

# WHAT’S OLD IS NEW: CAN OBSOLETE IMMIGRATION LAWS ASSIST VICTIMS OF A NEW CLIMATE CRISIS?

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INTRODUCTION.....	571
A. Environmental Destruction in the Bahamas .....	571
B. Growing Number of Environmentally-Displaced Persons...	573
I. CURRENT REFUGEE LAW .....	574
A. International Law.....	574
B. Current United States Law for Refugees.....	576
II. UNITED STATES IMMIGRATION PROVISIONS FOR VICTIMS OF NATURAL DISASTERS.....	580
A. Past United States Immigration Provisions for Victims of “Natural Calamities” .....	580
1. <i>Refugee Relief Act of 1953</i> .....	581
2. <i>Azorean Refugee Act of 1958</i> .....	582
3. <i>1965 INA Amendments - “Conditional Entrants”- INA 203(a)(7)</i> .....	585
4. <i>Sicily Earthquake Bills of 1968—House Judiciary Committee</i> .....	588
5. <i>Refugee Act of 1980</i> .....	590
B. Current Protections for Victims of Natural Disasters—Temporary Protected Status .....	592
III. POTENTIAL REMEDIES .....	594
A. Applying Past Provisions for Current Victims of Climate-Related Disasters .....	594
1. <i>Refugee Relief Act of 1953</i> .....	594
2. <i>Azores Refugee Act</i> .....	594
3. <i>1965 INA—“Conditional Entry”</i> .....	595

## INTRODUCTION

### A. Environmental Destruction in the Bahamas

In September 2019, Hurricane Dorian barreled its way across the Caribbean. Starting as a tropical storm, it rapidly developed into a Category

Five hurricane.<sup>1</sup> At the same time as it leapt in strength and size, the hurricane slowed in speed, until it was traveling at a speed of just five miles per hour.<sup>2</sup> State governments across the Atlantic seaboard declared states of emergency, not knowing where the hurricane would land or how long it would stay once it did crash into shore.<sup>3</sup> Throughout Labor Day weekend, Hurricane Dorian crawled across the Caribbean Sea—a 280-mile long monster with sustained winds of 183 miles per hour, moving at the speed of a turtle.<sup>4</sup> It finally crashed into the Bahamas as a Category Five hurricane on September 1, 2019, with wind speeds of over 175 miles per hour.<sup>5</sup> First it hit the Abacos Islands, then it slowly moved over the Grand Bahamas Island. And there it stayed.<sup>6</sup>

Hurricane Dorian stalled and swirled over the Bahamas for two days; pummeling the Bahamas with 185 mile per hour wind speeds equivalent to category four tornado.<sup>7</sup> A storm surge of over twenty feet hit the coastline as torrential rains fell.<sup>8</sup> Finally, Hurricane Dorian pulled away from the islands on September 3, 2019, leaving complete devastation behind.<sup>9</sup> Seventy percent of Grand Bahama Island was now underwater, including the main airport.<sup>10</sup> Three out of every four homes on Grand

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1. NAT'L WEATHER SERV., *Hurricane Dorian*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Sept. 6, 2019), <https://www.weather.gov/mhx/Dorian2019> [<https://perma.cc/GH54-MHGZ>].

2. Jeff Masters, *Hurricane Dorian Was Worthy of a Category 6 Rating*, SCI. AM. (Oct. 3, 2019), <https://blogs.scientificamerican.com/eye-of-the-storm/hurricane-dorian-was-worthy-of-a-category-6-rating/> [<https://perma.cc/6GLH-JKVV>].

3. See Travis Fedschun, *Hurricane Dorian, Category 5 storm makes landfall in Bahamas with 185 mph winds*, FOX NEWS CHANNEL (Sept. 1, 2019), <https://www.foxnews.com/us/hurricane-dorian-bahamas-warning-florida-carolinas> [<https://perma.cc/73V9-72WW>].

4. Jennifer Sangalang, *How big is Hurricane Dorian? About the size of Georgia*, FLA. TODAY (Sept. 2, 2019), <https://www.floridatoday.com/story/news/2019/09/02/hurricane-dorian-size-storm/2168947001/> [<https://perma.cc/HT89-MXSP>].

5. NAT'L HURRICANE CTR., NAT'L HURRICANE CTR. TROPICAL CYCLONE REPORT: HURRICANE DORIAN 3 (Lixion A. Avila et al. 2020).

6. See *id.*; see also Michel Mann & Andrew E. Dessler, *Global heating made Hurricane Dorian bigger, wetter – and more deadly*, THE GUARDIAN (Sept. 4, 2019), <https://www.theguardian.com/commentisfree/2019/sep/04/climate-crisis-hurricane-dorian-floods-bahamas> [<https://perma.cc/4H7A-BW8P>].

7. See NAT'L HURRICANE CTR., *supra* note 5, at 3; see also NAT'L WEATHER SERV., *Enhanced Fujita Scale*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Sept. 6, 2019), [https://www.weather.gov/tae/ef\\_scale](https://www.weather.gov/tae/ef_scale) [<https://perma.cc/F4C3-GVZX>].

8. Mann & Dressler, *supra* note 6.

9. OCHA SERVS., *The facts: Hurricane Dorian's devastating effect on The Bahamas*, RELIEFWEB (Aug. 4, 2020), <https://reliefweb.int/report/bahamas/facts-hurricane-dorian-s-devastating-effect-bahamas> [<https://perma.cc/M7KK-T7L2>].

10. See Chris D'Angelo, *What Did Hurricane Dorian Do to the Bahama's Coral Reefs?*, MOTHER JONES (Oct. 13, 2019), <https://www.motherjones.com/politics/2019/10/what-did-hurricane-dorian-do-to-the-bahamas-coral-reefs/> [<https://perma.cc/Y67M-T63F>]; see also Andrew Freedman et al., *Satellite images show the destruction of Dorian in the*

Bahama Island were submerged under water.<sup>11</sup> In Marsh Harbor, for example, the entire infrastructure of society was erased—schools, stores, police stations, and churches were wiped off the map.<sup>12</sup> Bahamians were left without access to food or water or shelter.<sup>13</sup>

Many Bahamians traveled to Kingsport, where they attempted to leave the country and head to the United States.<sup>14</sup> However, one ferry heading to Fort Lauderdale, Florida was turned back and passengers who did not have a current United States visa were forced to disembark back in the Bahamas.<sup>15</sup> The Trump Administration decided not to grant Temporary Protected Status to Bahamians on September 15, 2019.<sup>16</sup> Bahamians could not qualify as refugees or asylees under United States immigration law.<sup>17</sup> Bahamians were left marooned, facing life-threatening circumstances at home, yet unable to find shelter or refuge in the United States.

Hurricane Dorian followed a trend of hurricanes affected by climate change.<sup>18</sup> The increasing temperatures of the oceans allows for bigger storms; and the wind speeds of hurricanes increase roughly seven percent for each one degree Celsius of warming.<sup>19</sup>

## B. Growing Number of Environmentally-Displaced Persons

The plight that the residents of Marsh Harbor currently face has become increasingly common around the world. Natural disasters are the leading cause of displacement.<sup>20</sup> Since 2008, an average of 24 million

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*Bahamas*, WASH. POST (Sept. 5, 2019), <https://www.washingtonpost.com/weather/2019/09/05/satellite-images-show-destruction-dorian-bahamas/> [<https://perma.cc/MP5R-JT8Z>].

