

Northwestern Journal of Law & Social Policy

Volume 15
Issue 1 *Fall*

Article 1

Fall 2019

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

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Recommended Citation

Andrew I. Schoenholtz, *The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven*, 15 *Nw. J. L. & Soc. Pol'y.* 1 (2019).
<https://scholarlycommons.law.northwestern.edu/njlsp/vol15/iss1/1>

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

Andrew I. Schoenholtz*

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. However, in about half of the designated nationalities—including the largest groups—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 group status in this way 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 United States. For that reason, Congress required that eligible individuals had to already be in the United States 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 repeatedly opened up temporary protection for some new arrivals through twenty re-designations of eleven nationalities. The data shows that it is not the policy that attracts people to the United States, 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 crisis that 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 crisis does not end would effectively lead to long-term TPS programs. Over time, people put down strong roots in their communities through work, family, education, and religious institutions. Given this limitation in the current law, Congress should adopt ways to keep TPS temporary both by facilitating return when conflict ends in a reasonable period of time and by

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enabling those who have become part of their American communities to be recognized as such when violence and instability is prolonged.

TPS policies have not resulted in a significant magnet effect after twenty-six designations and one hundred twenty-two separate extensions covering twenty-two nationalities. Accordingly, Congress can act more generously by providing a temporary measure of protection to all those who flee serious harm or devastation and by transitioning temporary protection to a permanent status for individuals who cannot return home safely after a reasonable period of time. By enacting these reforms, lawmakers will enable TPS to achieve its full potential as a robust humanitarian policy.

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INTRODUCTION

Americans generally think of the great nineteenth-century Irish migration as economically motivated and associate those 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 Given the forced nature of this migration, these Irish immigrants are most accurately characterized as refugees fleeing a humanitarian disaster exacerbated by British political machinations.²

¹ See CIARÁN Ó. MURCHADHA, THE GREAT FAMINE: IRELAND’S AGONY 1845-1852, 180 (2013).

² See CHRISTINE KINEALY, THIS GREAT CALAMITY: THE IRISH FAMINE 1845-52 299, 353, 357–358 (1995) (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

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 reunification 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, they would be much like the women and children fleeing Central American violence—in need of humanitarian protection but without legal status to enter. Like the women and children fleeing Central American violence today, those Irish migrants might be uncharitably labeled “illegals” too.

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 in various regions of the world.⁴ In such dangerous situations, the failure of states to live up to this central responsibility

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 ASS'N OF AM. 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) (In 1845, the first signs of the potato blight caused by the fungus *Phytophthora infestans* became apparent in Ireland and Western Europe. “In 1846, emigration, though large—116,000 people left Ireland—had had an orderly character. By the spring of 1847, people were not leaving Ireland; they were fleeing, the way a crowd flees a burning building: heedlessly, recklessly, with no thought other than to get out. In 1847, 215,000 Irish sailed to North America, while 150,000 headed to Britain.” “[B]ad luck, a primitive infrastructure, and a poverty bordering on immiseration can only explain so much of the one-third population loss. British policy makers also bore much responsibility for what happened. . . . What turned a natural disaster into a human disaster was the determination of senior British officials to use relief policy as an instrument of nation building in one of the most impoverished parts of the empire.” “The result was a relief program that, in its particulars, was more concerned with fostering change than with saving lives. Thus, to facilitate agricultural modernization, London demanded that the inefficient small farmer surrender his two- or three-acre plot in order to qualify for relief; and to promote self-reliance, Parliament passed the Poor Law Extension Act, which transferred the entire cost of relief to Ireland.”).

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 under the UN Refugee Convention because they have not been “specifically targeted”); DENNIS GALLAGHER ET AL., 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 LOTHER 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); J.J. MESSNER, FUND FOR PEACE, THE FRAGILE STATES INDEX 6–7, 11 (2017), <https://fragilestatesindex.org/2017/05/14/fsi-2017-factionalization-and-group-grievance-fuel-rise-in-instability/> (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,

results in forced displacement and international migration. So far, American law and policy makers have responded to such humanitarian crises in a mixed fashion through a rather limited form of temporary protection.

In 1990, Congress enacted Temporary Protected Status (TPS), balancing two goals that serve very different purposes.⁵ First, the TPS statute allowed the federal government to provide a temporary legal status to nationals from countries where the Secretary of Homeland Security⁶ 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. In this way, TPS protects designated nationals from return to countries where they face significant violence and other serious harm; many such nationals merit protection because they possess what scholars have called a “well-founded fear of death.”⁷ As then-Representative Hamilton Fish Jr. (R-NY) stated on the House Floor regarding a 1989 safe haven bill: “The threat to human life posed by war or natural disaster can be as great—or even greater—than the risk to life posed by the threat of persecution.”⁸

Second, Congress aimed to prevent the grant of temporary legal status from subsequently encouraging large numbers of foreign nationals to migrate to the United States.⁹ Unfortunately, the way Congress and the Executive have resolved the tension between humanitarian 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 how these policies have balanced humanitarian protection and border control. The analysis considers whether TPS has proven to be a magnet attracting significant numbers of new arrivals. The Article also discusses what it would take to keep TPS temporary and to create such a safe haven for ongoing arrivals from humanitarian crises. Taking future control of unauthorized immigration and work into account, this Article proposes ways of ensuring that all those with a well-founded fear of serious harm are protected. Finally, it posits ways to make TPS truly temporary, both by facilitating return when conflict and other crises end in a reasonable period of time and by enabling those who have become part of their American communities to be recognized as such when violence and instability is protracted.

and South Sudan. The next most fragile states are the nine countries classified as “High Alert.” Of the 178 countries 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”).

⁵ 8 U.S.C.A § 1254a(a)(1)(B) (West 2012).

⁶ In 1990, Congress authorized the Attorney General, who oversaw the Immigration and Naturalization Service, to designate TPS nationalities. When Congress created the Department of Homeland Security through the Homeland Security Act of 2002, Congress transferred those powers to the Secretary of Homeland Security. Public Law 107-296, § 102, 116 Stat. 2135, 2141–42 (2002).

⁷ See Aristide R. Zolberg, et al., *Who Is a Refugee?* Chapter 1, in *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* (1989); Dennis Gallagher et al., *Temporary Safe Haven: The Need for North American-European Responses*, in *REFUGEES & INTERNATIONAL RELATIONS* 333 (Loescher & Monahan eds., 1989).

⁸ 135 CONG. REC. 25,837 (1989).

⁹ See 136 CONG. REC. 27,131 (1990) (statement of Rep. Mary Rose Oakar (D-Ohio) asserting that arrival cut-off dates would eliminate the risk of a magnet effect).

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

Lawmakers constructed TPS out of a 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 general statutory authority to enforce the immigration laws,¹⁰ 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 if they were deported to their home countries due to political strife and conflict. EVD did not provide these individuals with legal admission or immigration status—it only provided for a stay of deportation and work authorization if they were already in the United States.¹¹ 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.¹² 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.¹³

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.¹⁴ Starting in 1981 and throughout that decade, lawmakers asked the Attorney General to grant EVD to Salvadorans who had fled the civil war, but no Attorney General did so.¹⁵ 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.¹⁶

¹⁰ See 8 U.S.C.A § 1103(a)(1) (West 1952).

¹¹ Legal immigration status enables a non-citizen to remain in the United States as long as that status is valid. It is a more secure form of a permission to live in the country as compared to a “stay of deportation” or “a stay of removal,” which can be lifted at any time. EVD did not change the unauthorized immigration status of its beneficiaries, and under current laws, unauthorized status can restrict those who become eligible for a legal immigration status from obtaining one.

¹² GALLAGHER ET AL., *supra* note 3, at 19.

¹³ See *id.*

¹⁴ 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://edsources.org/wp-content/uploads/old/Deferred-Action-Congressional-Research-Service-Report1.pdf>.

¹⁵ Diamond, *supra* note 14; 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).

¹⁶ 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

One additional extra-statutory device used by Attorney Generals was Deferred Enforced Departure (DED). Alike in function and differing only in name, DED is a variation of EVD, is granted through presidential memoranda or executive orders, and is based on the power to conduct foreign relations.¹⁷ Like EVD, DED does not grant immigration status to individuals but merely prevents their removal from the United States and provides the opportunity to apply for employment authorization.¹⁸ 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.¹⁹ President Bush created DED because of ongoing litigation regarding EVD that involved political motivations going back to the Reagan Administration.²⁰ Subsequently, Presidents have authorized DED for Persian Gulf evacuees (1991), Salvadorans (1992), Haitians (1997), and Liberians (1999 and 2007).²¹ Currently, nationals of Liberia are the only group authorized for DED.²² 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, 2019.²³ President Trump authorized a 12-month extension of this DED wind-down until March 31, 2020.²⁴

Neither EVD nor DED was codified in law.²⁵ The lack of legal standards concerned many lawmakers,²⁶ who addressed this by creating such standards through the TPS statute. 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; additionally, it imposed a supermajority requirement

Committee also identified EVD as inherently flawed and recognized that the Temporary Safe Haven Act of 1988 responded to and redressed these concerns satisfactorily).

¹⁷ *Adjudicator's Field Manual*, § 38.2: *Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIGR. SERVS., § 38.2(a) (2014), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html#0-0-0-591>; see also *Congress Steps up Protection for Chinese Students*, REFUGEE REPS., 9–10 (July 1989) (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”).

¹⁸ *Id.* at § 38.2(c).

¹⁹ Exec. Order, 55 Fed. Reg. 13897 (Apr. 13, 1990), <http://cdn.loc.gov/service/ll/fedreg/fr055/fr055072/fr055072.pdf>.

²⁰ Bill Frelick & Barbara Kohnen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUD. 339, 342 (1995); Peter Perl, *2nd Area Church Group Gives Sanctuary to Salvadoran Refugees*, WASH. POST (Oct. 11, 1983) (those lobbying for EVD for Salvadorans argued that the decision not to grant was that the Reagan Administration supported the right-leaning Salvadoran government).

²¹ AM. IMMIGR. COUNCIL, EXECUTIVE GRANTS OF TEMPORARY IMMIGRATION RELIEF, 1956-PRESENT 7–9 (Oct. 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/executive_grants_of_temporary_immigration_relief_1956-present_final_0.pdf.

²² See *Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIG. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status/deferred-enforced-departure>.

²³ *Memorandum on Expiration of Deferred Enforced Departure for Liberians* (Mar. 27, 2018), <https://www.govinfo.gov/content/pkg/DCPD-201800196/pdf/DCPD-201800196.pdf>.

²⁴ 84 Fed. Reg. 13,059, 13,059–64 (Apr. 3, 2019).

²⁵ 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).

²⁶ 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”).

for a group's adjustment of status to lawful permanent residence (LPR) and limited eligibility to those already present in the United States at the time of designation.²⁷

The EVD and DED frameworks adopted by the TPS legislation provided temporary safety only to those already present in the United States. TPS does not protect individuals fleeing ongoing humanitarian emergencies if they arrive in the United States after the Attorney General (now the Secretary of Homeland Security) establishes the program for a particular nationality.²⁸ Neither DED or EVD had generally been available to members of those nationalities seeking admission to the United States; similarly, the TPS provisions explicitly provide that TPS is not available to those seeking admission only for the purpose of gaining TPS.²⁹ Since none of these policies have applied to individuals fleeing an ongoing crisis, protection is only partial.³⁰

The TPS legislation specifies just which country condition circumstances merit designation and protection. Section 244(b)(1) of the Immigration and Nationality Act sets out three possible findings that the Attorney General and Secretary 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

²⁷ 8 U.S.C.A § 1254a (West 2012).

