United States is barred by international treaty from sending the refugees back to Indochina until the safety of the refugees can be assured.[102] Third, under present regulations, it would take well over

93. *Id.* art. 16.
94. *Id.* art. 23.
95. *Id.* art. 21.
96. *Id.* art. 25.
97. *Id.* art. 26.
98. *Id.* art. 27.
99. *Id.* art. 28.
100. *Id.* art. 30.
101. *See Hearings on Indochina Refugees* note 1 and text accompanying notes 7-15 *supra*. The reluctance of other countries to accept Indochinese refugees has been well documented. In June, 1977, a full two years after the fall of Saigon, over 80,000 Indochinese refugees remained stranded in refugee camps in Thailand and throughout Southeast Asia while awaiting resettlement. San Diego Union, Jul. 16, 1977, pt. A, at 1, col. 2. Refugees continue to arrive in Thailand at a rate of over 500 a month. Los Angeles Times, Jun. 2, 1977, pt. I, at 12, col. 1. Many of the refugees are refused even temporary permission to land in most Asian countries and must exist in boat communities, often drifting from country to country. *Id.* Only the United States, France, and Australia are considered to have significant refugee programs. *Id.* One group of 66 Vietnamese were plucked from the sea by an Israeli ship. Other ships had refused to aid Vietnamese in their floundering crafts. Once aboard, the refugees were denied permission to land anywhere they sought refuge, including the United States, Taiwan, Hong Kong, and Japan. The United Nations could not aid the refugees. Finally Israel, with its bitter refugee history, allowed the refugees to immigrate. *Id.*, Jun. 27, 1977, pt. I, at 1, col. 4.
102. *See* note 90 *supra*. Accounts from newly escaped refugees from Indochina confirm the real possibility of physical peril awaiting returning refugees. Los Angeles Times, Jun. 27, 1977, pt. I, at 1, col. 4. Furthermore, in light of the present political situation and the past history of communist revolutions, a safe return of the refugees to their homeland seems improbable in the future (the brief, elected government of President Allende in Chile is the only *significant* example of a communist government being overthrown by non-communist opposition). There is always the chance that some of these regimes may guarantee the safe return of all refugee-escapees to their homelands, but to date there has been no known reliable assurances given that returning refugees will not be persecuted.

twenty-five years for all the refugee-parolees to adjust their status to permanent resident.[103] Because both permanent residents and refugee-parolees are certain to remain in the United States permanently, it seems unjust that both groups do not enjoy the same constitutional status.[104]

*Parole Authority Background*

Parole was first developed in the 1920's as a non-statutory, discretionary administrative device.[105] The parole authority took statutory form in 1952,[106] but the concept remained the same as in the pre-statutory period. Parole was utilized to temporarily allow individual aliens into the United States for humane considerations or matters of public interest.[107] The parole authority allowed immigration officials to circumvent the restrictive immigration statutes[108] by allowing the temporary admission of aliens who lacked valid visas or were otherwise excludable. The dominant characteristic of the pre-1956 statutory and non-statutory uses of parole was that parole was invoked only in cases of individual hardship, and not for refugee groups.[109] Strong evidence exists showing that Congress firmly intended that parole be invoked only on behalf of individuals when enacting the parole statute in 1952.[110]

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103. For the present adjustment-of-status procedure, *see* note 205 *infra*. Under this procedure, a maximum of 5,100 Indochinese could adjust their status each year. Realistically, however, the actual number to adjust will be lower, due to competition from other refugees.

104. For a discussion of equating refugee-parolees with permanent resident aliens, *see* note 204 *infra*.

105. *In re* L-Y-Y, 9 I. & N. Dec. 70, 71 (1960); Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175 (1975).

106. I. & N. Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970). For text of the section, *see* note 6 *supra*.

107. Examples include the following: paroling aliens for medical treatment, *see* United States *ex rel.* Lam Hai Cheung v. Esperdy, 345 F.2d 989 (2d Cir. 1965); avoiding the holding of aliens in prison pending their exclusion, *see* Kaplan v. Tod, 267 U.S. 228, 230 (1925); and enabling the parolee to qualify for naturalization or adjustment of status in a limited number of cases, to defend criminal actions and to testify for the government in criminal cases, [1950] INS ANN. REP. 49, 50.

108. *See* I. & N. Act §§ 201-203, 8 U.S.C.A. §§ 1151-1153 (West Supp. 1977). For an explanation of the restrictive immigration quota system, *see* note 205 *infra*.

109. *See* [1950-1952] INS ANN. REP.

110. *See House Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary, Study of Population and Immigration Problems*, 88th Cong., 2d Sess., ser. 13, at 160 (1964) (statement of Congressman Michael Feighan). Congressman Feighan stated: "It [the parole statute] was intended as a remedy for individual hardship cases, no more, no less." He further noted that the use of parole for admitting large groups of people was not contemplated: "I know at the time we were thinking of *individuals* in distress rather than any group." *Id.* at 133 (emphasis added). *See also id.*, ser. 14, at 66, 67 (1963); Comment, *Refugee-*

In 1956 President Eisenhower became the first president to alter the statutory and administrative concept of the parole authority by paroling refugees from the Hungarian uprising.[111] The President took advantage of the flexibility inherent in the language of the statute to effectuate the parole, using the phrase: "The Attorney General may in his discretion parole into the United States [aliens] *temporarily* under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest."[112] By his action President Eisenhower set the precedent of using the parole authority to admit *mass* refugee groups into the country for the purpose of permanent residence. [113]

Leng May Ma v. Barber

This parole of the Hungarian refugees by President Eisenhower set the stage for the Court's 1957 decision in *Leng May Ma v. Barber*.[114] In *Leng May Ma* a native of China was paroled into the country to settle her disputed American citizenship claim. Upon a determination of the validity of her claim of citizenship, she was ordered excluded. The parolee tried to fight the exclusion by attempting to invoke section 243(h) of the Immigration and Nationality Act.[115] The

*Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175 (1975).

