

DIVERGENT JOURNEYS FROM KABUL AND KYIV: HOW CONGRESS CAN ENSURE EQUAL PATHWAY PROGRAMS FOR PAROLEES TO THE UNITED STATES

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“Even on a mountain, there is still a road.” - Afghan Proverb

I. INTRODUCTION

Scenes of Afghan citizens rushing United States military aircraft and handing their babies off to soldiers at the Kabul airport in August of 2021 shocked the conscience of the West.¹ The Taliban entered Afghanistan’s capital city that month, completely unopposed, after twenty years of United States presence.² As Kabul fell and the deadline for the United States’ withdrawal on August 30 approached, the streets outside of the airport grew crowded.³ People had no shelter from the scorching sun.⁴ A child-care center was created quickly after panic-stricken parents disappeared, leaving their children behind, hopeful that they would be delivered to safety.⁵ Reporter Jane Ferguson recounted, “A skinny boy . . . burst

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¹ Jane Ferguson, *Who Gets To Escape The Taliban: The Chaotic American Withdrawal Forced Individual Soldiers, Aid Workers, and Journalists to Decide Which Afghans Would be Saved*, THE NEW YORKER (Oct. 21, 2021), <https://www.newyorker.com/news/dispatch/who-gets-to-escape-the-taliban>; *Video Shows Baby Being Handed Over Kabul Airport Wall to US Troops*, CNN, <https://www.cnn.com/videos/world/2021/08/20/kth-kabul-airport-wall-baby-afghanistan-ac360-vpx.cnn> (last visited July 3, 2023); Sara Boboltz, *Afghans Photographed Handing Babies Over Barbed Wire to Soldiers at Airport: At Least One of the Children Was Taken to a Medical Facility by the U.S. Marines and Has Been Reunited With Family*, THE HUFFINGTON POST (Aug. 20, 2021), https://www.huffpost.com/entry/kabul-airport-babies-razor-wire_n_611fae60e4b0e5b5d8e950eb.

² Ferguson, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

into tears when I asked him where his parents were. He didn't know, but someone had written 'USA' on the back of his hand."⁶

Less than one year later, in March of 2022, the world watched from handheld devices as Russian military tanks crossed the border into Ukraine.⁷ Aerial strikes detonated bombs on the capital city of Kyiv, obliterating civilian neighborhoods and government buildings without distinction.⁸ While many Ukrainian citizens stayed behind to fight, millions fled across the country's western border into Poland.⁹

When distressing events, such as the Taliban takeover of Afghanistan and the Russian invasion of Ukraine, occur on the global stage, the international community can provide support in several ways. This includes providing refuge for civilians fleeing from violent conflict.¹⁰ In fact, countries that have signed the 1951 Refugee Convention (the Convention), held by the United Nations High Commissioner for Refugees (UNHCR), have an obligation to protect refugees and to "treat them according to internationally recognized standards."¹¹

In the wake of the Afghan and Ukrainian conflicts, the Biden Administration identified the importance of providing pathways to allow both Afghans and Ukrainians into the United States, via executive order.¹² The Biden Administration exercised its power to

⁶ *Id.*

⁷ Kyle Chayka, *Watching the World's "First TikTok War"*, THE NEW YORKER (Mar. 3, 2022), <https://www.newyorker.com/culture/infinite-scroll/watching-the-worlds-first-tiktok-war>.

⁸ Jen Kirby & Jonathan Guyer, *Russia's War in Ukraine, Explained: Putin's Invasion in February Began Europe's First Major War in Decades*, VOX (Mar. 6, 2022), <https://www.vox.com/2022/2/23/22948534/russia-ukraine-war-putin-explosions-invasion-explained>.

⁹ *Id.*; *How Many Ukrainian Refugees are There and Where Have They Gone?*, BBC (July 4, 2022), <https://www.bbc.com/news/world-60555472>.

¹⁰ U.N. HIGH COMM'R FOR REFUGEES OFF. IN CYPRUS, PROTECTING REFUGEES 4 (2017), https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/05/UNHCR_Brochure_EN.pdf.

¹¹ *Id.*

¹² Jarrett Renshaw & Ted Hesson, *U.S. to Welcome up to 100,000 Ukrainians Fleeing War Amid Broader Aid Effort*, REUTERS (Mar. 24, 2022), <https://www.reuters.com/world/us/us-accept-up-100000-ukrainians-fleeing-war-sources-2022-03-24/>; *How Many Refugees Will President Biden Welcome From Afghanistan and Other Countries?*, INT'L RESCUE COMM. (Sept. 28, 2021),

parole individuals into the United States through the establishment of Operation Allies Welcome (OAW) for Afghans and Uniting for Ukraine (U4U) for Ukrainians.¹³ However, the Biden Administration chose to use its executive power to parole differently between the two groups. The programs differ in both policy and practice, impeding the safe and effective entry of Afghans at higher rates than Ukrainians.¹⁴ Thus, the disparate treatment of these two groups by the Biden Administration raises the questions that this comment seeks to answer: how are dissimilar parole programs addressing similar circumstances constitutional and what can be done to make them more equal?

First, Section II of this comment examines what led to the White House's creation of parole programs for Afghans and Ukrainians and compares OAW and U4U. Section III discusses how such disparate pathways implemented by the same presidential administration are justified under the Constitution, despite the presence of the Equal Protection Clause in the Fifth Amendment. Section IV establishes why Congress is the most appropriately situated branch of the federal government to protect equal rights for individuals applying for parole. It then proposes a congressional solution that should be adopted to ensure the construction of equal parole programs moving forward. Finally, Section V provides a brief conclusion.

II. THE TREATMENT OF AFGHAN AND UKRAINIAN PAROLEES PRIOR TO SEPTEMBER 1, 2022

A. *A Brief Overview of Relevant Refugee Law*

President Biden's Afghan and Ukrainian parole programs provide individuals with parole status.¹⁵ This is a form of temporary

<https://www.rescue.org/article/how-many-refugees-will-president-biden-welcome-afghanistan-and-other-countries>.

¹³ Muzaffar Chishti & Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts*, MIGRATION POL'Y INST. (July 13, 2022), <https://www.migrationpolicy.org/article/afghan-ukrainian-us-arrivals-parole>.

¹⁴ *Id.*

¹⁵ *Operation Allies Welcome*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/allieswelcome#:~:text=In%20coordination%20with%20ot>

protection.¹⁶ A parolee is not the same as a refugee, even though some parolees may meet the definition of refugee.¹⁷ To apply for refugee status from outside of the United States, a person must first qualify as a refugee under international law.¹⁸ This article focuses on parole but will explain the refugee system to help situate the use of the relevant parole programs.

The Convention defines a refugee as a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence, is unable or, owing to such fear, is unwilling to return to it.¹⁹

The United States, which is party to the Convention, has adopted an almost identical definition of the term, but expressly includes people who have experienced past persecution.²⁰ The *Oxford Handbook of Refugee and Forced Migration Studies* states that the term “persecution implies a human rights violation of a particular gravity.”²¹ The term refugee then, is not all encompassing to include

her%20federal, arrived%20Afghans%20and%20their%20families (last visited Oct. 2, 2022); *Uniting for Ukraine*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/ukraine#:~:text=On%20April%2021%2C%202022%2C%20President,come%20to%20the%20United%20States> (last visited Oct. 2, 2022).

¹⁶ *Explainer: Humanitarian Parole*, NAT’L IMMIGR. F. (Mar. 22, 2022), <https://immigrationforum.org/article/explainer-humanitarian-parole/>.

¹⁷ *Id.*

¹⁸ *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL (Sept. 20, 2021), <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy>.

¹⁹ Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150.

²⁰ Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42).

²¹ OXFORD HANDBOOK OF REFUGEE & FORCED MIGRATION STUDIES 39 (Elena Fiddian-Qasmiyeh et al. eds., 2014).

all people fleeing from the generalized violence of war, and it can be a tough standard to meet.²²

The President, in consultation with Congress, enumerates the number of refugee admissions into the United States each year.²³ Once an individual qualifies as a refugee under international law, a “durable solution” is identified.²⁴ If selected for resettlement, an individual is referred to one of nine U.S. Department of State Resettlement Support Centers located in various countries, “where they are screened to ensure they meet U.S.-designated processing priorities.”²⁵ The application process alone can take anywhere from six months to several years.²⁶ United States Custom and Immigration Services (USCIS) data indicates that the average processing time for Form I-730 refugee petitions has gone up every year, from three months in 2012 to twenty-eight months in 2022.²⁷

However, when conflicts arise that require a swift response, it is within the power of the executive branch to establish alternative pathways for individuals who may or may not otherwise qualify as refugees, via executive order.²⁸ This is precisely what the Biden Administration did in announcing OAW in September 2021 to resettle vulnerable Afghans, and in establishing U4U in April 2022 for Ukrainians fleeing “Russia’s unprovoked war of aggression.”²⁹

²² Lindsay M. Harris, *Afghan Allies in Limbo: The U.S. Immigration Response*, 66.3, HOW. L. J. 1, 26 (2023) (unpublished).

²³ *An Overview of U.S. Refugee Law and Policy*, *supra* note 18.

²⁴ *Id.* Durable solutions include voluntary repatriation, local integration, or resettlement. *Id.*

²⁵ *Id.* Processing priorities range from priority one for individuals who cannot be repatriated or locally integrated into their current location, to priority two for groups of special concern,” and priority three “for relatives of refugees already settled in the United States.” *Id.*

²⁶ *Fact Sheet: U.S. Asylum Process*, NAT’L IMMIGR. F. (Jan. 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/#:~:text=How%20long%20does%20the%20asylum,his%20or%20her%20asylum%20claim.>

²⁷ *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year*, USCIS, <https://egov.uscis.gov/processing-times/historic-pt> (last visited Apr. 23, 2023).

²⁸ ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 51 (2020).

²⁹ *Uniting for Ukraine*, *supra* note 15.