11. Freedman et al., *supra* note 10.

12. *See id.*

13. *See* OCHA SERVS., *supra* note 9.

14. Sanya Mansoor, *After Dorian Survivors Are Kicked Off Rescue Ship, U.S. Border Patrol Says All Bahamians Welcome -- Except Those Who Aren't*, TIME MAG. (Sept. 10, 2019), <https://time.com/5672378/bahamas-dorian-survivors-us-visa/> [<https://perma.cc/549N-6YVV>].

15. *Id.*

16. Makini Brice et al., *U.S. denies protective status to Bahamas hurricane evacuees*, REUTERS (Sept. 11, 2019), <https://www.reuters.com/article/us-storm-dorian-immigration-bahamas/u-s-denies-protective-status-to-bahamas-hurricane-evacuees-idUSKCN1VW2OS> [<https://perma.cc/W7XW-NCA9>].

17. Lila Sevener, *Climate Change, Migration, and Immigration Law*, THE REG. REV. (Nov. 19, 2020), <https://www.theregreview.org/2020/11/19/sevener-climate-change-migration-immigration-law/> [<https://perma.cc/XMD8-EE3B>].

18. Mann & Dressler, *supra* note 6.

19. *Id.*

20. David Keane, Note, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"*, 16 GEO. INT'L ENVTL. L. REV. 209, 211 (2004).

people have been displaced by catastrophic weather disasters each year.<sup>21</sup> This number is expected to rise due to the effects of climate change. A *Science* journal study projected that asylum applications to the EU will increase twenty eight percent if global temperatures continue the current rate of increase.<sup>22</sup> Some statisticians predict that 150 to 200 million people could become displaced as a result of climate change-related disasters by 2050.<sup>23</sup>

However, the current scheme of refugee and asylum law seems completely unprepared to deal with, or even label, this growing category of migrants. “Environmental migrants” are not given refugee protection under either international law or United States immigration law.<sup>24</sup> Although these migrants are fleeing destruction and deadly conditions, they are not considered refugees under current United Nations (“UN”) treaties.<sup>25</sup> Similarly, victims of natural disasters cannot receive asylum or refugee protection under United States immigration law.<sup>26</sup> How has this happened, and how can the law potentially be changed to recognize “environmental migrants” as valid refugees or asylum-seekers?

## I. CURRENT REFUGEE LAW

### A. International Law

Current international refugee law was largely crafted during the United Nations Human Rights Convention of 1951 (“UNHRC”) and the 1967 United Nations Protocol.<sup>27</sup> The UN Human Rights Convention of 1951 defined the term “refugee,” and established rights for refugees. These rights included the right of “nonrefoulement” (so the refugee will not be sent back to the persecuting country), the right of housing and other rights.<sup>28</sup> Originally, the UN Human Rights Convention only applied to Europeans displaced before January 1, 1951. The 1967 UN Protocol broadened the

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21. Tim McDonnell, *The Refugees The World Barely Pays Attention To*, NAT’L PUB. RADIO (June 20, 2018), <https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to> [https://perma.cc/V9WQ-S47Q].

22. *Id.*

23. *Climate Change Could Force 216 Million People to Migrate Within Their Own Countries by 2050*, THE WORLD BANK GRP. (Sept. 13, 2021), <https://www.worldbank.org/en/news/press-release/2021/09/13/climate-change-could-force-216-million-people-to-migrate-within-their-own-countries-by-2050> [https://perma.cc/9K8A-9HVJ].

24. See Sevenser, *supra* note 17; see also McDonnell, *supra* note 21.

25. U.N. High Comm’r for Refugees, *Climate change and disaster displacement*, <https://www.unhcr.org/en-us/climate-change-and-disasters.html> [https://perma.cc/8HAQ-GS2Z] (last visited Jan. 7, 2022).

26. 8 U.S.C. § 1101(42) (2016).

27. U.N. High Comm’r for Refugees, *The 1951 Refugee Convention*, <https://www.unhcr.org/en-us/1951-refugee-convention.html> [https://perma.cc/94B8-PF55] (last visited Jan. 7, 2022).

28. *Id.*

scope of the Convention to cover refugees from any country, displaced at any time.<sup>29</sup> These conventions created protections for refugees under international law and defined who could be considered a refugee.<sup>30</sup> In addition, they created guidelines for signatory countries to use when creating their own domestic asylum systems.<sup>31</sup>

The UNHRC defined “refugees” in Section 2(a) of the Act as: “(1) Presence outside the country of origin, (2) due to a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion, and (3) unable or unwilling to receive protection in own country.”<sup>32</sup> This definition requires “persecution” or “fear of persecution” by a government, and allows victims of such persecution to receive refugee status.<sup>33</sup>

However, this definition leaves victims of natural disasters out in the cold. These migrants are not fleeing political persecution, but an environmental catastrophe. The UNHRC definition requires an element of intent by a human actor (targeted persecution); while natural disasters, like earthquakes or volcanic eruptions, are random and not created with an intent to persecute a particular group.<sup>34</sup> So those fleeing natural disasters would not generally be able to qualify for refugee protection.

The 1967 Refugee Protocol similarly distinguished “environmentally displaced persons” from “refugees,” stating that refugees lack protection in their state and “must look to the international community for security,” while environmentally displaced people “can usually count upon the protection of their state, even if it is limited in its capacity to provide them with emergency relief or longer-term reconstruction assistance.”<sup>35</sup> In the Protocol, the UNHCR included a study that stated that the refugee status must be “caused by situations that occur between a State and its nationals.”<sup>36</sup> In 1979, the UNHCR created guidelines that removed any doubt about the status of environmentally displaced persons. These guidelines specifically excluded “victims . . . of natural disasters” from acquiring refugee protection.<sup>37</sup>

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29. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5) [<https://perma.cc/ES4G-3QAZ>] (last visited Mar. 3, 2022.)

30. *Id.*

31. *Id.*

32. Convention Relating to the Status of Refugees, G.A. Res. 429 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 48 (Dec. 14, 1950).

33. *Id.*

34. Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Protect the Environment*, 13 COLO. J. INT'L ENV'T L. & POL'Y 1, 6–7 (2002).

35. *Id.* at 6.

36. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol].

37. U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to

The international refugee law was simply not intended to protect people displaced by natural disasters, even though these people are fleeing danger and presenting a “refugee-like” situation. Instead, the refugee conventions apply to those that are fleeing due to persecution in their state.

This leaves “environmentally displaced persons” without any protection under international law.

Over the subsequent decades, the UN passed numerous conventions related to the environment and climate change, but struggled to create protections for those forced to migrate due to climate change-related disasters.<sup>38</sup>

Most recently, the UN has negotiated a “Global Compact for Migration and the Global Compact on Refugees,” which the UN General Assembly adopted in the fall of 2019.<sup>39</sup> The Compact was first proposed in 2016, on the heels of the 2015 Paris climate talks.<sup>40</sup> When it was proposed, many advocates believed that this Compact could provide a mechanism for migrants of environmental disasters. However, in March 2019, the lead UN negotiator stated that the compact would not grant “specific legal international protection to climate-induced migrants.”<sup>41</sup> Despite its name, the Global Compact for Migration offers no protections for migrants displaced by environmental disasters. However, the final draft does ask countries to better map and predict migration movements that arise from “sudden and slow-onset natural disasters, environmental degradation,” and the “adverse effects of climate change,” and it encourages countries to “cooperate to identify, develop and strengthen solutions, including planned relocation and visa options” for climate change migrants.<sup>42</sup>

## B. Current United States Law for Refugees

The United States ratified the UN Refugee Protocol in 1967.<sup>43</sup> In 1980, the United States Congress passed the Refugee Act.<sup>44</sup> This Act

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the Status of Refugees, ¶ 39, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992 ed.), <http://www.unhcr.org/4d93528a9.pdf> [<https://perma.cc/FT7L-ENUS>].

