

## Comments

### REFUGEE-PAROLEE: THE DILEMMA OF THE INDOCHINA REFUGEE

#### INTRODUCTION

Recently, President Ford used the parole authority<sup>1</sup> to admit 150,000 refugees who fled from the conflict in Indochina.<sup>2</sup> However, these refugees are not considered to have entered<sup>3</sup> the United States because, as parolees, they are legally regarded as if stopped at the border.<sup>4</sup> The dichotomy between physical presence and legal status is inherent in the parole statute, but the resultant prob-

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1. Immigration and Nationality Act § 212(d) (5), 8 U.S.C. § 1182(d) (5) (1970). Section 212(d) (5) provides that:

The Attorney General may in his discretion 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, 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.

2. The parole of the Indochina refugees was authorized by the Attorney General, acting at the "urgent request" of the President. 33 CONG. Q. WEEKLY REP. 839 (1975).

3. Entry distinguishes those aliens who are recognized as having a legal presence. The physical entry of a parolee into the United States does not affect his legal status. *See, e.g.,* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

4. *See Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958).

lems are multiplied by the use of parole as authority for the admission of a large group of refugees. The President's actions have gone beyond the use which Congress had originally intended for the parole statute<sup>5</sup> and may cause serious problems for some of the Indochina refugees.

#### PAROLE AUTHORITY: AN OVERVIEW

The Immigration and Nationality Act provides an orderly scheme for the entry of aliens into the United States.<sup>6</sup> Under the Act, an alien seeking entry into the United States must meet stringent requirements<sup>7</sup> before entry will be allowed. In enacting these requirements Congress recognized that in some cases an alien would need to enter the country before the visa requirements could be fulfilled.<sup>8</sup> In order to provide immigration officials with the authority necessary to deal with these cases, Congress enacted the parole statute,<sup>9</sup> which authorized the parole of otherwise inadmissible aliens into the United States. To implement the provision, Congress accorded the Attorney General<sup>10</sup> the discretionary power to grant parole in those cases which he deemed meritorious.<sup>11</sup> Despite the statutory authority, the President has usually made the decision to exercise the parole power in those instances where a large group of refugees have sought entry into this country.<sup>12</sup> The Attorney General has then approved the President's decision which has been implemented by the Immigration and Naturalization Service.

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5. See *Hearings on Indochina Refugees Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 4, at 47 (1975). As Congressman Cohen noted: "It seems from the whole tenor of the discussion that it [parole] is on a permanent basis as far as the State Department and others might be concerned."

6. Immigration and Nationality Act §§ 201-240, 8 U.S.C. §§ 1151-1230 (1970).

7. *Id.* §§ 212(a)(1)-(31), 8 U.S.C. §§ 1182(a)(1)-(31) (1970).

8. H.R. REP. NO. 1365, 82d Cong., 2d Sess. in 2 U.S. CODE CONG. & AD. NEWS 1653, 1706 (1952).

9. Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970).

10. The discretionary power is delegated to the Attorney General, but he in turn is authorized to delegate his authority to immigration officials. Compare Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a) (1970), with 8 C.F.R. § 103.1 (1975).

11. Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970).

12. The decision to evacuate refugees from Communist regimes is essentially a foreign policy decision which has been made by the President and the Department of State.

Parole is an unusual provision because it circumvents standard entry procedure by allowing an otherwise excludable alien to enter the United States.<sup>13</sup> Parole is not, however, a grant of admission. Although a parolee may physically be within the United States, legally he has not entered because he has not met the entrance requirements.<sup>14</sup> The parolee occupies a unique position, one thought to be merely an enlargement of the confinement which an excluded alien would face when stopped at the border.<sup>15</sup>

#### THE HISTORICAL DEVELOPMENT AND USE OF PAROLE

##### *Pre-Statutory Parole*

The procedure of allowing excluded aliens to enter the United States was developed during the 1920's as an administrative practice without statutory authority.<sup>16</sup> At first, parole was used by immigration officials to avoid holding aliens in custody pending their exclusion.<sup>17</sup> The Immigration and Naturalization Service initiated a similar practice during World War II as a means of dealing with alien enemies.<sup>18</sup> Parole allowed these aliens some freedom, while they technically remained in custody. The early administrative practices and the wartime enemy alien parole were formalized into Immigration and Naturalization operating instructions in the years following the war.<sup>19</sup> These instructions gave the Immigration and Naturalization Service district directors the discretionary authority to temporarily release excludable aliens into this country.<sup>20</sup> Although used primarily in deportation proceedings, parole was also used during this period to permit excluded aliens to enter the United States to defend criminal actions, to testify in criminal cases for the Government, to apply for registry, and to permit adjustment of status.<sup>21</sup>

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13. By definition, an alien found excludable would not be allowed to enter. See Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a) (1970).