In order to expedite the process of evacuating Afghans and Ukrainians to safety, OAW and U4U rely on the concept of parole, rather than the refugee process.³⁰ Parole is a mechanism in the INA that “authorizes the Secretary of Homeland Security to exercise discretion to temporarily allow certain noncitizens to physically enter or remain in the United States . . . [although they] do not have a legal basis for [admittance].”³¹ Parole is thus generally used when urgent humanitarian situations arise or where significant public benefits exist for a person to be in the United States.³²

USCIS indicates that parole requests have reached an unprecedented volume since fall of 2021, resulting in higher than normal processing times.³³ Individuals who enter on parole are granted entry into the United States for a limited time and are not provided with immigration status.³⁴ Unlike refugees, parolees are typically ineligible for public benefits, such as refugee cash assistance or food stamps, although exceptions for Afghans and Ukrainians will be subsequently addressed.³⁵

B. *The Taliban’s Takeover and OAW*

In April 2021, the White House announced that all United States troops and military personnel would depart Afghanistan by September 11, 2021.³⁶ This order followed the 2020 peace deal between the United States and the Islamic fundamentalist group, the

³⁰ *Operation Allies Welcome*, *supra* note 15; *Uniting for Ukraine*, *supra* note 15.

³¹ *The Use of Parole Under Immigration Law*, AM. IMMIGR. COUNCIL (July 18, 2022), <https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law#:~:text=The%20executive%20has%20the%20authority,case%2Dby%2Dcase%20analysis>.

³² *Id.*

³³ *Parole Processing*, USCIS (Dec. 15, 2023), <https://www.uscis.gov/humanitarian/humanitarian-parole/parole-processing>.

³⁴ *The Use of Parole Under Immigration Law*, *supra* note 31. Individuals who obtain parole are generally expected to depart the United States once their parole expires or seek another form of status or relief. *Id.*

³⁵ *Explainer: Humanitarian Parole*, *supra* note 16.

³⁶ Jennifer Brick Murtazashvili, *The Collapse of Afghanistan*, 33 J. OF DEMOCRACY 40 (2022).

Taliban, to end the twenty-year war in Afghanistan.³⁷ After the United States led the invasion that toppled the Taliban's regime in 2001, the group fled across the border into Pakistan.³⁸ The Islamic Republic of Afghanistan, the United States-backed government, ended on August 15, 2021, as the Taliban swiftly took back control of Kabul, causing widespread chaos at the capital's airport as civilians sought to flee.³⁹

After the initial rush to the airport, the need to flee continued. Despite promises in the peace deal to respect the rights of women and minorities, and to provide amnesty for Afghans who had supported the United States' efforts, the Taliban imposed a strict interpretation of Islamic law targeting these groups.⁴⁰ The United Nations Assistance Mission in Afghanistan (UNAMA) has documented human rights violations such as restricted freedom of the press, disappearances of protestors and activists, and restrictions on girls from attending secondary school and on women from working.⁴¹ The Taliban's struggle to transition into a functioning government has additionally led to a nationwide economic crisis of unprecedented scale.⁴² UNAMA cites that at least fifty-nine percent of the population is in need of humanitarian assistance.⁴³

According to the United Nations High Commissioner for Refugees (UNHCR), by December 2021 there were 3.5 million Afghans internally displaced due to the conflict, with an additional 5.7 million Afghans displaced in neighboring countries.⁴⁴ Afghans

³⁷ Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (Jan. 19, 2023), cfr.org/backgrounders/us-taliban-peace-deal-agreement-afghanistan-war.

³⁸ *Id.*

³⁹ Murtazashvili, *supra* note 36.

⁴⁰ *Id.*; Sahar Akarbarzai, et al., *Taliban to Impose Their Interpretation of Sharia Law in Afghanistan*, CNN (Nov. 15, 2022), <https://www.cnn.com/2022/11/15/asia/taliban-afghanistan-sharia-law-intl-hnk/index.html>.

⁴¹ *Human Rights in Afghanistan: 15 August 2021 – 15 June 2022*, UNAMA (Jul. 20, 2022), <https://unama.unmissions.org/un-releases-report-human-rights-afghanistan-taliban-takeover>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Afghanistan Emergency*, UNCHR, <https://www.unhcr.org/en-us/afghanistan-emergency.html> (last visited Oct. 4, 2022).

who allied with or assisted the United States during the two-decade war are a particularly vulnerable group.⁴⁵ Army Captain Jeff Trammell worked with a former Afghan interpreter who could not get himself and his family out of the country before the United States withdrew.⁴⁶ Trammell's interpreter described his situation, stating: " 'After Americans left Afghanistan, I passed one year of my life like a prisoner. No work, no food.' " ⁴⁷ He further explained how he and his family only went out onto their rooftop at night to get a breath of fresh air.⁴⁸ The International Rescue Committee estimated that more than 300,000 Afghans could be at risk for assisting the United States since 2002.⁴⁹

The Biden Administration recognized the need to provide a pathway to the United States for people like Trammell's interpreter, who had worked alongside the United States at great risk.⁵⁰ When President Biden announced OAW, he directed the Department of Homeland Security (DHS) "to lead and coordinate ongoing efforts . . . to support vulnerable Afghans, including those who worked alongside us in Afghanistan for the past two decades, as they safely resettle in the United States."⁵¹ White House spokesperson Jen Psaki explained, "these are courageous individuals [and] [w]e want to make sure we recognize and value the role they've played over the last several years."⁵²

⁴⁵ Julia Ainsley, *Fear, Hiding and Frustration for Afghans Left Behind One Year After U.S. Evacuation*, NBC NEWS (Aug. 4, 2020, 4:30 AM), <https://www.nbcnews.com/politics/immigration/fear-hiding-frustration-afghans-left-one-year-us-evacuation-rcna41406>.

⁴⁶ *Id.*

⁴⁷ *Id.* "Trammell's Interpreter" is used rather than the interpreter's name for privacy reasons. *Id.*

⁴⁸ *Id.*

⁴⁹ Lauren Leatherby & Larry Buchanan, *At Least 250,000 Afghans Who Worked With U.S. Haven't Been Evacuated, Estimates Say*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/interactive/2021/08/25/world/asia/afghanistan-evacuations-estimates.html>.

⁵⁰ Jonathan Landay & Idrees Ali, *U.S. to Start Evacuating Some Under-Threat Afghan Visa Applicants*, U.S. NEWS & WORLD REPORT (July 14, 2021), <https://www.usnews.com/news/world/articles/2021-07-14/exclusive-us-expected-to-announce-start-of-evacuation-of-afghan-visa-applicants>.

⁵¹ *Operation Allies Welcome*, *supra* note 15.

⁵² *Press Briefing by Press Secretary Jen Psaki, July 14, 2021*, THE WHITE HOUSE (July 14, 2021, 12:43 PM), <https://www.whitehouse.gov/briefing->

OAW is based on humanitarian parole, which is commonly used to permit the entry of individuals for a specific purpose, such as to seek medical treatment or to attend a family member's funeral.⁵³ It has also been used in the past to resettle a significant number of people following armed conflict.⁵⁴ In 1975, Operation New Life relied on humanitarian parole upon the United States' withdrawal from Vietnam for 130,000 parolees.⁵⁵ Humanitarian parole was also used in Operation Pacific Haven in 1996 during the United States' withdrawal from Iraq.⁵⁶ As parole provides entry for a set period of time, OAW grants Afghan parolees entry into the United States for two years.⁵⁷

Approximately 86,000 Afghan nationals entered the United States through OAW by September 2022.⁵⁸ Many of these parolees may have been eligible for refugee resettlement, but OAW presented a swifter form of evacuation compared to refugee processing times.⁵⁹ A fourteen step approval process for parole is necessary prior to their arrival in the United States.⁶⁰ This process begins with screening and vetting that "involves biometric and biographic [procedures led] by intelligence, law enforcement, and counterterrorism [officials.]"⁶¹ This vetting balances providing

room/press-briefings/2021/07/14/press-briefing-by-press-secretary-jen-psaki-july-14-2021/#:~:text=country%20so%20far%3F-,MS.,over%20the%20last%20several%20years.

⁵³ *Explainer: Humanitarian Parole*, *supra* note 16.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Operation Allies Welcome*, *supra* note 15.

⁵⁸ Priscilla Alvarez, *Biden Administration Pivoting to Long-Term Strategy to Assist Afghans*, CNN (Sept. 1, 2022), <https://www.cnn.com/2022/09/01/politics/afghan-resettlement/index.html>. In early September 2022, the White House announced that OAW and the use of parole for Afghans would be phased out in favor of alternative methods that shave off time and provide more secure benefits for Afghan nationals. For this reason, this comment is limited in scope to the timeframe between late August 2021 and early September 2022. *Id.*

⁵⁹ *Explainer: Humanitarian Parole*, *supra* note 16.

⁶⁰ *Operation Allies Welcome*, *supra* note 15.

⁶¹ *Id.*

protection for “vulnerable Afghans” and national security.⁶² Upon arrival in the United States, individual parolees are tested for COVID-19 and vaccinations are administered before being transferred to a military base, where they remain temporarily to receive a full medical screening.⁶³ Parolees then move to a resettlement location, where non-governmental organizations step in to provide integration services.⁶⁴

While OAW has benefited tens of thousands of Afghan nationals, almost as many, around 74,000, were sitting in the parole pipeline as of July 2022.⁶⁵ Due to the absence of a United States consulate in Afghanistan, many applicants are required to travel to a third country, such as Pakistan, to begin their screening process.⁶⁶ Initially, Afghans who were able to evacuate from the Kabul airport were processed in countries such as Qatar, Bahrain, and Kuwait.⁶⁷ Taliban restrictions on travel have made it increasingly difficult for Afghans to obtain visas for third countries by requiring a clear destination and prohibiting women from traveling without a male guardian.⁶⁸

Afghans have faced long processing delays brought on by limited staffing to process applications and the multiple layers of screening.⁶⁹ The parole pipeline is affected by more than just processing delays. USCIS initially set narrow parameters for eligibility, requiring “an applicant to demonstrate that they were

⁶² *Id.*; Ted Hessen, *Explainer: Who are the Afghan Refugees Coming to the U.S. and What Happens When They Arrive?*, REUTERS (Aug. 26, 2021, 3:19 PM), <https://www.reuters.com/world/who-are-afghan-refugees-coming-us-what-happens-when-they-arrive-2021-08-26/>.

⁶³ *Operation Allies Welcome*, *supra* note 15.

⁶⁴ *Id.*

⁶⁵ Alvarez, *supra* note 58.

⁶⁶ Chishti & Bolter, *supra* note 13.

⁶⁷ *Operation Allies Welcome*, *supra* note 15.

⁶⁸ *Taliban Restrict Afghans Going Abroad, Raises Concern from U.S. and UK*, REUTERS (Mar. 1, 2022, 1:42 AM), <https://www.reuters.com/world/asia-pacific/taliban-restrict-afghans-going-abroad-draws-criticism-uk-envoy-2022-02-28/>.