²⁸ *Id.* at § 1254a(c)(1)(A).

²⁹ *Id.* at § 1254a(c)(5).

³⁰ 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*, 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 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).

(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.³¹

When Congress enacted TPS, civil wars in Central America dominated their focus. Supporters of the statute pointed to a long history, that dated back to President Eisenhower's administration, of providing a temporary haven to individuals until it was safe to return or be deported. In recommending passage of the "Temporary Safe Haven Act of 1988" as amended to the whole House, the House Judiciary Committee reported that Republican and Democratic Administrations had provided temporary safety to nationals of thirteen countries who could not show that they were persecuted refugees:

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.³²

During final consideration of the TPS provisions on October 2, 1990, Rep. Jack Brooks (D-Tex.) summed up the purpose of temporary safe haven on the House Floor 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."³³

Opponents of the statute 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. For example, as Rep. Bill McCollum (R-Fla.) said on the House Floor in October 1990, "[The temporary safe haven provisions] keep lots of illegals here indiscriminately for extended periods of time."³⁴ The previous year, Rep. McCollum argued on the House Floor that "by and large the Salvadorans who are in this country are here for economic reasons."³⁵ Referring to temporary safe haven as an amnesty, Rep. Lamar Smith (R-Tex.) said on the House Floor during final deliberations of the TPS provisions:

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

³¹ 8 U.S.C.A § 1254a(b)(1).

³² H.R. REP. NO. 100-627, at 6.

³³ 136 CONG. REC. 27,129 (1990).

³⁴ *Id.*

³⁵ 135 CONG. REC. 25,831 (1989).

be fair to those who have been law abiding, and we should not reward lawbreakers to the detriment of the law abiders.³⁶

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 it made no sense to grant asylum when conditions can change quickly. During final consideration of the TPS provisions on the House Floor in October 1990, he argued that the bill would grant:

amnesty to a bunch of illegals who are here from four for [sic] five countries and picking them out [sic] 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 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.³⁷

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

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

³⁶ 136 CONG. REC. 27,129. Some members today continue to view TPS through the lens of amnesty. For example, Reps. Steve King (R-Iowa), Louie Gohmert (R-Tex.) and Michael McCaul (R-Tex.), Rep. Mo 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.” Press Release, Congressman Mo Brooks, Brooks Introduces Legislation to Reform TPS Program (May 24, 2017), <https://brooks.house.gov/media-center/news-releases/brooks-introduces-legislation-reform-tps-program>.

³⁷ 136 CONG. REC. 27,129.

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.³⁸

Rep. Gray ultimately focused this House Floor debate with Rep. McCollum on the fact that only refugees fleeing targeted persecution are eligible for asylum but that refugees fleeing war also deserve to remain safely in the United States:

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.³⁹

In response, Rep. McCollum asserted that refugees fleeing war 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."⁴⁰ As a matter of law, war refugees who are persecuted on account of a protected characteristic, such as political opinion or ethnicity, are eligible for asylum, but those who are simply trying to flee fighting are not. The latter often constitute the majority of those displaced in civil wars. Whether or not Rep. McCollum understood this distinction or simply opposed any expansion of humanitarian protection is not clear from this debate. Rep. Bruce 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.⁴¹

Had the Attorney General exercised his discretion in the 1980s to apply EVD to additional countries, such as El Salvador, Liberia, Lebanon, and Kuwait, Congress might not have enacted

³⁸ *Id.* at 27,130.

³⁹ *Id.* (statement of Rep. Gray).

⁴⁰ *Id.*

⁴¹ *Id.* at 27,131.

TPS.⁴² However, many members of Congress believed that legal standards set by statute would ensure a more consistent application of this non-deportation protection. For example, Rep. Mary Rose Oakar (D-Ohio) 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.”⁴³

Rep. Oakar went on to explain that she and twelve other members of Congress asked the Attorney General to grant Extended Voluntary Departure to Lebanese nationals but were told that doing so “would set a bad precedent for people from other strife-torn countries.”⁴⁴ She concluded

⁴² As early as 1981, members of Congress, including Sen. Edward Kennedy, called on the Attorney General to grant EVD to Salvadorans. GALLAGHER ET AL., *supra* note 3, at 38-39. This policy paper discusses the political controversies over EVD for Salvadorans who fled the civil war. *Id.* at 33-44. Congressional pressure continued during the decade. Based on their deep concern regarding human rights violations and violence in El Salvador and dissatisfaction over the Reagan Administration rejection of EVD for Salvadorans, Rep. Moakley and Sen. DeConcini introduced safe haven legislation for Salvadorans in 1984. *Id.* at 40. When Salvadoran President Duarte asked President Reagan to grant EVD to Salvadorans in 1987, Rep. Moakley called on the President to do so via a House Floor statement. 133 CONG. REC. 9800 (1987). Due to the Reagan and Bush Administrations’ disagreements with the Congressional members who supported safe haven for Salvadorans, the TPS legislation explicitly granted TPS to Salvadorans in 1990. Pub. L. No. 101-649 § 303, 104 Stat. 5035 (Nov. 29, 1990).

⁴³ *Id.* at 27,130. Rep. Oakar reported the problems faced by Lebanese nationals in this regard. “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 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. 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.” *Id.* at 27,130-27,131.

⁴⁴ *Id.* at 27,131.

that “[b]ecause the Justice Department is opposed to helping these people, the only solution is legislative.”⁴⁵

But perhaps the most contested issue Congress debated involved concerns of some members 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.⁴⁶ According to this perspective, such individuals would use this safe haven provision as a vehicle for economic advancement rather than to fulfill its humanitarian intent.⁴⁷ The Bush Administration also feared that grants of temporary protection would establish precedent which would encourage people from other countries in similar circumstances to expect comparable treatment.⁴⁸

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.”⁴⁹

The author of the safe haven provisions, Rep. Joe 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?”⁵⁰

Sen. Dennis 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.”⁵¹

Rep. Moakley addressed the various objections to TPS:

⁴⁵ *Id.*

⁴⁶ See *Temporary Safe Haven Act of 1987: Hearing Before the Subcomm. on Immigration, Refugees, and Int’l Law of the H. Comm. on the Judiciary*, 100th Cong. 24 (1987) [hereinafter *Temporary Safe Haven Hearing*] (statement of Delia Combs, Assistant INS Commissioner) (expressing the incumbent Administration’s belief that enacting 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”).

⁴⁷ 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 General 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 Law. 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) (Sen. 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).

⁴⁸ 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).

⁴⁹ 136 CONG. REC. 27,131 (1990).

⁵⁰ *Id.*

⁵¹ *Id.* at 35,611.

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 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.⁵²

By a vote of 285 to 131 with 17 abstentions, the supporters of temporary safe haven provisions defeated the amendment proposed by Rep. McCollum.⁵³

Beyond the policy's humanitarian roots, some lawmakers emphasized another goal of this statutory form of relief. Sen. DeConcini argued that TPS creates a "registration system" that could "facilitate the return of Salvadorans when the period of temporary protection status expires."⁵⁴ This important point was consistently raised in discussions surrounding safe haven legislation. In a hearing on the Temporary Safe Haven Act of 1987, for example, a precursor to what would later become TPS, both Doris Meissner, future Commissioner of the INS from 1993 until 2000, and Rep. Fish (R-NY) viewed an effective safe haven registration system as an improvement on EVD.⁵⁵ 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.⁵⁶ In this way, legislators established TPS as a humanitarian provision with the goal of facilitating return and enforcement of the immigration laws when temporary protection was no longer needed.

II. THE PERCEPTION AND REALITY OF MAGNET EFFECTS

Given lawmakers' concerns, this analysis begins by considering the two most promising approaches that might reveal whether TPS acts as a magnet: (1) TPS enrollment following re-designations, and (2) border inadmissibility determinations and apprehensions following designations, extensions, and re-designations of TPS nationalities.

To address the concern that TPS would create a magnet effect resulting in greater cross-border movements, Congress limited granting TPS to those in the United States at the time when a DHS Secretary establishes the designation for a particular country.⁵⁷ In cases where a Secretary extends the designation, the extension only covers those who were in the United States before the

⁵² *Id.* at 27,132.

⁵³ *Id.* at 27,132–33.

⁵⁴ *Id.* at 35,611.

⁵⁵ *Temporary Safe Haven Hearing*, *supra* note 46, at 36, 155 (1987).

⁵⁶ *Id.* at 36.

⁵⁷ *See* Frelick & Kohnen, *supra* note 20, at 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").

initial cut-off date.⁵⁸ Since the designation cut-off date defines eligibility, Secretaries are limited in their ability to provide TPS to continuing arrivals from on-going humanitarian emergency. At most, Secretaries can advance the eligibility cut-off date through re-designation.⁵⁹ This mechanism does allow those who enter the United States after an initial designation and before a re-designation to register for TPS, even though it does not address ongoing humanitarian arrivals that occur following re-designation.⁶⁰ Secretaries have re-designated eleven of the twenty-two countries (including one province) since the statute became effective in 1990: Angola, Burundi, Haiti, Kosovo Province, Liberia, Sierra Leone, Somalia, South Sudan, Sudan, Syria, and Yemen.⁶¹ To date, Secretaries have re-designated countries twenty times, some more than once.

A. TPS Enrollment Following Re-Designations

Policymakers concerned about a potential magnet effect thought that the TPS designation might encourage new arrivals to come to the United States in order to gain this special benefit.⁶² TPS enrollment following re-designation provides valuable, though imperfect, information about any such effect on new arrivals. Enrollment following re-designation is open to three groups. Re-designation enables those who arrived after the initial designation but before the new cut-off date to enroll in TPS. Those who arrived before the initial designation and registered then, of course, may enroll again as long as they continue otherwise to be eligible for TPS. Finally, those who arrived before the initial designation and could have, but did not, register for TPS at that time, may register for the first time during the re-designation enrollment period.⁶³ The publicly available government data does not separate out these three groups, which would enable the identification of only those who arrived after the initial designation and before the re-designation.

While this metric is not perfect, the analysis still reveals what happened in terms of additional registrations during the re-designation period. Table 1 provides DHS estimates of TPS beneficiaries following the re-designations. In the cases of Liberia, Somalia, South Sudan, Sudan,

⁵⁸ The statute requires continuous physical presence “since the effective date of the most recent designation of that state.” 8 U.S.C.A § 1254a(c)(1)(A)(i). The statute refers to an “initial period of designation” and an “extended period of designation,” making it clear that only those who can demonstrate continuous physical presence since the initial designation are eligible for TPS. 8 U.S.C.A § 1254a(b)(3)(A).

⁵⁹ The statute authorizes broad authority to designate as long as country conditions findings are made warranting such designation and explicitly refers to eligibility based on “the most recent designation.” 8 U.S.C.A § 1254a(c)(1)(A)(i).

⁶⁰ The statute provides for registration in connection with “the most recent designation.” 8 U.S.C.A § 1254a(c)(1)(A)(i).