The intentions of Congress in creating the statutory parole authority were set forth in the Joint Committee Report. *See* H.R. REP. No. 1365, 82d Cong., 2d Sess. *reprinted in* [1952] 2 U.S. CODE CONG. & AD. NEWS 1653, 1706 (emphasis added), which stated in part:

> The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief. The committee believes that the broader discretionary authority is necessary to permit the Attorney General *to parole inadmissible aliens into United States in emergency cases, such as the case of an alien who requires immediate medical attention* before there has been an opportunity for an immigration officer to inspect him, and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, *such as, for instance, a witness for purposes of prosecution.*

The statute, while not specifically excluding mass refugee groups, used the singular phrase "an alien." Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175, 178-79 (1975).

111. United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610, 615 (2d Cir. 1958).

112. I. & N. Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (West 1970) (emphasis added).

113. *See Hearings on H.R. 7700 Before the Subcomm. on Immigration and Naturalization of the House Comm. on the Judiciary*, 88th Cong., 2d Sess., ser. 13, pt. 2, at 485 (1964), for Congressional approval (via the House and Senate Judiciary Committees) of the President's application of the parole authority to admit the Hungarian refugees.

114. 357 U.S. 185 (1957).

115. I. & N. Act § 243(h), 8 U.S.C. § 1253(h) (1970).

statute authorized the Attorney General "to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to physical persecution . . . ."[116] The Court stated the issue as being "whether the granting of *temporary* parole somehow effects a change in the alien's legal status."[117] The Court held that the parolee was ineligible to invoke section 243 because she was not "within the United States." As a parolee, she had never *entered* the United States.[118] Not having entered the United States, the parolee could not be within the United States for the purposes of the statute, despite the parolee's physical presence within the country. The court's reasoning is reflected in the following statement:

> The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally "within the United States" *is inconsistent with the congressional mandate, the administrative concept of parole and the decisions of this Court.* Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks, or those likely to abscond. . . . Certainly this policy reflects the humane qualities of an enlightened civilization.[119]

Taken in conjunction with the pre-statutory uses of parole and Congress' non-consideration of refugee-parolees in enacting statutory parole,[120] the Court's reasoning with respect to standard parolees is clear.[121] The key considerations are the temporary nature of the admittance, the avoidance of needless confinement at the border while trying to gain a visa or settle a claim of citizenship, and the humane and convenient aspects of the whole administrative procedure.[122] The Court had no trouble finding lack of entry and subsequent lack of entitlement to constitutional rights because the admittance was only temporary.[123] The temporary parolee is entitled to nothing but humane treatment.

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116. *Id.* (emphasis added).
117. 357 U.S. at 188 (emphasis added).
118. *Id.* at 189.
119. *Id.* at 190 (emphasis added).
120. *See* note 110 *supra.*
121. The Court's rationale was as follows: Detaining a sick alien at the border for lack of a visa would be inhumane. Therefore, the alien is released from detention and paroled into the country to receive American medical treatment. Upon completion of the treatment, the alien is returned to the border. The alien is admitted for a definite, *temporary* period for a humane purpose or a purpose affecting the public interest. Upon completion of the purpose the alien leaves the country. His presence is only temporary and is at the discretion of the Attorney General because the alien has no right of entry.
122. Leng May Ma v. Barber, 357 U.S. 185, 190 (1957).
123. *Id.*

THE INAPPLICABILITY OF *LENG MAY MA* TOWARDS REFUGEE-PAROLEES

The Court's reasoning that the parolee never *enters* because his presence within the country is temporary confirms the inapplicability of *Leng May Ma* to refugee-parolees. Refugee-parolees are not temporary visitors to this country.[124] Certainly the convenience and humanitarian aspects of the Court's reasoning in *Leng May Ma* apply to refugee-parolees, but it is the *permanent* presence of refugee-parolees that distinguishes them from standard parolees.[125] Political refugees are usually permanent, or at least indefinite invitees.[126] Inviting refugees from communist countries to live in the United States is a foreign policy decision made by the President,[127] logically with full awareness that the refugees will remain as permanent residents.[128] That these refugees will be able to return home safely or find another country willing to accept them is unlikely.[129] In essence, the refugee-parolees have been invited here to remain as de facto permanent residents, yet without the constitutional protections granted permanent residents.

The *Leng May Ma* Court clearly overlooked the existence of the Hungarian refugee-parolees. This is evidenced by the Court's several references to the temporary nature of parole.[130] The manner in which the Supreme Court framed the issue presented in *Leng May Ma* succinctly illustrates this point: "Our question is whether the grant-

124. Refugee-parolees are stranded in this country until they themselves decide to return to their homeland. This is mandated by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968). Because the United States may deport a parolee only to the "country whence he came," the government is precluded by the Protocol from deporting the parolee. I. & N. Act § 237(a), 8 U.S.C. § 1227(a) (1970). Other countries are welcome to offer refugee-parolees the opportunity to come and live there, but these invitations have been minimal. *See* text accompanying notes 6-15 *supra*. Previous refugee groups, such as the Cubans and the Hungarians, have been allowed to permanently resettle in the United States. *See* text accompanying notes 146-154 *infra*.

125. *See* note 124 *supra*.

126. *Id.* Refugee-parolees are by definition political refugees. *See* note 16 *supra*.

127. The President, at his discretion, directs the Attorney General to parole foreign refugees into the country as part of the United States foreign policy objective to aid oppressed peoples from around the world. *See* United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610, 613 (2d Cir. 1958) and text accompanying notes 6-15 *supra*.

128. *See* notes 90 & 102 *supra*.

129. *See Hearings on Indochina Refugees*, note 1 and note 90 *supra*.

130. 357 U.S. at 188, 190 (1957).

ing of *temporary* parole somehow effects a change in the alien's legal status."[131] By overlooking the existence of the Hungarian refugee-parolees, the Court effectively laid down a blanket rule. The rule blurred all distinctions between standard parolees and refugee-parolees,[132] and resulted in a lumping together of all parolees into a single, constitutionally-bereft class. This result was not rational. Refugee-parolees are the utter antithesis of standard parolees.

It is not readily apparent why the Court blurred the distinctions between standard parolees and refugee-parolees by laying down an all-inclusive rule. Possible explanations include mere inadvertence or calculated neglect. A third reason may be that *Leng May Ma* was heard by the lower courts before the full consummation of the parole of the Hungarians.[133] Both the lower courts and the parties were therefore unaware of the constitutional plight of refugee-parolees. Until the parole of the Hungarians, there were no instances of a parole of a mass refugee group.[134] Thus, the issue of the constitutional status of refugee-parolees simply did not exist at the time *Leng May Ma* was heard by the lower courts. By the time the appeal reached the Supreme Court, the parole of the Hungarians had been put into effect.[135] The timing of the appeal of *Leng May Ma* to the Supreme Court followed too closely to the Hungarian parole to allow the refugee-parolee issue to crystallize and thereby be injected into the appeal.