⁶⁹ Chishti & Bolter, *supra* note 13.

fleeing targeted, individualized harm.”⁷⁰ This standard led to a high denial due to the evidentiary burden.⁷¹

In June 2022, USCIS acknowledged these low approval rates by lowering the standard from individualized, targeted harm, to being a member of a group that has faced “widespread, systematic, or pervasive attacks” by the Taliban.⁷² DHS then announced additional classes of Afghans eligible for parole: (1) “Afghans who support U.S. military interests” (including “the Soviet occupation of Afghanistan”); (2) “[i]ndividuals employed as civil servants in Afghanistan from September 27, 1996 to December 22, 2001 or after August 15, 2021[.]”]; (3) “[i]ndividuals who provided insignificant or certain limited material support to a designated terrorist organization[,]” such as conducting a “commercial transaction . . . in response to a reasonably perceived threat of [violence.]”⁷³ Despite the intention to increase the number of admissible Afghans, these categories remain narrow, requiring extensive evidence, and are not sufficient to provide the broader assistance many Afghans require.⁷⁴

C. War with Russia and U4U

After Russia spent the early weeks of 2022 establishing a sizeable military presence along the border it shares with Ukraine, Vladimir Putin launched a “ ‘full-scale invasion’ ” of Ukraine on February 24, 2022.⁷⁵ This act of hostility followed Putin’s unilateral declaration of independence of the Ukrainian regions of Donetsk

⁷⁰ *Id.*

⁷¹ Camilo Montoya-Galvez, *U.S. Expands Eligibility for Afghans and Others Seeking Entry on Humanitarian Grounds*, CBS NEWS (July 1, 2022), <https://www.cbsnews.com/news/immigration-us-expands-eligibility-afghans-others-seeking-entry-humanitarian-grounds/>.

⁷² *Id.*

⁷³ *DHS and DOS Announce Exemptions Allowing Eligible Afghans to Qualify for Protection and Immigration Benefits*, DHS (June 14, 2022), <https://www.dhs.gov/news/2022/06/14/dhs-and-dos-announce-exemptions-allowing-eligible-afghans-qualify-protection-and>. See drop down: Online Filing of Form I-134A, Declaration of Financial Support.

⁷⁴ Montoya-Galvez, *supra* note 71.

⁷⁵ Tucker Reals & Alex Sundby, *Russia’s War in Ukraine: How it Came to This*, CBS NEWS (Mar. 23, 2022, 8: 44 AM), <https://www.cbsnews.com/news/ukraine-news-russia-war-how-we-got-here/>.

and Luhansk in Donbas and was the latest in an eight-year conflict that began when Russia last invaded Ukraine in 2014 to annex the Crimean Peninsula.⁷⁶ NATO Secretary General Jens Stoltenberg stated, “ ‘Peace on our continent has been shattered . . . [w]e now have a war in Europe on a scale and of a type we thought belonged to history.’ ”⁷⁷

By the afternoon of the invasion, Russian troops and tanks had entered from Belarus in the north, and the eastern and southern fronts of Ukraine from Russia.⁷⁸ The main battlefronts emerged on the outskirts of the capital city of Kyiv, and two of Ukraine’s largest cities, Mariupol and Kharkiv.⁷⁹ Russia reportedly launched more than 400 missiles within the first week of its invasion, often targeting civilian homes and infrastructure.⁸⁰ Millions of people were suddenly without basic necessities, such as food, water, medicine, and safe shelter, as the healthcare system crumbled and public infrastructure collapsed, making it “the worst humanitarian crisis Europe has seen in decades[.]”⁸¹ The Office of the High Commissioner for Human Rights recorded 5,237 civilian deaths between February 24, 2022, and July 24, 2022.⁸²

The conflict quickly produced the fastest-growing displaced persons “crisis in Europe since World War II.”⁸³ As of late September 2022, 7.5 million Ukrainians had been registered outside of Ukraine, with the largest number (over two million) in Poland and Germany.⁸⁴ Men between the ages of eighteen and sixty were

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Kirby & Guyer, *supra* note 8.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Russian Attack on Ukraine: What is Happening?*, INT’L RESCUE COMM. (Mar. 21, 2022), <https://www.rescue.org/article/ukraine-russia-crisis-what-happening>.

⁸² *Ukraine: Civilian Casualty Update 25 July 2022*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R (July 25, 2022), <https://www.ohchr.org/en/press-releases/2022/07/ukraine-civilian-casualty-update-25-july-2022>.

⁸³ Kirby & Guyer, *supra* note 8.

⁸⁴ Erol Yayboke, et al., *Update on Forced Displacement Around Ukraine*, CTR. FOR STRATEGIC & INT’L STUD. (Oct. 3, 2022), <https://www.csis.org/analysis/update-forced-displacement-around-ukraine>.

barred from leaving Ukraine, resulting in women, children, and the elderly making up the highest percentage of fleeing individuals.⁸⁵

Since the invasion, the Biden Administration has implemented serious economic sanctions against Russia and has filtered billions of dollars to Ukraine for military assistance.⁸⁶ President Biden took support one step further on April 21, 2022, when he announced the United States' commitment to accepting 100,000 Ukrainians.⁸⁷ At a news briefing in Brussels, President Biden affirmed his commitment, stating, "[T]his is not something that Poland or Romania or Germany should carry on their own. This is an international responsibility."⁸⁸

The resulting executive parole program, U4U, was announced as "a new streamlined process to provide Ukrainian citizens who have fled Russia's unprovoked war of aggression opportunities to come to the United States[.]"⁸⁹ The application process is entirely electronic and free.⁹⁰ To be eligible for the program, an individual

⁸⁵ *Id.* Interestingly, the Ukrainian capital of Kyiv is a "transit point for thousands of internally displaced people and refugees" from Eastern Europe and around the world. Lily Hyde, *Refugees in Ukraine Fear Becoming Trapped in Another Conflict*, POLITICO (Feb. 15, 2022, 4:00 AM), <https://www.politico.eu/article/crimea-refugees-crimean-tatar-ukraine-russia-moscow-conflict-displaced-people-invasion/>. Sahar Merzaie, a former Afghan BBC social media manager, fled Afghanistan from the Kabul airport when the Taliban fell in August, arriving in Ukraine. Merzaie's inability to escape conflict demonstrates many of the complexities and dangers of being a refugee. *Id.*

⁸⁶ Kirby & Guyer, *supra* note 8; Antony J. Blinken, *\$2.8 Billion in Additional U.S. Military Assistance for Ukraine and Its Neighbors*, U.S. DEP'T OF STATE (Sept. 8, 2022), <https://www.state.gov/2-8-billion-in-additional-u-s-military-assistance-for-ukraine-and-its-neighbors/>.

⁸⁷ *President Biden to Announce Uniting for Ukraine, a New Streamlined Process to Welcome Ukrainians Fleeing Russia's Invasion of Ukraine*, DEP'T OF HOMELAND SEC. (April 21, 2022), <https://www.dhs.gov/news/2022/04/21/president-biden-announce-uniting-ukraine-new-streamlined-process-welcome-ukrainians>.

⁸⁸ *Remarks by President Biden in Press Conference*, WHITE HOUSE (Mar. 24, 2022, 6:32 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/24/remarks-by-president-biden-in-press-conference-7/>.

⁸⁹ *President Biden to Announce Uniting for Ukraine*, *supra* note 87.

⁹⁰ *Frequently Asked Questions About Uniting for Ukraine*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/uniting-for-ukraine/frequently-asked-questions-about-uniting-for-ukraine> (last visited Apr. 23, 2023).

must have been (1) physically present in Ukraine immediately prior to the Russian invasion (at least until February 11, 2022); (2) have been displaced as a result of the invasion; and (3) must satisfy vaccination, public health, biometric and biographic screening requirements.⁹¹ Additionally, the program is only open to Ukrainians and their non-Ukrainian immediate family members who have the support of an individual or entity in the United States as part of a sponsorship program.⁹² Support can be provided by “[a]ny U.S. citizen or individual, including representatives of non-government organizations” and sponsors must declare their financial support and pass the appropriate security background checks.⁹³ Several organizations have stepped in to help facilitate the sponsorship process, such as Welcome Connect, a refugee resettlement group that works to pair Ukrainian applicants with willing sponsors.⁹⁴

U4U allows an individual to enter as a parolee for up to two years.⁹⁵ It is a “special” parole program, which is an escalated parole process designed to address the specific circumstances of certain populations.⁹⁶ Since April 25, 2022, more than 100,000 people in the United States have applied to sponsor Ukrainian

⁹¹ DEP’T OF HOMELAND SEC., *Implementation of the Uniting for Ukraine Parole Process*, 87 FED. REG. 25040, 25042 (2022).

⁹² *Id.*

⁹³ *Id.* The support process is triggered by filing a Form I-134, *Declaration of Financial Support*, with USCIS through an online portal. Security and background checks are conducted to protect against exploitation of the program. The United States has around one million people of Ukrainian descent who have sponsored family members. Global Refuge Staff, *Biden Administration Announces “Uniting for Ukraine”: New Sponsorship Program for Ukrainians Seeking Safety in the U.S.*, GLOB. REFUGE (Apr. 21, 2022), <https://www.globalrefuge.org/news/biden-administration-announces-uniting-for-ukraine-new-sponsorship-program-for-ukrainians-seeking-safety-in-the-u-s/>.

⁹⁴ *Sponsor FAQs for Ukrainians*, WELCOME.US (May 10, 2023), <https://ukraine.welcome.us/>.

⁹⁵ *Uniting for Ukraine*, *supra* note 15.

⁹⁶ *The Use of Parole Under Immigration Law*, *supra* note 31. Examples of other special parole programs include the Haitian Family Reunification Parole Program (HFRP) and the Central American Minors Refugee and Parole Program (CAM). *Id.*

parolees, and more than 50,000 Ukrainians have arrived as a result.⁹⁷ Krish O'Mara Vignarajah, President of the Lutheran Immigration and Refugee Service, applauded the Biden Administration's considerable effort directed towards the safe and quick arrival of Ukrainians, but in critique, noted "[t]he effort is a classic example of where there's a will, there's a way, [and w]e need to recognize that there is inequity in our immigration system."⁹⁸

A similar sponsorship program, Homes for Ukraine, has been successful in the United Kingdom, resulting in more than 200,000 visas issued to Ukrainians.⁹⁹ Families hosting Ukrainians have begun urging the government to end refugee "favoritism" and to use the Homes for Ukraine structure as a template for other groups.¹⁰⁰ The overwhelmingly positive response towards these sponsorship programs reflects an increasingly positive attitude toward welcoming foreigners, along with the realization that it is functionally possible to do so.