14. *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

15. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953).

16. *In re L-Y-Y-*, 9 I. & N. Dec. 70, 71 (1960).

17. See *Kaplan v. Todd*, 267 U.S. 228, 230 (1925).

18. 1946 INS ANN. REP. 34.

19. *Id.* at 35.

20. 1950 INS ANN. REP. 49, 50.

21. *Id.*

Thus, the Immigration Service had a fully developed procedure for paroling aliens into the United States prior to the enactment of any statutory authority.<sup>22</sup> Parole was, however, only used in those "circumstances where the case was exceptionally meritorious and [where] immediate deportation would be inhumane."<sup>23</sup> During the period when parole was granted without statutory authority no large group of refugees was paroled into the United States.<sup>24</sup>

### *Statutory Parole*

In 1952, Congress substantially revised the Immigration laws by enacting the McCarren-Walter Act.<sup>25</sup> Initially, the Act included a limited parole provision which restricted parole to those aliens who required medical treatment in the United States.<sup>26</sup> The Immigration and Naturalization Service and the Attorney General, however, urged that the statute reflect the existing practice of paroling aliens under all emergent and humanitarian circumstances.<sup>27</sup> In accepting these proposals the Joint Committee Report stated:

The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief. The committee believes that the broader discretionary authority is necessary to permit the Attorney General to parole inadmissible aliens into the United States in emergency cases, such as the case of an alien who requires immediate medical attention before there has been an opportunity for an immigration officer to inspect him, *and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States*, such as, for instance, a witness or for purposes of prosecution.<sup>28</sup>

While neither the committee report nor the statute explicitly dealt with the question of whether parole was to be used to admit large groups of people, the statute was drafted using the singular

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22. *Hearings on H.R. 2816 & S. 716 Before the Joint Subcomm. on Immigration and Naturalization of the Senate and House Comm. on the Judiciary*, 82d Cong., 1st Sess. 713 (1951).

23. 1950 INS ANN. REP. 49, 50.

24. See 1940-1952 INS ANN. REP.

25. See H.R. REP. NO. 1365, 82 Cong., 2d Sess. in 2 U.S. CODE CONG. & AD. NEWS 1653, 1706 (1952); *Hearings on H.R. 2816 & S. 716 Before the Joint Subcomm. on Immigration and Naturalization of the Senate and House Comm. on the Judiciary*, 82d Cong., 1st Sess. 713 (1951) (statement of Peyton Ford, Deputy Att'y Gen.).

26. Note, *Leng May Ma v. Barber*, 27 GEO. WASH. L. REV. 373, 374 n.11 (1959).

27. See H.R. REP. NO. 1365, 82d Cong., 2d Sess. in 2 U.S. CODE CONG. & AD. NEWS 1653, 1706 (1952).

28. *Id.* (emphasis added).

phrase "an alien."<sup>29</sup> Statements made later by a member of the drafting committee, Michael Feighan, support the theory that the statute was intended to be used only in individual cases. Congressman Feighan stated: "It [the parole statute] was intended as a remedy for individual hardship cases, no more, no less."<sup>30</sup> The Congressman also specifically noted that the committee did not intend parole to be used as authority for the admission of large groups of people.<sup>31</sup> "I know at the time we were thinking in terms of individuals in distress rather than any group."<sup>32</sup> Thus, the early Immigration Service practices, the wording of the statute, and the statements of Mr. Feighan demonstrate that the parole authority was enacted to allow the Immigration Service to continue to parole *individuals*.<sup>33</sup>

### 1956-1975: A History of Parole Misuse

President Eisenhower was the first President to use the parole statute as a means of granting admission to a large group of refugees. By authorizing the parole of refugees from the Hungarian Revolution,<sup>34</sup> the President initiated the misuse of the parole provision. While the decision to grant parole to the Hungarian refugees was made when Congress was not in session,<sup>35</sup> spokesmen of both the House and Senate Judiciary Committees informally advised the Department of State that parole "provides the proper and lawful instrumentality for coping with the emergency in a manner consistent with the policy outlined by the President . . ."<sup>36</sup> This

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29. Immigration and Nationality Act § 212(d) (5), 8 U.S.C. § 1182(d) (5) (1970).