*Congressional Reaction to* Leng May Ma

One year after *Leng May Ma*, Congress was so convinced of the Hungarian refugee-parolees' permanent status within the United States that it enacted legislation allowing the Hungarians to uniformly adjust their status to permanent resident.[136] Congress thereby effectively exempted the Hungarian refugee-parolees from the constitutional restrictions imposed by *Leng May Ma*.[137] Congress may

131. *Id.* at 188.

132. *See* note 16 *supra*. The Court's ruling in *Leng May Ma* pertained to *all* aliens paroled under § 212(d)(5).

133. The parole of the Hungarians commenced after October 23, 1956, and extended into 1957. Swing, *Hungarian Escapee Program*, 6 I. & N. REP. 43 (1958). The Ninth Circuit's opinion in *Leng May Ma* was rendered on February 5, 1957. The original action commenced in the United States District Court sometime before then. The Hungarian parole was still in its formative stages during the above court actions.

134. *See* [1940-1952] INS ANN. REP.

135. *Leng May Ma* was argued on May 20, 1958 and decided on June 16, 1958. 357 U.S. 185 (1957).

136. Act of Jul. 25, 1958, Pub. L. No. 85-559, 72 Stat. 419.

137. As a permanent resident, an alien is no longer subject to exclusion proceedings while he is in the country. Instead, he becomes subject to expulsion

have been trying to negate the Court's lumping together of standard parolees and the Hungarian refugee-parolees.

*Presidential Rejection of* Leng May Ma

The *Leng May Ma* Court stated that "to hold that petitioner's parole placed her legally 'within the United States' is inconsistent with the congressional mandate [and] the administrative concept of parole . . . ."[138] This statement may have been valid before the Hungarian Revolution, but certainly not in the aftermath of the uprising.[139] Several presidents have repeatedly demonstrated that the "administrative concept of parole" includes using the parole authority to admit mass refugee groups into the United States for permanent resettlement.[140]

In 1956, President Eisenhower paroled over 30,000 Hungarian refugees[141] into the United States. In 1959, the United States participated in the World Refugee Year where the President announced that the country would accept refugees from around the world.[142] In the 1960's, Presidents Kennedy and Johnson paroled over 650,000 Cuban refugees[143] into the country. In 1962, President Kennedy directed the parole of a large group of Chinese refugees from the Peoples' Republic of China.[144] Over 1,500 Ugandans of Asian descent were paroled by President Nixon in 1972 and 1973.[145] Finally, there was the parole of Indochinese refugees into the United States.

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proceedings in which the alien is entitled to a full procedural due process hearing. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). If the permanent resident leaves the United States, he may, under certain circumstances, be subject to *exclusion* proceedings upon his re-entry. Rosenberg v. Fleuti, 374 U.S. 449 (1963).

138. 357 U.S. at 190.

139. *See* text accompanying notes 146-54 *infra*.

140. *Id.*

141. United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610, 612 (2d Cir. 1958).

142. Presidential Proclamation of Dwight D. Eisenhower, May 19, 1959, [1960] 2 U.S. CODE CONG. & AD. NEWS 3127-28. Congress approved this policy by passing the Fair Share Refugee Law Act of Jul. 14, 1960, Pub. L. No. 86-648, 74 Stat. 504, which specifically authorized granting parole to large refugee groups.

143. Bernsen, *Rights of Refugees*, 52 INTERPRETER RELEASES 407, 409 (1975). *See also* [1970-1974] INS ANN. REP.

144. *House Subcomm. on Immigration and Naturalization of the Comm. of the Judiciary, Study of Population and Immigration Problems*, 88th Cong., 2d Sess., ser. 13, at 106 (1964).

145. [1973] INS ANN. REP. 5.

The past acts of the United States government[146] in allowing the mass Hungarian and Cuban refugee groups to enter the country for the purpose of permanent resettlement created a presumption that future mass refugee-parolee groups would receive similar treatment. History had shown that "the congressional mandate and administrative concept of parole"[147] of mass refugee groups flowed towards treating the groups as if they had entered as permanent resident aliens.[148] The enactments of uniform adjustment-of-status legislation[149] for the Hungarians[150] and Cubans[151] confirms this fact.

Certainly, the government has the right to rebut this presumption of admission for permanent residence. Congress could manifest an intent to treat a subsequent mass refugee-parolee group as being only *temporary* parolees, thereby invoking the *Leng May Ma* doctrine.[152]

In the matter regarding the parole of the Indochinese, various avenues existed by which the United States government could have rebutted the presumption. When ordering the parole of the Indochinese, President Ford or Congress could have set at least three possible express time limits on the duration of the parole.[153] He could have granted parole for a specified number of days or years, at the expiration of which the refugee-parolees remaining in the country would be excluded. A second form of deadline could have been the

146. These acts consisted of granting the refugees the option to remain permanently within the United States and also to adjust their status from parolee to permanent resident without having to follow the very restrictive standard adjustment-of-status procedure. For an outline of the standard adjustment-of-status procedure, *see* note 205 *infra*.

147. Leng May Ma v. Barber, 357 U.S. 185, 190 (1957).

148. Enactment of adjustment-of-status legislation in favor of particular refugee groups indicates an understanding by Congress that the refugees will remain permanently in the United States. The refugees should therefore not be arbitrarily denied constitutional and statutory benefit by virtue of the standard restrictive adjustment statutes which would bind many of the refugees to parolee status for an unreasonable length of time. Uniform adjustment-of-status legislation allows the refugees to almost immediately adjust their status from parolees to permanent residents, if they so desire, and thus by-pass the standard adjustment procedure.

149. *See* note 148 *supra*.

150. The Hungarians had their status adjusted by the Act of Jul. 25, 1958, Pub. L. No. 85-559, 72 Stat. 419. Also, the World Refugee Year refugees had their status adjusted by the Act of Jul. 14, 1960, Pub. L. No. 86-648, 74 Stat. 504.