D. Comparing OAW and U4U

While advocates applaud the Biden Administration's response to the crisis in Ukraine, many have been outspokenly critical of the pronounced difference in the response received by Afghans less than

⁹⁷ Camilo Montoya-Galvez, *5 States Account for Half of 123,962 Requests to Sponsor Ukrainian Refugees in U.S.*, CBS NEWS (Sept. 13, 2022, 4:01 PM), <https://www.cbsnews.com/news/ukrainian-refugees-sponsors-5-states-applications/>.

⁹⁸ Camilo Montoya-Galvez, *U.S. Admits 100,000 Ukrainians in 5 Months, Fulfilling Biden Pledge*, CBS NEWS (July 29, 2022, 6:26 PM), <https://www.cbsnews.com/news/us-admits-100000-ukrainians-in-5-months-fulfilling-biden-pledge/>. In referencing inequality in the United States immigration system, Vignarajah is specifically referring to the disparate treatment of Afghan and Ukrainian refugees. *Id.*

⁹⁹ *Ukraine Family Scheme, Ukraine Sponsorship Scheme (Homes for Ukraine) and Ukraine Extension Scheme Visa Data*, GOV.UK (last updated Jan. 4, 2024), <https://www.gov.uk/government/publications/ukraine-family-scheme-application-data/ukraine-family-scheme-and-ukraine-sponsorship-scheme-homes-for-ukraine-visa-data--2>.

¹⁰⁰ Charlotte Lynch, *Ex-minister Joins Ukraine Host Families in Call for End to Refugee 'Favouritism'*, LBC (Mar. 14, 2023), <https://www.lbc.co.uk/news/ex-minister-ukraine-host-families-end-refugee-favouritism/>.

a year earlier.¹⁰¹ “There are clearly two refugee systems – one for Ukrainians and one for Afghans,” Matt Zeller, an advisor to Iraq and Afghanistan Veterans of America, said[.]¹⁰² Margaret D. Stock argued that, in light of “[t]he United States’s immediate action and strong commitment to help Ukrainians[,]” the weak response towards Afghans will make others less likely to serve alongside United States soldiers in future conflicts.¹⁰³ Many critics feel that Afghans should have been afforded the same urgency because they fought alongside the United States.¹⁰⁴

Afghans and Ukrainians utilizing parole both face an uncertain future regarding their immigration status. Neither program grants refugee status, which can lead to permanent legal residence in the United States.¹⁰⁵ Parole only lasts for two years and is subject to the discretion of the executive branch.¹⁰⁶ Thus, both groups are subject to a legal limbo; neither group knows whether they will be permitted to remain in the United States permanently. While the experience of parole inherently lends to uncertainties upon arrival in the United States, there are clear disparities in the journeys taken. This section will compare OAW and U4U, highlighting several key differences such as the distinction between humanitarian and special parole, eligibility requirements, and the application process.

OAW operates as humanitarian parole, while U4U is a type of special parole.¹⁰⁷ This is a key distinction. Through humanitarian parole, Afghans do not receive any extra protections or expedited procedures.¹⁰⁸ Their requests have flooded the understaffed, general

¹⁰¹ Dan De Luce, *Afghans Subject to Stricter Rules Than Ukrainian Refugees, Advocates Say*, NBC NEWS (Apr. 19, 2022, 12:16 PM), <https://www.nbcnews.com/politics/immigration/afghans-subject-stricter-rules-ukrainian-refugees-advocates-say-thousa-rcna26513>.

¹⁰² *Id.*

¹⁰³ Margaret D. Stock, *Time to Treat Afghan Allies With the Same Respect as Those Fleeing Ukraine*, THE HILL (Aug. 15, 2022, 8:30 AM), <https://thehill.com/opinion/immigration/3601572-time-to-treat-afghan-allies-with-same-respect-as-those-fleeing-ukraine/>.

¹⁰⁴ See De Luce, *supra* note 101.

¹⁰⁵ *An Overview of U.S. Refugee Law and Policy*, *supra* note 18.

¹⁰⁶ Chishti & Bolter, *supra* note 13.

¹⁰⁷ *The Use of Parole Under Immigration Law*, *supra* note 31.

¹⁰⁸ *Id.*; Abigail Hauslohner, *Biden Welcomes Ukrainian Refugees, Neglects Afghans, Critics Say*, THE WASHINGTON POST (Apr. 28, 2022, 10:57 AM),

humanitarian parole program.¹⁰⁹ Special parole is separate from the general parole process.¹¹⁰ Special parole programs are designed by DHS to address the specific circumstances of identified populations, such as the Haitian Family Reunification Parole Program (HFRP), implemented in the wake of the devastating earthquake.¹¹¹ Thus, OAW is unique in name more so than substance, as it primarily relies on the preexisting norms of humanitarian parole. Conversely, U4U has carved out a pathway that is unique to Ukrainians, under the umbrella of special parole.

Despite the suffering of individuals in both countries due to armed conflict, U4U is more generous in terms of eligibility. U4U is open to all those fleeing from “Russia’s unprovoked war of aggression,” whereas OAW initially required applicants to provide evidence that they were being individually targeted by the Taliban.¹¹² USCIS’s revised eligibility in June 2022 more broadly required evidence of being part of a targeted group, rather than a targeted individual.¹¹³ This lesser standard is still higher than U4U, as it is open to any Ukrainian citizen or immediate family member displaced as a result of the Russian invasion.¹¹⁴

Filing the application under OAW also comes with its own set of obstacles. Afghans are subject to a fourteen-step application process, resulting in a time-consuming process that could lead to several months—or even years—of waiting in third countries and foreign military bases; if they are even able to make it out of Afghanistan.¹¹⁵ Conversely, U4U allows for a truncated process that is initiated by a one-step, online application to be completed by the sponsor, followed by one round of biographic attestations from

<https://www.washingtonpost.com/national-security/2022/04/28/biden-refugees-ukraine-afghanistan/>.

¹⁰⁹ Hauslohner, *supra* note 108.

¹¹⁰ *The Use of Parole Under Immigration Law*, *supra* note 31.

¹¹¹ *Id.*

¹¹² *Uniting for Ukraine*, *supra* note 15; Chishti & Bolter, *supra* note 13.

¹¹³ Chishti & Bolter, *supra* note 13.

¹¹⁴ *Uniting for Ukraine*, *supra* note 15.

¹¹⁵ Chishti & Bolter, *supra* note 13; *Explainer: Humanitarian Parole and the Afghan Evacuation*, NAT’L IMMIGR. F. (Aug. 30, 2021), <https://immigrationforum.org/article/explainer-humanitarian-parole-and-the-afghan-evacuation/>; *see also Operation Allies Welcome*, *supra* note 15.

the individual seeking entry.¹¹⁶ Processing times for U4U average six to eight weeks.¹¹⁷

As OAW is a general humanitarian parole program, applicants must either pay an associated fee of \$575 (USD) per applicant or apply for a fee waiver requiring extensive documentation of the applicant's inability to pay.¹¹⁸ The \$575 fee is formidable as it is more than the average annual income of an Afghan citizen, which the World Bank estimates to be \$340.¹¹⁹ Thus far, the U.S. has received over twenty-five million dollars in application fees from Afghan applicants.¹²⁰ Conversely, where Ukrainians have an average annual income of \$3,961, the flexibility of enacting a special parole program has resulted in a free application without the requirement of a fee waiver.¹²¹ Ukrainians who applied for humanitarian parole prior to the creation of U4U were offered a refund.¹²² Additionally, where OAW requires mailing of physical paperwork, U4U is a completely electronic process.¹²³

Applicants for both programs must appear at a United States consulate to undergo biometric screenings and interviews.¹²⁴ Given the absence of a United States consular presence in Afghanistan and Ukraine due to their respective conflicts, applicants must travel to a third country.¹²⁵ Ukrainians have generally been welcomed by their

¹¹⁶ *The Use of Parole Under Immigration Law*, *supra* note 31; *Uniting for Ukraine*, *supra* note 15.

¹¹⁷ *Options For Ukrainians With Expiring Humanitarian Parole*, UKR. IMMIGR. TASK FORCE (Jan. 31, 2023), <https://www.ukrainetaskforce.org/options-for-ukrainians-with-expiring-humanitarian-parole/>. Six to eight weeks was the average processing time as of fall 2022 and January 2023. However, the source has since been updated to reflect processing times of twelve-eighteen months. *Id.*

¹¹⁸ Hauslohner, *supra* note 108; Harris, *supra* note 22 at 27.

¹¹⁹ *Adjusted Net National Income Per Capita*, WORLD BANK, <https://data.worldbank.org/indicator/NY.ADJ.NNTY.PC.CD> (last visited Feb. 14, 2023).

¹²⁰ Hauslohner, *supra* note 108.

¹²¹ WORLD BANK, *supra* note 119; *Uniting for Ukraine*, *supra* note 15.

¹²² Hauslohner, *supra* note 108.

¹²³ Camilo Montoya-Galvez, *More than 45,000 Americans Have Applied to Sponsor Ukrainian Refugees in the U.S.*, CBS NEWS (June 3, 2022), <https://www.cbsnews.com/news/ukrainian-refugees-us-sponsorship-45000-americans-apply/>.

¹²⁴ Chishti & Bolter, *supra* note 13.