⁶¹ In addition, three of the twenty-two countries—El Salvador, Liberia, and Sierra Leone—were designated more than once after termination of the initial designation. *See* Table 3: Duration of TPS Table, *infra* p 24; *Temporary Protected Status*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/temporary-protected-status> (last updated Nov. 6, 2019) (TPS notices for each country); *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Nov. 18, 2019) (information available under “Countries Currently Designated for TPS” and “Countries Previously Designated for TPS”).

⁶² *See notes* 46 and 47 and accompanying text.

⁶³ All three groups may be able to demonstrate continuous physical presence since “the effective date of the most recent designation.” 8 U.S.C.A § 1254a(c)(1)(A)(i).

and Syria, re-designations occurred more than once.⁶⁴ The estimated number of beneficiaries is reported after DHS takes its next action to extend, re-designate, or terminate TPS.

As Table 1 below shows, four TPS nationalities decreased in size following re-designation: Angola, Kosovo Province, Somalia, and Sudan (three times). Except in the case of Haiti, which is fully discussed below, the increases following a re-designation among the other nationalities set out in Table 1 below ranged from ten (South Sudan) to 3,000 (Liberia). The difficulty of reaching the United States means that African and Middle Eastern refugees largely remain in their region or at most try to reach Europe. For example, as DHS Secretary Nielsen reported in the 2018 extension of TPS for Syrians: “After nearly seven years of armed conflict, over half of Syria’s pre-war population has been forced to flee from their homes. There are 11.5 million displaced Syrians in the region, both inside Syria and in neighboring countries.”⁶⁵ Simply looking at the Table 1 numbers of nationals who registered following re-designation for TPS makes it clear that neither the original designations nor the re-designations attracted a sizeable flow of refugees from these countries. An estimated 2,600 Syrians, for example, registered initially in 2012; some 5,000 after the first re-designation, around 5,800 following the second, and about 7,000 registered after the third re-designation in 2016.⁶⁶ Thus with regards to the re-designations of these ten countries or provinces, including multiple re-designations of Liberia (three), Somalia (two), South Sudan (three), Sudan (three), and Syria (three), policymakers’ concerns that TPS has any potential magnet effect for these nationals is unsubstantiated by any empirical evidence.

⁶⁴ See *Temporary Protected Status*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/temporary-protected-status> (last updated Nov. 6, 2019) (TPS notices for each country *Temporary Protected Status*); U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Nov. 18, 2019); see Table 3: Duration of TPS Table, *infra* p. 24.

⁶⁵ 83 Fed. Reg. 9329, 9331 (Mar. 5, 2018).

⁶⁶ *Id.* at 9330.

*Table 1: DHS Estimates of TPS Beneficiaries for Re-designated States*⁶⁷

	Initial Designation	Re-designation	2 nd Re-designation	3 rd Re-designation
Angola	3,372	1,000 ⁶⁸	N/A*	N/A*
Burundi	400	1,000 ⁶⁹	N/A*	N/A*
Haiti	47,000	60,000	N/A*	N/A*
Kosovo Province	5,000	1,000 ⁷⁰	N/A*	N/A*
Liberia I	5,000	8,000	10,000 ⁷¹	N/A*
Liberia II	2,400	3,792 ⁷²	N/A*	N/A*
Sierra Leone	4,000	5,000 ⁷³	N/A*	N/A*
Somalia	2,000	250	270	N/A*
South Sudan	<10	<20	50	70
Sudan	4,000	1,500	648	600 ⁷⁴
Syria	2,600	5,000	5,800	7,000
Yemen	1,000	1,250	N/A*	N/A*

*No subsequent re-designations

⁶⁷ Compiled using information from *Temporary Protected Status*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/temporary-protected-status> (last updated Nov. 6, 2019) (using the TPS notices for each country) and U.S. CITIZENSHIP & IMMIGRATION SERVICES., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Nov. 18, 2019). As the round numbers suggest and the notices generally state, these are estimates. See, e.g., *Extension of the Designation of Sierra Leone Under the Temporary Protected Status Program*, 65 Fed. Reg. 67,405, 67,407 (Nov. 9, 2000) (The Attorney General states: "I estimate that there are approximately 5,000 nationals of Sierra Leone (or aliens who have no nationality and who last habitually resided in Sierra Leone) who have been granted TPS and who are eligible for reregistration." Moreover, the author has learned from discussions with DHS officials that with respect to termination notices, the estimates actually represent all individuals who have received TPS following the initial designation and subsequent re-designations unless that status was withdrawn by DHS. Finally, the government reports these estimates in the extension or termination notice that follows the relevant designation or re-designation notice).

⁶⁸ In the Termination Notice for Angola, the Attorney General estimated that only 316 Angolans received TPS benefits in 2003. *Termination of Designation of Angola Under the Temporary Protected Status Program*, 68 Fed. Reg. 3896, 3897 (Jan. 27, 2003).

⁶⁹ In the Termination Notice for Burundi, the DHS Secretary estimated that only 30 Burundians had been granted TPS as of 2007. *Termination of the Designation of Burundi for Temporary Protected Status*, 72 Fed. Reg. 61,172, 61,174 (Oct. 29, 2007).

⁷⁰ In the Termination Notice for Kosovo Province, the Attorney General estimated that no more than 1,000 Kosovars had been granted TPS as of 2003. *Termination of Designation of the Province of Kosovo in the Republic of Serbia in the State of the Federal Republic of Yugoslavia (Serbia-Montenegro) Under the Temporary Protected Status Program*, 65 Fed. Reg. 33,356–57 (Jan. 27, 2003).

⁷¹ In the 2006 Termination Notice for Liberia, the DHS Secretary estimated that about 3,600 Liberians had been granted TPS at that point in time. *Termination of the Designation of Liberia for Temporary Protected Status*, 72 Fed. Reg. 55,000, 55,004 (Sept. 20, 2006).

⁷² In the 2016 Termination Notice for Liberia, the DHS Secretary estimated that about 2,160 Liberians received TPS benefits at that point in time. *Six-Month Extension of Temporary Protected Status Benefits for Orderly Transition Before Termination of Liberia's Designation for Temporary Protected Status*, 81 Fed. Reg. 66,059, 66,061 (Sept. 26, 2016).

⁷³ In the Termination Notice for Sierra Leone, the DHS Secretary estimated that about 3,700 Sierra Leoneans received TPS benefits as of 2003. *Termination of the Designation of Sierra Leone for Temporary Protected Status*, 68 Fed. Reg. 52,407, 52,410 (Sept. 3, 2003).

⁷⁴ DHS estimates some 1,040 Sudanese TPS beneficiaries in the 2017 Termination Notice. *Termination of the Designation of Sudan for Temporary Protected Status*, 82 Fed. Reg. 47,228, 47,230 (Oct. 11, 2017).

Policymakers view nationals of Haiti as more susceptible to a magnet effect because of the proximity of that country and the long history of Haitian immigration to the United States, including significant legal immigration.⁷⁵

The TPS registration numbers are useful in assessing whether the 2010 TPS designation⁷⁶ or the subsequent 2011 re-designation attracted additional Haitians to the United States. We first examine the registration numbers. Table 2 includes 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:

Table 2: Haitian TPS Beneficiaries

Date of Re-Designation and Extension	Number of Haitian 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 for Haiti was made a mere eight days after the January 2010 earthquake that killed approximately 230,000 people, affected three million people, and significantly destroyed infrastructure across the island nation.⁷⁷ When the initial 18-month designation was made, the devastating effects of the earthquake were evident but it was unclear how long Haiti would remain in a state of crisis. As reported in the May 2011 re-designation, some 47,000 Haitians had successfully registered for TPS in 2010.⁷⁸ According to that re-designation, UNICEF reported that 1.6 million Haitians, including 800,000 children, were displaced from their homes.⁷⁹ In addition, severe cholera outbreaks, including about 200,000 known cases, threatened to spread nationwide.⁸⁰ With these dire conditions, the Secretary of DHS re-designated Haiti to enable individuals who were lawfully admitted to the United States after the earthquake through humanitarian parole or temporary visas to register for and remain legally under TPS.⁸¹ In fact, DHS gave special permission to orphaned children to enter the United States following the earthquake by using humanitarian parole, a discretionary authority for urgent humanitarian emergencies under INA Sec. 212(d)(5).⁸²

⁷⁵ According to the Migration Policy Institute, over 675,000 Haitian immigrants lived in the United States in 2015. Jennifer Schulz and Jeanne Batalova, *Haitian Immigrants in the United States* (Aug. 2, 2017), <https://www.migrationpolicy.org/article/haitian-immigrants-united-states>.

⁷⁶ See *Designation of Haiti for Temporary Protected Status*, 75 Fed. Reg. 3,476 (Jan. 21, 2010).

⁷⁷ *Extension and Re-designation of Haiti for Temporary Protected Status*, 76 Fed. Reg. 29,000–01 (May 19, 2011).

⁷⁸ *Id.* at 29,002.

⁷⁹ *Id.* at 29,001.

⁸⁰ *Id.*

⁸¹ *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.”).

⁸² *Secretary Napolitano Announces Humanitarian Parole Policy for Certain Haitian Orphans*, U.S. DEP'T OF HOMELAND SEC. (Jan. 18, 2010), <https://www.dhs.gov/news/2010/01/18/secretary-announces->

Following this re-designation, approximately 13,000 additional individuals present in the United States by or before January 12, 2011 registered for TPS, for a total of 60,000 TPS beneficiaries.⁸³ This number includes three groups: those among the 47,000 Haitians who registered after the initial 2010 designation; those who met the continuous residence requirement and could have but did not register in 2010 but chose to do so after the re-designation; and those, like the orphaned children, who arrived following the initial designation but before the new cut-off date established by the re-designation. Without a detailed breakdown of this DHS data, we cannot know for sure how many of the 60,000 were new registrants who had arrived lawfully during the first year following the earthquake—the intended beneficiaries of the re-designation according to the DHS Secretary. The number of legal Haitian admissions at that time certainly shows that most if not all of the 13,000 additional registrants could have been the orphans and others allowed to enter the United States lawfully.⁸⁴ It remains a possibility, of course, that some of the new registrants may have already been in the United States when Haiti was initially designated in 2010, but did not register for TPS for good cause⁸⁵ or for other reasons such as cost, fear of providing DHS with information that could facilitate deportation, or an inability to take time off from work to apply for the status.⁸⁶

humanitarian-parole-policy-certain-haitian-orphans. On humanitarian parole, *see* U.S. CITIZEN & IMMIGR. SERVS., *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states>. Haitians with visitor or other non-immigrant visas also entered the United States following the earthquake and before the advanced cut-off date of the re-designation. *See 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>; *Extension and Re-designation of Haiti for Temporary Protected Status*, 76 Fed. Reg. 29,000, 29,002 (May 19, 2011).

⁸³ *See Extension of the Designation of Haiti for Temporary Protected Status*, 77 Fed. Reg. 59,943, 59,945 (Oct. 1, 2012).

⁸⁴ 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* U.S. DEP'T OF HOMELAND SECURITY, 2012 YEARBOOK OF IMMIGRATION STATISTICS 68 (2013), 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).

⁸⁵ 8 C.F.R. § 244.2(f)(2) (2018) (identifying 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). The regulation sets out four different types of “good causes,” including, for example, that the TPS applicant is a “nonimmigrant or has been granted voluntary departure status or any relief from removal.” “Good cause” in this case is used as a general term of art. The terminology is not found in the regulation, but its general meaning is applicable here.