30. HOUSE SUBCOMM. ON IMMIGRATION AND NATURALIZATION OF THE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, 88th Cong., 2d Sess., ser. 13, at 160 (1964).

31. *Id.* at 108.

32. *Id.* at 133.

33. HOUSE SUBCOMM. ON IMMIGRATION AND NATURALIZATION OF THE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, 88th Cong., 1st Sess., ser. 14, at 66, 67 (1963).

34. PRESIDENTIAL PAPERS OF DWIGHT D. EISENHOWER 1116-17 (1956) (White House statement concerning the admission of additional Hungarian refugees).

35. HOUSE SUBCOMM. ON IMMIGRATION AND NATURALIZATION OF THE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, 88th Cong., 1st Sess., ser. 14, at 67 (1963).

36. *Hearings on H.R. 7700 Before the Subcomm. on Immigration and Naturalization of the House Comm. on the Judiciary*, 88th Cong., 2d Sess., ser. 13, pt. 2, at 485 (1964).

advice effectively sanctioned the President's misuse of the parole authority.

President Eisenhower's action set three important precedents which he and his successors would later use as authority for their future use of parole.<sup>37</sup> This action established that parole could be used to allow groups of refugees to enter the United States; that a President could make the decision to use parole; and that parole could be used as authority to allow individuals to enter the United States for permanent residence.

Three years after paroling the Hungarian refugees, President Eisenhower announced that the United States would participate in the World Refugee Year by accepting refugees from throughout the world.<sup>38</sup> In order to implement the President's proclamation, Congress enacted the "Fair Share Refugee Law," which specifically authorized the granting of parole to large groups of refugees.<sup>39</sup> By authorizing this use of parole, Congress acted contrary to its own previously declared intention<sup>40</sup> that parole be used only in individual cases.

The parole provision was again misused to allow large groups of Cuban refugees to enter the United States. Initially, Cuban refugees were admitted by nonimmigrant visas, but in 1961, as the influx of refugees increased, the Immigration Service adopted a policy of allowing Cuban refugees to come into the United States on parole.<sup>41</sup> The parole of Cuban refugees has continued throughout the 1960's and early 1970's.<sup>42</sup>

In 1962, President Kennedy authorized the parole of a large group of Chinese who had been forced to move from mainland China to Hong Kong.<sup>43</sup> The executive was not, however, the only governmental body to use parole as a means of admitting a large group of refugees; the Department of State, with the approval of the Chair-

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37. See Presidential Proclamation of Dwight D. Eisenhower, May 19, 1959 in 2 U.S. CODE CONG. & AD. NEWS 3127-28 (1960). See also Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504.

38. Presidential Proclamation of Dwight D. Eisenhower, May 19, 1959 in 2 U.S. CODE CONG. & AD. NEWS 3127-28 (1960).

39. Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504.

40. H.R. REP. NO. 1365, 82d Cong., 2d Sess. in 2 U.S. CODE CONG. & AD. NEWS 1653, 1706 (1952).

41. HOUSE SUBCOMM. ON IMMIGRATION AND NATURALIZATION OF THE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, 88th Cong., 2d Sess., ser. 13, at 106 (1964).

42. See 1970-1974 INS ANN. REP.

43. HOUSE SUBCOMM. ON IMMIGRATION AND NATURALIZATION OF THE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, 88th Cong., 2d Sess., ser. 13, at 91 (1964).

man of the House Subcommittee on Immigration (acting without committee approval)<sup>44</sup> used parole to admit a group of Russian Orthodox Church Old Believers.<sup>45</sup> The initial misuse of the parole provision by President Eisenhower to admit the Hungarian refugees had become precedent for the continued use of the parole provision to allow the entry of large refugee groups.

In 1965, Congress undertook the first major revision of the Immigration and Nationality Act of 1952. This revision abolished the national origins quota system<sup>46</sup> which had restricted the number of aliens admitted to the United States by limiting the number of visas available to each country. In place of the quota system, Congress enacted a system of preference categories which determined visa eligibility by preference qualification rather than by national origin.<sup>47</sup> The seventh preference in the new system provided for the conditional entry of refugees, but limited the number of conditional entrants to 10,200 from non-Western Hemisphere countries.<sup>48</sup> Commenting on the seventh preference provision, the Senate Committee Report noted that the procedure of "conditional entry of refugees as proposed by this bill is not unlike the parole procedure utilized during the existence of the so-called Fair Share Act . . . ."<sup>49</sup> The report, however, went on to state:

Inasmuch as definite provision has now been made for refugees, it is the express intent of the committee that the parole provisions of the Immigration and Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation [8 U.S.C. § 212(d)(5) (1970).] The parole provisions were designed to authorize the Attorney General to act only in emergent, *individual*, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.<sup>50</sup>

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44. *Hearings on H.R. 7700 Before the Subcomm. on Immigration and Naturalization of the House Comm. on the Judiciary*, 88th Cong., 2d Sess., ser. 13, pt. 2, at 486 (1964).