¹²⁵ *Id.*

European neighbors without visas, providing easier access to the United States' consulates in those countries.¹²⁶ Afghans need to first obtain a visa to travel to a neighboring country, which the Taliban makes difficult.¹²⁷ Shala Gafary, managing attorney for the Afghan Legal Assistance project at Human Rights First, describes these challenges: “[I]magine a mom with a couple of small kids. How is she supposed to get to Pakistan when the Taliban is not allowing women to travel by themselves without being accompanied by a male guardian?”¹²⁸

Professor Lindsay Harris highlights these comparisons between OAW and U4U to demonstrate that the disparate treatment of these groups is “one of the latest episodes in the long history of racism in the creation, execution, and implementation of immigration policy in the United States.”¹²⁹ She makes the strong argument that this disparate treatment seems out of sorts with the notion that Afghans are more likely to meet the definition of a refugee than Ukrainians.¹³⁰ Where many Ukrainians are fleeing generalized war, Afghans have had to prove a fear of persecution by the Taliban, which already places them within the potential realm of qualifying for refugee status.¹³¹ Professor Harris recommends that Congress broaden OAW to encompass more Afghans, relax requirements for family reunification, and make the filing and processing experience comparable to U4U, even if that means increasing staffing and allocation of resources.¹³²

Biden Administration officials have denied critics' claims of favoritism, claiming that their commitment to welcoming

¹²⁶ Hauslohner, *supra* note 108. The European Union and European nations have faced the same international backlash and scrutiny for the stark difference in its treatment of Ukrainian refugees compared to their treatment of refugees from the Middle East, Africa, and particularly Syrian refugees who came in 2015. The Associated Press, *Europe Welcomes Ukrainian Refugees but Others, Less So*, NPR (Feb. 28, 2022, 5:47 AM), <https://www.npr.org/2022/02/28/1083423348/europe-welcomes-ukrainian-refugees-but-others-less-so>.

¹²⁷ Hauslohner, *supra* note 108.

¹²⁸ *Id.*

¹²⁹ Harris, *supra* note 22, at 1.

¹³⁰ *Id.* at 26.

¹³¹ Hauslohner, *supra* note 108.

¹³² Harris, *supra* note 22, at 37.

Ukrainians does not limit their ability to assist Afghans and others.¹³³ The Biden Administration also reminds critics of the 76,000 Afghans who were evacuated upon the United States' withdrawal and paroled into the United States.¹³⁴ The data, however, does not paint such a favorable picture. By mid-June 2022, one year after the initial large-scale evacuation, less than 5,000 OAW applications had been fully adjudicated and only 297 of those were approved.¹³⁵ By the end of June 2022, more than 17,000 Ukrainians had been paroled into the United States through U4U and more than 24,000 had been granted parole but were yet to arrive in the United States.¹³⁶ This presents "a stark contrast to the 297 Afghans who had been granted humanitarian parole over a much longer timeframe."¹³⁷

It is clear, from the differences elucidated above, that the Biden Administration, faced with two groups in need of protection from armed conflict, established two different programs. U4U is applicant and sponsor friendly, resulting in faster entry with much higher approval rates. OAW is narrowly limited, cumbersome, and has resulted in a high denial rate despite the great risk to many Afghans who have provided support and may otherwise qualify as refugees. How is the President able to craft unequal programs for similarly situated groups? Does the Constitution provide any limitation on the President's parole power? Section III answers those questions.

III. THE CONSTRUCTION OF DISPARATE PAROLE PROGRAMS

A. *Equal Protection: Citizens v. Noncitizens*

The Fifth Amendment of the United States Constitution states, "No person shall be . . . deprived of life, liberty, or property, without

¹³³ Hauslohner, *supra* note 108.

¹³⁴ *Id.*; Priscilla Alvarez, *Biden Administration Extends Immigration Relief to Afghans in the US*, CNN (Mar. 16, 2022, 9:15 AM), <https://www.cnn.com/2022/03/16/politics/afghans-immigration-relief/index.html#:~:text=The%20US%20resettled%20more%20than,years%20and%20received%20work%20permits.>

¹³⁵ Chishti & Bolter, *supra* note 13.

¹³⁶ *Id.*

¹³⁷ *Id.*

due process of law.¹³⁸ The Fifth Amendment imposes the same equal protection standards on the federal government that the Fourteenth Amendment imposes on the states, requiring equal protection under the law and opening the federal government up to lawsuits where it “actually discriminated” against an individual.¹³⁹ Equal protection does not require identical treatment, but rather “forbids different treatment of similarly situated persons without an adequate justification.”¹⁴⁰ Section II paints a picture of two “similarly situated” groups that have been treated unequally under the execution of OAW and U4U.

The Equal Protection rights contained in the Fifth and Fourteenth Amendments guarantees equal treatment to all “persons[,]” which for more than a century, the Supreme Court of the United States has recognized to mean “all persons within the territorial jurisdiction, without regard to any differences of . . . nationality.”¹⁴¹ Therefore, “[t]he general rule is that where foreign nationals and citizens are similarly situated, they must be treated equally.”¹⁴² This rule was established by the Supreme Court of the United States in *Yick Wo v. Hopkins*. In this case, San Francisco passed an ordinance requiring those running laundry operations in buildings not made of brick or stone to apply for a permit, at a time when 320 of the city’s laundries were constructed

¹³⁸ U.S. CONST. amend. V.

¹³⁹ *Id.*; U.S. CONST. amend. XIV, § 1; see also *Equal Protection*, LEGAL INFO. INST. AT CORNELL L. SCH., https://www.law.cornell.edu/wex/equal_protection (last visited Oct. 16, 2022). The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

¹⁴⁰ David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV., 367, 380 (2003).

¹⁴¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

¹⁴² Cole, *supra* note 140, at 380.

of wood.¹⁴³ All but one of the 200 Chinese operators' permits were denied, while those similarly situated laundry operators not of Chinese descent had theirs granted.¹⁴⁴ Thus, Chinese nationals, Yick Wo and Wo Lee, were fined and imprisoned after continuing to run their laundry businesses.¹⁴⁵ The Court held that this act of discrimination was illegal because petitioners complied with all safety requirements, while conducting their businesses in wooden buildings.¹⁴⁶ The Court reasoned that their rights "are not less because[] they are aliens and subjects of the Emperor of China."¹⁴⁷

To identify an equal protection violation, the question becomes which level of scrutiny applies, and then whether the government's classification is justified under that level of scrutiny.¹⁴⁸ Strict scrutiny is applied to constitutional challenges of state and local government laws classifying noncitizens, or "aliens."¹⁴⁹ A law is justified under strict scrutiny "if it is proved necessary to achieve a compelling government purpose."¹⁵⁰ In *Graham v. Richardson*, the Supreme Court of the United States struck down a Pennsylvania law that made noncitizens ineligible for public assistance, holding that "a State's desire to preserve . . . welfare benefits for its own citizens" was an "inadequate" justification under strict scrutiny.¹⁵¹

However, greater deference is provided to federal laws classifying noncitizens for immigration purposes.¹⁵² Thus, acts of the legislative and executive branches are subject to the lowest level of scrutiny under the Fifth Amendment—rational basis—¹⁵³ where a law will be upheld under rational basis so long as it is "rationally related to a legitimate government purpose."¹⁵⁴ The application of

¹⁴³ *Yick Wo*, 118 U.S. at 356.

¹⁴⁴ *Id.* at 374.

¹⁴⁵ *Id.* at 356.

¹⁴⁶ *Id.* at 374.

¹⁴⁷ *Id.* at 368.

¹⁴⁸ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 725-26 (6th ed. 2019)

¹⁴⁹ *Id.* at 834.

¹⁵⁰ *Id.* at 727.

¹⁵¹ *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

¹⁵² CHEMERINSKY, *supra* note 148, at 832.

¹⁵³ *Id.* at 838.

¹⁵⁴ *Id.* at 727.

rational basis rather than strict scrutiny at the federal level is often linked to notions of sovereignty and the plenary power doctrine.¹⁵⁵

In *Mathews v. Diaz*, the Supreme Court of the United States upheld a federal statute denying medical benefits to aliens who had not been admitted for permanent residency and who had not been in the United States for at least five years.¹⁵⁶ While the factual scenario is similar to that in *Graham v. Richardson*, the Court reasoned that “[s]ince decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive.”¹⁵⁷ Thus, the government may treat noncitizens differently for immigration purposes if the government action passes the applicable level of scrutiny, as the Court held it had here.

Given that OAW and U4U are executive orders governing immigration status, rational basis would likely apply in the event of an equal protection claim. Therefore, it is probable that the Constitution would permit the disparate treatment of Afghan and Ukrainian parolees under the Fifth Amendment should this minimum level of scrutiny be applied. The federal government would likely invoke national security as a legitimate purpose. The additional screening layers and high denial rates that Afghans face could pass as a rational means for vetting the admittance of individuals arriving from a country with which we share a long and contested history. However, the equal protection analysis may not even be applicable here, as the Supreme Court of the United States has held that the Constitution is weakest in its protections for those who are outside of the United States seeking entry.

Once Afghan and Ukrainian parolees arrive in the United States, they are entitled to protections under the Constitution, including the Equal Protection Clause. Afghans and Ukrainians who are outside of the United States are not protected by the Constitution.¹⁵⁸ Policies based on exclusion evade constitutional

¹⁵⁵ *Id.* at 838.

¹⁵⁶ *Mathews v. Diaz*, 426 U.S. 67, 87 (1976).

¹⁵⁷ *Id.* at 81.

¹⁵⁸ *Id.* at 80.

standards that would apply to government conduct that affects foreign nationals present within the United States.¹⁵⁹ This leaves great power in the hands of the President and Congress to create admissions standards.

B. Equal Protection: Noncitizens v. Citizens

A foundational principle of United States constitutional law is that the federal government is “one of enumerated powers[.]” meaning “it can exercise only the powers granted to it” and powers “necessary and proper” to the execution of those delegated powers.¹⁶⁰ This was determined in the 1819 Supreme Court of the United States decision, *McCulloch v. Maryland*, which held that “all powers not delegated to the federal government are reserved to the states and to the people.”¹⁶¹ Article 1, § 8, clause 4 of the Constitution grants Congress the express power to “establish an uniform Rule of Naturalization.”¹⁶² The Constitution, however, does not expressly provide Congress the power to admit or remove non-citizens.¹⁶³ The Migration and Importation Clause in Article I, § 9, clause 1, of the Constitution was “considered a potential grant of power to Congress[.]” but its historical context primarily implies that the clause was merely intended to bar Congress from halting the

¹⁵⁹ Ilya Somin, *Immigration Law Defies American Constitution*, THE ATLANTIC (Oct. 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/us-immigration-laws-unconstitutional-double-standards/599140/>. “[I]n *Trump v. Hawaii*, the Supreme Court upheld President Donald Trump’s ‘travel ban’ policy which barred entry into the United States from several Muslim-majority nations[.]” which would otherwise be a clear violation of the Fifth Amendment due its discriminatory targeting of Muslims and lack of any legitimate justification. *Id.*

¹⁶⁰ *M’Culloch v. Maryland*, 17 U.S. 316, 324, 405, 411-12 (1819).

¹⁶¹ Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 3 (2002) (citing *M’Culloch v. Maryland*, 17 U.S. 316, 405 (1819)).