⁸⁶ *See Designations of Temporary Protected Status and Fraud in Prior Amnesty Programs: Hearing Before the Subcomm. on Immigr. & Claims of the H. Comm. on the Judiciary*, 106th Cong. 13 (1999) (statement of Paul Virtue, INS Gen. Counsel) (“by applying for TPS, many applicants were identifying themselves to INS as being [people who were unlawfully present in the United States], so once the TPS period expires . . . they could be targeted for removal.”); 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 & Kohlen, *supra* note 20, at 349 (1995) (suggesting that fear of deportation following TPS termination is the greatest disincentive for eligible applicants).

In any event, the total number of Haitians who registered declined to 51,000 as of 2014⁸⁷ and then to 50,000 as of 2015.⁸⁸ By May 2017, DHS reported that only 46,000 Haitians were still registered for TPS.⁸⁹ The absence of any significant increase, other than as intended by the re-designation, in the number of Haitians registered for TPS over the course of multiple extensions and a re-designation demonstrate that these policies did not attract large flows to the United States clamoring to obtain this legal immigration status.

B. Border Inadmissibility Determinations and Apprehensions: The Case of Haiti

The magnet effect that policymakers believe may result from TPS involves the arrival of non-citizens who do not have valid visas to enter the United States. Such individuals have two ways of attempting to enter the country. They can present themselves to border officials at land, air and sea ports of entry, or they can try to enter without inspection along the border where officials are not posted. Accordingly, the number of Haitians presenting themselves at ports-of-entry without a valid visa and the number of Haitians apprehended in between the ports-of-entry constitute two additional metrics that might reveal whether these TPS policies had a magnet effect.⁹⁰ Chart 1 sets out the number of Haitians determined to be inadmissible when they presented themselves at ports-of-entry without a valid visa, including individuals seeking asylum:⁹¹

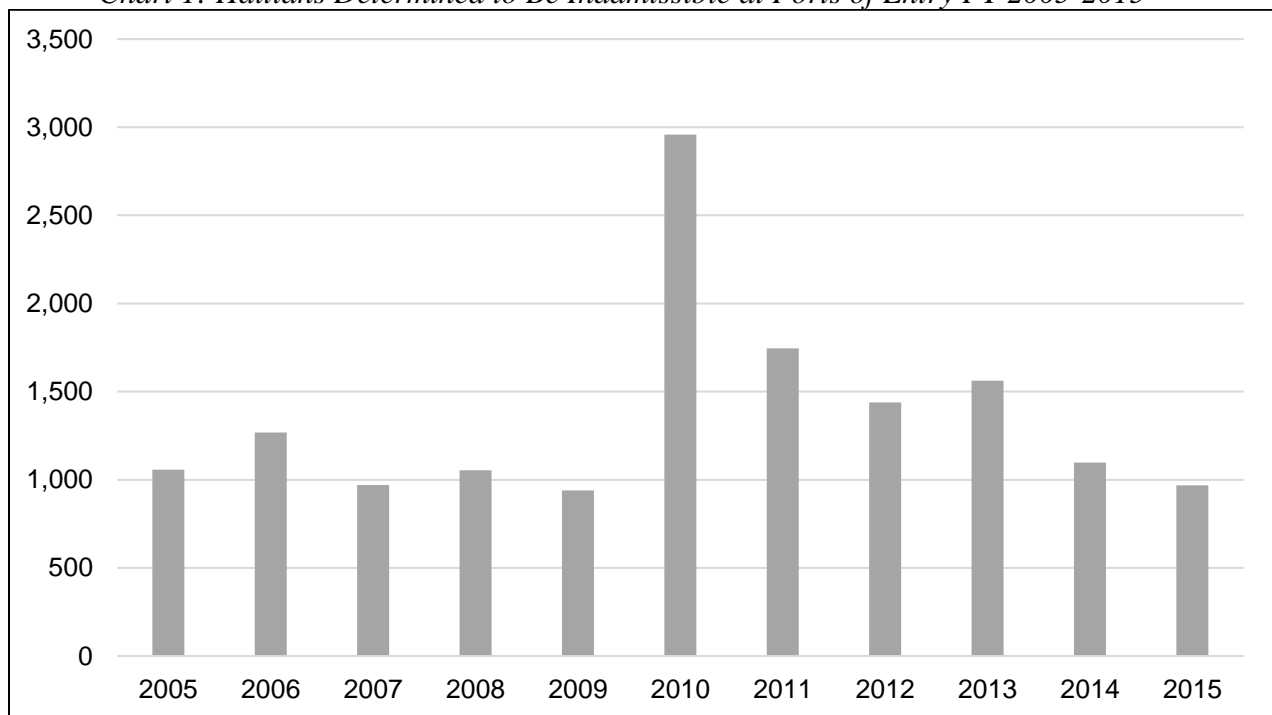
⁸⁷ *Extension of the Designation of Haiti for Temporary Protected Status*, 79 Fed. Reg. 11,808, 11,810 (Mar. 3, 2014).

⁸⁸ *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*, CTR. FOR IMMIGR. STUD. 4–6 (July 2015), <https://cis.org/sites/cis.org/files/north-TPS.pdf>.

⁸⁹ *Extension of the Designation of Haiti for Temporary Protected Status*, 82 Fed. Reg. 23,830, 23,831 (May 24, 2017). This was the last report of current TPS beneficiaries from Haiti. The 2018 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 in the termination notice 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 did 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 & IMMIGR. SERVS., I-821 TEMPORARY PROTECTED STATUS: CURRENT APPROVED INDIVIDUALS WITH A VALID, 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; See *Termination of the Designation of Haiti for Temporary Protected Status*, 83 Fed. Reg. 2648, 2649 (Jan. 18, 2018).

⁹⁰ 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. RES. SERV., RS21349, U.S. IMMIGR. POL’Y ON HAITIAN MIGRANTS 1 (2011).

⁹¹ As the DHS Office of Immigration Statistics explains, three groups constitute most of the inadmissibility determinations made by U.S. border officials: those with missing, invalid or fraudulent documents; those

Chart 1: Haitians Determined to Be Inadmissible at Ports of Entry FY 2005-2015⁹²

During the five years before the 2010 initial designation of TPS, the number of Haitian determined to be inadmissible each year ranged from 940 to 1,267.⁹³ During the following six years, that number ranged from 968 to 2,959.⁹⁴ The increase during the year of the earthquake resulting in a high of 2,959 Haitians included all of fiscal year FY 2010 (October 1, 2009-September 30, 2010), and a good portion may have arrived following the TPS designation in January 2010. The post-designation part of that FY 2010 increase may well have been connected to the earthquake or to the TPS designation itself or to both. In other words, some of these Haitians may have left because of the humanitarian emergency itself. It is possible that some also left hoping that they would eventually benefit from the TPS policy. There is no way to disentangle both potential proximate causes. In any case, immediately after the 2011 re-designation, the numbers started going down. In FY 2014 and FY 2015, the number of inadmissible arrivals returned to pre-earthquake levels.⁹⁵ The number of Haitian arrivals determined to be inadmissible in the five years following the TPS designation, then, does not indicate that TPS policies themselves acted as a magnet in any significant way.

who seek asylum; and crews of foreign vessels. Bryan Baker, *Annual Report: Immigration Enforcement Actions: 2016*, DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGR. STATS. 5-7 (2016), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.

⁹² Baker, *supra* note 91, at 6 tbl.3.; OFF. OF IMMIGR. STATS., U.S. DEP'T HOMELAND SECURITY, 2011 YEARBOOK OF IMMIGR. STATS. 98 tbl.37 (2012), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2011.pdf.

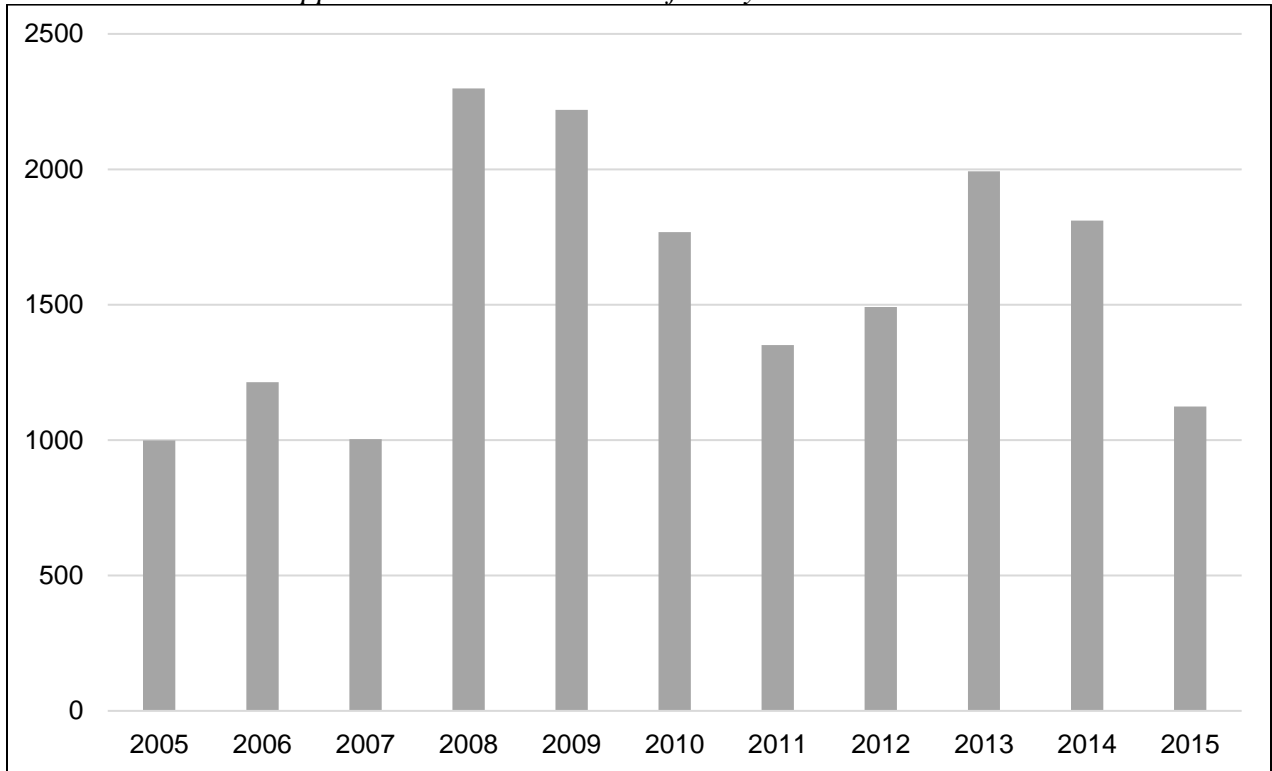
⁹³ *Id.*

⁹⁴ Baker, *supra* note 91, at 6 tbl.3

⁹⁵ *Id.* In FY 2016, the number increased to 6,974, which DHS attributed particularly to Haitians leaving Brazil in connection with (1) rising unemployment, (2) the outbreak of the Zika virus, and (3) serious political uncertainties there.