151. The Cubans had their status adjusted by the Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161.

152. The *Leng May Ma* holding states that parolees are in the United States only temporarily and have made no entry. Consequently, they do not qualify for the protection of the Constitution.

153. The President merely directed the Attorney General to invoke I. & N. Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970), which sets no definite time limit on the length of the parole of a refugee.

granting of parole to the refugees with the condition that Congress enact adjustment-of-status legislation within a certain time period. If Congress failed to act within that time period, the refugee-parolees would be excluded. A third express time limit could have stipulated that all refugees who had not adjusted their status to that of permanent resident by means of the existing statutory procedure within a specified time would be excluded.[154]

*The Government's Failure to Rebut the Presumption*

Congress and the President failed to set any express—or even implied—time limits on the length of the three paroles of the Indochinese. There is other evidence that the government failed to rebut the presumption of admission for permanent residence.

Resettlement Aid

The enactment of congressional resettlement aid for the Indochinese refugee-parolees[155] indicates that Congress failed to rebut the presumption. Rather than enacting legislation granting the Indochinese a time limit on their parole, Congress chose to grant them money for resettlement. Congress thus acquiesced to the grant of *indefinite* parole and indeed helped the Indochinese prepare for indefinite parole by giving them financial aid to smooth the transition of the Indochinese into American society.[156]

Dispersal of the Refugee-Parolees

By seeking to spread the resettlement of the Indochinese throughout the United States, the government is showing that it wants to blend the refugees as smoothly as possible into American society.[157] If Congress intended to allow the Indochinese refugee-parolees to remain within the country only for a definite temporary period, then

154. This approach would not violate the U. N. Protocol as long as the refugee is not forced to return to his homeland against his will. *See* note 90 *supra*.

155. The Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, 89 Stat. 87 (codified at 22 U.S.C.A. § 2601) (West Supp. 1977), *as amended by* Act of Jun. 21, 1976, Pub. L. No. 94-313, 90 Stat. 691, provided $455,000,000 for emergency assistance for transportation, temporary maintenance, and resettlement of the refugees from South Vietnam, Cambodia, and Laos; the Foreign Assistance Appropriation Act of 1975, Pub. L. No. 94-24, 89 Stat. 89, *as amended by* Act of Jun. 30, 1976, Pub. L. No. 94-330, 90 Stat. 773, provided $485,000,000 in special assistance to refugees.

156. *See Hearings on Indochina Refugees, supra* note 1, at 24-25.

157. *Id.*

the refugee camp[158] approach would have been much more effective. It would have been far simpler to round up and exclude the Indochinese upon the expiration of their parole if the refugees were concentrated in one area. Spreading the refugee-parolees throughout the country would be illogical if Congress had planned to keep them in the country only a short period of time.

Labor Authorization

Aliens admitted for temporary or nonimmigrant purposes are generally *prohibited* from seeking employment within the United States.[159] However, aliens admitted for the purpose of becoming permanent residents are authorized to seek such employment.[160] By authorizing the Indochinese refugee-parolees to work, the President indicated he was treating the refugee-parolees in the same way as those aliens admitted for the purpose of becoming permanent residents and not in the same category as those aliens admitted for nonimmigrant purposes.[161]

## THE *PAKTOROVICS* "INVITEE" APPROACH

There is a third argument for finding that the Indochinese refugee-parolees have made a legal entry into the country and are therefore entitled to the protection of the Constitution. In *United States ex rel. Paktorovics v. Murff*,[162] a Hungarian refugee-parolee was granted a hearing on the revocation of his parole. The Court of Appeals for the Second Circuit noted that parolees were normally treated as not being "within the United States" and were not protected by the Constitution; therefore they were not entitled to a revocation hearing within the meaning of the fifth amendment.[163] This case was different, however. Citing the circumstances under which the Hungarian refugees were paroled into the United States, the court found this case to be *sui generis*. The court's reasoning was that when the United States invites political refugees into the country, they come

158. The refugee-parolees were originally kept in refugee camps at places such as Camp Pendleton, California.

159. I. & N. Act § 212(a)(14), 8 U.S.C.A. § 1182(a)(14) (West Supp. 1977); 8 C.F.R. § 214.1(c) (1976).

160. Truax v. Raich, 239 U.S. 33 (1915).

161. The distinction to be drawn here is that an alien who is allowed into the country for a temporary specific purpose, such as tourism, pursuant to I. & N. Act § 101(a)(15), 8 U.S.C.A. § 1101(a)(15) (West Supp. 1977), has no need or right to work unless the reason for coming to the United States is to perform some special job. Aliens here for permanent resettlement, however, do have a right to work because they cannot be expected to remain permanently without earning a livelihood. *See* Truax v. Raich, 239 U.S. 33 (1915).

162. 260 F.2d 610 (2d Cir. 1958).

163. *Id.* at 613.

under the protection of the Constitution—at least, for purposes of revocation of parole.[164]

The court found the Hungarian refugee-parolees to be "invitees" on the basis of President Eisenhower's directives to offer parole for the refugees.[165] The court found the invitation to be pursuant to the announced foreign policy of the United States, as formulated in the presidential directive of December 1, 1956:[166]

> The eyes of the free world have been fixed on Hungary over the past 2½ months. Thousands of men, women, and children have fled their homes to escape Communist oppression. They seek asylum in countries that are free. Their opposition to Communist tyranny is evidence of a growing resistance throughout the world. Our position of world leadership *demands* that, in partnership with the other nations of the free world, we be in a position to grant that asylum.[167]

The court went on to note congressional endorsement of the extraordinary presidential action through the enactment of legislation aiding the Hungarian refugee-parolees.[168]

*Paktorovics* has been distinguished and limited by the courts.[169] It has been the only occasion where the Attorney General's power to revoke parole without a hearing has been held invalid as violative of fifth amendment due process requirements. The reason for the courts' limiting of *Paktorovics* to its own special facts is the precise reason that *Paktorovics* applies to the Indochinese refugee-parolees: *Paktorovics* dealt with refugees who were members of a mass group.[170]

The case of *Ahrens v. Rojas*[171] highlights this vital distinction. In

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164. *Id.* The court held that "in order to bring section 212(d)(5), 8 U.S.C.A. § 1182(d)(5), 'into harmony with the Constitution,' a hearing is required to the revocation of parole . . . ."