45. HOUSE SUBCOMM. ON IMMIGRATION AND NATURALIZATION OF THE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, 88th Cong., 2d Sess., ser. 13, at 107 (1964).

46. Immigration and Nationality Act §§ 201-204, 66 Stat. 175-79 (1952), as amended 8 U.S.C. §§ 1151-1154 (1970).

47. *Id.* §§ 203(a)(1)-(7), 8 U.S.C. §§ 1153(a)(1)-(7) (1970).

48. *Id.* § 203(a)(7), 8 U.S.C. § 1153(a)(7).

49. S. REP. No. 748, 89th Cong., 1st Sess. 16-17 (1965).

50. *Id.* (emphasis added).

On April 21, 1975, President Ford directed the Attorney General to authorize parole for 130,000 refugees from Indochina.<sup>51</sup> The President's use of parole was contrary to the previously expressed intent of Congress, but consistent with the interpretation and use of the parole authority established by his predecessors.<sup>52</sup> Over the past nineteen years, the executive has developed its own concept and use of parole as authority for the entry of large groups of refugees. Although Congress has acquiesced in the Presidents' actions,<sup>53</sup> the statute itself still reflects the previous belief and understanding of Congress that parole was to be used in individual cases. The conflict between executive use and Congressional intent poses major problems for refugees on parole.

#### PROBLEMS OF THE PAROLEE

##### *Parole v. Entry—The Problem of Metaphysical Status*

The United States Supreme Court in *Shaughnessy v. United States ex rel. Mezei*<sup>54</sup> held that an alien's temporary detention on Ellis Island did not constitute an "entry" for immigration purposes. The Court extended the *Shaughnessy* holding in *Leng May Ma v. Barber*<sup>55</sup> by ruling that a parolee had not "entered" the United States, although the alien was physically present within the country. The Court found that parole was "simply a device through which needless confinement is avoided"<sup>56</sup> and that a parole grant did not affect the parolee's legal status.<sup>57</sup> As will be demonstrated, this dichotomy between physical presence and legal status directly affects the rights of paroled aliens.

##### The Parole Grant

Because parole is a privilege extended by the government, the parole grant can be conditioned. A parolee may be restricted to a specific geographical area or required to report to an immigration official on a weekly, monthly, or yearly basis.<sup>58</sup> The terms of the

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51. 33 CONG. Q. WEEKLY REP. 839 (1975).

52. See text accompanying notes 34-45 *supra*.

53. Acquiescence is implied by the enactment of the statutes authorizing adjustment of status for parolees.

54. 345 U.S. 206, 215 (1953).

55. 357 U.S. 185 (1958).

56. *Id.* at 190.

57. *Id.* at 188.

58. *Hearings on Indochina Refugees Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 4, at 101 (1975) (statement of James Greene, Deputy Comm. INS).*



parole may also be changed after parole has been granted.<sup>59</sup> The parolee has little voice in determining the conditions of parole. Like the grant of parole itself, the conditions are determined by the Attorney General.<sup>60</sup>

### Revocation of Parole

The Attorney General can terminate an alien's parole status if he determines that the purpose of the entry has been met.<sup>61</sup> In the case of an alien paroled into the United States to defend a criminal action, parole is ended when the sentence is served.<sup>62</sup> Similarly, in the case of an alien admitted for medical treatment, parole expires at the end of the treatment.<sup>63</sup> Parole may also be revoked if it appears that a parolee is excludable under any of the provisions of the Immigration and Nationality Act.<sup>64</sup>

In enacting the parole provision, Congress did not grant parolees any constitutional rights. The Attorney General may revoke an alien's parole without informing him of the grounds for revocation<sup>65</sup> and without a hearing.<sup>66</sup> With only one exception,<sup>67</sup> the power of the Attorney General to revoke parole without a hearing has been upheld.<sup>68</sup> The courts have allowed the Attorney General to act unrestrained by procedural due process requirements, because, as the Supreme Court noted in *Shaughnessy v. United States ex rel. Mezei*: "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exer-

59. *Id.* at 104.