The best government data available to consider the second metric, Haitians apprehended in between ports-of-entry, includes all Haitians apprehended by DHS—those arrested in the interior as well as near the border. Even though the government data found in Chart 2 is not disaggregated to show only those apprehended as they arrived near the border, it still may reveal trends.⁹⁶

Chart 2: Haitians Apprehended Between Ports of Entry and in the Interior FY 2005-2015⁹⁷



As Chart 2 shows, the number of Haitians apprehended near the border between the ports-of-entry as well as in the interior of the United States increased from 999 in FY 2005 to over 2,200 in each of FY 2008 and 2009. When TPS was designated in FY 2010, the apprehensions declined to below 1,800. In FY 2011 when TPS was re-designated, apprehensions declined further to below 1,400. The numbers increased in FY 2013, and then declined to 1,124 in FY

⁹⁶ Whereas border apprehensions generally involve recent arrivals, administrative arrests in the interior generally involve those who have been in the United States unlawfully as well as those with lawful status who become subject to removal. Immigration and Customs Enforcement “usually identifies potentially removable aliens in the interior by working with federal, state, and local law enforcement agencies to check the immigration status of people who are arrested or incarcerated, and also conducts operations to detain certain at-large removable aliens.” *Id.* at 3. It is worth noting, as this DHS report shows in Table 1, that Haitians were not among the top ten nationalities apprehended from FY 2010-2015. *Id.* at 2, 4 tbl.1.

⁹⁷ OFF. OF IMMIGR. STATS., U.S. DEP’T HOMELAND SECURITY, 2011 YEARBOOK OF IMMIGRATION STATISTICS 93 tbl.34 (2012), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2011.pdf; OFF. OF IMMIGR. STATS., U.S. DEP’T HOMELAND SECURITY, 2015 YEARBOOK OF IMMIGRATION STATISTICS 93 tbl.34 (2016), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf.

2015.⁹⁸ Again, this apprehension data includes both interior and border arrests, thus it is possible that even these decreases and increases have more to do with interior than with border arrests. In any case, neither the downward nor the upward changes following TPS designation and re-designation suggest any significant magnet effect.

All of these metrics—TPS registrations, inadmissibility determinations, and apprehensions—demonstrate that the designation, re-designation, and multiple extensions of TPS for Haitians did not act as a magnet. TPS registrations intentionally increased by 13,000 following the 2011 re-designation in coordination with DHS policy providing for the legal admission of orphans and others.⁹⁹ By 2017, the number of Haitian registrants declined to 1,000 fewer than the initial 2010 registration.¹⁰⁰ With regards to those determined to be inadmissible, the numbers started going down after the 2011 re-designation, and in FY 2014 and FY 2015, the number of inadmissible arrivals returned to pre-earthquake levels.¹⁰¹ Finally, the relative decreases and increases in the number of Haitians apprehended near the border and in the interior starting in the year of designation and for the five years following, including the year of re-designation, did not result in major changes.¹⁰² In short, the TPS policies for Haitians did not have a magnet effect.

III. HOW TO ENSURE THAT TPS IS TEMPORARY

Congress authorized the temporary protection of individuals to prevent returning them to a crisis in their home countries in unsafe conditions or when their return would exacerbate the humanitarian problems in their home country.¹⁰³ When designing TPS, Congress understood that some conflicts may extend over many years.¹⁰⁴ For this reason, Congress explicitly included a requirement for temporariness in the cases of environmental disasters and “extraordinary and

⁹⁸ OFF. OF IMMIGR. STATS., U.S. DEP’T HOMELAND SECURITY, 2016 YEARBOOK OF IMMIGRATION STATISTICS 93 tbl.34 (2017), <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf>.

⁹⁹ See *supra* Table 2, p. 17, and notes 83–85.

¹⁰⁰ See *supra* Table 2, p. 17.

¹⁰¹ See *supra* Chart 1, p. 20.

¹⁰² See *supra* Chart 2, p. 21.

¹⁰³ The designation criteria for TPS set out in the statute focus on conditions that prevent the safe return of nationals, such as conflict, and the substantial disruption of living conditions caused by disasters such that a government is unable to handle returns. 8 U.S.C.A § 1254a(b)(1).

¹⁰⁴ Congress focused particular attention, for example, on the civil war in El Salvador. As Sen. DeConcini (D-AZ) stated on the Senate floor in late October 1990 as it considered the final conference report of the Immigration Act of 1990, which included the TPS provisions: “Since 1979, continuous violence and civil war has plagued tiny El Salvador, a country about the size of Massachusetts. Over that time, over 1 million, or at least 20 percent, of the country’s 5 million inhabitants have been uprooted by conflicts as government forces clash with those of the opposition.” 136 CONG. REC. 35,611 (1990). Due to the conflict and human rights violations in El Salvador, Rep. Moakley (D-MA) started advocating for some type of safe haven protection for Salvadorans in 1983, four years into the civil war. See *Stay of Deportation for Undocumented Salvadorans and Nicaraguans: Hearing on H.R. 618 Before the Subcomm. on Immigration, Refugees, and Int’l Law. of the H. Comm. on the Judiciary*, 100th Cong. 18-19 (1987). It took another seven years of conflict and advocacy before Rep. Moakley achieved his goal: El Salvador was the only country that Congress explicitly designated for TPS. Sec. 303 of P.L. 101-649, 104 STAT. 5035 (Nov. 29, 1990).

temporary” conditions; it did not include this requirement in the case of armed conflicts.¹⁰⁵ Even where it included this requirement, Congress did not provide a definition for “temporary.” Congress simply authorized the Executive to grant TPS for six to eighteen months at a time.”¹⁰⁶

As Table 3 below indicates, TPS at times only lasted for a few years. The most recent examples of such truly “temporary” policies involve Guinea and Sierra Leone, which were designated on November 21, 2014 because of an Ebola virus disease outbreak that began in January 2014.¹⁰⁷ This was the largest Ebola virus disease outbreak since the virus was discovered.¹⁰⁸ By the designation date, over 2,400 people had died and there were an additional 6,700 reported cases of Ebola. The DHS Secretary extended TPS once in May 2016 but then announced in September 2016 that the Ebola virus had subsided and the conditions in Sierra Leone and Guinea no longer supported the designation of TPS. The final six-month extension that lasted until May 21, 2017 provided for an “orderly transition.”¹⁰⁹ TPS also ended in less than four years after initial designation for beneficiaries from Kuwait, Lebanon, Guinea-Bissau, Kosovo, Angola, and Rwanda.

¹⁰⁵ See Immigration and Naturalization Act § 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).

¹⁰⁶ 8 U.S.C.A. § 1254a(b)(2).

¹⁰⁷ Designation of Guinea for Temporary Protected Status, 79 Fed. Reg. 69,511, 69,512 (Nov. 21, 2014); Designation of Sierra Leone for Temporary Protected Status, 79 Fed. Reg. 69,506, 69,508 (Nov. 21, 2014).

¹⁰⁸ Designation of Guinea for Temporary Protected Status, 79 Fed. Reg. 69,511, 69,512 (Nov. 21, 2014); Designation of Sierra Leone for Temporary Protected Status, 79 Fed. Reg. 69,506, 69,508 (Nov. 21, 2014).

¹⁰⁹ 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 JUST., <https://www.justice.gov/eoir/temporary-protected-status> (last updated Nov. 6, 2019) (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 (2019).

Table 3: Duration of TPS¹¹⁰

Designated Nationality	Date TPS Begins	Termination/Extension Date	Duration of TPS (nearest half year)
Kuwait	3/27/1991	3/27/1992	1 year
	DED 3/28/1992	DED 12/31/1993	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	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
Monserrat	8/27/1997	2/27/2005	7.5 years
Bosnia Hercegovina	8/10/1992	2/10/2001	8.5 years
Liberia I	3/27/1991	9/28/1999	8.5 years
	DED 9/29/1999	DED 9/28/2002	3 years of DED
Liberia II	10/1/2002	10/1/2007	5 years
	DED 10/1/2007	DED 11/21/2014	7 years of DED
Liberia III	11/21/2014	5/21/2017	2.5 years
	DED 5/21/2017	3/31/2020	3 years of DED
South Sudan**	11/3/2011	Extension until: 11/3/2020	9 years
Syria**	3/29/2012	Extension until: 3/31/2021	9 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	6/30/1992	1.5 years
	DED 7/1/1992	DED 12/31/1994	2.5 years of DED
El Salvador II*	3/9/2001	Termination: 3/9/2019	18 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), 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. On April 11, 2019, in *Saget v. Trump*, No. 18-cv-01599 (E.D.N.Y.), the U.S. District Court for the Eastern District of New York also enjoined the termination of TPS for Haiti, pending a final decision on the merits of the case. The terminations for Nepal and Honduras are also on hold while *Ramos* is resolved. *Bhattarai v. Nielsen*, No. 19-cv-731 (N.D. Cal).

**No pending expiration of TPS.

¹¹⁰ This Table was compiled from the following sources: *Temporary Protected Status*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/temporary-protected-status> (last updated Nov. 6, 2019) (using the TPS notices for each country); *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Nov. 18, 2019).

A. Facilitating Voluntary Return When TPS is Temporary

If a crisis ends within a few years such that it is safe to return home, TPS can actually be temporary. Numerous examples above, from Kuwait to Rwanda, demonstrate this. Ending the policy does not necessarily mean that TPS beneficiaries with no other legal way of remaining in the United States actually returned voluntarily. Congress did not establish any policies to encourage voluntary return when this humanitarian program ends in a timely fashion. Without such return incentives and evidence that repatriation occurs, critics of TPS are more easily able to argue that the United States should not provide safe haven in the first place.¹¹¹ Accordingly, the United States should develop practices to encourage beneficiaries to return to their home countries in ways that will help them reintegrate.

Such voluntary return policies and practices constitute one of the critical functions that the United Nations High Commissioner for Refugees (UNHCR) has played for millions of conflict refugees around the globe.¹¹² Observers have long recommended that the United States adopt UNHCR strategies as ways to help TPS beneficiaries rebuild their lives in their home countries. In the 1990s, for example, Bill Frelick and Barbara Kohlen, then experts at the U.S. Committee for Refugees, advocated for the facilitation of voluntary return; they argued that “[f]or TPS to be an effective form of *temporary* protection, the U.S. government should . . . encourage voluntary repatriation and reintegration as part of a larger process of rehabilitation and reconstruction of societies emerging from conflict situations.”¹¹³

Experts and legislators have proposed various methods to achieve what UNHCR aims for when assisting refugees with repatriation. Sustainable return and reintegration are UNHCR’s goals to create durable solutions such that returning refugees will not be displaced again and can build “peaceful, productive and dignified lives.”¹¹⁴ To facilitate voluntary return, UNHCR’s reintegration activities focus on infrastructural rehabilitation, promotion of the rule of law, investments in basic needs, and livelihood strategies.¹¹⁵

1. Engaging UNHCR’s Assistance in Facilitating Voluntary Return of TPS Beneficiaries

In a hearing on TPS before the House Committee on the Judiciary in 1999, Rep. Sheila Jackson-Lee (D-Tex.) 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

¹¹¹ See North, *supra* note 88, at 6–7.

¹¹² See *Voluntary Repatriation*, UNHCR, <https://www.unhcr.org/en-us/voluntary-repatriation-49c3646cfe.html>.

¹¹³ Frelick & Kohlen, *supra* note 20, at 339.

¹¹⁴ UNHCR, *Policy Framework and Implementation Strategy: UNHCR’s Role in Support of the Return and Reintegration of Displaced Populations*, Parts I and II, ¶¶ 1-10 (2008), <https://www.unhcr.org/en-us/partners/guides/4c2203309/policy-framework-implementation-strategy-unhcrs-role-support-return-reintegration.html>.