¹⁶² U.S. CONST. art. 1, § 8, cl. 4.

¹⁶³ David Weissbrodt and Laura Danielson, *Chapter 2: The Source and Scope of the Federal Power to Regulate Immigration and Naturalization*, THE UNIV. OF MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/immigrationlaw/chapter2.html> (last visited Oct. 16, 2022).

slave trade prior to 1808.¹⁶⁴ The Court also looked to the Constitution's Commerce Clause, Article I, § 8, clause 3, which authorizes Congress "to regulate Commerce with foreign Nations, and among the several States[.]"¹⁶⁵

In 1884, the Supreme Court of the United States relied on these powers in the *Head Money Cases*, upholding the constitutionality of a federal tax levying fifty cents on every noncitizen who arrived in the United States.¹⁶⁶ However, this established a very narrow power, so as congressional action regarding immigration began to reach beyond the scope of taxation to more forms of regulation, the Court sought a broader base for federal power.¹⁶⁷ Thus, the Court was tasked with identifying the source of the federal government's power over immigration by looking outside of the Constitution itself while remaining peripheral with its enumerated powers.¹⁶⁸

The "plenary power doctrine" generally refers to "judicial deference to, or a lack of constitutional limitations on, Congress's exercise of its immigration power."¹⁶⁹ The Court established the plenary power doctrine through a series of cases that provide the legislative and executive branches unfettered power to determine the substance of immigration law, including the exclusion or admission of noncitizens.¹⁷⁰

The Court found the source for federal power to regulate immigration in the Chinese Exclusion Act case, *Chae Chan Ping v. United States*.¹⁷¹ Justice Field spoke for a unanimous Court, stating:

¹⁶⁴ *Id.*

¹⁶⁵ U.S. CONST. art. 1, § 8, cl. 3.

¹⁶⁶ T. ALEXANDER ALENIKOFF, ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 28 (West Academic Publishing, 9th ed. 2021).

¹⁶⁷ Weissbrodt and Danielson, *supra* note 163.

¹⁶⁸ *Id.*

¹⁶⁹ Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 374, 375 (2004).

¹⁷⁰ *Id.* at 380.

¹⁷¹ David A. Martin, *Why Immigration's Plenary Power Endures*, 68 OKLA. L. REV. 29, 31 (2015). Chae Chan Ping, a Chinese national, resided in the United States for fifteen years. Before traveling home to China to see family, he obtained an official certificate provided by the law as a means for readmission to the United States upon his return. While he was at sea on his return voyage, Congress passed another law under the Chinese Exclusion Act nullifying reentry certificates for Chinese nationals, resulting in Ping's exclusion and habeas corpus challenge. The

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.¹⁷²

The Court invoked the concept of independent nationhood to read a full range of actions regarding the conduct of foreign relations into the “rather skeletal specific actions” enumerated in the Constitution, reasoning that the assertion of a nation’s sovereignty includes the inherent authority to choose which noncitizens to admit or exclude.¹⁷³ According to Professor David A. Martin, the Court did not deploy sovereignty as grounds for denying rights but used the concept primarily to answer a federalism question.¹⁷⁴ If the *Chae Chan Ping* Court had held that the federal government lacked authority to control migration in regard to the Chinese Exclusion Act, that power would have been left up to the states as part of their general police powers.¹⁷⁵

The Court reinforced the power to exclude, derived from plenary power, in *Shaughnessy v. United States ex rel. Mezei*. The Court upheld the exclusion of a noncitizen who had previously lived in the United States for twenty-five years but left to spend nineteen months in Hungary.¹⁷⁶ He was permanently excluded from the United States on national security grounds upon his return and left stranded on Ellis Island as no other country would grant him entry.¹⁷⁷ The Court explained that “an alien on the threshold of

initial focus of the Chinese Exclusion Act of 1882 established a ten-year prohibition on Chinese labor immigration. Howard S. Myers, III., *America’s Immigration Policy – Where We Are and How We Arrived: An Immigration Lawyer’s Perspective*, 44 MITCHELL HAMLINE L. REV. 743, 747 (2018).

¹⁷² *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889).

¹⁷³ Martin, *supra* note 171, at 36-37.

¹⁷⁴ *Id.* at 33.

¹⁷⁵ *Id.* at 35.

¹⁷⁶ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208 (1953).

¹⁷⁷ *Id.*

initial entry stands on different footing” than one who has passed through the gates, even illegally, as they are entitled to due process of the law.¹⁷⁸ The Court further reasoned that neither the noncitizen’s prior residence, nor his harborage on Ellis Island, “transforms this into something other than an exclusion proceeding.”¹⁷⁹

The Court demonstrated its wide deference to legislative policy in *Fiallo v. Bell*, where three sets of unwed fathers and their illegitimate children sought preferential immigration treatment for either the father or the child, based on their relationship with the other.¹⁸⁰ Appellants contested Sections 101(b)(1)(D) and 101(b)(2) regarding “who qualifies as ‘children’ or ‘parents’ . . . does not extend to an illegitimate child seeking preference by virtue of his relationship with his natural father.”¹⁸¹ The Court applied a facial legitimacy test to uphold Congress’s policy choices in providing preferential immigration status to natural mothers but not fathers of illegitimate children.¹⁸²

In *Kerry v. Din*, the Court addressed a United States naturalized citizen’s claim that she had a protected liberty interest in her marriage, and thus was entitled to judicial review of a consular officer’s decision to deny her husband’s visa application pursuant to 8 U.S.C.S. § 1182(a)(3)(B) based on his former role as civil servant in the Taliban regime.¹⁸³ In holding that a denial of her husband’s application did not deprive her of life, liberty, or property under the Fifth Amendment, Justice Scalia distinguished this case from cases such as *Loving v. Virginia*, explaining that the federal government had “not attempted to forbid a marriage.”¹⁸⁴ He reasoned that “Din remains free to live with her husband anywhere in the world that

¹⁷⁸ *Id.* at 212.

¹⁷⁹ *Id.*

¹⁸⁰ *Fiallo v. Bell*, 430 U.S. 787, 790 (1977).

¹⁸¹ *Id.* at 788-89.

¹⁸² *Id.* at 795, 797. The facial legitimacy test was first applied to the executive branch in *Kleindienst v. Mandel*, a First Amendment case. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

¹⁸³ *Kerry v. Din*, 576 U.S. 86, 88-89 (2015).

¹⁸⁴ *Id.* at 94.

both individuals are permitted to reside[.]” but that the federal government was able to preclude his entry into the United States.¹⁸⁵

Despite facing generations of scholarly criticism, the establishment of the plenary power of the federal government to regulate immigration has endured for over one hundred years.¹⁸⁶ For example, as recently as in 2012, in *Arizona v. United States*, the Supreme Court of the United States struck down an Arizona statute in which the state tried to take law enforcement of illegal immigration into its own hands.¹⁸⁷ Justice Kennedy, writing for the Court’s majority, concluded, “[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . The federal power to determine immigration policy is well settled.”¹⁸⁸

Congress has exercised its plenary power over immigration through the Immigration and Nationality Act.¹⁸⁹ Congress created categories of individuals who may enter the United States as well as categories of individuals who may not. These choices are subject to Fiallo’s facial legitimacy test at best, which provides no more protection than rational basis. Congress also created the parole power, which it delegated to the executive branch.

¹⁸⁵ *Id.* at 101.

¹⁸⁶ COX & RODRIGUEZ, *supra* note 28, at 29; Weissbrodt & Danielson, *supra* note 163. Subsequent Supreme Court cases, such as *Fong Yue Ting v. United States*, decided in 1893, “reinforced national sovereignty as the source of federal power to control immigration and consistently reasserted the plenary and unqualified scope of this power.” *Id.*

¹⁸⁷ Vincent J. Cannato, *Our Evolving Immigration Policy*, NAT’L AFFS. (2012), <https://www.nationalaffairs.com/publications/detail/our-evolving-immigration-policy>. The state law in question was Senate Bill 1070 and it was initially adopted because Arizona legislatures were concerned with the federal government’s ability to stop illegal immigration, which was “wreaking havoc in the state.” *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Howard S. Myers, III., *Immigration Law: An Examination of America’s Immigration System at a Time of Uncertainty* AMERICA’S IMMIGRATION POLICY—WHERE WE ARE AND HOW WE ARRIVED: AN IMMIGRATION LAWYER’S PERSPECTIVE, 44 MITCHELL HAMLINE L. REV. 743, 750 (2018).

C. *The President's Role in Plenary Power*

In holding that the power of the federal government to exclude foreigners was an “incident of sovereignty” in *Chae Chan Ping*, the Court did not expressly consider how that power might be divided between Congress and the President.¹⁹⁰ Two camps emerged within the courts, the first of which firmly placed plenary power within Congress and proffers that the executive branch only has power to the extent that Congress delegates that power to it.¹⁹¹ The second asserts that “the Executive Branch possesses inherent constitutional authority to exclude or expel noncitizens” as an incident of executive control over foreign affairs.¹⁹²

Article II of the United States Constitution vests the President with executive powers, making them commander in chief, and requiring that they “. . . take Care that the Laws be faithfully executed[.]” which is interpreted to mean that the President can create directives with the same power as federal law, while subject to congressional override with new legislation.¹⁹³ Congress, however, can adopt laws that grant “additional powers to the President.”¹⁹⁴ Thus, executive power can be said to be an amalgam of the two: inherent in its own right, and delegated from the legislative branch. The ideals of both camps have influenced how Congress and the executive branch have viewed their relationship with each other, but Professors Adam B. Cox and Cristina M. Rodriguez claim that “a deep historical truth about the structure of immigration [policy is that] the President stands at its center.”¹⁹⁵

Regarding the congressional provision of executive immigration power, in *Trump v. Hawaii*, the Supreme Court of the United States upheld the constitutionality of President Donald J. Trump’s ban on the entry of foreign nationals from seven majority-

¹⁹⁰ COX & RODRIGUEZ, *supra* note 28, at 34.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Executive Orders 101: What are They and How Do Presidents Use Them?*, NAT’L CONST. CTR. (Jan. 23, 2017), <https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them>. (quoting U.S. CONST. art. II, § 3).

¹⁹⁴ *Id.*

¹⁹⁵ COX & RODRIGUEZ, *supra* note 28, at 3.