60. Immigration and Nationality Act § 212(d) (5), 8 U.S.C. § 1182(d) (5) (1970).

61. 8 C.F.R. § 212.5(a) (1975).

62. *In re Accardi*, 14 I. & N. Dec. \_\_\_ (I.D. 2206, 1973); *In re K-*, 9 I. & N. Dec. 143, 157 (1961).

63. *United States ex rel. Lam Hai Cheung v. Esperdy*, 345 F.2d 989, 990 (2d Cir. 1965).

64. See Immigration and Nationality Act §§ 212(a) (1)-(31), 8 U.S.C. §§ 1182(a) (1)-(31) (1970).

65. 8 C.F.R. § 212.5(a) (1975).

66. *Id.*

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

68. *United States ex rel. Stellas v. Esperdy*, 366 F.2d 266, 268 (2d Cir. 1966); *United States ex rel. Lam Hai Cheung v. Esperdy*, 345 F.2d 989, 990 (2d Cir. 1965); *Ahrens v. Rojas*, 292 F.2d 406, 411 (5th Cir. 1961); *In re M-B-*, 8 I. & N. Dec. 406, 407 (1959).

cised by the Government's political departments largely immune from judicial control."<sup>69</sup>

### Exclusion

After parole is revoked, the alien is treated as if he were applying for admission.<sup>70</sup> His prior presence in the United States is not considered. Accordingly, the parolee becomes subject to exclusion procedures rather than deportation even though he is physically within the country.<sup>71</sup> Although the Immigration Service does not have to recognize the parolee's prior presence in the country for purposes of affording the alien the advantages of deportation, the Service can use events which occurred during the alien's parole as grounds for exclusion.<sup>72</sup> Thus, the parolee is considered present in the country for one purpose and yet is treated as if he had never entered for another.

In a number of cases the Immigration Service has successfully excluded aliens based upon objectionable events<sup>73</sup> which occurred while the aliens were on parole. For example, in *In re Stoytcheff*,<sup>74</sup> an alien who was paroled into the United States was later excluded when it was determined that he had become mentally incompetent. Aliens who have been convicted of a crime involving moral turpitude while on parole have also been excluded. In *In re Sanchez-Marin*,<sup>75</sup> Cuban parolees were excluded because they were convicted of manslaughter while on parole. In each of these cases the basis for exclusion occurred while the alien was on parole, although legally he was not recognized as being present within the country. The problem was summarized by a federal district court when it commented, "[i]ndeed, the legal fiction strains credibility . . ."<sup>76</sup>

Once parole has been revoked, the alien is examined by an immigration official in order to determine if he is eligible for admission into the United States.<sup>77</sup> At all times the alien has the burden

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69. 345 U.S. 206, 210 (1953).

70. Immigration and Nationality Act § 212(d) (5), 8 U.S.C. § 1182(d) (5) (1970).

71. Deportation is only used against an alien who has actually entered. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

72. *Klapholz v. Esperdy*, 201 F. Supp. 294, 299 (S.D.N.Y. 1961), *aff'd*, 302 F.2d 928 (2d Cir.), *cert. denied*, 371 U.S. 891 (1962).

73. See 8 C.F.R. § 235.1(d) (1975).

74. 11 I. & N. Dec. 329, 331 (1965).

75. 11 I. & N. Dec. 264, 267 (1965).

76. *United States ex rel. Stellas v. Esperdy*, 250 F. Supp. 85, 87 (S.D.N.Y. 1966).

77. 8 C.F.R. § 212.5(a) (1975).

of establishing that his case is meritorious and that he should be allowed to enter.<sup>78</sup> If the examining officer decides that the alien is not "clearly and beyond a doubt entitled to land"<sup>79</sup> then the case is referred to a special inquiry officer. The special inquiry officer is required "to conduct proceedings . . . to determine whether an arriving alien . . . shall be allowed to enter or shall be excluded and deported."<sup>80</sup> A hearing is not required to determine admissibility; all that is required is an essentially fair proceeding.<sup>81</sup> Hence, the classification of the parolee as an excludable alien serves to deny him the procedural protections accorded an alien who has "entered" and subjects him to more limited exclusion proceedings.