38. Falstrom, *supra* note 34, at 12.

39. Global Compact for Safe, Orderly and Regular Migration, Objective 16, G.A. Res. 73/195 (Dec. 19, 2018), [https://refugeesmigrants.un.org/sites/default/files/180711\\_final\\_draft\\_0.pdf](https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf) [<https://perma.cc/DH7G-VGVJ>].

40. Gillian D. Triggs & Patrick C.J. Wall, ‘The Makings of a Success’: *The Global Compact on Refugees and the Inaugural Global Refugee Forum*, 32 INT’L J. REFUGEE L. 283, 284–85 (2020).

41. See Vince Chadwick, *Global Compact for Migration not the answer for climate refugees: UN representative*, DEVEX (Mar. 20, 2018), <https://www.devex.com/news/global-compact-for-migration-not-the-answer-for-climate-refugees-un-representative-92373#:~:text=Louise%20Arbour%20told%20members%20of%20the%20European%20Parliament,give%20%E2%80%9Cspecific%20legal%20international%20protection%20to%20climate-induced%20migrants.%E2%80%9D> [<https://perma.cc/X7D6-ES2Z>].

42. G.A. Res. 73/195, *supra* note 39.

43. Protocol, *supra* note 36.

adopted the 1967 UN Refugee Protocol and created new federal immigration laws to create protections for refugees and asylum-seekers.<sup>45</sup> This Act was intended to create a comprehensive system for refugee and asylum applicants to the United States. The Refugee Act mirrored almost exactly the language of the UN Convention. The Act defines refugee as:

Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of *persecution or a well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>46</sup>

As in the UN definition, the Refugee Act required a migrant to show “persecution or a well-founded fear of persecution” to receive refugee status.<sup>47</sup> The Refugee Act also created separate systems to process applicants; those that had already been screened at UN refugee camps could enter as refugees, while migrants who were applying independently could seek asylum at United States ports of entry, or within the United States.<sup>48</sup> However, whether applying for asylum or entering the United States as a refugee, the same definition applied. And this definition offered no provisions for victims of natural disasters or other environmental catastrophes.<sup>49</sup>

This definition means that migrants displaced by climate change and environmental disasters currently cannot seek protection under United States refugee law. However, there are indications that this situation may be changing, as both the Biden Administration and Congress introduce initiatives to assist climate migrants and address the impacts of climate migration.<sup>50</sup>

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44. United States Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

45. *Id.*

46. *Id.* (emphasis added).

47. *Id.*

48. *Id.*

49. *Id.*

50. *President Biden's Executive Actions on Immigration*, CTR. FOR MIGRATION STUD. (May 24, 2021), <https://cmsny.org/biden-immigration-executive-actions/> [<https://perma.cc/T5XD-N6RF>]; Senator Markey, *Rep. Velazquez Reintroduce Legislation to Aid People Displaced by Climate Change and Support Global Resilience*, ED MARKEY (May 19, 2021), <https://www.markey.senate.gov/news/press-releases/senator-markey-rep-velzquez-reintroduce-legislation-to-aid-people-displaced-by-climate-change-and-support-global-resilience> [<https://perma.cc/VSQ4-MEGS>].

During the 2020 Presidential campaign, Joe Biden promised to reenter the Paris Accord and re-engage on addressing the effects of climate change.<sup>51</sup> Future members of the Biden Administration wrote articles specifically regarding the need to address climate refugees.<sup>52</sup>

On February 4, 2021, President Biden signed an executive order that dealt with assisting refugees and planning for the impact of climate change on migration.<sup>53</sup> The order directed his National Security Advisor and other agencies to undertake a study of climate change and its impact on migration, including forced migration, internal displacement, and planned relocation. The executive order asked these agencies to submit a report to the President within six months.<sup>54</sup> This report would include an analysis of many different aspects of climate-related migration, including its implications for international security, options for protecting and resettling people displaced by climate change, mechanisms to identify climate migrants, and opportunities to work collaboratively with other countries and organizations to respond to climate change migration.<sup>55</sup>

Biden's action brought renewed focus to the issue of climate migrants.<sup>56</sup> Local governments and mayors asked to be included in the climate migration study.<sup>57</sup> Refugee organizations undertook their own reports to the Biden Administration on options for climate migrants.<sup>58</sup>

In October 2021, the White House released its "Report on the Impact of Climate Change on Migration."<sup>59</sup> This report evaluated the impacts of climate change on migration, and made a series of recommendations. The report recognized that existing international refugee and asylum "legal protection frameworks are limited in scope to protect people displaced by climate change."<sup>60</sup> However, the United States should strengthen these protections and "maximize their application" for those

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51. Christopher Brito, *Joe Biden vows to rejoin the Paris climate deal on first day of office if elected*, CBS NEWS (Nov. 5, 2020, 12:26 PM), <https://www.cbsnews.com/news/paris-climate-accord-biden-rejoin-president/> [<https://perma.cc/DD98-F4YC>].

52. For example, John Kerry, Biden's special envoy for climate, wrote that "[it] is just a matter of time before the global refugee process has to incorporate the idea of climate migration into our overall framework." John Kerry, *Climate Migration, Food Supply, and Global Security*, WORLD WAR ZERO (Aug. 25, 2020), <https://worldwarzero.com/magazine/2020/08/climate-migration-food-supply-and-global-security/> [<https://perma.cc/W4UT-PSQ3>].

53. Exec. Order No. 14,013, 86 Fed. Reg. 8839 (Feb. 4, 2021).

54. *Id.*

55. *Id.*

56. Adam Aton, *Biden Pushes U.S.—and the World—to Help Climate Migrants*, SCI. AM. (Feb. 8, 2021), <https://www.scientificamerican.com/article/biden-pushes-u-s-and-the-world-to-help-climate-migrants/> [<https://perma.cc/2LE2-8J3E>].

57. Letter from Mayors to President Joe Biden (Apr. 22, 2021).

58. *E.g.*, REFUGEES INT'L, TASK FORCE REPORT TO THE PRESIDENT ON THE CLIMATE CRISIS AND GLOBAL MIGRATION (2021).

59. THE WHITE HOUSE, Report on the Impact of Climate Change on Migration (2021).

60. *Id.* at 6.

displaced by climate change.<sup>61</sup> For example, the report suggested that the United States could assess how climate change could intersect with the existing criteria for refugee status, or how to protect individuals from removal where climate change makes conditions in that country unsafe.<sup>62</sup>

The Report noted that climate change is not currently a factor for refugee referrals from the UN Human Rights Council, and the United States does not have any alternative legal pathways for those displaced by climate change. The Report recommended that the Executive Branch work with Congress to create a “new legal pathway for individualized humanitarian protection in the United States for individuals facing serious threats to their life due to climate change.”<sup>63</sup>

In its final section, the report created legislative recommendations. Here, it stated that the current Temporary Protected Status should be extended to allow those displaced by climate change to receive permanent status in the United States. In addition, the report stated that the White House should explore, with Congress and stakeholders, the need for new protections for individuals “who can establish that they are fleeing . . . serious, credible threats to their life or physical integrity due to climate change.”<sup>64</sup> In all, the report provides an overview of the existing situation regarding climate change migration, and opened the door for the Executive Branch and Congress to create new humanitarian provisions to assist those displaced due to climate change.