165. 260 F.2d at 614.

166. This directive was referred to in a message from the President of the United States to the Congress, January 31, 1957. The message stated in part:

> On December 1, I directed that above and beyond the available visas under the Refugee Relief Act—approximately 6,500 in all— emergency admission should be granted to 15,000 additional Hungarians through the exercise by the Attorney General of his discretionary authority under section 212(d)(5) of the Immigration and Nationality Act; and that when these numbers had been exhausted, the situation be reexamined.

103 CONG. REC. 1355 (1957).

167. 260 F.2d at 613 (emphasis added).

168. *Id.* at 614.

169. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.54 (rev. ed. 1976).

170. *Id.*

171. 292 F.2d 406 (5th Cir. 1961).

*Ahrens*, a Cuban who had been paroled into the United States following the collapse of the Batista regime sought a hearing on the revocation of his parole. He cited *Paktorovics* as precedent for granting a hearing to a refugee-parolee. The Court of Appeals for the Fifth Circuit denied the refugee-parolee's claim to a hearing on the revocation of his parole. The court held that *Paktorovics* did not apply in this case because *Paktorovics* was limited to its own special facts. The factual difference between *Paktorovics* and *Ahrens* was that the refugee parolee in *Ahrens* had been individually paroled into the country on January 1, 1959—several years before the United States government began paroling Cubans into this country as a mass refugee group.[172] *Paktorovics* could not apply because the refugee-parolee in *Paktorovics* had been paroled into the country as a member of a mass refugee-parolee group.

Where other courts have declined to follow *Paktorovics* and grant a parole revocation hearing,[173] the parolee involved has been either a standard parolee or a refugee-parolee who was not a member of a mass refugee group.[174] There have been no further cases involving members of mass refugee-parolee groups. There is an explanation for this. The Hungarian, World Refugee Year, and Cuban refugee-parolees had their status legislatively adjusted to that of permanent resident very soon after their parole.[175] As permanent residents, these refugees are no longer subject to exclusion proceedings. The refugees are now subject to expulsion proceedings[176] which demand a full

172. This program began in 1961. *House Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary, Study of Population and Immigration Problems*, 88th Cong., 2d Sess., ser. 13, at 106 (1964).

173. Among the courts in this category are courts from the Second Circuit—the circuit in which *Paktorovics* was decided.

174. *See* Lam Hai Cheung v. Esperdy, 345 F.2d 989 (2d Cir. 1965) (involving a standard parolee whose medical parole had expired); Wong Hing Fun v. Esperdy, 335 F.2d 656 (2d Cir. 1964) (confining *Paktorovics* to its special facts in a case involving two Chinese sailors who were paroled into the country for shore leave and who were therefore standard parolees); Stellas v. Esperdy, 250 F. Supp. 85 (S.D.N.Y. 1966) (affirming *Paktorovics*' applicability where a member of a mass refugee-parolee group was concerned, but finding that the petitioner was a temporary—and therefore standard—parolee and was not entitled to a parole revocation hearing); Licea-Gomez v. Pilliod, 193 F. Supp. 577 (N.D. Ill. 1960) (distinguishing *Paktorovics* and limiting the case on the ground that the parolee came into the country upon the passage of a congressman's private bill on the parolee's behalf and therefore was not a member of a mass refugee-parolee group).

175. *See* notes 150 & 151 *supra*. The Hungarians began arriving in 1956 and had their status adjusted in 1958. The World Refugee Year refugees began arriving in 1959 and had their status adjusted in 1960. The Cubans began arriving in 1961 and had their status adjusted in 1966.

176. I. & N. Act § 241(a), 8 U.S.C.A. § 1251(a) (West Supp. 1977).

procedural due process hearing.[177] Thus, there has been no reason to invoke *Paktorovics*. The Indochinese refugee-parolees, however, have not yet had their status adjusted, and the holding in *Paktorovics* should be applicable to them.

To bring the Indochinese refugee-parolees under the holding in *Paktorovics*, it is clear that they must have been "invited here pursuant to the announced foreign policy of the United States."[178] As suggested by *Ahrens*, the government's invoking of section 212(d)(5) of the Immigration and Nationality Act on behalf of a *mass* refugee group signifies an invitation pursuant to announced foreign policy.[179] Congressional approval of this executive action can be found in the various bills passed which granted aid to the refugee-parolees.[180] Members of the House and Senate Judiciary Committees were consulted by the President and the Attorney General prior to the grant of parole, and these members gave approval to the plan.[181] Furthermore, evidence of congressional acquiesence can be found in congressional authorization of the right of the refugee-parolees to seek employment.[182]

### EQUATING REFUGEE-PAROLEES WITH RESIDENT ALIENS

The constitutional rights which are granted to entrant aliens are given on the basis of the alien being "within the country."[183] While the degree of protection granted nonimmigrants, undocumented aliens, and permanent resident aliens varies,[184] all three are granted some measure of protection by the Constitution once they have made an entry into the United States.[185] With respect to aliens, the Constitution is a territorial instrument. It protects those aliens who have

177. *See* authority cited note 50 *supra*.
178. 260 F.2d at 614.
179. The Fifth Circuit's ruling suggests that where an individual is not paroled into this country as part of a program of mass parole for refugees, but rather is paroled on an individual basis, the parolee is then not classified as an "invitee" under *Paktorovics* and is not entitled to a hearing on the revocation of his parole.
180. *See* note 155 *supra*.
181. *See Hearings on Indochina Refugees, supra* note 1, at 56-57; Bernsen, *Rights of Refugees*, 52 INTERPRETER RELEASES 407, 409 (1975).
182. *See* Bernsen, *Leave to Labor*, 52 INTERPRETER RELEASES 291, 296 (1975). *See also* note 86 *supra*.
183. Leng May Ma v. Barber, 357 U.S. 185 (1957); Kaplan v. Tod, 267 U.S. 228 (1925). *See* Kleindienst v. Mandel, 408 U.S. 753, 771 (1972) (dissenting opinion).
184. *See* text accompanying notes 37-67 *supra*.
185. Leng May Ma v. Barber, 357 U.S. 185 (1957).

made an entry into the territory of the United States.[186] An alien outside the territory of the United States is not entitled to any fundamental rights under the Constitution.[187]

While both the United States government and the court in *Paktorovics* approach the problem of the refugee-parolees' constitutional status from different points of view, both reach essentially the same conclusion: The Indochinese refugee-parolees are entitled to some measure of constitutional protection. This conclusion may be inferred from the past actions of the government that it considers the Indochinese refugee-parolees to be "within the country" as permanent residents.[188] In addition, the *Paktorovics* court expressly stated that refugee-parolees were entitled to constitutional procedural due process protection in exclusion proceedings.[189]

The question arises as to what constitutes "some measure." Based on the substantially identical nature and needs of the two groups, a strong argument may be made that refugee-parolees should be granted the same degree of constitutional protection as permanent resident aliens.[190] Both groups have been admitted into the United States for the purpose of resettlement, unlike nonimmigrants and undocu-

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186. *Id.*

187. *Id.* Note that parolees have been granted some rights—though not all—under the Constitution. *See* text accompanying notes 86-89 *supra*.

