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Legal Sidebar

Humanitarian Parole Authority: A Legal Overview and Recent Developments

January 11, 2024

Parole authority under 8 U.S.C. § 1182(d)(5)(A) has garnered recent attention by lawmakers. Section 1182(d)(5)(A) grants discretion to the Department of Homeland Security (DHS) to temporarily "parole" an alien who is applying for admission to the United States into the country "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." This provision does not define *urgent humanitarian reasons*, *significant public benefit*, or *case-by-case basis*, leaving substantial debate over the manner in which the executive branch exercises discretion in invoking what is commonly known as humanitarian parole authority. One such question that has resulted in ongoing litigation is whether parole processes for certain "classes" of persons contravene the "case-by-case basis" requirement (e.g., current parole processes for individuals from Cuba, Haiti, Nicaragua, and Venezuela implemented by the Biden Administration). This Legal Sidebar provides an overview of the parole authority, briefly discusses Section 1182(d)(5)(A) and its historical uses, examines current litigation, and reviews recent legislative proposals.

Overview

Section 1182(d)(5)(A) provides:

> The Attorney General may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Although the current statutory language references the Attorney General as exercising parole authority, the Homeland Security Act of 2002 transferred most immigration functions, including parole authority, from the Attorney General to the Secretary of the newly established DHS.

Parole allows an alien, who may be considered inadmissible and ineligible to be "admitted" to the United States under immigration laws, to either enter, reenter, or remain in the United States for a temporary

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LSB11102

period pending review of his or her immigration status. An alien who has been paroled and allowed to physically enter the United States has not been admitted to the United States for immigration purposes and is considered to be an "applicant for admission" at the end of parole. DHS typically grants parole for a fixed period. During parole, aliens may obtain work authorization.

DHS has interpreted its parole authority broadly in implementing regulations. As for the parole of aliens from custody, DHS has promulgated regulations that clarify when parole may be granted on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." Under 8 C.F.R. § 212.5(b), DHS has enumerated certain "groups" of detained aliens eligible for parole who "would generally be justified only on a case-by-case basis for 'urgent humanitarian reasons' or 'significant public' benefit" so long as they do not present as a security or flight risk. This group encompasses aliens with serious medical conditions, pregnant women, certain alien minors, and aliens "who will be witnesses in proceedings ... conducted by judicial, administrative, or legislative bodies." The regulation also includes wide-ranging language that permits the parole of aliens "whose continued detention is not in the public interest as determined by" certain officials. For "all other arriving aliens," officials may, "after review of the individual case," parole arriving aliens "in accordance" with 8 U.S.C. § 1182(d)(5)(A). Under 8 C.F.R. § 212.5(e), parole automatically terminates without written notice when the alien departs the United States or at the expiration of the authorized period of parole. DHS may also, upon notice, terminate parole when the purpose of parole is accomplished or whenever it determines that "neither humanitarian reasons nor public benefit warrants the continued presence of an alien in the United States."

Although the humanitarian parole authority generally applies to aliens seeking entry to the United States, DHS can exercise its parole authority for aliens already physically present in the United States. DHS claims the authority to grant parole to aliens who are physically present in the United States after a surreptitious entry (i.e., between ports of entry), and this is often called "parole in place." DHS has employed parole in place for a limited category of aliens, such as certain U.S. servicemembers or immediate relatives of certain U.S. servicemembers. Another exercise of parole authority is known as "advance parole," which "is a practice whereby the government decides in advance of an alien's arrival that the alien will be paroled into the United States when he arrives at a U.S. port-of-entry." Upon being paroled back into the country, such aliens receive similar benefits as other parolees (e.g., eligibility for work authorization and a potential path to adjustment of status).