¹¹⁵ *Id.* at Part VII, ¶¶ 56-63.

local, [non-governmental] organizations capable of delivering services at the grassroots level.”¹¹⁶

2. Investments in Rule of Law and Economic Development of Home Countries

Other experts have specifically proposed that the U.S. government proactively remedy 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 the Executive Director of the Center for Migration Studies, Donald Kerwin, observes, the “[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.”¹¹⁷ Along with other experts, he also recommends creating regional migration agreements that use development and institution-building initiatives to encourage the return of migrant groups.¹¹⁸

3. Creating Financial Incentives for TPS Beneficiaries to Return Voluntarily

In addition to establishing such programs that create safety and stability in the countries of return, Congress should target individual TPS beneficiaries with financial incentives that derive from their employment in the United States. For example, 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.¹¹⁹ In 1998, this author, along with two other researchers, recommended 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.¹²⁰ That recommendation remains viable—individuals who earned wages and made Social Security contributions would receive a meaningful portion of those contributions once they have safely returned to their home country. Congress should also authorize the use of the employer contributions connected to these returnees’ Social Security accounts to target the communities to which these former TPS beneficiaries return in an effort to ensure safety and livelihood opportunities.

4. Data Reporting Requirements Associated with TPS Termination and U.S. AID’s Role in Facilitating Return

The American Promise Act of 2017, introduced by Rep. Nydia Velázquez (D-NY), proposed changes to the reporting requirements associated with the termination of TPS for a given

¹¹⁶ *Designations of Temporary Protected Status and Fraud in Prior Amnesty Programs: Hearing Before the Subcomm. on Immigr. & Claims of the H. Comm. on the Judiciary*, 106th Cong. 86 (1999) (statement of Rep. Sheila Jackson Lee).

¹¹⁷ 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).

¹¹⁸ *Id.*; see Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 558–566 (1998).

¹¹⁹ See *Benefits Planner: Social Security Credit*, SOC. SECURITY ADMIN., <https://www.ssa.gov/planners/credits.html> (last visited Oct. 28, 2019).

¹²⁰ Martin et al., *supra* note 118, at 575.

country.¹²¹ Her proposal recommends that the DHS Secretary analyze the home country's financial ability to provide for its repatriated citizens. The report would include the steps that the country has taken to remedy the cause of its initial designation as well as an analysis of the financial and social impacts of repatriation.¹²² This information would also help U.S. AID and other agencies in establishing and implementing their own rule of law and economic development programs to facilitate repatriation upon termination of TPS for any particular home country.

Congress should carefully consider and then adopt the best options to facilitate voluntary repatriation when TPS ends in a reasonable period of time. By creating humanitarian return policies for TPS beneficiaries, Congress can contribute to sustainable repatriation and reintegration and ensure that TPS becomes a truly temporary status. By establishing such policies, Congress will make it more likely that the United States can continue to provide this valuable protection to those who cannot return safely to their countries during crises.

B. Making TPS Work When Conditions Preventing Safe Return Do Not Change in a Timely Way

As Table 3 shows, a good number of the designated nationalities have been eligible for temporary protection for over ten years. In fact, Somalia's TPS designation has been in place since 1991 and will continue at least until 2020.¹²³ Unfortunately, Congress did not create the policy tools needed to deal with long-lasting situations that make it unsafe for nationals to return home.

While Congress did not limit TPS in overall duration, the statute provides two problematic ways to handle lengthy crises. One solution involves authorizing LPR status for TPS beneficiaries. However, this solution requires a supermajority in the Senate.¹²⁴ Since the creation of TPS, sixty or more senators have never voted for such a measure. This effectively means that the executive branch only has one workable option: to re-designate TPS indefinitely as humanitarian crises become protracted. That is precisely what administrations have done. As Table 3 shows, DHS has provided four nationalities with TPS for two decades or more. These limited policy tools undermine the purpose of TPS to provide temporary safety to those whose countries are in crisis.

C. A Humanitarian Solution for a Humanitarian Problem

At the human and social levels, these two solutions are problematic because during these lengthy periods, children are born, school and work relationships are developed, businesses are built, and families become integrated into communities. In economic terms, the longer that 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, Sen. Barbara Mikulski (D-MD) proposed a bill to provide LPR status to Polish EVD holders; her statement advocating for Polish EVD holders continues to be salient today:

¹²¹ American Promise Act of 2017, H.R. 4253, 115th Cong. § 3 (1st Sess. 2017).

¹²² The American Promise 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." *Id.* § 2.

¹²³ Extension of the Designation of Somalia for Temporary Protected Status, 83 Fed. Reg. 43,695, 43,696 (Aug. 27, 2018).

¹²⁴ 8 U.S.C. § 1254a(h).

Almost all of these [Poles] have been in the United States more than 5 years. Many now have children that [sic] were born in the United States. Since coming to this country, these Poles have been productive members of the American community. They are committed to bettering the economic and social status of themselves or [sic] their children. There is no future for them in Poland. Their only future is here.¹²⁵

Applying Sen. Mikulski's criteria to TPS beneficiaries today reveals a human, social and economic portrait similar to that of the Polish EVD holders she described. Nationals of the three countries with the largest number of TPS beneficiaries currently in the United States (El Salvador, Honduras, and Haiti) have established significant American ties over time.¹²⁶ This group of 302,000 beneficiaries includes parents of 273,200 U.S. citizen children.¹²⁷ More than twenty percent of these TPS beneficiaries, some 68,000, were childhood arrivals.¹²⁸ About thirty percent of these households are homeowners.¹²⁹ More than one half of the Salvadoran and Honduran TPS beneficiaries have lived in the United States for twenty years or longer.¹³⁰ These strong ties to the United States underscore the problems with the current program. Congress intended TPS to remain temporary, but it did not include viable alternatives when home country conditions preclude the safe return of individuals benefiting from TPS.

Experts have recognized that TPS traps long-term beneficiaries in a legal limbo by making it especially difficult to achieve a legislative path to a legal immigration status that reflects the duration of their stay in the United States, such as LPR status.¹³¹ This problem occurs 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. Recognizing that the Senate supermajority requirement is not a feasible way to address the situation of the many long-term TPS beneficiaries, legislators and experts have proposed alternative durable solutions.¹³²

Following the establishment of TPS, as discussed below, only once have legislators provided even an indirect and somewhat arduous path to lawful permanent resident status for a specific nationality that included some TPS beneficiaries--and even that path would not take effect until several years after the end of TPS.¹³³ While Congress enacted legislation not long

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

¹²⁶ Robert Warren & Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. ON MIGRATION & HUM. SEC. 577, 577-78, 581-82, 588 (2017).

¹²⁷ *Id.* at 578.

¹²⁸ *Id.* at 577.

¹²⁹ *Id.* at 581.

¹³⁰ *Id.* at 578.

¹³¹ 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 & HUMAN. SEC. 22, 29-31 (2014); *see also* Frelick & Kohnen, *supra* note 20, at 357-58.

¹³² Bergeron, *supra* note 131, at 35-37; *see also* Pia M. Orrenius & Madeline Zavodny, *Creating Cohesive, Coherent Immigration Policy*, 5 J. ON MIGRATION & HUMAN SEC. 180, 190 (2017).

¹³³ *See* Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, § 203, 111 Stat. 2160, 2196-2200 (1997). In contrast with the direct path to lawful permanent resident status that Congress created for Cubans and Nicaraguans in Section 202, Congress required Salvadorans, including some who had TPS in the early 1990s, to apply for suspension of deportation. The latter is an indirect, more difficult path to lawful permanent residence status that requires a showing of "extreme hardship." *See* Mary Giovagnoli, USING ALL THE TOOLS IN THE TOOLBOX: HOW PAST ADMINISTRATIONS HAVE USED

before creating TPS that enabled nationalities with EVD to become lawful permanent residents, proposals authorizing permanent immigration status for all TPS beneficiaries who have resided in the United States for a set period of years have not yet been adopted by Congress. Such a systemic statutory change would eliminate the requirement of a Senate supermajority to adjust to LPR status and replace it with a way to end the temporary humanitarian program at the point when home country conditions still prevent return and TPS beneficiaries have integrated into U.S. society through work, family, education, and length of residence, among other factors.

D. Congressional Authorization of Durable Solutions for a Specific Nationality

In 1997, 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 1980s, should be allowed in some cases to pursue a pathway to LPR status after spending many years in the United States.¹³⁴ The Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA) provided Nicaraguans with a direct pathway to LPR status but made Salvadorans and Guatemalans apply for suspension of deportation.¹³⁵ Those granted suspension of deportation after showing extreme hardship and meeting other statutory requirements included some Salvadorans who had been granted TPS in 1991 as directed by Congress until that program ended in June 1992.¹³⁶

E. Congressional Enactment of a Durable Solution for Certain EVD Beneficiaries

While Congress has not enacted a general durable solution for TPS beneficiaries, it did so for EVD beneficiaries as late as 1987. Congress enabled nationals of countries who had entered the United States before July 21, 1984 and who were provided EVD before November 30, 1987 to apply for “temporary permanent resident” status and then adjust to lawful permanent resident status after one year.¹³⁷ This law allowed nationals from Afghanistan, Ethiopia, Poland, and Uganda to become LPRs.¹³⁸ When introducing the legislation into the House of Representatives, Rep. Chester Atkins (D-MA) lauded the bill’s provision of a durable solution, saying, “[w]ith 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.”¹³⁹

EXECUTIVE BRANCH AUTHORITY IN IMMIGRATION, AM. IMMIGR. COUNCIL 3, 7–15 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Using_All_the_Tools_-_NACARA_090111.pdf.

¹³⁴ See CONG. RESEARCH SERV., THE NICARAGUAN ADJUSTMENT AND CENTRAL AMERICAN RELIEF ACT: HARDSHIP RELIEF AND LONG-TERM ILLEGAL ALIENS 1, 6-7 (1998), https://www.everycrsreport.com/files/19980715_98-3_08ea932ffbb5b70b21888bb84863bfba90bfba25.pdf.

¹³⁵ Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, §§ 202-203, 111 Stat. 2160, 2193-2200 (1997).

¹³⁶ See Deferral of Enforced Departure for Salvadorans, 57 Fed. Reg. 28,700, 28,701 (June 26, 1992).

¹³⁷ Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 902, 101 Stat. 1331, 1400–01 (1987).

¹³⁸ Frelick & Kohlen, *supra* note 20, at 341–42, 357.

¹³⁹ 99 CONG. REC. 15,556, 64 (1987) (statement of Rep. Chester Atkins).

F. Congressional Proposals of Durable Solutions for TPS Beneficiaries

To date, then, the only legislation that provided a durable solution for any TPS nationality affected only one group, Salvadorans, back in 1997, five years after their TPS ended. No proposal establishing a general durable solution has yet met with success.