188. *See* text accompanying notes 147-61 *supra*.

189. United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610, 613 (2d Cir. 1958).

190. *See* text accompanying notes 101-04 *supra*. To deny refugee-parolees coequal constitutional and statutory status with permanent resident aliens could theoretically result in a violation of the equal protection clause of the Constitution. Refugee-parolees are entitled to some measure of constitutional protection. The *Paktorovics* court held that refugee-parolees are entitled to procedural due process in parole revocations. Conceivably, this naked entitlement to some constitutional protection may also include within its parameters the right to equal protection. If so, discrimination between permanent residents and refugee-parolees would violate equal protection because permanent residents and refugee-parolees are virtually identical groups. Both are alien groups permitted to settle permanently within the United States. Any discrimination based on the circumstances of either group's entry into the United States would be arbitrary, irrational, and unjustifiable. The essential characteristic of each group is their permanence. They are foreigners entitled to live in the United States. Whether they were allowed to enter as permanent residents or parolees is immaterial. After entry, the two groups merge. Any discrimination could not survive even a minimal scrutiny test. Unequal treatment based on the labels of permanent resident and parolee would certainly be impermissible. Refugee-parolees, unlike nonimmigrant and undocumented aliens, may remain permanently within the country while the others may not. This permanence entitles refugee-parolees to greater protection than the other two groups. Thus, the refugee-parolees should receive the same protection that permanent residents have earned by virtue of their permanent nature.

The rebuttal to the above argument lies in the fact that no court has expanded upon *Paktorovics* to hold that refugee-parolees are entitled to equal protection under the Constitution. It is the conclusion of this author that, based on the reasoning behind the *Paktorovics* holding, *Paktorovics* should be so expanded.

mented aliens. Both are entitled to seek employment, unlike nonimmigrants and undocumented aliens.

### THE NEED FOR JUDICIAL ACTION

Without the aid of the courts or Congress in implementing the above recommendation, the Indochinese refugee-parolees may continue to be denied the protection of the Constitution under the existing law. While *Paktorovics* agreed in principle that refugee-parolees are indistinguishable from permanent resident aliens, the holding only extended the constitutional right of procedural due process in parole revocation proceedings to refugee-parolees.[191] The ruling in *Paktorovics* must be expanded to grant refugee-parolees equal constitutional status with permanent resident aliens in *all* areas, not just in matters of parole revocations. Judicial or congressional recognition is needed to effectuate this expansion.

#### *Legislative Goals*

There are three proposed avenues open to Congress for alleviating the refugee-parolee confusion. First, Congress could enact legislation extending permanent resident constitutional status to any present and future refugee-parolee meeting the following criteria:

> (1) The alien must have fled his homeland under a well-founded fear of persecution based on race, religion, nationality or membership in a particular social or political group. The alien must be unwilling to return to his homeland.[192]
>
> (2) He must be a member of a mass refugee group. Such a group must be comprised of refugees fleeing from a similar home and/or geographical area, and these refugees must be fleeing from persecution reasonably common to all of them. To qualify as a mass group, it must be large enough so as to be inadmissible under the section 203(a)(7) conditional entry statute.[193] This statute can accommodate

191. United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610, 613 (2d Cir. 1958).

192. *See* note 90 *supra*.

193. I. & N. Act § 203(a)(7), 8 U.S.C.A. § 1153(a)(7) (West Supp. 1977). Section 203(a)(7) provides that:

> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 1151(a)(ii) of this title to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on

groups of up to 5,100 in a single year, but it is extremely unlikely that so large a number of visas would be available.[194]

(3) The group must be paroled into the United States *as a group* under the section 212(d)(5)[195] parole statute. Finally, the parole must not have been expressly limited in terms of duration by either Congress or the President.[196]

Such legislation would protect the Indochinese refugee-parolees in the event of judicial failure to expand on the *Paktorovics* holding[197] and would of course benefit future refugee-parolees.

Second, Congress could enact uniform adjustment of status legislation[198] for the present Indochinese refugee-parolees. Adjusting status would allow the refugee-parolees to benefit from not only the constitutional rights but the statutory rights extended to permanent resident aliens. These benefits include the ability to have alien relatives given preferential immigration treatment.[199] While these statutory benefits are important, they are not as vital as constitutional

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account of race, religion or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

194. This is partially the result of the statutory allocation scheme. *See* note 205 *infra*. There are other reasons for the unfeasibility of employing § 203(a)(7) to admit large refugee groups into the United States as conditional entrants. The main problem centers on the fact that the statute requires the issuance of visas to the refugees while the more flexible § 212(d)(5) does not. Every time a parolee already living in the United States uses a § 203(a)(7) visa to adjust his status to permanent resident, one visa is deducted from the total allotment available that year to admit refugees as conditional entrants. I. & N. Act § 245(b), 8 U.S.C. § 1255(b) (1970). Coupled with the fact that every refugee-alien from a communist or Middle Eastern country is competing within his respective hemisphere for the available visas, the above factors combine to make § 203(a)(7) an ineffective means of admitting mass refugee groups into the United States. During 1977, only 600 Indochinese were admitted as conditional entrants during the first six months of the year. San Diego Union, Jul. 4, 1977, pt. A, at 1, col. 3.