### Judicial Review

The decision to exclude an alien is made by the special inquiry officer or, in certain cases, by the regional commissioner based upon his evaluation of the merits of an alien's application.<sup>82</sup> The alien has the right to appeal his exclusion to the Board of Immigration Appeals,<sup>83</sup> except if he has been found excludable because of mental illness, disease, or for national security reasons.<sup>84</sup> If his appeal is rejected by the Board, he can then seek judicial review by filing a petition for habeas corpus or declaratory judgment in a federal appellate court.<sup>85</sup> The court will limit its review to determining whether the Board committed a flagrant abuse of discretion,<sup>86</sup> and absent a finding of such abuse, the alien will be excluded.

An alien who is found excludable because his presence endangers the national security or because he is found to be a subversive has even less of an opportunity to discover the basis of his exclusion.<sup>87</sup>

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78. Immigration and Nationality Act § 203(d), 8 U.S.C. § 1153(d) (1970).

79. *Id.* § 235(b), 8 U.S.C. § 1255(b).

80. *Id.* § 236(a), 8 U.S.C. § 1226(a).

81. *Sui Fung Luk v. Rosenberg*, 276 F. Supp. 909, 912 (C.D. Cal. 1967), *aff'd*, 409 F.2d 555, 558 (9th Cir. 1969).

82. Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a) (1970).

83. *Id.* § 236(b), 8 U.S.C. § 1226(b).

84. *See id.* § 235(c), 8 U.S.C. § 1225(c).

85. *See Brownell v. Tom We Shung*, 352 U.S. 180, 184 (1956); Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105a (1970).

86. *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966); *Wan Ching Shek v. Esperdy*, 304 F. Supp. 1086, 1087 (S.D.N.Y. 1969).

87. 8 C.F.R. § 235.8(b) (1975).

The case of an alien found excludable on these grounds is referred directly to the regional commissioner.<sup>88</sup> The alien may submit a statement or any other information which he believes would be helpful,<sup>89</sup> but the regional commissioner may decide the case and order immediate exclusion without revealing the information on which he based his decision.<sup>90</sup> An alien excluded under these provisions has no right to an administrative appeal; his only appeal is to the courts

A parolee who has been unable to win either an administrative or judicial appeal must be sent to the "country from whence he came."<sup>91</sup> This phrase has been construed to mean "that country in which the alien has a place of abode and which he leaves with the intention of coming ultimately to this country."<sup>92</sup> Unlike the deported alien, who may designate the country to which he will be deported,<sup>93</sup> the excluded parolee has no choice. As the Second Circuit stated; "[t]here can be only one country—'the country' in the words of the statute . . . ."<sup>94</sup>

The alien who has been paroled into the United States remains subject to the "direct control" of the Immigration and Naturalization Service for the entire period of his parole.<sup>95</sup> At any time parole can be summarily revoked if, in the opinion of the Attorney General or his delegate, the alien has become excludable or his presence is no longer in the public interest.<sup>96</sup> These harsh results can be explained by reconsidering the intended purpose of the statute. The parole provision was enacted as a temporary remedy for hardship cases, consequently Congress did not furnish parolees any procedural safeguards.<sup>97</sup> The current use of the parole authority to admit the Indochina refugees reveals the fallacy of using parole to admit a large group of refugees. These refugees have come to

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88. *Id.* § 235.8(a).

89. Immigration and Nationality Act § 235(c), 8 U.S.C. § 1225(c) (1970).

90. 8 C.F.R. § 235.8(b) (1975).

91. Immigration and Nationality Act § 237(a), 8 U.S.C. § 1227(a) (1970).

92. *United States v. Holland-American Line*, 231 F.2d 373, 376 (2d Cir. 1956).

93. Immigration and Nationality Act § 243(a), 8 U.S.C. § 1253(a) (1970).

94. *Menon v. Esperdy*, 413 F.2d 644, 651 (2d Cir. 1969).

95. *Hearings on Indochina Refugees Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 4, at 101 (1975) (statement of James Greene, Deputy Comm. INS).

96. Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970).

97. Compare Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a) (1970), with Immigration and Nationality Act § 242(b), 8 U.S.C. § 1252(b) (1970).

the United States with the expectation of becoming permanent residents, but because they have been admitted on parole, the Indochina refugees will face the possibility of exclusion until they are allowed to end parole and adjust status.