On April 22 and 23, 2021, the Biden Administration held a “Leaders Summit on Climate” with forty world leaders to “galvanize effort to tackle the climate crisis,”<sup>65</sup> and Biden called on world leaders to bring the “highest possible ambitions” to the Glasgow conference.<sup>66</sup> All these activities have contributed to the possibility that the Biden Administration is willing to offer protections to migrants affected by climate change.

At the same time, Congressmen have introduced new bills that would allow climate migrants to receive status in the United States. On September 27, 2019, Senator Ed Markey introduced a bill that addressed climate resilience strategies, and included a provision to admit “climate-displaced persons.”<sup>67</sup> The bill’s introduction stated that “[f]orced

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61. *Id.* at 17.

62. *Id.* at 18.

63. *Id.* at 21.

64. *Id.* at 32.

65. Press Release, The White House, Statement on President Biden Inviting 40 World Leaders to Leaders Summit on Climate (Mar. 26, 2021).

66. Ella Nilsen & Betsy Klein, *Biden announces global goal to reduce planet-warming methane emissions*, CNN (Sept. 17, 2021), <https://www.cnn.com/2021/09/15/world/us-eu-methane-pledge-climate/index.html> [<https://perma.cc/25ZU-EFAV>].

67. S. 2565, 116th Cong. (2019); *Senator Markey Introduces First of Its Kind Legislation to Address Climate “Refugee” Crisis* (Sept. 27, 2019), <https://www.markey.senate.gov/news/press-releases/senator-markey-introduces-first-of-its-kind-legislation-to-address-climate-refugee-crisis> [<https://perma.cc/PWH7-63TK>].

displacement and forced migration are increasing in the context of environmental changes and climate-induced disruptions, including weather-related disasters, drought, famine, and rising sea levels.” The bill listed several examples of such climate-related disasters, including the 2019 flooding in India that displaced three million people.<sup>68</sup> It included new immigration provisions for those displaced by such disasters.

This bill defined “climate-displaced persons” as people displaced from their habitual homes “due to sudden or progressive change in the environment.”<sup>69</sup> The bill would amend the Immigration and Nationality Act to potentially admit 50,000 “climate-displaced persons.”<sup>70</sup> It also called on the State Department to address the humanitarian impacts of climate change.<sup>71</sup> Representative Nydia Velázquez introduced a similar bill in the House of Representatives in 2019.<sup>72</sup> On April 22, 2021, Senator Ed Markey and Representative reintroduced the bills in Congress, where the bills are still pending.<sup>73</sup>

There seems to be new movement and willingness in the United States to assist those displaced by climate-related disasters, but these new initiatives seem to conflict with the existing United States and international law related to refugees. However, would it really conflict with United States immigration policies and values to assist victims of environmental disasters? How has the United States dealt with similar situations in the past?

## II. UNITED STATES IMMIGRATION PROVISIONS FOR VICTIMS OF NATURAL DISASTERS

### A. Past United States Immigration Provisions for Victims of “Natural Calamities”

Although victims of natural disasters do not qualify for residency or asylum under current United States immigration law, at many points in the past, the United States *has* created provisions to protect and assist victims of natural disasters.<sup>74</sup> These displaced people were referred to as “refugees” and given the option to relocate permanently to the United States.<sup>75</sup> Maybe it is time to reinstate some of these laws to protect environmental migrants today.

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68. S. 2565, 116th Cong. § 2.

69. *Id.* § 3.

70. *Id.* § 8.

71. *Id.* § 5.

72. H.R. 4732, 116th Cong. (2019).

73. S. 1335, 117th Cong. (2021); H.R. 2826, 117th Cong. (2021).

74. Designation of Honduras Under Temporary Protected Status, 64 Fed. Reg. 524 (Jan. 5, 1999).

75. Refugee Relief Act of 1953, Pub. L. No. 83-203, § 2–3, 67 Stat. 400 (expired Dec. 31, 1956).

### 1. Refugee Relief Act of 1953

The United States first granted immigration status for victims of natural disasters in 1953, one year after passing the country's first comprehensive Immigration and Nationality Act (“INA”).<sup>76</sup> The INA was passed in 1952, without originally including any provisions for refugees.<sup>77</sup> In 1953, Congress passed the Refugee Relief Act (“RRA”), which created immigrant visas for refugees.<sup>78</sup> Section 2(A) of the RRA defined “refugees” that could qualify under the Act:

[A]ny person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, *natural calamity or military operations*, is out of his usual place of abode and unable to return, and who is in any event in need of assistance for the essentials of life and for transportation.<sup>79</sup>

This law created three different groups who could receive refugee status: (1) persons who cannot return to their home because of persecution or fear of persecution, (2) persons who cannot return to their home because of natural calamity, and (3) persons who cannot return to their home because of military operations.<sup>80</sup> Victims of natural disasters or other environmental catastrophes were specifically included as refugees, based on natural calamity alone without needing to also show persecution.<sup>81</sup> Similarly, people displaced by war or military operations could also enter the United States as refugees.<sup>82</sup>

The Act created 209,000 non-quota immigrant visas for “refugees, escapees, German expellees, orphans and relatives of United States citizens.”<sup>83</sup> These were not temporary visas; instead, the refugee could relocate permanently in the United States.<sup>84</sup> Applicants who were approved received lawful permanent residence in the United States and could later apply for citizenship.<sup>85</sup> The Act expired on its own terms in 1956.<sup>86</sup> Statistics do not show how many refugees received status due to “natural calamities,” because the Immigration and Naturalization Service (“INS”) did not distinguish the different bases for refugee status.

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76. *Id.*

77. Immigration and Nationality Act, Pub. L. No. 82-1414, 66 Stat. 163 (1952).

78. Refugee Relief Act § 2–3.

79. *Id.* (*emphasis added*).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

The Eisenhower Administration recognized that the Refugee Relief Act of 1953 expanded the scope of the definition of “refugee” to include victims of natural disasters.<sup>87</sup> On February 17, 1954, Eisenhower’s Cabinet Secretary Maxwell Rabb wrote to the State Department Administrator of Security and Consular Affairs, Scott McLeod, regarding the Natural Calamity Clause. “As we previously discussed,” he stated, “the use of the National Calamity Clause [of the RRA] could properly and effectively be utilized here to give wider scope to the “refugee definition.”<sup>88</sup> McLeod wrote his response a week later, stating that “there has never been any question in our minds that the Refugee Relief Act would be construed to include as refugees the earthquake victims in Greece, the flood victims in Holland, the Po River Valley flood victims in Italy and the flood victims in Japan.”<sup>89</sup> Far from being a radical departure, this correspondence reveals that the United States had always considered humanitarian issues, and sought to include victims of natural disasters into the scope of people granted protection as refugees.

One year later, Congress amended the Refugee Relief Act to allow more flexibility in allocating visas; while retaining the same definition of “refugee.”<sup>90</sup> On the first anniversary of the Refugee Relief Act, President Eisenhower asked the nation's Governors to organize committees to “stimulate the speed and effectiveness” of the resettlement in the United States of foreign victims of Communist persecution, military action, or natural disaster.<sup>91</sup>

Although the RRA includes government persecution as grounds for receiving a visa, it also includes additional grounds that allow individuals to be considered refugees without needing to prove targeted State actions against them.<sup>92</sup> This definition takes the focus off of the intent of a State and focuses on the needs of the individual migrant.