195. I. & N. Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970).

196. The legality of this time limit under the Protocol Relating to the Status of Refugees depends on the form of action taken upon expiration of the limit. If the United States prevails upon another nation to invite the refugee-parolees to come live there, then neither the Protocol nor American immigration laws are violated. *See* notes 90 & 124 *supra*.

197. *See* text accompanying notes 204-14 *infra*.

198. Such legislation would permit any member of the Indochinese refugee-parolee group to adjust his status by a simplified procedure, with no restrictions in terms of numbers or time.

199. *See* note 52 *supra*.

rights. In the event of a judicial expansion of *Paktorovics*, it would be permissible for Congress to refuse to enact uniform adjustment-of-status legislation. Permanent resident constitutional status is all to which the Indochinese should be entitled. It would be within the discretion of Congress to refuse to go further.[200]

Finally, Congress must consider the question of future mass refugee-parolee groups. This is a very real problem as over 80,000 Indochinese refugees still remain homeless.[201] Congress has several alternatives. It may repeal the parole authority completely. Congress may remove the parole authority from the executive branch and transfer it to Congress.[202] A third alternative would be to enact legislation granting an automatic option of adjustment of status to permanent resident upon parole for all future refugee-parolees meeting the criterion noted under the first proposal in this section.[203] A final alternative would consist of placing time limits on future mass refugee-parolee groups. These time limits would serve to expressly label the parole as temporary in nature and subject the parolees to the *Leng May Ma* ruling.

*The Courts*

In the past, Congress has enacted uniform adjustment-of-status legislation to enable the Hungarian, World Refugee Year, and Cuban refugees to obtain permanent resident status and the resulting constitutional rights. Why is judicial intervention presently needed when Congress has always acted in the past?

There are two important reasons the Constitution should be *judicially* extended to the Indochinese and future mass refugee-parolee groups. First, it is possible Congress will never enact adjustment-of-status legislation in favor of the Indochinese refugee-parolees.[204]

200. *But see* note 190 *supra*.
201. *See* text accompanying notes 8-15 *supra*.
202. Congress can regain control of the parole authority by means of its plenary power over immigration. *See* text accompanying notes 24-29 *supra*.
203. *See* text accompanying notes 192-96 *supra*.
204. House Bills H.R. 13176 and 14447, 94th Cong., 2d Sess. (1976), and Senate Bill S. 2313, 94th Cong., 2d Sess. (1976), were introduced during the 94th Congress but lapsed in committee. These bills provided for a retroactive adjustment of status to permanent resident for the Indochinese refugee-parolees.
There are many reasons why Congress has not enacted such legislation. At the time of the original parole, congressional failure to act was based on the hostile mood of the nation toward the massive influx of refugees. *See Hearings on Indochina Refugees, supra* note 1, at 24-25 (Ambassador Brown refers to newspaper headlines proclaiming that 1,000,000 Vietnamese refugees will be dumped

Without such legislation the refugee-parolees would be forced to follow existing adjustment-of-status procedures.[205] There have been

in California); *id.* at 58 (Ambassador Brown refers to public concern over admitting the Indochinese refugees at a time of economic difficulty); *id.* at 16 (Congressman Fish refers to the cold American reception of the refugees). Having only recently extricated itself from an unpopular war in Vietnam, the American populace in the spring of 1975 did not wish to be reminded of the Vietnam debacle. Many Americans feared increased job competition. *But see id.* at 13-14 (the impact of the Indochinese upon the American job market was not expected to be severe; of the 130,000 original refugees, approximately 30,000 would be seeking employment). Also feared were the creation of Vietnamese ghettos and the release of corrupt South Vietnamese officials and war criminals into American society. *See id.* at 24-25, 28-30, 77, 88, 100-01. Indeed, an estimated 55,000 to 60,000 refugees live in California, with 20,000 in San Diego. San Diego Union, Jul. 4, 1977, pt. I, at 1, col. 3. At the present time, there is evidence that key members of Congress, including Rep. Joshua Eilberg, Chairman of the Judiciary Subcommittee on Immigration, have become highly critical of the Indochinese parole program. This criticism seems to be based on the fact that the decision to parole refugee groups is mostly in the hands of the executive branch, though the concurrence of House and Senate leaders is usually obtained beforehand. Once the parole is accomplished, however, Congress is left with the responsibility of appropriating vast sums of resettlement aid for the parolees. This federal spending is hard for members of Congress to reconcile with their constituents. The theme of "American first" creeps into play. However, regardless of their reasons these key members of Congress have been successful in blocking the enactment of adjustment-of-status legislation.

205. *See* I. & N. Act § 245, 8 U.S.C.A. § 1255 (West Supp. 1977). This section sets forth the procedure by which parolees may adjust their status to permanent resident. The parolee must meet the requirements for admission, be currently eligible to receive a visa, and be able to convince the Attorney General to exercise his discretion favorably and grant a visa. The number of visas available to aliens from countries in the Eastern Hemisphere totals 170,000 per year. *Id.* § 201(a), 8 U.S.C.A. § 1151(a). The number of visas available to aliens from the Western Hemisphere totals 120,000 per year. *Id.* These visas are allocated among seven preference categories. The preference system confers priority on aliens who have specified familial relationships to American citizens and residents, or who have specified occupational skills. *Id.* § 203(a), 8 U.S.C.A. § 1153(a). Parolees applying for a visa within each preference category must vie with other aliens from their respective hemisphere (within a 170,000 annual limit for the Indochinese) and from their respective homeland. A maximum of 20,000 aliens from any one country may adjust their status within a given year. *Id.* § 202(a), 8 U.S.C.A. § 1152(a). *See* 111 CONG. REC. 21, 589 (1965) (remarks of Congressman Feighan). Refugee-parolees are generally limited to seeking visas within the seventh preference, which is the refugee category. This category is limited to 10,200 Eastern Hemisphere refugees per year (6% of 170,000), but only 5,200 of these may be used for adjustment of status. The other 5,200 are to be used by conditional entrant refugees. *See* notes 193 & 194 *supra*. Also, if a single country uses up its 20,000 allocation in a single year, that country will be required to allocate its visas during the succeeding year according to the § 203(a) preference category percentages. I. & N. Act § 202(e), 8 U.S.C.A. § 1152(e) (West Supp. 1977). Thus, if the particular preference category to which the alien applies has its supply of visas exhausted, the parolee's application for adjustment of status will be denied. Similarly, if the 20,000 limit has been attained for the parolee's country, his application will be denied. The Indochinese refugee-parolees must compete with all other Eastern Hemisphere aliens. The maximum number of the Indochinese who could adjust their status each year would be 20,000, but it is unlikely that such a maximum could be reached because of competition from

estimates that it would take over twenty-five years[206] before any significant number of the Indochinese refugee-parolees could adjust their status to that of permanent resident.[207] Many of the refugee-parolees would be ineligible under the present adjustment standards and thus would be precluded totally from adjusting their status to that of permanent resident.[208]