#### ENDING PAROLE

In the past, both Congress and the executive branch have perceived the dilemma arising from the use of parole as the first step in securing permanent residence for large numbers of refugees. As Congressman Feighan noted:

Keeping these people in a parole status indefinitely minimizes the good will we created throughout the world by taking them into our country in the first instance. Moreover, the indefinite parole status cannot help but, with the passing of time, set the . . . refugees apart from the rest of American society . . . .<sup>98</sup>

In order to alleviate these problems, Congress enacted specific legislation authorizing an adjustment of status to permanent resident for refugee-parolees. Congress passed legislation authorizing adjustment of status for Hungarian parolees in 1958.<sup>99</sup> A similar provision was enacted as part of the Fair Share Relief Act in 1960,<sup>100</sup> and in 1966 Congress authorized adjustment of status for Cuban parolees.<sup>101</sup> In each of these instances Congress recognized the dilemma caused by the misuse of parole and determined that the best solution was to authorize an adjustment of status for refugee-parolees.<sup>102</sup>

The presence of the Indochina refugees again raises the problem of finding a means of enabling these parolees to quickly adjust to permanent residence status. Members of Congress have already recognized that:

They [Indochina refugees] are, in a sense, under our jurisdiction now and we can act accordingly, but eventually how they are treated with respect to the use of parole authority and thereafter, how they may be treated in terms of adjusting their status from simply being on parole to being a citizen is the problem.<sup>103</sup>

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98. H.R. REP. NO. 1199, 85th Cong., 1st Sess. in 2 U.S. CODE CONG. & AD. NEWS 2027-28 (1957).

99. Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419.

100. Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504.

101. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161.

102. See statutes cited notes 99-101 *supra*.

103. 121 CONG. REC. 4011 (daily ed. May 14, 1975) (remarks of Congressman Sarbanes).

Since Congress believes that these parolees are intended to become permanent residents of the United States,<sup>104</sup> the problem is in enacting legislation which will allow them to achieve this status.

### *Adjusting Status Under Current Provisions*

The Immigration and Nationality Act authorizes an adjustment of status to permanent resident if a parolee can meet the requirements for admission, is currently eligible to receive a visa, and can convince the Attorney General to exercise his discretion favorably.<sup>105</sup> However, each of these requirements poses a barrier to the Indochina parolee attempting to adjust status.

### Numerical Limitations

The number of immigration visas available to aliens from countries not within the Western Hemisphere is limited to 170,000 per year.<sup>106</sup> The total number of visas is allocated among seven preference categories.<sup>107</sup> Aliens applying for a visa within each preference category must compete with other aliens in each category for the limited number of visas available.<sup>108</sup> No particular number of visas is allocated to any specific country, but no more than 20,000 visas are available to aliens from any one country within one year.<sup>109</sup> If the particular category in which the parolee has sought to obtain a visa is oversubscribed, his application for an adjustment of status will be denied. The same result will occur if the 20,000 person limit is exceeded for the country from which the parolee has come.

The problems which faced the Cuban refugee-parolees in adjusting their status are suggestive of those which the Indochina refugees may face. Initially, when Congress authorized adjustment of status for Cuban parolees, there were no numerical limitations on the number of visas available to Western Hemisphere immigrants.<sup>110</sup> The imposition of numerical limitations in July 1968, caused disproportionately large numbers of Cuban parolees to adjust their status in May and June of 1968.<sup>111</sup> It was recognized that the

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104. *Hearings on Indochina Refugees Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 4, at 47 (remarks of Congressman Cohen).

105. Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (1970).

106. *Id.* § 201(a), 8 U.S.C. § 1151(a).

107. *Id.* § 203(a), 8 U.S.C. § 1153(a).

108. 111 CONG. REC. 21,589 (1965) (remarks of Congressman Feighan).

109. Immigration and Nationality Act § 202, 8 U.S.C. § 1152 (1970).

110. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161.

111. 1968 INS ANN. REP. 7.

ensuing limitations on the availability of visas would substantially lengthen the time required to adjust status.<sup>112</sup> Similarly, the current numerical limitations serve to diminish the possibility that the Indochina refugees will be able to quickly end their parole by adjusting status.<sup>113</sup>

### The Problem of Discretion

The parolee who has met the objective requirements for admission must still persuade the Attorney General to grant his application for adjustment of status.<sup>114</sup> As the statute is now construed, the alien who has fulfilled the statutory prerequisites is merely eligible for an adjustment of status.<sup>115</sup> Thus, the parolee has the burden of proving that his application "*merits favorable consideration.*"<sup>116</sup> However, since the decision to grant an adjustment is wholly discretionary, a parolee has no guidelines to follow in attempting to argue the merits of his application.<sup>117</sup> In commenting on the difficulties in the adjustment process, the Third Circuit noted:

It is this lack of any express or implicit specification of policy objectives or standards or even relevant factors, either in § 1255 or in the regulations promulgated by the Attorney General, which makes the exercise of discretion by his delegate an utterly unguided and unpredictable undertaking. Only the inevitable necessity of disposing of the case is specified, like a result without a cause. What is the desired goal and what guides should channel the course to it receive no recognition.<sup>118</sup>

Obtaining a favorable decision from the Attorney General will not be an obstacle for all of the Indochina refugees, but for some of the parolees it will pose a formidable problem.<sup>119</sup>

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112. 1969 INS ANN. REP. 9.

