

NOTE

Congress Needs to Pass an Afghan Adjustment Act Now

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|---|-----|
| Introduction | 187 |
| I. Past Aid to Cuban and Southeast Asian Immigrants | 191 |
| A. Cuban Adjustment Act | 191 |
| B. Indochina Migration and Refugee Act | 194 |
| II. Logic for Implementation | 197 |
| A. Necessary Aid to Vulnerable Populations | 197 |
| B. Alliance with Afghanistan and the Harm Principle | 201 |
| C. Benefit to the International Community | 206 |
| III. Passed and Proposed Legislation | 210 |
| Conclusion | 213 |

Introduction

Videos of and reporting on the United States' withdrawal from Afghanistan—the chaos, the desperation, the fear—has been to younger generations a fresh horror, and has left older generations seeing double: through one lens, the fall of Kabul; through the other, the fall of Saigon.¹ The world has once again played witness to the deadly whirlpool left as the United States withdraws its armed presence, leaving a brief vacuum before local power fills the void. After twenty years of armed warfare and efforts at nation-building from the United States, the Afghan capital was recaptured by the Taliban before the United States had even finished evacuating its

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1. Ahmad Mukhtar et al., *Afghanistan's president flees the country as Taliban moves to take Kabul*, CBS NEWS (Aug. 15, 2021), <https://www.cbsnews.com/news/afghanistan-taliban-kabul-peaceful-transfer-of-power/?intcid=CNM-00-10abd1h> [https://perma.cc/CNL8-ZFQV]. See also Guardian Staff, *Afghanistan likened to fall of Saigon as officials confirm Taliban take Kandahar*, THE GUARDIAN (Aug. 13, 2021, 1:25 PM), <https://www.theguardian.com/world/2021/aug/13/afghanistan-likened-to-fall-of-saigon-as-us-and-uk-send-troops-to-aid-evacuation> [https://perma.cc/Y4S5-Z47H].

forces.²

With the Taliban rapidly consolidating their control of Afghanistan, and its civilians battered with flashbacks to the Taliban's 1996 - 2001 rule, Afghans are now seeking any and every way out of the country before the Taliban locks down the borders.³ What responsibility does the United States now have to the Afghan people? To some, none: it is not our fault that Afghanistan's government failed to learn from twenty years of occupation, and there is nothing we could have done to properly prepare them.⁴ To others, an ongoing military duty: we should not have left at all if the Afghan government was unprepared; we should have stayed as long as necessary to bolster them against the Taliban.⁵

Practically, whether we should have left or not, we have, and we must now turn our attention to what the U.S. can do in absence of continued military presence on Afghan soil. In the aftermath of the withdrawal from Vietnam, as hundreds of thousands of Vietnamese, Cambodian, and Laotian refugees clambered for an escape, the United States eased their path with several pieces of legislation, including the Indochina Migration and Refugee Assistance Act of 1975.⁶ Nor was that the first time the United States had sought to shorten and simplify the immigration process for immigrants from a country undergoing a chaotic regime change. In 1966, the government passed the Cuban Adjustment Act to grant Cuban refugees from Fidel Castro's newly instated government a quicker route to permanent residency.⁷ In both cases, legislation offered refuge to immigrants from what the United States saw as an extremist government abroad.

The Taliban, a fundamentalist Islamic militant group, is infamous for their oppressive theocratic rule over Afghanistan in the late 1990s, and while the group claims its attitudes have modernized, their only evidence so far are suspect promises.⁸ Already, women have been removed from

2. Paul LeBlanc, *Chaos is Unfolding in Afghanistan. Here's What You Need to Know*, CABLE NEWS NETWORK (Aug. 15, 2021), <https://www.cnn.com/2021/08/15/politics/taliban-kabul-afghanistan-explainer/index.html> [https://perma.cc/WWA4-XPFY].

3. See generally Mukhtar et al., *supra* note 1.

4. See generally Kevin Liptak et al., *Biden admits Afghanistan's collapse 'did unfold more quickly than we had anticipated'*, CABLE NEWS NETWORK (Aug. 16, 2021), <https://www.cnn.com/2021/08/16/politics/biden-afghanistan-speech/index.html> [https://perma.cc/6AWS-QRD5].

5. Jason Amerine, *Opinion: Afghanistan's Collapse was Not Pre-Ordained. It was Willful Abandonment*, CABLE NEWS NETWORK (Aug. 1, 2021), <https://www.cnn.com/2021/08/16/opinions/afghanistan-collapse-abandonment-jason-amerine/index.html> [https://perma.cc/M7JN-M4FC].

6. Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, 89 Stat. 87.

7. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161.