## 2. *Azorean Refugee Act of 1958*

The Azores Islands, including the Island of Faial, lay off the coast of Portugal. On September 27, 1957, the Capelinhos Volcano erupted on Faial.<sup>93</sup> Lava, smoke, and ash shot over 20,000 feet in the air, and ash

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87. Memorandum from Maxwell M. Rabb to Scott McLeod (Feb. 17, 1954) (on file with Dwight D. Eisenhower Presidential Library).

88. *Id.*

89. Memorandum from Maxwell M. Rabb to Scott McLeod (Feb. 24, 1954) (on file with Dwight D. Eisenhower Presidential Library).

90. Refugee Relief Act § 2 (1955).

91. *Id.*

92. *Id.*

93. Rui Coutinho et al., *Responses to, and the short and long-term impacts of, the 1957/1958 Capelinhos volcanic eruption and associated earthquake activity on Faial, Azores*, 196 J. OF VOLCANOLOGY AND GEOTHERMAL RES. 265, 267 (2010).

rained down while several earthquakes shook the island.<sup>94</sup> In the whaling village of Capelo, the ash covered the docks, and left residents unable to continue whaling and fishing.<sup>95</sup> Most of Failal's 25,000 residents lost their homes and livelihoods as lava covered the island.<sup>96</sup> The Capelinhos Volcano did not stop erupting until October 24, 1958, over a year later.<sup>97</sup> The volcano eruption ejected so much lava that a new island was created, only to be later submerged by the sea.<sup>98</sup>

In 1958, then-Senator John F. Kennedy and Senator John Pastore co-sponsored a bill to assist refugees from the Azores Islands. On June 4, 1958, Senator Pastore introduced the bill in the Senate.<sup>99</sup> On the Senate floor, Senator Pastore stated that the bill was for "relief of certain aliens distressed as the result of natural calamity in the Azores Islands."<sup>100</sup>

On the Senate floor, Pastore detailed the catastrophic effect of the volcanic eruption:

This is a story of terror and tragedy, of the destruction of homes by the hundred and of more than five thousand people who had to be evacuated from the island of Fayal in the Azores. It is a story of people panicked by almost continuous earthquakes, as the volcano of Pico Gorda belches forth its fumes and smoke and lava, and the country folk flee their homes.<sup>101</sup>

Senator Pastore also emphasized how helping the Azores refugees would be in the spirit of American values:

In this country the relatives of these desperate people in the Azores look to us for an expression of help and friendship which is the meaning of America as we like to portray it to the world. This measure is such an act of friendship, offering to destitute families the shelter of this land if there is no likelihood of their lives being reestablished in their homeland. This measure is America speaking at its finest, its fairest to a people in need.<sup>102</sup>

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94. *Id.* at 268.

95. *Id.* at 272.

96. H.R. RES. 1438, 110th Cong. (2004).

97. Coutinho et al., *supra* note 93, at 268.

98. *Id.*

99. S. REP. NO. 85-1875, at 3 (1985) (Comm. Rep.).

100. 85 CONG. REC. 10,080 (1958) (statement of Sen. Pastore).

101. *Id.*

102. *Id.*

On June 30, 1958, then-Senator John F. Kennedy co-sponsored the bill.<sup>103</sup> In his speech on the Senate floor, Senator Kennedy compared the impact of the volcanic eruption to that of an atomic explosion.<sup>104</sup> He stated that the bill would authorize 1,500 visas to Portuguese nationals who have lost their homes and their means of livelihood in the volcanic ash.<sup>105</sup> “It would be a simple, humanitarian gesture,” he said, “in keeping with the traditions and ideals of our country, to offer them refuge here.”<sup>106</sup>

The Azores Refugee Act passed on August 18, 1958.<sup>107</sup> Two years later, Congress issued an additional 2,000 visas, and in 1961, issued another 2,500.<sup>108</sup> The Act was renewed until 1962.<sup>109</sup> During that time, almost 5,000 people displaced by the volcanic eruption received immigrant visas to relocate to the United States.<sup>110</sup> Many refugees relocated to New England.<sup>111</sup> In 2008, Congress passed a resolution marking the fiftieth anniversary of the Azores Refugee Act.<sup>112</sup> The resolution celebrated the Azorean Refugee Act as “worthy and admirable legislation that represented America at its finest, reaching out to people in need.”<sup>113</sup>

The Azores Refugee Act marked an important milestone in United States immigration history. For the first time, the United States specifically passed a bill to allow victims of a natural disaster to immigrate to the United States. The Azores Refugee Act mirrors the language of the earlier Refugee Act, considering victims of a “natural calamity” to be refugees under United States law.<sup>114</sup> In addition, the Senators’ remarks reveal the humanitarian reasons for allowing the people displaced by such a disaster to relocate to the United States.<sup>115</sup> Senator Kennedy stated that the continuing eruptions prevented people from being able to rebuild where they were, destroyed their livelihood as fishermen and required their evacuation.<sup>116</sup> Thus, continuing natural disasters mean that people are unable to continue to live in their homeland, and must seek refuge in other countries.<sup>117</sup>

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103. S. REP. NO. 85-1875, at 3.

104. *Id.*

105. *Id.*

106. *Id.*

107. Nationals of Portugal and the Netherlands, relief, Pub. L. No. 85-892, 72 Stat. 1712.

108. 154 CONG. REC. 19,879, at 19,983 (2008) (statement of Rep. Nunes).

109. H.R. RES. 1438, 110th Cong. (2008).

110. 154 CONG. REC. 19,879, at 19,983 (2008) (statement of Rep. Nunes).

111. *Id.*

112. H.R. RES. 1438, 110th Cong. (2008).

113. *Id.*

114. Nationals of Portugal and the Netherlands, relief, Pub. L. No. 85-892, 72 Stat. 1712.

115. S. REP. NO. 85-1875, at 3 (1958) (Comm. Rep.).

116. *Id.*

117. *Id.*

Congress considered that allowing victims of this natural disaster to be refugees was not only possible, but an example of America “at its finest.”<sup>118</sup>

Climate migrants today face a similar situation in which they are unable to continue to live in their homeland due to continuing natural disasters. The Azores Refugee Act re-establishes that the United States did, at one time, consider victims of “natural calamity” to be refugees under United States immigration law.

### 3. 1965 INA Amendments - “Conditional Entrants”- INA 203(a)(7)

In 1965, Congress passed major amendments and reforms to United States immigration law.<sup>119</sup> Specifically, Congress amended the Immigration and Nationality Act to create a new quota system. This system eliminated previous quotas based on national origins and replaced it with a preference system.<sup>120</sup> Under the new system, immigrant visas were apportioned based on a preference category. To receive an immigrant visa, an applicant had to establish they fell within a certain preference category (i.e., Immediate relative of a United States citizen, etc.).<sup>121</sup>

The 1965 INA amendments included six preference categories for family-based and work-based petitions, but it also included a new seventh preference category in section 203(a)(7) for “Conditional Entries.”<sup>122</sup> This “Conditional Entry” category was specifically intended for refugees; and again, victims of natural disasters were considered refugees. Section 203(a)(7) of the INA stated that:

Conditional entries shall be made available . . . to aliens who satisfy an Immigration and Naturalization Service Office at an examination in any non-Communist or non-Communist dominated country,

(A) that:

(i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country, or (II) from any country within the general area of the Middle East, and

(ii) are unable or unwilling to return to such country or area on account of race, religion or political opinion, and

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118. *Id.*

119. Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

120. *Id.* at 911–13.