Muslim nations, asserting that “Congress . . . had given the President such sweeping exclusion authority . . . plainly laid out in the [INA] since 1952.”¹⁹⁶ The Court was referring to section 212(f) of the INA, which permits the President to direct the exclusion of any aliens where it would be determined to be detrimental to the United States’ interests.¹⁹⁷ President Trump’s Muslim ban was not unprecedented. As early as 1798, Congress was fearful of French influence on the growing American democracy, and thus passed the Alien Friends Act which “empower[ed] the President to deport ‘all such aliens as he shall judge dangerous to the peace and safety of the United States.’ ”¹⁹⁸

Section 215(d)(5) of the INA grants the executive branch parole power.¹⁹⁹ It states that the Secretary of the Department of Homeland Security may, in his discretion, parole noncitizens into the United States temporarily, under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest.²⁰⁰ Parole permits the executive branch to authorize the entry of foreign nationals who would be otherwise inadmissible under the INA without additional congressional action.²⁰¹

A common mechanism for the executive branch to act is through the issuance of an executive order, which is a written directive that has the force of law so long as it is issued pursuant to

¹⁹⁶ *Id.* at 47-48. This ban came after the terrorist attack in a Paris nightclub and a mass shooting in San Bernardino, California. It was largely an early indication that President Trump planned to follow through on the anti-immigration promises he made on the campaign trail. *Id.*

¹⁹⁷ *Id.* at 50 (citing INA § 212).

¹⁹⁸ *Id.* at 48. (quoting Alien Friends Act §1, 1 STAT. 570, 571 (1798)). Additionally, during World War I, Congress granted the President power to impose any restriction deemed necessary for public safety whenever the nation was at war. COX & RODRIGUEZ, *supra* note 28, at 48.

¹⁹⁹ INA § 215(d)(5).

²⁰⁰ *Id.* This section of the INA continues to explain the basis of parole, such as that parole is not considered admission to the United States, and thus those aliens paroled should be returned to the custody of the Nation from which he was paroled, or to be processed as any other applicant for admission to the United States. *Id.*

²⁰¹ COX & RODRIGUEZ, *supra* note 28, at 51.

an existing power.²⁰² To have the force of law, the source of authority must either be Article II of the Constitution, “or an express or implied delegation of power from Congress to the President[,]” which would stem from Congress’s own constitutional powers.²⁰³ Thus, in the case of U4U and OAW, President Biden derived the power to parole Afghans and Ukrainians via executive order from the congressional delegation of parole power in the INA.

Impermanency is a key issue presented by using an executive order.²⁰⁴ Executive orders issued by one President can be revoked or altered either by that same President or by a later administration.²⁰⁵ The past three Presidential administrations have relied heavily on executive orders to both further their own immigration policies and revoke the policies of their predecessors. President Obama created the Deferred Action for Childhood Arrivals Program (DACA) via executive order, which protected more than three-quarters of a million undocumented migrants who arrived in the United States as children.²⁰⁶ Professor Howard S. Myers asserted that “through executive action, President Obama achieved some of what he was unable to achieve legislatively.”²⁰⁷ President Trump attempted to end DACA during his term but the Supreme Court of the United States held that while President Trump did have the authority to terminate the program, the way he went about it was improper.²⁰⁸

Fulfilling his campaign promises, President Trump made more than 1,000 policy changes to the immigration system during his

²⁰² ABIGAIL A. GRABER, CONG. RSCH. SERV., R46738, EXECUTIVE ORDERS: AN INTRODUCTION 1 (2021), <https://crsreports.congress.gov/product/pdf/R/R46738>.

²⁰³ *Id.*

²⁰⁴ *Id.* at 2.

²⁰⁵ *Id.*

²⁰⁶ Myers, *supra* note 189, at 784.

²⁰⁷ *Id.* at 783.

²⁰⁸ Nina Totenberg, *Supreme Court Rules for DREAMers, Against Trump*, NPR (June 18, 2020, 10:12 AM), <https://www.npr.org/2020/06/18/829858289/supreme-court-upholds-daca-in-blow-to-trump-administration>. The Trump administration had not provided proper justification for ending the program. *Id.*

term.²⁰⁹ In his first few weeks in office, President Biden got straight to work reevaluating and reversing many of his predecessor's policies via executive order.²¹⁰ However, the work of a previous President cannot typically be undone overnight. The Trump administration, vowing to take the lowest number of refugees in recent history at 18,000 per fiscal year, left the United States Refugee Program (USRAP) gutted and understaffed.²¹¹ Thus, it would need to be rebuilt before President Biden could fulfill his campaign promise to accept 125,000 refugees per year.²¹² President Biden began this process via an executive order issued on February 4, 2021, titled, *Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration*.²¹³

Upon President Biden's first anniversary in the White House, the Migration Policy Institute (MPI) found that "he has outpaced his predecessor in the number of executive actions taken during his first year in office, making significant change in the areas of humanitarian protection, interior and border enforcement[,] and legal immigration."²¹⁴ Despite how pro-immigration the Biden Administration has been, he has faced criticism for both relying too

²⁰⁹ *1,047 Trump-era Immigration Policies (and Their Current Status)*, IMMIGR. POL'Y TRACKING PROJECT, <https://immigrationpolicytracking.org/home/> (last visited Oct. 20, 2022).

²¹⁰ Sarah Libowsky & Krista Oehlke, *President Biden's Immigration Executive Actions: A Recap*, LAWFARE (Mar. 3, 2021, 12:13 PM), <https://www.lawfareblog.com/president-bidens-immigration-executive-actions-recap>.

²¹¹ *Id.* The President sets the annual cap on refugees for the fiscal year pursuant to the Refugee Act of 1980. In contrast to President Trump's ceiling of 18,000, President Obama had set the ceiling at 110,000. *Id.*

²¹² *Id.*

²¹³ See Proclamation No. 14,013, 86 Fed. Reg. 8839 (Feb. 04, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/executive-order-on-rebuilding-and-enhancing-programs-to-resettle-refugees-and-planning-for-the-impact-of-climate-change-on-migration/>.

²¹⁴ *Biden Has Taken Nearly 300 Executive Actions on Immigration in His First Year, Outpacing Trump*, MIGRATION POL'Y INST. (Jan. 19, 2022), <https://www.migrationpolicy.org/news/biden-executive-actions-immigration-first-year/>.

heavily on executive orders and for the disparate treatment of Afghan and Ukrainian refugees under OAW and U4U.²¹⁵

Despite criticism, it is clear from the above analysis that the executive branch is vested with parole power. The Constitution, however, does not provide strong guardrails for the execution of parole power because it involves questions of admission. Disparate treatment of parolees outside of the United States does not trigger any constitutional protections under the Equal Protection Clause of the Fifth Amendment. Even if the Constitution applied, classifications would only be subject to a rational basis or functionally similar review. The Constitution allows for the unequal treatment of similarly situated parolees to persist. Additionally, even if OAW and U4U provided equal treatment, the inherent uncertainty of the future of executive orders would allow a future administration to end the temporary refuge or to implement an unequal parole policy. To grant equal, stable protection for those seeking parole, Congress should have a heavier hand.

IV. A CONGRESSIONAL SOLUTION

Afghans and Ukrainians have faced many of the same horrors that arise from conflict. However, the inability of Afghans to relocate within their own country, and the higher likelihood that Afghans meet the Convention's refugee standard, makes it more puzzling that Afghans and Ukrainians seeking parole have been treated disparately through the executive's two parole programs. Even if the Constitution does not demand equal treatment of parolees, Congress should pass legislation to amend section 212(d)(5) of the INA to introduce specific parameters to the executive branch's execution of parole power.

First, the amendment should set clear categories for conflicts that trigger special humanitarian parole protections over general humanitarian parole. A category should be established for when war arises in nations allied with the United States, and where groups of

²¹⁵ Aamer Madhani, *Biden Faces Scrutiny Over Reliance on Executive Orders*, (Jan. 28, 2021, 7:23 PM), <https://apnews.com/article/joe-biden-donald-trump-coronavirus-pandemic-immigration-environment-f5c48846c6db54ec0ddf0f3f62485b1e/>.

individuals and their families have allied with the United States during a conflict. Yet another category, for example, could be those who face egregious acts from their government, such as special parolees from Haiti.²¹⁶

Second, Congress should demand a standard application process for special parole. This would include setting standard practices for screenings, interviews, biometrics processes, application fees, and the application itself. This would encourage increased transparency in the parole process. Moreover, equal agency resources, such as processing by USCIS, must be granted to each special parole group. Finally, Congress should protect special parole groups designated by one President, by prohibiting an incoming administration from eliminating parole for the group until either the parole period ends, or the threat has been determined to be dissolved so that parole populations are not left at risk of premature expulsion due to changing political tides.

A. Why Congress?

Congress is the best-situated branch to implement equal protection for similarly situated parolees. The executive branch has been provided little direction in granting parole, which has led to disparate treatment. Congress can establish clearer standards that are not subject to change without additional legislation. This could be pivotal for protection due to the current impermanency of parole via executive order.

Congress has the authority to revise the executive branch's parole power. As discussed above, it is established that the President derives inherent powers regarding foreign affairs from the Constitution and these powers may be broadened by an express or implied grant from Congress. The President's parole power thus comes not from the Constitution, but from an express grant from Congress in section 212 of the INA.²¹⁷ If the President's parole power had come from the Constitution, Congress would not be able to control it. However, as Congress carved out this executive power in the INA, Congress is in the best position to reshape its contours.

²¹⁶ *The Use of Parole Under Immigration Law*, *supra* note 31.

²¹⁷ See Immigration and Nationality Act (INA) § 212, 8 U.S.C. § 1182.

Congressional delegations of power come in varying breadths. As Mark Strand and Tim Lang of the Congressional Institute explain, “Congress often passes laws explicitly giving the President discretion in how to administer a law, within some prescribed boundaries. It also passes laws that are so vague as to require the Executive Branch to flesh out the details.”²¹⁸ At present, the parole power granted to the President is vague enough to permit the President broad discretion in executing the details. However, because Congress created the power, it can amend the power to include prescribed boundaries.