8. See Peter Beaumont, *Taliban seek no 'revenge' and all Afghans will be 'forgiven'*, THE GUARDIAN (Aug. 17, 2021), <https://www.theguardian.com/world/2021/aug/17/taliban-seek-no-revenge-and-all-afghans-will-be-forgiven> [https://perma.cc/SQ2K-FHMJ]; see also Clarissa Ward, *Calm and fear on the streets of Kabul as jubilant Taliban celebrate their victory*, CABLE NEWS NETWORK (Aug. 16, 2021), <https://www.cnn.com/2021/08/16/middleeast/kabul-streets-taliban-regime-intl/index.html> [https://perma.cc/ALL2-FBWW].

school and the workplace,⁹ non-compliant civilians are being beaten,¹⁰ and the Office for the Promotion of Virtue and the Prevention of Vice, a department remembered for brutal enforcement of the group's extremist vision of Islamic morality, has been re-established in Kabul.¹¹ The Taliban has restricted music,¹² whipped journalists and violently dispersed protests,¹³ and promised the return of executions and other severe punishments to enforce their version of Qur'anic law.¹⁴

The Taliban's takeover has accelerated the economic straits Afghanistan was already experiencing. Even prior to Taliban capture of Kabul, approximately 72% of Afghans lived in poverty,¹⁵ and with NGOs with-

9. Jonathan Franklin, *Female Government Workers In Kabul Told To Stay Home In Latest Taliban Rule*, NAT'L PUB. RADIO (Sept. 19, 2021), <https://www.npr.org/2021/09/19/1038685721/female-workers-kabul-stay-home-taliban-rule> [https://perma.cc/6L3H-27T7]; *Taliban tells women and girls to stay home from work and school*, CBS NEWS (Sept. 20, 2021), <https://www.cbsnews.com/news/afghanistan-taliban-women-girls-work-school-sharia-rules/> [https://perma.cc/QZ3M-XBUF]; see also *In focus: Women in Afghanistan one year after the Taliban takeover*, U.N. WOMEN (Aug. 15, 2022), <https://www.unwomen.org/en/news-stories/in-focus/2022/08/in-focus-women-in-afghanistan-one-year-after-the-taliban-takeover> [https://perma.cc/HD67-UJWS].

10. Zarifa Ghafari, *The world should not yet engage with the new Taliban government*, AL-JAZEERA (Sept. 16, 2021), <https://www.aljazeera.com/opinions/2021/9/16/the-world-should-not-yet-engage-with-the-new-taliban-government> [https://perma.cc/B2XQ-JKQQ].

11. Emma Graham-Harrison, *'We don't want people to be in a panic,' says chief of Taliban morality police*, THE GUARDIAN (Sept. 19, 2021), <https://www.theguardian.com/world/2021/sep/19/persuasion-first-violence-later-the-talibans-new-vice-and-virtue-approach> [https://perma.cc/H3YM-TZKQ].

12. See Tiffany Wertheimer, *Afghan music school falls silent under Taliban rule*, BRITISH BROAD. CORP. (Aug. 27, 2021), <https://www.bbc.com/news/world-asia-58344197> [https://perma.cc/TEB3-5BJ6]; Doloresz Katanich, *Meet the students fighting against the 'musical genocide' in Afghanistan*, EURONEWS (Mar. 17, 2023), <https://www.euronews.com/culture/2023/03/17/meet-the-students-fighting-against-the-musical-genocide-in-afghanistan> [https://perma.cc/8MHV-JGSR]; see also Tim Lister, *Barbers in Afghanistan's Helmand Province are now prohibited from shaving beards and playing music*, CABLE NEWS NETWORK (Sept. 27, 2021), <https://edition.cnn.com/2021/09/26/world/taliban-afghanistan-beards-music-intl/index.html> [https://perma.cc/2H5C-TQR4]; *Afghanistan Country Focus*, EUR. ASYLUM SUPPORT OFF. 1, 27 (Jan. 2022) https://coi.euaa.europa.eu/administration/easo/PLib/2022_01_EASO_COI_Report_Afghanistan_Country_focus.pdf [https://perma.cc/TU47-DAQ9].

13. Osama bin Javaid, *A day with the Taliban 2.0*, AL-JAZEERA (Sept. 15, 2021), <https://www.aljazeera.com/features/2021/9/15/a-day-with-the-taliban-2-0> [https://perma.cc/Q7HR-LV23]; Trinidad Deiros, *The persecution of female protestors in Afghanistan: 'The Taliban ran me over and tried to kill me'*, EL PAIS (Mar. 16, 2023), <https://www.msn.com/en-us/news/world/the-persecution-of-female-protestors-in-afghanistan-the-taliban-ran-me-over-and-tried-to-kill-me/ar-AA18HHN4> [https://perma.cc/2R9P-LJK2].