Experts recognized the need for a durable solution, however, during the Congressional discussions of a safe haven in the 1980's. In a House of Representatives hearing on the original TPS legislation, for example, Doris Meissner, the head of the Immigration and Naturalization Service in the Clinton Administration, then a policy expert at the Carnegie Endowment for International Peace, suggested a rolling registry program which would allow TPS holders to gain legal status if safe haven protection extended for a period of ten or fifteen years.¹⁴⁰ Following TPS enactment and after observing the inability of TPS to protect conflict refugees in protracted situations, other experts suggested that Congress make long-term TPS beneficiaries eligible for regular adjustment of LPR status or find other ways to provide a durable solution for those who cannot return home in safety.¹⁴¹

During the Trump Administration in particular, legislators have introduced bills that would establish various durable solutions.¹⁴² Member of Congress generally did so in response to the Department of Homeland Security actions to end TPS for Sudan, El Salvador, Haiti, and Nicaragua in 2017 and 2018.¹⁴³ Rep. Sheila Jackson-Lee's (D-TX) Save America Comprehensive Immigration Act of 2017, for example, would grant legal permanent resident status to those who have been in the United States continuously with TPS status for at least five years.¹⁴⁴

The American Promise Act of 2017, introduced by Rep. Nydia Velázquez (D-NY), would allow nationals of TPS-designated countries who were granted or eligible for TPS on or before October 1, 2017 and who have been continuously in the country for three years to apply for adjustment of status to legal permanent residence.¹⁴⁵ In supporting the bill, Rep. Ted 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

¹⁴⁰ *Temporary Safe Haven Hearing*, *supra* note 46, at 36–37 (statement of Doris Meissner).

¹⁴¹ Bergeron, *supra* note 131, at 35–37; Kerwin, *supra* note 117, at 65–66.

¹⁴² Yari Gutierrez, *Temporary Protected Status: An Explainer*, BIPARTISAN POL'Y CTR. (Dec. 21, 2018), <https://bipartisanpolicy.org/blog/temporary-protected-status-tps-an-explainer/>.

¹⁴³ 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 109.

¹⁴⁴ Save America Comprehensive Immigration Act of 2017, H.R. 3647, 115th Cong. § 1301(a) (1st Sess. 2017).

¹⁴⁵ American Promise Act of 2017, H.R. 4253, 115th Cong. § 2 (1st Sess. 2017).

home than the United States. Deporting them is neither sensible nor compassionate.¹⁴⁶

In both 2017 and 2019, Sen. Chris Van Hollen (D-MD) along with several other senators introduced the “Safe Environment from Countries Under Repression and Emergency (SECURE) Act,” which allows certain nationals of a TPS designated country who have been continuously in the United States for at least three years to apply for lawful permanent resident status.¹⁴⁷ Responding to the actions to try to terminate TPS for certain nationalities, Sen. Van Hollen said:

For decades, individuals living in the United States have been granted Temporary Protected Status to stay here when their home countries have become too dangerous to return to because of devastating natural disasters, ongoing civil war, or extreme violence. . . . These men and women have lived here legally for years – they have jobs and businesses and are our neighbors. We cannot in good faith send them back to some of the most dangerous places in the world. The courts have made clear this Administration’s decisions are unjust, and this legislation will take permanent action to give these families certainty and security.¹⁴⁸

Sen. Ben Cardin (D-MD) added: “President Trump’s decision to end TPS for Honduras, Haiti, El Salvador and other countries—as well as ending DED for Liberia—will needlessly rip families apart. We cannot let that happen.”¹⁴⁹

G. Durable Solutions for Those with Humanitarian Protection in Other Common Law Countries

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, for example, are eligible to apply to settle indefinitely.¹⁵⁰ Once settled (indefinite leave to remain), such individuals are on a path to citizenship.¹⁵¹ Both Canada and Australia also allow individuals with similar temporary humanitarian protection to become permanent residents and ultimately citizens.¹⁵²

¹⁴⁶ Press Release, Nydia M. Velázquez, U.S. Congresswoman, Key Members of Congress Move to Preserve TPS, Protect Immigrants (Nov. 3, 2017), <https://velazquez.house.gov/media-center/press-releases/key-members-congress-move-preserve-tps-protect-immigrants>.

¹⁴⁷ Safe Environment from Countries Under Repression and Emergency (SECURE) Act, S. 2144, 115th Cong. § 2(b) (1st Sess. 2017); Safe Environment from Countries Under Repression and Emergency (SECURE) Act, S. 879, 115th Cong., § 2(b) (1st Sess. 2019).

¹⁴⁸ Press Release, Christopher Van Hollen, U.S. Senator, Van Hollen, Cardin, Feinstein, Kaine Introduce Legislation to Protect TPS Recipients (Mar. 26, 2019), <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-cardin-feinstein-kaine-introduce-legislation-to-protect-tps-recipients>.

¹⁴⁹ *Id.*

¹⁵⁰ U.K. HOME OFFICE, HUMANITARIAN PROTECTION VERSION 5.0 22 (5th rev. 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/597377/Humanitarian-protection-v5_0.pdf.

¹⁵¹ *Apply for Citizenship if You Have Indefinite Leave to Remain or ‘Settled Status,’* GOV.UK, <https://www.gov.uk/apply-citizenship-indefinite-leave-to-remain> (last visited Jan. 7, 2019).

¹⁵² *See Application for Permanent Residence in Canada—Protected Persons and Convention Refugees*, GOV’T OF CAN. (Nov. 20, 2018), <https://www.canada.ca/en/immigration-refugees->

As the above analysis indicates, Congress should find ways appropriate to the humanitarian nature of TPS to keep it temporary. That requires two significant types of reforms. First, Congress should authorize programs that encourage voluntary repatriation when a crisis ends in a reasonable period of time. Such programs will ensure both that TPS for such nationalities is temporary and that TPS beneficiaries return in a safe and dignified way during that temporary period. Second, Congress should provide a durable solution for conflict refugees and others when the crisis is prolonged. That will also keep TPS temporary and ensure that those who have integrated into American communities are provided a lasting solution to their displacement.

IV. HOW TPS CAN HANDLE ARRIVALS FROM AN ONGOING HUMANITARIAN CRISIS

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.¹⁵³ 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 perceived magnet effect of any TPS policy.¹⁵⁴ In response to these concerns by opponents, Rep. Sam Gejdenson (D-CT) expressed the view that entry cut-off dates are unlikely to eliminate Salvadorans fleeing to the United States because they will continue to seek safety as long as there are dangerous conditions in their country.¹⁵⁵ 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.

A second aspect of TPS also seriously limits the policy from covering those who flee an ongoing crisis. The group-based designation system created by Congress only covers those nationalities where the Secretary of Homeland Security decides to exercise his or her discretion. Some countries experiencing civil conflict, such as Colombia, have never been designated. While the group designation mechanism potentially offers a speedy way to provide temporary safe haven, TPS has been criticized by experts for gaps in protection for similarly situated nationalities.¹⁵⁶

In contrast with the very limited form of temporary protection provided to nationals who happen to be in the United States when the DHS Secretary selects a group for TPS, Western European countries have provided a form of temporary protection to civil war refugees and

citizenship/services/application/application-forms-guides/application-permanent-residence-canada-protected-persons-convention-refugees.html; *Apply for Citizenship: Who Can Apply*, GOV'T OF CAN. (July 3, 2018), <https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/become-canadian-citizen/eligibility.html>; *Become an Australian Citizen (by Conferral) Permanent Residents or New Zealand Citizens*, AUSTRALIAN GOV'T: DEP'T OF HOME AFFAIRS (last updated Sept. 27, 2019), [https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/permanent-resident; Protection Visas \(Onshore\)](https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/permanent-resident; Protection Visas (Onshore)), AUSTRALIAN GOV'T: DEP'T OF HOME AFFAIRS, <https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/onshore-protection>.

¹⁵³ See, e.g., H.R. 4447, 98th Cong. (1983).

¹⁵⁴ See *Temporary Suspension of Deportation of Certain Aliens: Hearing on H.R. 4447 Before the Subcomm. On Immigr., Refugees, and Int'l L. of the H. Comm. on the Judiciary*, 98th Cong. 59 (1984).

¹⁵⁵ See *id.* at 60.

¹⁵⁶ Bill Frelick, *What's Wrong with Temporary Protected Status and How to Fix It 2* (forthcoming 2019) (unpublished manuscript) (on file with author).

others fleeing an *ongoing* humanitarian emergency in *any* nation.¹⁵⁷ The United Kingdom, for example, provides “humanitarian protection” to those who are at a real risk of serious harm, including in situations of general or indiscriminate violence.¹⁵⁸ EU policies and state member practice address large groups entering EU States during an emergency¹⁵⁹ as well as individuals seeking protection. For many member states, the latter occurs during individual asylum determinations.¹⁶⁰ In those cases, officials decide whether an individual has a well-founded fear of persecution or is a refugee from conflict or other serious harm.¹⁶¹ Differentiating this form of protection from asylum for persecuted refugees derived from the Refugee Convention, the EU calls this “subsidiary” or “complementary” protection.¹⁶²

A. *Managing Humanitarian Arrivals Through Individual and Group Determinations*

To fully ensure that TPS provides protection to those fleeing serious ongoing violence or disruption, Congress should incorporate TPS into the individualized asylum process, as many developed democratic states have done.¹⁶³ DHS Asylum Officers already conduct interviews with those seeking protection from persecution and make asylum decisions. In those same interviews and with great efficiency, Asylum Officers could determine whether or not such individuals qualify for TPS if they do not qualify for asylum.¹⁶⁴

Incorporating TPS into the individualized asylum system is not the only tool that the government should have to address such humanitarian cases. There is still an important role that group-TPS can play for the United States. If Congress adopts this recommendation to incorporate TPS into the individualized asylum system, then group-TPS can be used to respond to migration emergencies that would overwhelm the individual asylum adjudication system.¹⁶⁵ When a large number of people from three Central American countries seeking safety in recent years arrived in the United States, DHS funneled applications for protection through the asylum system, creating significant caseloads that could not be handled in a timely fashion.¹⁶⁶ That did not have to be the

¹⁵⁷ See 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).

¹⁵⁸ U.K. HOME OFFICE, *supra* note 150, at 12–15.

¹⁵⁹ In 2001, the Council of the European Union directive created a procedure on temporary protection in the event of a mass influx of displaced persons who could not safely return to their home country. Karoline Kerber, *The Temporary Protection Directive*, 4 EUR. J. MIGRATION & L. 193 (2002).

¹⁶⁰ Helene Lambert, *The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence*, 25 INTL J. REF. L. 207, 210 (2013).

¹⁶¹ *Id.*

¹⁶² Belen Olmos Giupponi, *EU Return Policy and International Human Rights Law: Keeping the Balance between Border Security and Human Dignity*, 18 SPANISH YEARBOOK OF INT’L L. 163, 164 (2013-2014).

¹⁶³ See Martin et al., *supra* note 118, at 569–70; see also Frelick & Kohlen, *supra* note 20, at 355 (calling for a mandatory prohibition on return for conflict refugees, similar to *nonrefoulement* or withholding of removal for persecuted refugees).

¹⁶⁴ Bill Frelick, Director of Human Rights Watch’s Refuge Rights Program, also recommends that such “complementary” protection be provided on a regular basis through the individualized asylum system. Frelick, *supra* note 156, at 8.

¹⁶⁵ Frelick also recommends this use of group TPS upon the arrival of sufficiently large numbers. *Id.* at 10.