121. *Id.* at 912–13.

122. *Id.*

(iii) are not nationals of the countries or areas in which their application for conditional entry is made; or

(B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode . . .<sup>123</sup>

When Congress amended the INA in 1965, it again made a deliberate choice to include people displaced by natural disasters in the category of “refugees.”<sup>124</sup> The language of this provision is similar to the earlier 1953 Refugee Relief Act, except that it now adds a “catastrophic natural calamity,” and allows the President to define what would constitute such a catastrophic natural disaster.<sup>125</sup>

Congress stated that its purpose “in adding [aliens who had been uprooted from their place of usual abode by a catastrophic natural calamity] to the refugee category [was] to provide relief in those cases where aliens have been forced to flee their homes as a result of serious natural disasters, such as earthquakes, volcanic eruptions, tidal waves, and in any similar natural catastrophes.”<sup>126</sup>

One of the reasons Congress decided to include victims of “catastrophic natural calamities” in the seventh preference was to avoid the need to make special refugee designations, such as the one for the victims of the volcanic eruption in the Azores in the 1950s.<sup>127</sup>

Applicants would apply with the INS abroad and have an examination with an INS Officer. If they can show the adjudicator that they have been uprooted by a “catastrophic natural calamity” and are unable to return to their usual home, the applicant can receive “Conditional Entry” into the United States.<sup>128</sup>

This “Conditional Entry” status lasted for two years. At the end of that two-year period, the entrant would report back to INS for examination. After that examination, the refugee would either be deported or granted permanent residence inside the United States.<sup>129</sup> Through this provision, environmentally displaced persons could relocate permanently to the United States as refugees.

Although Congress enacted a law that would offer broad protections to victims of natural disasters, this law was never actually successfully used by refugees. First, the Executive branch narrowed the

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123. *Id.* (emphasis added).

124. *Id.*

125. *Id.*

126. S. REP. NO. 89-748 (1965).

127. *Id.*

128. Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911, 912-13 (1965).

129. *Id.* at 914.

applicability of the law, making it very difficult for refugees to enter the United States under this provision.<sup>130</sup> Section 203(a)(7) of the INA required the President to define whether a disaster is a “catastrophic natural calamity.”<sup>131</sup> In the succeeding years, no President ever declared a disaster to be a catastrophic natural calamity.<sup>132</sup>

Second, the enacting regulations created additional hurdles for victims of natural disasters. Under this regulation, refugees could only apply for conditional entry status in eight countries, mostly in Europe.<sup>133</sup> This meant that refugees must first flee to one of those eight countries, and then apply there for refugee status in the United States.<sup>134</sup> This had the effect of blocking applications from Latin America, Asia, or Africa.<sup>135</sup> When the regulation was originally enacted, these countries were chosen because these were also the countries listed in the Displaced Persons Act.<sup>136</sup> Over the later years, the list of countries where people could apply for conditional entry was expanded to include Hong Kong (1970) and Spain (1977).<sup>137</sup>

These requirements made it almost impossible for an applicant to receive status under INA 203(a)(7). In the case of *Matter of Pasarikovski*, 12 IN & N Dec. 526 (1967), a Serbian citizen applied for refugee status under INA 203(a)(7) as a person displaced by a catastrophic natural calamity.<sup>138</sup> Pasarikovski entered the United States as a student in 1961.<sup>139</sup> He claimed that the 1963 earthquake in Skopje, Yugoslavia had left him homeless.<sup>140</sup> However, the INS denied his application, stating that Pasarikovski could not claim refugee status under INA 203(a)(7) because the President had not yet defined what constitutes a “catastrophic natural calamity.”<sup>141</sup>

Pasarikovski appealed. The appellate court confirmed that an earthquake had occurred in Skopje, Yugoslavia, on July 26, 1963.<sup>142</sup> However, the immigration court agreed with the INS, and concluded that because the President had not yet defined what constitutes a “catastrophic natural calamity,” Pasarikovski could not claim refugee status under INA

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130. Janet L. Parker, *Victims of Natural Disasters in U.S. Refugee Law and Policy*, 3 MICH. J. INT’L L. 137, 140–41 (1982).

131. *Id.*

132. *Id.*

133. *Id.* at 140. These eight countries were Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon.

134. *Id.*

135. *Id.*

136. *Id.* at 150 n.37.

137. *Id.*

138. *Pasarikovski*, 12 I. & N. Dec. 526 (Dep’t of Just., 1967).

139. *Id.*

140. *Id.*

141. *Id.* at 527.

142. *Id.* at 526.

203(a)(7).<sup>143</sup> So, although INA 203(a)(7), by its terms, would seem to allow for victims of many natural disasters to seek refuge in the United States, the Executive Branch's limiting regulation and failure to define "catastrophic natural calamity" meant that this provision was never successfully used. Nonetheless, under this provision, United States immigration law's definition of "refugees" included victims of natural disasters for over fifteen years, from its enactment in 1965 to its final repeal by the Refugee Act of 1980.<sup>144</sup>

#### 4. *Sicily Earthquake Bills of 1968—House Judiciary Committee*

The United States government struggled to determine the best way to assist victims of natural disaster. On January 12, 1968, Sicily was rocked by a devastating earthquake that destroyed homes, towns, and left over 40,000 people homeless.<sup>145</sup> A series of earthquakes continued to rock Sicily for the next six months.<sup>146</sup> In the United States Congress, Congressmen proposed several different bills that would allow Sicilian earthquake victims to become refugees in the United States.<sup>147</sup>

Three major proposals were introduced in the House of Representatives.<sup>148</sup> Each of the bills granted special immigrant visas to those uprooted by the earthquakes in Sicily.<sup>149</sup> Each considered earthquake victims to be "refugees," however, they differed in the number of immigrant visas available for these survivors.<sup>150</sup>

On February 21, 1968, the House Judiciary Subcommittee held a hearing entitled "Refugees from Sicily."<sup>151</sup> During this hearing, the House received testimony about these pending bills for Sicilian earthquake victims and discussed the overall purpose of the refugee laws.<sup>152</sup> This hearing offers important insight into the intended scope of the United States' definition of "refugees," and the effectiveness or ineffectiveness of INA 203(a)(7)(b).

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143. *Id.* at 527.

144. Parker, *supra* note 130, at 139–40.

145. 114 CONG. REC. 22507 (1968) (statement of Rep. Podell).

146. *Refugees From Sicily: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary on H.R. 14806, H.R. 14807, and H.R. 14808 and Similar Bills*, 90th Cong. 1 (1968) [hereinafter *Hearings*].

147. *Id.* at 2.

148. *Id.*

149. *E.g.*, H.R. 14806 "A BILL for the relief of refugees from Sicily, Italy, and for other purposes," authorized "five thousand special immigrant visas to natives and citizens of Italy and their accompanying spouses and children, who have been uprooted by the catastrophic national calamity in Sicily and are unable to return to their usual place of abode."

150. *Id.* at 2–3. H.R. 14808, H.R. 14807, and H.R. 14806 makes available 2,000, 1,000, and 5,000 immigrant visas, respectively, for survivor refugees. *Id.*

151. *Hearings*, *supra* note 146.