113. See *Gestuvo v. District Director of United States INS*, 337 F. Supp. 1093, 1096 (C.D. Cal. 1971).

114. *Jarecha v. INS*, 417 F.2d 220, 223 (5th Cir. 1969).

115. *Astudillo v. INS*, 443 F.2d 525, 527 (9th Cir. 1971).

116. *Santos v. INS*, 375 F.2d 262, 264 (9th Cir. 1967).

117. See Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (1970).

118. *Ameeriar v. INS*, 438 F.2d 1028, 1042 (3d Cir. 1971) (Freedman, J., dissenting).

119. Questions regarding the background of some of the Indochina refugees and the possibility of not allowing an adjustment of status have already been raised. See *Hearings on Indochina Refugees Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 4, at 30-50.

If the parolee's application for adjustment of status is denied, then he may appeal the decision to a federal court. However, the scope of judicial review is limited because of the discretionary nature of the decision involved.<sup>120</sup> If the reviewing court does not determine that there was an abuse of discretion,<sup>121</sup> then the alien will be unable to adjust status.

### Remedial Proposals

The limitations<sup>122</sup> on adjusting status under existing statutory provisions suggest that Congress will have to proceed outside these provisions in order to allow the Indochina refugees to end parole within a relatively short time. Remedial legislation will have to circumvent the numerical visa limitations in order to provide an easier means for allowing the Indochina refugees to adjust their status. Legislation of this kind would serve to limit the duration of parole and the problems which can arise from it. In enacting such legislation, Congress should also specify those qualities which it believes are necessary for a parolee to adjust status. A list of qualifications would serve to aid immigration officials in determining which parolees should be allowed to adjust status and also inform the parolees of the qualifications which are necessary if an adjustment of status is desired.

### CONCLUSION

The continued use of parole by the executive branch to admit large groups of refugees indicates that the parole statute should be amended to prevent future abuse. Numerical limitations could be imposed which would restrict the number of parolees admitted each year. By limiting the number of parolees, Congress would effectively prevent the type of misuse which has occurred. However, if Congress should decide that paroling large groups of refugees into the United States is a proper use of the parole authority, then it should pass legislation which would eliminate the problems which the Indochina parolees now face. Parole has been used as if it were a grant of admission, yet parolees are denied the privileges granted to resident aliens.<sup>123</sup> When parole is "more in the nature of an

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120. *Astudillo v. INS*, 443 F.2d 525, 527 (9th Cir. 1971); *Maturo v. INS*, 404 F.2d 337 (2d Cir. 1968).

121. An abuse of discretion was defined by the Fifth Circuit as a decision that was "arbitrary, capricious, or not supported by the reasonable, substantial and probative evidence on the record as a whole." *Jarecha v. INS*, 417 F.2d 220, 225 (5th Cir. 1969).

122. Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (1970).

123. A parolee remains subject to exclusion and its limited procedural



entry [rather] than a detention" parolees should be granted the same status as other aliens who have legally entered the United States.<sup>124</sup> In order to give refugee-parolees a legal status which comports with the reason for their parole,<sup>125</sup> Congress should enact legislation which would provide parolees with permanent resident status within thirty days after their arrival in the United States. By enacting such a provision, Congress would accord parolees the same rights as resident aliens and would prevent the inequities which presently result from the use of the parole authority.

MARVIN SAMUEL GROSS

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protections. However, the alien who has "entered" enjoys the full protection of a *due process* hearing in deportation proceedings. See, e.g., 1 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 3.18 (rev. ed. 1975).

124. *Diaz v. Weinberger*, 361 F. Supp. 1, 6 n.5 (S.D. Fla. 1973), *prob. juris. noted*, 416 U.S. 980 (1974).

125. See *Hearings on Indochina Refugees Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 4, at 47 (remarks of Congressman Cohen).