Further, the amount of discretion the executive has in executing parole may lead to vast differences from one administration to the next.²¹⁹ To undo the actions of a predecessor, or even one’s own actions, a President may simply need to issue another executive order.²²⁰ This was demonstrated in President Biden’s first year in office as he undid many of President Trump’s immigration actions almost immediately.²²¹ By that precedent, the next President can easily undo President Biden’s immigration policies established via executive order, thereby leaving Afghans and Ukrainians who are in the United States on parole, and those still left in the application channel, at risk. Congressional action certainly takes longer to set in place than an executive order, but once a law is passed, it remains in place until Congress either repeals or amends it, stabilizing enforcement as Presidential administrations change.²²² The executive branch may not prefer to limit this power, but the President would still retain the discretion to designate specific groups for parole and to create new programs via executive order, so long as it is within the parameters established by Congress. Congressional action on this matter may incentivize the President to have a seat at the table when negotiating the new parole standards

²¹⁸ Mark Strand & Tim Lang, *President Biden Undoes Trump’s Executive Orders: Why the President Needs Congress*, CONG. INST. (Jan. 25, 2021), <https://www.congressionalinstitute.org/2021/01/25/president-biden-undoes-trumps-executive-actions-why-the-president-needs-congress/>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

and may encourage the President to see the clear benefits of such action.

There will undoubtedly be challenges to congressional action. Congress rejected the Afghan Adjustment Act (the Act), which did not make it into an omnibus spending bill.²²³ The Act would have created pathways to permanent residency for Afghans in the United States before their parole expires this year.²²⁴ It had bipartisan support, but was staunchly opposed by Senator Chuck Grassley, who proposed his own Immigration Parole Reform Act of 2023 to stop the use of parole as a way to allow groups of nonimmigrants to enter.²²⁵ His proposal includes clarification that parole is available only to individuals and not to groups such as Afghan allies or Ukrainians fleeing Russia's war of aggression.²²⁶ His bill would also limit parole to one year and would narrow definitions of statutory terms such as "urgent humanitarian reason" and "significant public benefit[.]"²²⁷ However, Senator Grassley's interest in clarifying key terms could open the playing field for bipartisan discussion of amending the INA's parole provisions. It is important that the proposals below are viewed in the context of not just solving the inequalities between OAW and U4U, but for similarly situated groups in the future who may find themselves on disparate paths.

B. Amending the Immigration and Nationality Act (INA)

Parole within the INA has been amended on two prior occasions in The Refugee Act of 1980 and the Illegal Immigration Reform and

²²³ Robbie Gramer, *Bill That Would Provide Lifeline to Afghan Refugees Blocked in Congress*, FOREIGN POL'Y (Dec. 20, 2022), <https://foreignpolicy.com/2022/12/20/afghanistan-refugees-afghan-adjustment-act-congress-omnibus-bill/>.

²²⁴ *Id.*

²²⁵ *Id.*; *The Immigration Parole Reform Act of 2023*, CHUCK GRASSLEY U.S. SENATOR FOR IOWA, https://www.grassley.senate.gov/imo/media/doc/immigration_parole_reform_act_of_2023_summary.pdf (last visited Apr. 27, 2023).

²²⁶ *The Immigration Parole Reform Act of 2023*, *supra* note 225.

²²⁷ *Id.*

Immigration Responsibility Act of 1996.²²⁸ Both amendments narrowed the scope of parole to its modern contours, discussed above. The recommendation here is that Congress adds language to section 212(d)(5) of the INA to set additional parameters surrounding the Executive's parole power.

i. Establishing Clear Categories for Special Parole

The first recommendation to amend section 212(d)(5) of the INA is to establish clear categories for priority in triggering the added protections of special parole over humanitarian parole. President Biden has demonstrated the need for this by placing Ukrainians in a special parole program and Afghans in a general humanitarian parole program, despite both groups facing similar conflicts and having strong ties to the United States. These categories should be prioritized.

The first category should be for foreign nationals of nations that are either allies of the United States, such as Ukraine, or designated groups within a nation's larger population that have allied with the United States, such as the Afghans who fought alongside the United States during the twenty-years of war in Afghanistan.²²⁹ The second category should constitute those individuals and groups of individuals facing egregious acts of violence and persecution from nations that are not direct allies with the United States, such as the special programs currently in place for Haitians under HFRP.²³⁰ The priority categories could be expanded from here to address other populations, such as those facing climate crisis or natural disasters.

The use of categories would not impede this policy, but would merely provide priority preference, or how the federal government allocates its processing resources, to populations with close ties to the United States, further strengthening those ties, and thus further strengthening national security in the long term. Further, whereas

²²⁸ Refugee Act of 1980, Sess. 634, 96th Cong. (1979) (enacted); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Sess. 828, 104th Cong. (1996).

²²⁹ See INT'L RESCUE COMM., *supra* note 12.

²³⁰ See generally, *The Haitian Family Reunification Parole (HFRP) Program*, USCIS, <https://www.uscis.gov/humanitarian/humanitarian-parole/the-haitian-family-reunification-parole-hfrp-program> (last visited Mar. 23, 2023).

the equal protection analysis requires some level of justification for government classification, this categorical system could require Congress to provide a rationale for its classification, rather than the current system which is subject to no scrutiny at all. This recommendation also ensures that similarly situated foreign nationals, such as Afghans and Ukrainians, receive the same placement under special parole, which will be vital to ensuring equal protection from the start.

ii. Standardizing the Application Process for Special Parole

The second recommendation to amend section 212(d)(5) of the INA is to standardize the application process for special parole, respective to the needs of each category. Where U4U employs a truncated, online application due to the flexibility of special parole, OAW subjects its applicants to a much longer process under general humanitarian parole. The flexibility of special parole permits the Executive's discretion to set the application process for each individual program, which could still create inequalities within the categorization system mentioned above. This is why the special parole application should be standardized at each priority level.

The application itself should be as detailed or as straightforward as Congress considers sufficient for national security. Application fees should be waived for all those designated under special parole, regardless of category, just as they were for Ukrainian applicants. A \$575 processing fee or a fee waiver with a high evidentiary burden is often insurmountable for applicants in precarious situations that would invoke special parole.

Biometrics procedures, screenings, and interviews should also be standardized per the needs of national security. It may be argued that groups, such as Ukrainians, do not pose the same level of threat to the United States' national security as those coming from countries that harbor terrorist groups, such as the Taliban in Afghanistan. However, in Ukraine, the government is currently working to identify and punish those who have allied with Russia.²³¹

²³¹ Andrew E. Kramer & Maria Varenikova, *As Russia Retreats, a Question Lingers: Who Counts as a Collaborator?*, N.Y. TIMES (Sept. 22, 2022), <https://www.nytimes.com/2022/09/22/world/europe/ukraine-collaborators-russia.html>.

War is not black and white. Those caught in the crossfire face complicated choices to make. Thus, the screening and interview process should be standardized in a way that balances the need to protect those within the United States with processing times that could become a barrier for the safe arrival of a potential parolee.

The importance of keeping processing times low will hinge on the proper and equal allocation of funds and resources to each program. The United States may not be able to eliminate the diverse array of geopolitical barriers a parolee faces, such as the lack of access to embassies for Afghans. However, standardizing those aspects of the application process which the United States does have control over can help to ensure that the United States is not constructing unequal barriers on an already uneven playing field.

iii. Restraint on Reversing Parole

The final recommendation to amend section 212(d)(5) of the INA is to expressly limit the Executive's sole discretion regarding the termination of their own, or a predecessor's special parole program. This would not limit the President's power to designate a group in need of parole. However, it would protect the parolee's reliance on the period of parole they were granted, which is typically short enough to create its own uncertainties.

Should future administrations wish to terminate a parole program, Congress should demand that the justification be based on evidence and a determination that the situation causing the need for the special program, such as the war in Ukraine, has dissipated, and thus the individuals benefiting from parole are no longer threatened. A similar system of review is already in place for countries whose citizens fall under Temporary Protected Status (TPS). TPS can be granted to eligible individuals who are physically present in the United States and unable to return safely to their country of origin due to conditions or circumstances "preventing their country from adequately handling the return."²³² Like parole, TPS is granted for

²³² *Fact Sheet: Temporary Protected Status (TPS)*, NAT'L IMMIGR. F. (Feb. 1, 2023), <https://immigrationforum.org/article/fact-sheet-temporary-protected-status/>.

a set time, but TPS can be extended while an individual's country remains in designated status.²³³

DHS can designate a country for TPS due to: (1) ongoing armed conflict, (2) environmental disaster, or (3) other extraordinary and temporary conditions.²³⁴ At least sixty days prior to expiration of a designation period, the Secretary must review the conditions in the designated country to determine whether TPS should remain in effect by meeting with the appropriate government agencies to determine whether the country still meets the criteria for designation.²³⁵ Thus, a similar review process should be implemented for special parole. This will lower the risk of termination via changing administrations when their countries are still unsafe for return.

Further, if the current President were successful in terminating a prior special parole program, current parolees should be permitted to remain in the United States until their individual parole naturally terminates. Parole is typically set for a period of two years for an individual and terminates if not extended.²³⁶ The current administration, therefore, would not be required to extend parole for individuals once their program has been terminated, but they should be permitted to complete their two years of parole to have the appropriate amount of time to safely make a decision about their future; whether that includes applying for immigration status within the United States or returning to their country of origin. Together, all three of these recommendations will help to create more equal treatment under United States immigration law.

V. CONCLUSION

In 2021, the world watched the United States-backed Afghan government collapse, and in 2022, a war in Europe unfolded on a scale not seen on the continent since World War II.²³⁷ With ever emerging global conflicts and the threat of displacement over

²³³ *Id.*

²³⁴ 8 U.S.C.S. § 1254a(b)(1).

²³⁵ § 1254a(3)(A).

²³⁶ *The Use of Parole Under Immigration Law*, *supra* note 31.

²³⁷ Reals & Sundby, *supra* note 75.

climate change, the United States will be called on to respond, as it has been in the past.²³⁸ Situations like Afghanistan and Ukraine will happen again, and the United States allies and others will be in need of protection.

Congress should act to amend the Executive's parole power outlined in the INA by implementing the changes proposed in this comment. Despite the weak constitutional protections for Afghans and Ukrainians, striving for equal treatment of parolees in future situations such as those in Afghanistan and Ukraine would be mutually beneficial. Where those impacted by conflict will receive temporary protection in the United States, the United States will increase national security through fostering stronger relationships with those offered protection. The proposed classification structure would provide clearer guidelines for future decision makers. While it may not be possible to guarantee safe haven for all, this would bring the United States one step closer to offering more equal protection, whether an individual was born in Kabul or Kyiv.

²³⁸ *Climate Change and Disaster Displacement*, UNCHR, <https://www.unhcr.org/en-us/climate-change-and-disasters.html> (last visited Oct. 21, 2022).