Parole under Section 1182(d)(5)(A) is legally distinct from release from detention on "conditional parole" under 8 U.S.C. § 1226(a)(2)(B), and this distinction may have implications for whether an individual may be eligible for other immigration benefits, such as adjustment of status. For example, the Cuban Adjustment Act of 1966 (CAA) permits a Cuban national to adjust his or her status to lawful permanent resident (LPR) if an individual has been "inspected and admitted or *paroled* into the United States." In a 2023 decision, the Board of Immigration Appeals clarified that conditional parole is not "parole" for purposes of the CAA, and determined that a Cuban national released on conditional parole is not eligible to adjust his or her status under the act.

Historical Background

The initial passage of the Immigration and Nationality Act (INA) in 1952 included parole authority, granting the Attorney General the discretion to "parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States.... " Since 1952, various presidential Administrations have used the parole authority. For example, in 1956, the Eisenhower Administration invoked this authority to parole some 30,000 Hungarian nationals into the United States in response to the Hungarian Refugee Crisis.

The current version of the parole statute comes from the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), in which Congress struck Section 1182(d)(5)(A)'s prior language, "for emergent reasons or for reasons deemed strictly in the public interest," and inserted "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Neither IIRIRA nor any other provision within the INA define what constitutes "urgent humanitarian reasons or significant public benefit." Since the passage of IIRIRA, the executive branch has regularly used the parole authority. In his concurring opinion in *Biden v. Texas*, in which the Supreme Court held that the rescission of the Migrant Protection Protocols did not contravene certain federal statutes regulating the inspection and admission of aliens, Justice Kavanaugh noted how "every Administration beginning in the late 1990s has relied heavily on the parole option, including the administrations of Presidents Clinton, Bush, Obama, Trump, and Biden." Examples of its invocation in recent administrations include parole for "international entrepreneurs," parole for "lightering crew," and parole for orphaned children following the 2010 earthquake in Haiti.

Ongoing Litigation: *Texas v. Department of Homeland Security*

The Biden Administration's recent use of the statutory parole authority has attracted scrutiny. Since 2021, the Biden Administration has invoked the parole authority to enable aliens from certain countries—Ukraine, Cuba, Haiti, Nicaragua, and Venezuela—to enter the United States so long as they satisfy other eligibility criteria. For instance, regulations provide that, to qualify for the parole processes for Cuba, Haiti, Nicaragua, and Venezuela ("CHNV"), the applicant must apply in his or her home country, pass a background check, demonstrate he or she has a financial supporter in the United States, and fly into the United States to an interior port of entry. He or she may remain in the United States for up to two years and obtain work authorization.

In *Texas v. Department of Homeland Security*, the State of Texas, along with 20 other states, sued in January 2023 in the Southern District of Texas seeking injunctive relief to terminate the new parole processes for CHNV. The district court held a bench trial over August 24-25, 2023. The parties have submitted post-trial briefing and proposed findings of fact, but the district court has not yet issued a ruling. Although several legal issues have been raised in the litigation, two are particularly relevant here: (1) standing for states to challenge the exercise of parole authority and (2) the scope of the statutory parole authority.

As a threshold question, the district court is considering whether the plaintiff states have Article III standing to sue the federal government for injunctive relief. This litigation follows on the heels of the 2023 decision *United States v. Texas*, in which the Supreme Court held that Texas and Louisiana lacked Article III standing to challenge immigration-enforcement guidelines that prioritized the arrest and removal of certain aliens. The Court explained that, although Texas and Louisiana alleged monetary costs resulting from DHS's policy, they failed to show a "legally and judicially cognizable" injury that is traditionally addressed through the judicial process. Here, too, the federal government claims that the plaintiff states' alleged harm of indirect costs is not enough to establish standing following the Court's 2023 decision, and it asserts that the parole processes have *decreased* costs by reducing the amount of migration across the border. The plaintiff states argue, however, that affirmative immigration relief of parole still imposes indirect costs, as parolees are eligible for benefits such as driver's licenses. If the district court were to find that the plaintiff states lack standing, the court would lack jurisdiction to address the underlying merits.