¹⁶⁶ DHS placed asylum seekers in expedited removal, found that most Salvadorans, Hondurans and Guatemalans demonstrated a credible fear of persecution, and placed them in removal proceedings before

case. If the government had this dual system in place, it could have designated group-TPS for the three Central American nationalities and directed those individuals to apply for group-TPS protection. For those who then applied for asylum, the government could have held off making any individualized asylum determination until either the asylum caseload allowed DHS to turn to those applications or once TPS was winding down. That would have allowed the government to manage the regular caseload of individual asylum seekers fleeing persecution. Moreover, the government could have developed a regional approach to the emergency with other safe countries in the Americas in connection with the group TPS designations.¹⁶⁷

B. Improving TPS as Part of Comprehensive Immigration Reform

Like the United Kingdom and the EU, the United States should provide temporary protection to all those who need safety from conflict, other serious violence, or major upheaval. The analysis above demonstrates that TPS policies have not resulted in the imagined magnet effect. If, however, policymakers are still not ready to improve TPS as recommended above, they should do so as part comprehensive immigration reform, which will include effective ways to address unauthorized immigration.

At the time that Congress enacted TPS, the United States did not have effective controls of unauthorized cross-border movements or work—some 3.5 million unauthorized then resided in the country.¹⁶⁸ As of 2017, there were some 10.5 million unauthorized immigrants in the United States, down from a peak of 12.2 million in 2007.¹⁶⁹ Registered TPS beneficiaries number over 300,000 from ten countries today,¹⁷⁰ including more than 180,000 who have been issued valid employment authorization documents by USCIS.¹⁷¹ 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.¹⁷²

Even though the TPS population is small when compared to the unauthorized population, some lawmakers are not willing to enact the reforms recommended here to improve TPS before the government controls unauthorized immigration in a meaningful way.¹⁷³ For many years, Congress has funded tremendous capacity at and between ports of entry to control unlawful

immigration judges. In FY 2013, fewer than 24,000 so-called “defensive” asylum claims were filed in immigration courts. More than 122,000 such claims were filed in FY 2017, and that record is well on track to be broken in FY 2019. See *Adjudication Statistics: Defensive Asylum Applications*, EXEC. OFF. FOR IMMIGR. REV., DEP’T OF JUST. (July 24, 2019), <https://www.justice.gov/eoir/page/file/1106356/download>.

¹⁶⁷ See Martin et al., *supra* note 118, at 556–59.

¹⁶⁸ That was just four years following the first and to date only major legalization program enacted by Congress. *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, OFF. OF POL’Y & PLANNING, U.S. IMMIGR. & NATURALIZATION SERV. 8, <https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%201990%20to%202000.pdf>.

¹⁶⁹ *Hispanic Trends: Unauthorized Immigrant Population Trends for States, Birth countries and Regions*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/>.

¹⁷⁰ WILSON, *supra* note 109, at 5.

¹⁷¹ USCIS, *supra* note 89, at 13.

¹⁷² *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.*

¹⁷³ See Indra Ekmanis, *This Sweeping Immigration Bill Won’t Pass, but It’s Still A ‘Major Win,’* PRI’S THE WORLD (Mar. 21, 2019), <https://www.pri.org/stories/2019-03-21/sweeping-immigration-bill-won-t-pass-it-s-still-major-win>.

entry.¹⁷⁴ It has been politically easy for Congress to fund border control with very significant resources: “[s]ince 1993, when the current strategy of concentrated border enforcement was first rolled out along the U.S.-Mexico border, the annual budget of the U.S. Border Patrol has increased more than ten-fold, from \$363 million to more than \$4.7 billion.”¹⁷⁵ 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,¹⁷⁶ which until 2014 constituted the vast majority of those entering unlawfully across the southern border with Mexico.¹⁷⁷ One of the leading analysts, Edward Alden, argues that border enforcement has been a significant reason for the substantial decline in unauthorized migration across the southern border, with successful illegal entries falling from roughly 1.8 million in 2000 to just 200,000 by 2015.¹⁷⁸ In fact, border enforcement has been so successful that since 2007, the majority of newly added unauthorized immigrants arrived with legal visas and overstayed; in 2014, two-thirds of those who joined the unauthorized population did so by remaining in the United States after their lawful permission to stay expired.¹⁷⁹

Unauthorized immigration cannot be controlled without addressing the major reason many immigrants overstay their visas or cross the border without permission—the opportunity to work for an American business.¹⁸⁰ Congress knows how to establish a system that will control access to

¹⁷⁴ The agency responsible for border control, Customs and Border Protection (CBP), consistently received significantly more funding than the agency responsible for the interior enforcement of the immigration laws (Immigration and Customs Enforcement, or ICE) and the Department of Justice adjudicators at the Executive Office for Immigration Review (EOIR). See *Stronger Border Security: 2019 Budget Fact Sheet*, WHITE HOUSE, https://www.whitehouse.gov/wp-content/uploads/2018/02/FY19-Budget-Fact-Sheet_Border-Security.pdf.

¹⁷⁵ *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL 2 (May 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf.

¹⁷⁶ See Edward Alden, *Is Border Enforcement Effective? What We Know and What It Means*, 5 J. MIGRATION & HUM. SECURITY 481, 489–90 (2017). In addition to providing an excellent analysis of these strategies, Alden lists many helpful sources at the end of his article.

¹⁷⁷ *Id.* at 487–88. 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 United States.

¹⁷⁸ *Id.* at 481. Moreover, he points out that in 2014, two-thirds of those added to the unauthorized population arrived with legal visas and overstayed. As I suggest in this subpart, the most effective strategy to deter those who overstay their visas mainly to improve their economic lives is through worksite enforcement. *Id.* at 487–88.

¹⁷⁹ *Id.* at 482, 488; Robert Warren & Donald Kerwin, *The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays Have Outnumbered Undocumented Border Crossers by a Half Million*, 5 J. ON MIGRATION & HUM. SEC. 124–25 (2017).

¹⁸⁰ Of an estimated 11 million unauthorized immigrants, about 8 million worked in the United States as of 2014. “Unauthorized immigrants make up a larger share of the U.S. labor force (5% in 2014) than of the total population (3.5%) in part because they are disproportionately likely to be of working age. Fully 92% of unauthorized immigrants are ages 18 to 64, compared with 60% of the U.S.-born population and 76% of lawful immigrants.” Jeffrey S. Passel and D’Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable after the Great Recession*, PEW RES. CTR. 4, 7 (2016), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2016/11/LaborForce2016_FINAL_11.2.16-1.pdf; “No matter how many miles of fence we build and how many agents we station on the border, I truly believe people will come to this country illegally as long as they believe America offers a better life and a better job,” Sen. Portman (R-OH) said on the Senate floor during discussions of S. 744. Julia Preston and Ashley Parker, *Bill to Expand U.S. Database to Verify Hires*, N.Y. TIMES (June 26, 2013),

the workplace so that only those with authorization to work will be able to do so—the Senate passed a bipartisan comprehensive immigration reform bill in 2013 that included an effective worksite verification system to do just that, while providing sufficient worker visas to meet U.S. employer needs.¹⁸¹

Once access to the workplace is effectively controlled, DHS will be able to assure Congress that policies to protect refugees fleeing an ongoing 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 foreign nationals who no longer need temporary protection to support themselves through work—their work authorization would end, depriving them of access to jobs. Since the analysis above in Part II shows that TPS policies have not resulted in a significant magnet effect, Congress should change the law now to ensure that those fleeing ongoing humanitarian emergencies receive protection in the United States. But in the very least, when Congress decides to address unauthorized immigration by controlling the workplace and establishes an effective system that meets the needs of employers with legal workers, lawmakers should adopt the recommendations proposed here to protect all those who flee conflict or need protection from other unsafe conditions in their home countries.

CONCLUSION

Since its inception in 1990, TPS has provided a safe haven for more than 400,000 individuals from over twenty-two countries around the globe. However, the policy needs to be reformed to ensure that TPS serves all those who need and deserve a temporary measure of protection.

When a conflict or humanitarian crisis ends in a reasonable period of time, the United States should not only terminate TPS for that country but should also encourage and facilitate voluntary repatriation. UNHCR commonly provides financial incentives to help displaced people restart their lives back home and reintegrate after conflict has ended. The United States should implement a similar practice by giving back Social Security withholdings to TPS workers who return home during the termination period.

TPS is not the appropriate policy to provide long-term safe haven in protracted situations. Over time, people put down strong roots in their communities through work, family, education, and religious institutions. The United States should transition temporary protection to a permanent status for individuals who cannot return home safely because of prolonged and significant violence, upheaval, or instability.

Moreover, justice demands that similarly situated refugees from conflict, or other serious violence and disruption, be treated alike. Due to concerns that TPS would attract large numbers of new arrivals, Congress limited TPS to those already in the United States when a country is

<https://www.nytimes.com/2013/06/27/us/politics/bill-to-expand-us-database-to-verify-hires.html>.

¹⁸¹ S. 744, *Border Security, Economic Opportunity, and Immigration Modernization Act*, 113th Congress, Title III, Subtitle A, *Employment Verification System* (2013). S. 744 was “a broad-based proposal for reforming the U.S. immigration system written by a bipartisan group of eight senators known as the ‘Gang of Eight,’” consisting of Sens. Schumer (D-NY), McCain (R-AZ), Durbin (D-IL), Graham (R-SC), Menendez (D-NJ), Rubio (R-FL), Bennet (D-CO), and Flake (R-AZ); *A Guide to S. 744: Understanding the 2013 Senate Immigration Bill*, AM. IMMIGR. COUNCIL (July 10, 2013), <https://www.americanimmigrationcouncil.org/research/guide-s744-understanding-2013-senate-immigration-bill>.

designated by the Executive branch. Almost thirty years, twenty-six designations covering twenty-two nationalities, twenty re-designations of eleven nationalities, and one hundred twenty-two separate extensions later, no discernable magnet effect has occurred, as the above analysis demonstrates.¹⁸² The United States can and should provide temporary protection to all those who flee ongoing upheaval, not just to 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.

Finally, 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 stay in their home countries unless conflict or other serious violence prevents them from doing so.¹⁸³ It is in the national interest of the United States to help weak governments develop the capacity to protect their own citizens through rule of law programs and thus promote stability in the region. In addition, 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.¹⁸⁴

Policymakers now have three decades of experience and evidence regarding the benefits and shortcomings of TPS. The feared magnet effect has not happened. Accordingly, Congress should ensure that this important form of humanitarian protection live up to its name and serve as a temporary measure. Lawmakers should reform TPS so that it protects all those who need safe haven and transitions individuals who cannot return home safely after a reasonable period of time from temporary protection to a permanent status. When these reforms are in place, TPS will achieve its full potential as a robust humanitarian instrument that can protect all those who have a well-founded fear of death.

¹⁸² See Table 3: Duration of TPS Table, *supra* p. 24; *Temporary Protected Status*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/temporary-protected-status> (last updated Nov. 6, 2019) (TPS notices for each country); *Temporary Protected Status*, U.S. CITIZENSHIP & SERVS. (Sept. 1, 2019), <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Nov. 18, 2019) (information available under "Countries Currently Designated for TPS" and "Countries Previously Designated for TPS").

¹⁸³ According to the UN Population Division, international migrants comprised about 3.4% of the world's population in 2017, and refugees and asylum seekers made up only 10% of those international migrants. As of 2017, then, 99.6% of the world's population did not cross a border to seek safety in another country. *Population Facts: The World Counted 258 Million International Migrants in 2017, Representing 3.4% of Global Population*, No. 2017/5, U.N. DEP'T OF SOC. AND ECON. AFF., POPULATION DIVISION 1, 3 (Dec. 2017), https://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2017-5.pdf.

¹⁸⁴ 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. U.N. HIGH COMM'R FOR REFUGEES (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>.