152. *Id.* at 1–28.

The Subcommittee Chairman, Representative Feighan, reiterated that many victims could not be resettled locally because of the “widespread scope of the calamity and must look elsewhere for the opportunity to rebuild their shattered lives.”<sup>153</sup> Representative Feighan also emphasized that the bills to assist the earthquake victims fit squarely within United States values: “The United States has long had a tradition of offering a haven to the distressed and suffering, to the victims and refugees from disaster or tyranny, and this is certainly no exception,” and also cited the Azores Refugee Act of 1957 as offering “ample precedent” for the current bills.<sup>154</sup> Judiciary Committee Chairman Emanuel Celler supported extending a “hand of refuge” to the victims, and highlighted the fact that the people had lost their source of livelihood as the crops and irrigation systems were destroyed, and that it would likely take many years to refurbish the damaged areas.<sup>155</sup>

In the House Judiciary Subcommittee hearing, Representative MacGregor asked why the State Department did not simply admit the earthquake survivors under the seventh preference for “catastrophic natural calamities.”<sup>156</sup> Barbara Watson, State Department Administrator of the Bureau of Security and Consular Affairs, stated that the President had not declared it to be so. When a Representative pressed as to why not, she indicated that admitting refugees from Sicily could impact other immigration petitions from Italy.<sup>157</sup>

The annual national quota for Italy in 1968 was 20,000, meaning only 20,000 Italian petitioners could receive immigrant visas in a given year.<sup>158</sup> Refugee admissions under INA 203(a)(7) were counted against the overall total available to that country.<sup>159</sup> Thus, there were concerns that allowing Sicilian survivors to be admitted in the seventh preference category would be counted against Italy’s overall quota, creating a greater backlog of other petitions.<sup>160</sup> The State Department Administrator also stated that most seventh preference visas are given to refugees from Communist countries, leaving less available for victims of natural disasters.<sup>161</sup>

The Johnson Administration internally discussed the best option between using INA 203(a)(7) to admit earthquake victims and supporting

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153. *Id.* at 1.

154. *Id.*

155. *Id.* at 4–5 (statement of Rep. Emanuel Celler, Chairman of the Committee on the Judiciary).

156. *Id.* at 17–18.

157. *Id.* at 18 (statement of Barbara Watson, Administrator, Bureau of Security and Consular Affairs).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 19.

the new bill to admit 5000 Sicilian earthquake refugees.<sup>162</sup> Johnson's special assistant concluded that the seventh preference would be the quickest option, because it would allow people to be admitted immediately.<sup>163</sup> However, because Italy's annual cap of 20,000 was already almost met, he concluded that this would ultimately delay more people than it would help enter. For this reason, a separate bill offering special non-quota visas to Sicilian earthquake victims was a better option in the long run.<sup>164</sup> Ultimately, however, Congress did not pass a separate refugee law for the Sicilian earthquake victims.

Thus, it seems that one reason for the reluctance to use the seventh preference may be because these admissions counted against the overall quota of visas available for that country. This contrasts from the earlier Refugee Act of 1953, which allowed non-quota visas, allowing refugees to be admitted from a country without impacting the number of immigrant visas available to other petitioners.<sup>165</sup> The 1965 INA "Conditional Entry" provision for victims of natural catastrophes remained in effect for over fifteen years, until the passage of the 1980 Refugee Act.

#### 5. *Refugee Act of 1980*

In 1980, Congress passed the Refugee Act.<sup>166</sup> This Act created a new definition of "refugee," to bring the United States into conformity with the United Nations definition.<sup>167</sup> The Refugee Act also expanded the geographic scope of people who could seek asylum; eliminating the prior requirement that the "persecution" be by a Communist or Middle Eastern country.<sup>168</sup> The Act also created a permanent refugee resettlement agency.<sup>169</sup> However, while the 1980 Refugee Act expanded the provision protecting victims of persecution, it eliminated the provision protecting victims of natural catastrophes.<sup>170</sup>

The Refugee Act of 1980 defined "refugee" as:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually

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162. Philip Eric Wolgin, *Beyond National Origins: The Development of Modern Immigration Policymaking, 1948–1968*, 166 (2011) (Ph.D. dissertation, University of California, Berkeley).

163. *Id.*

164. *Id.*

165. *Id.* at 138–39.

166. Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (1980) (codified in scattered sections of 12 U.S.C.).

167. Parker, *supra* note 130, at 137.

168. *Id.*

169. Refugee Act of 1980, 8 U.S.C. § 1521 (2021).

170. Parker, *supra* note 130, at 137.

resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>171</sup>

This definition mirrors that found in the UN Convention of 1951.<sup>172</sup>

Still, an overview of United States immigration law on refugees reveals a clear intent to protect both those who were displaced due to persecution and those who were displaced by natural disasters.<sup>173</sup> These two categories were included in the original definition of “refugee” under United States law in 1953, as well as the preference categories for refugees established in 1965.<sup>174</sup> Given this background, granting protection to environmentally-displaced migrants does not seem so much a radical departure from refugee law, as much as a return to the original intent of refugee policy in the United States—offering shelter in the United States to those who are fleeing death or danger abroad.

As the risk and severity of environmental disasters continues to increase around the world, looking back at the earlier intent of the United States’ refugee policy can assist in crafting current legislation to assist migrants displaced by climate change-related natural disasters.

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171. 8 U.S.C. § 1101(a)(42) (1980).

172. Article 1 of the Convention defines a refugee as a person who has a “well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Convention and Protocol Relating to the Status of Refugees, Dec. 14, 1950.

173. Parker, *supra* note 130, at 137.

174. See Refugee Relief Act of 1953, Pub. L. No. 203-336, 67 Stat. 400, 400; Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911, 912–13 (1965).

## B. Current Protections for Victims of Natural Disasters—Temporary Protected Status

Although victims of natural disasters are no longer considered to be “refugees” under United States immigration law, they can still be eligible for certain protections. In 1990, Congress amended the INA to add a provision for “Temporary Protected Status.”<sup>175</sup> This provision allowed the Attorney General to provide temporary protection to nationals from countries that were experiencing armed conflicts or a natural disaster.<sup>176</sup> This power was later delegated to the Secretary of Homeland Security.<sup>177</sup>

The Secretary can grant Temporary Protected Status (“TPS”) based on three conditions: (1) war or armed conflict within the country, (2) environmental disaster, or (3) “extraordinary and temporary conditions” that prevent the safe return of nationals.<sup>178</sup> The environmental disaster provision requires: “an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,” when the foreign state cannot temporarily handle the return of its nationals and requests Temporary Protective Status.<sup>179</sup>

Although the majority of TPS designations involve countries in armed conflict, TPS has also been granted based on environmental disasters. In 1997, the British territory of Montserrat was granted TPS after a major volcanic eruption; marking the first time TPS was granted based on an environmental disaster.<sup>180</sup> Similarly, the countries of Nicaragua and Honduras received TPS in 1999 due to floods, and El Salvador and Haiti received TPS due to the earthquakes those countries suffered in 2001 and 2010 respectively.<sup>181</sup>

TPS designation lasts for eighteen months, although the Secretary can renew the designation.<sup>182</sup> Once a country receives TPS status, nationals that are already in the United States can receive protection from removal and apply for work authorization during that time period.<sup>183</sup> However, TPS does not allow nationals of that country to enter the United States.<sup>184</sup> So, for example, Nicaraguan citizens who were already inside the United States when the 1999 floods occurred could receive protection from removal, but

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175. See Immigration and Nationality Act § 244, 8 U.S.C. § 1254a (2021).