If the court determines that the plaintiff states have standing, a key question that may be addressed by the district court is whether the CHNV parole processes are consistent with the statute's requirement that

parole be granted for "significant public benefit" and "on a case-by-case basis." The plaintiff states argue that the Biden Administration's use of the parole authority to parole in individuals from the CHNV countries for "significant public benefit" is inconsistent with the legislative intent of the statutory provision and that the authority was intended for paroling an alien into the United States for certain circumstances, such as law enforcement matters and medical emergencies. According to the federal government, the legislative history relied on by the plaintiff states is misplaced because "[t]he legislative history of the actual provisions Congress enacted shows that Congress was well aware of the historically broad use of parole, that Congress rejected amendments that would have narrowed the parole authority in precisely the ways Plaintiffs urge this Court to do, and, as Plaintiffs concede, that Congress left the terms in Section 1182(d)(5)(A) undefined."

As for Section 1182(d)(5)(A)'s requirement that parole be granted on a "case-by-case basis," the plaintiff states claim that the CHNV parole processes are instead "programmatic parole" unauthorized by the statute. Conversely, the federal government argues that the CHNV processes are on a case-by-case basis, pointing to the various steps involved: vetting the financial supporter who has agreed to financially support the parole applicant in the United States, reviewing information by the supporter and parole applicant (including why they believe a favorable exercise of discretion is warranted), evaluating whether to provide travel authorization to the parole applicant, and evaluating and inspecting the parole applicant by a Customs and Border Protection officer at the port of entry upon arrival.

The district court has not yet issued a final decision in the litigation.

Proposed Legislation in the 118th Congress

On May 11, 2023, the House passed the Secure the Border Act (H.R. 2), which would amend Section 1182(d)(5) to restrict who is eligible for parole by defining what constitutes a qualifying urgent humanitarian reason or significant public benefit, as well as provide other conditions for granting parole. The bill would authorize the DHS Secretary to parole particular aliens into the United States for certain specified "urgent humanitarian reasons," including certain Cuban nationals, aliens who are returned to a contiguous country to attend an immigration hearing, aliens with qualifying medical emergencies, aliens with certain family emergencies (e.g., death of a family member is imminent or a funeral), and "lawful applicants for adjustment of status" under 8 U.S.C. § 1255 returning to the United States after temporary travel abroad. H.R. 2 would also define *significant public benefit* to mean the alien has assisted or will assist in a federal government law enforcement matter. The bill also clarifies that the term *case-by-case basis* "means that the facts in each individual case are considered and parole is not granted based on membership in a defined class of aliens to be granted parole." In addition, it would codify the policy permitting parole in place for immediate family members of members of the U.S. Armed Forces.

H.R. 2 would also reduce the availability of work authorization to parolees, provide that entry or reentry to the United States with a grant of parole would render an alien ineligible for adjustment to lawful permanent resident status and other immigration benefits if he or she was ineligible at the time of departure, and restrict the length of parole (either a period sufficient to accomplish the purpose or one year, whichever is shorter). Other bills introduced in the 118th Congress include similar proposed changes to Section 1182(d)(5) (e.g., H.R. 1183, H.R. 2453, S. 505).

Other legislation introduced in the 118th Congress includes the Safeguards Ensuring Criminal and Unvetted Refugees don't Enter America Act ("SECURE America Act") (H.R. 194), which would rescind DHS's authority to grant parole to aliens with an exception for aliens who have been granted immigration status under U.S. immigration laws. The Upholding the Law at Our Border Act (S. 276) would, "not less frequently than every 60 days until there have been fewer than 35,000 apprehensions per month at the southwest border for 3 consecutive months," require the DHS inspector general to conduct an investigation and submit a report to the executive branch and Congress on the "vetting and processing of

illegal aliens apprehended along the Southwest Border," including the number of aliens paroled into the United States and the justification for the grant of parole.

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