The second reason for judicial extension of the Constitution to refugee-parolees is that the aliens are left totally unprotected by the Constitution during the interim between the parole grant and an actual enactment of adjustment-of-status legislation. If Congress was to pass adjustment-of-status legislation and make it retroactive

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other aliens within each preference category, because of the preference percentage requirement that is mandated in years following a full 20,000 allotment, because of the need to convince the Attorney General to exercise his discretion favorably, and because of the labor certificate requirement.

Refugee-parolees may qualify for a higher preference (which offers a larger number of visas per year) by being the unmarried son or daughter of an American citizen, *id.* § 203(a)(1), 8 U.S.C.A. § 1153(a)(1); by being the spouse, unmarried son or daughter of a permanent resident, *id.* § 203(a)(2), 8 U.S.C.A. § 1153(a)(2); by being a talented professional, artist or educator, *id.* § 203(a)(3), 8 U.S.C.A. § 1153(a)(3); by being the married son or daughter of an American citizen, *id.* § 203(a)(4), 8 U.S.C.A. § 1153(a)(4); by being the brother or sister of an American citizen, *id.* § 203(a)(5), 8 U.S.C.A. § 1153(a)(5); or by being able to obtain labor certification, *id.* § 203(a)(6), 8 U.S.C.A. § 1153(a)(6).

A parolee attempting to adjust his status within the § 203(a)(3) or (a)(6) preference categories, which cover aliens skilled in the professions, science, art, and culture, in addition to skilled and unskilled laborers, must obtain a labor certification from the Secretary of Labor in order to receive a visa. To obtain a labor certification, the refugee's job must be one for which there is not a sufficient number of workers in the United States who are "able, willing, qualified, and available." Additionally, the refugee cannot become certified if his employment will adversely affect the wages and working conditions of such workers similarly employed. *Id.* § 212(a)(14), 8 U.S.C.A. § 1182(a)(14). Failure to obtain this certification will prevent the parolee from adjusting status. The labor certification requirement was waived at the time of the parole of the Indochinese, and they will be exempt from the requirement if they adjust their status under § 203(a)(7). *See* Rubin, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76 (1976).

It should be noted that a recent regulation, 8 C.F.R. § 212.8(b) (1977), will permanently exempt from labor certification any refugee-parolee who has been continuously present physically within the United States for at least two years. At the present time, it is not clear whether this regulation will exempt refugee-parolees from labor certification when attempting to adjust their status to permanent resident within the § 203(a)(3) or (a)(6) preference categories.

206. Bernsen, *Rights of Refugees*, 52 INTERPRETER RELEASES 407, 409 (1975). This estimate is based on a maximum of 5,200 refugee-parolees adjusting their status per year. *See* note 205 *supra*.

207. *See* note 205 *supra*.

208. *Id.*

to the date of the original parole, the retroactivity would not provide true protection. Realistically, some refugee-parolees who are damaged because they lack constitutional protection[209] cannot be made whole by retroactive legislation enacted several years in the future. The parolee's injury is immediate, and retroactive legislation does little to compensate for some past injuries.

For example, the refugee-parolee who is ordered excluded without a hearing and is subsequently deported back to his homeland might be imprisoned.[210] Retroactive legislation that would allow the refugee-parolee to adjust his status had he not been excluded would not prevent this result. But as a permanent resident, the alien would be subject to expulsion rather than exclusion proceedings.[211] The alien would be entitled to a procedural due process hearing on his expulsion.[212] The hearing would have enabled the parolee to adequately present the merits of his case and possibly prevent his deportation.

More than two years have passed since the first parole of the Indochinese.[213] No adjustment-of-status legislation has been passed. Three such bills expired in the last Congress.[214] It is impossible to tell how much longer the Indochinese refugee-parolees must wait for Congress to act.[215] The refugee-parolees lack constitutional protection throughout the delay.

## SUMMARY

It is this author's conclusion that the Supreme Court's ruling in *Leng May Ma v. Barber* should not be so broadly interpreted as to encompass refugee-parolees. Refugee-parolees are clearly distinguishable from the parolees contemplated by the *Leng May Ma* Court. Instead, the Second Circuit's subsequent holding in *United States ex rel. Paktorovics v. Murff* should be controlling. The courts, however, should expand on the *Paktorovics* holding and judicially

209. Leng May Ma v. Barber, 357 U.S. 185 (1957); Kaplan v. Tod, 267 U.S. 228 (1925).

210. *See* United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958).

211. I. & N. Act § 241(a), 8 U.S.C.A. 1251(a) (West Supp. 1977).

212. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

213. The first parole commenced on April 21, 1975.

214. *See* note 204 *supra*.

215. After this Comment went to press, President Carter signed into law an act of Congress authorizing a grant of permanent resident alien status to the Indochinese refugees-parolees. The grant covers all the Indochinese paroled since April 1975, including those boat persons who have yet to arrive in the United States. This uniform adjustment-of-status act, however, does not protect members of future refugee-parolee groups. Act of Oct. 28, 1977, Pub. L. No. 95-145, — Stat. —.

grant to the present Indochinese refugee-parolees a constitutional status equivalent to that enjoyed by permanent resident aliens. Future refugee-parolee group members should also be judicially granted such status, unless Congress enacts legislation at the time of parole specifically denying these refugee-parolees permission to settle permanently within the United States.

From the viewpoint of the Indochinese refugee-parolees, congressional legislation, giving the Indochinese a blanket adjustment-of-status to permanent resident option, would be the optimum solution. Such legislation would enable the Indochinese to become eligible for the statutory benefits as well as the constitutional protections enjoyed by permanent residents. Absent such legislation, however, the Indochinese should be entitled to at least increased constitutional protection, be it granted by the courts or Congress.

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