176. *Id.* § 244(b)(1)(A)–(B).

177. *Id.* § 244(b)(1).

178. *Id.*

179. *Id.* § 244(b)(1)(B).

180. DAVID S. WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 434 (6th ed. 2017).

181. *Id.*

182. Immigration and Nationality Act § 244(b)(2).

183. *Id.* § 244(a)(1).

184. Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J. OF L. AND PUB. POL’Y 328 (2001).

Nicaraguans inside that country could not apply for status or admission to the United States.

Although TPS offers some temporary protections to victims of natural disasters, it has major drawbacks. First, TPS status does not allow recipients to receive permanent status in the United States.<sup>185</sup> Once the current eighteen-month period expires, nationals are left without status and subject to removal.<sup>186</sup> Second, Temporary Protected Status must be extended by the DHS Secretary. If the Secretary declines to extend TPS to a country, residents have no recourse.<sup>187</sup> For example, after Hurricane Dorian hit the Bahamas in 2019, the Trump Administration declined to extend TPS to the Bahamas, in spite of the massive destruction in that country.<sup>188</sup> Currently, only twelve countries have Temporary Protected Status.<sup>189</sup>

Third, TPS does not allow survivors of natural disasters to immigrate to the United States.<sup>190</sup> This means that the people most directly impacted by the natural disaster are not able to seek refuge and safety in the United States. If nationals enter the United States after the TPS designation date, they cannot apply for TPS protection and can be removed.<sup>191</sup>

TPS thus stands in stark contrast to the refugee/asylum provisions, which allow refugees to immigrate to the United States after fleeing their country and receive permanent status in the United States.<sup>192</sup> Refugee status is based on the merits of the refugee's individual case, not dependent on a countrywide designation by the Secretary. While refugees may resettle in the United States permanently, TPS holders are left in a state of constant suspense about how long they will be allowed to stay in the United States.

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185. Immigration and Nationality Act § 244(f)(1).

186. See *Temporary Protected Status: An Overview*, AM. IMMIGR. COUNCIL (Sept. 14, 2021), <https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview> [<https://perma.cc/Z3GP-7JK3>].

187. Immigration and Nationality Act § 244(b)(5)(A).

188. Priscilla Alvarez, *Trump administration won't grant temporary protected status to Bahamians*, CNN (Sept. 10, 2019, 3:59 PM), <https://www.cnn.com/2019/09/10/politics/bahamas-tps-protections/index.html> [<https://perma.cc/9L99-WC9U>].

189. These countries are Burma (Myanmar), El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Venezuela, and Yemen. Temporary Protective Status, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/U4XW-3AGL>] (last visited Mar. 30, 2022).

190. See generally Hong, *supra* note 184, at 329.

191. Immigration and Nationality Act § 244(c)(1)(A).

192. See *id.* § 209(a).

### III. POTENTIAL REMEDIES

#### A. Applying Past Provisions for Current Victims of Climate-Related Disasters

Reviewing past immigration law reveals that victims of natural disasters *have* been considered refugees at several different points in United States history. These provisions could offer a useful template for crafting a remedy for the current victims of climate-related disasters. Unlike the current TPS status, the earlier laws allowed victims of disasters to permanently resettle in the United States, and contained specific provisions allowing those displaced by natural disasters to seek refuge.

##### 1. *Refugee Relief Act of 1953*

The Refugee Relief Act of 1953 provides a good model for protecting “environmental refugees” or climate change migrants today. Unlike the current refugee law, it specifically provided protections for victims of natural disasters.<sup>193</sup> The Act also focused on the immediate survival needs of refugees; adding that a refugee “is in any event in need of assistance for the essentials of life and for transportation.”<sup>194</sup> This definition also has a humanitarian concern. It gives weight to the desperate physical circumstances that refugees face, emphasizing that they are in need for the “essentials of life.”<sup>195</sup>

Under this Act, for example, Marsh Harbor residents could receive refugee status in the United States as victims of a “natural calamity,” and the fact that they lack the “essentials of life” after the destruction of the island is a factor that can be considered when determining if they are refugees.<sup>196</sup> In addition, “natural calamity” is a term that potentially includes climate change itself. Unlike the current “Temporary Protected Status,” this Act allowed victims of natural disasters to permanently relocate to the United States.<sup>197</sup> This could be more appropriate for climate-change related environmental destruction, where certain areas may not be inhabitable due to submersion underwater or desertification.

##### 2. *Azores Refugee Act*

The Azores Refugee Act is a “success story” in immigration law, allowing for the permanent resettlement of thousands of survivors of the

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193. Refugee Relief Act of 1953, Pub. L. No. 203-336, 67 Stat. 400, 400.

194. *Id.*

195. *See id.*

196. *See id.*

197. *See id.* at 403.

volcanic eruption.<sup>198</sup> This exemplified that Congress has the ability and authority to act quickly to pass legislation to assist climate change disasters, without necessarily needing to wait for the Executive Branch. The Azores Refugee Act was targeted towards one disaster, and one country.<sup>199</sup> Instead of attempting to assist all climate migrants, it is possible that a more targeted approach could provoke less resistance in Congress and with the public.

### 3. 1965 INA—“Conditional Entry”

The “Conditional Entry” system in INA 203(b)(7) offers a number of advantages when it comes to environmental migration. Having a second examination after the two-year period allows INS to consider whether this natural disaster was a temporary condition, or if it is still continuing to permanently displace residents.<sup>200</sup> This allows immigration to offer temporary shelter to those that have a short-term hardship, while extending permanent residence to those that have a long-term hardship due to permanent change in circumstances in that area.

This two-tier system seems especially appropriate when it comes to environmental disasters; some may create devastation for a short period of time until the government can reestablish basic services, whereas some may displace people forever due to the effects of climate change.<sup>201</sup>

So, for example, residents of Marsh Harbor could almost certainly show that they had suffered a “catastrophic natural calamity” from Hurricane Dorian. This would allow people to come to the United States to seek shelter and survival. However, it is difficult to determine the long-term consequences immediately after a disaster. It may be that Marsh Harbor can be rebuilt after a few years, or it could be that the coastal area will remain submerged, devastated, and uninhabitable. The two-tier system allows people to flee immediate danger from environmental disasters, while also allowing others to either return to the country or build a new life in the United States based on the later circumstances in that country.

This system may be preferable to the current “temporary protected status,” which only lasts eighteen months, and keeps migrants in constant suspense about whether they will remain in the United States or not. TPS does not allow lawful permanent residence, creating permanent limbo for TPS residents in the United States. In contrast, “conditional entrants” could feel secure in resettling to the United States after the second examination.

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198. See H.R. RES. 1438, 110th Cong. (2008).

199. See Nationals of Portugal and the Netherlands, relief, Pub. L. No. 85-892, 72 Stat. 1712, 1712.

200. See Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911, 913 (1965).

201. For example, due to desertification or loss of coastal areas and islands due to sea level rise.

Finally, “conditional entrants” could apply abroad and arrive in the United States with protected status, while TPS is only granted to people already within the United States when a disaster occurs.

All of these older immigration provisions reveal that the United States has been concerned with the plight of disaster victims since the INA itself was passed in 1952. This humanitarian concern for disaster victims has been part of United States immigration policy for many decades and can continue to serve as a template as the United States attempts to navigate through this new world of climate-related migration.