14. *Taliban Official Says Strict Punishment And Executions Will Return*, NAT'L PUB. RADIO (Sept. 24, 2021), <https://www.npr.org/2021/09/24/1040339286/taliban-official-says-strict-punishment-and-executions-will-return> [https://perma.cc/7N7W-QCN5]; see generally Associated Press, *Taliban hang body in Afghan city square, as grip of hardline rule looms*, CANADIAN BROAD. CORP. (Sept. 25, 2021) <https://www.cbc.ca/news/world/afghanistan-taliban-hardline-punishment-1.6189665> [https://perma.cc/LW47-AS4Z].

15. *The Latest: UN: Afghanistan on brink of "universal poverty,"* ASSOCIATED PRESS (Sept. 9, 2021), <https://apnews.com/article/middle-east-pakistan-afghanistan-islamabad-qatar-d35bb246ad1db460b2a2e8d24c77f99d> [https://perma.cc/5C8C-V9M7].

drawing funding and other states halting assistance payments for fear of funding the Taliban, Afghanistan teeters on the brink of economic crisis.¹⁶ For women forbidden from work, some of whom were the sole providers for their families, this leaves few options if they cannot get out of the country.¹⁷ Presently, some “40 million [Afghans] do not have enough to eat and 3.1 million [Afghan] children are at risk of acute malnutrition.”¹⁸ This ongoing economic crisis has been heightened by a devastating earthquake experienced in the summer of 2022, estimated to have killed more than a thousand people.¹⁹

In the 1960s, as Cuba underwent a revolution, the United States decided it was important to offer an escape to those at risk under the new government, or those who were frightened of the direction the country was taking. In the 70s, the United States failed to prevent the North Vietnamese forces from overtaking South Vietnam, but attempted to fulfill some lingering sense of duty by giving those fleeing the country a place to go and a streamlined process for obtaining American residency. Now, as we look at the scenes of a collapsing Kabul and the headlines of the new government being steadily stocked with hardline Taliban extremists,²⁰ it is incumbent on the United States, as Afghanistan’s partner of twenty years, to assist Afghanistan’s refugees. It is our moral duty, and our duty as an international partner, to handle the fallout of our own failed twenty-year war with the Taliban—especially in light of the fact that any Afghans who worked with the United States are being particularly targeted—and do what we can for the victims of the Taliban’s rule.

Congress and President Biden must pass legislation for Afghan refugees, immigrants, and asylees as they once did for Cuban and Southeast Asian refugees. By shortening the period needed for permanent residency, offering additional funds to states for public education of newly arrived Afghan children, and increasing funding to the immigration system to speed processing of the new arrivals, the United States can give some aid to our allies and ease the burdens on these refugees. Why put in the effort? Because it will help at-risk families and individuals find a safe haven; because Afghanistan has been our ally and her civilian population should not be left to the mercy of the Taliban; because the international commu-

16. Ali M. Latifi, *Afghans sell possessions amid cash crunch, looming crisis*, AL-JAZEERA (Sept. 13, 2012), <https://www.aljazeera.com/news/2021/9/13/afghans-sell-possessions-amid-cash-crunch-pending-economic-crisis> [https://perma.cc/P7BX-7CZW].

17. Kathy Gannon, *Taliban-run Kabul municipality to female workers: Stay home*, ASSOCIATED PRESS (Sept. 19, 2021), <https://apnews.com/article/business-afghanistan-kabul-taliban-e44d8521940021e4e7ab11d3898978b5> [https://perma.cc/Z78K-GV2R].

18. Javaid, *supra* note 13.

19. Jessie Yeung, *Afghanistan reels from deadly earthquake as crisis-hit country struggles for aid*, CABLE NEWS NETWORK (June 23, 2022), <https://www.cnn.com/2022/06/22/asia/afghanistan-earthquake-aid-rescue-search-intl-hnk/index.html> [https://perma.cc/N7DE-TV2V].

20. Kathy Gannon, *Taliban form all-male Afghan government of old guard members*, ASSOCIATED PRESS (Sept. 7, 2021), <https://apnews.com/article/middle-east-pakistan-afghanistan-arrests-islamabad-d50b1b490d27d32eb20cc11b77c12c87> [https://perma.cc/J383-RVHP].

nity benefits when the wealthy nations step up to care for the stateless and the persecuted, because we've done it before.

Because what point is there to an international community, if we can neither prevent nor offer aid in the face of such tragedy and need?

Part I of this Note discusses past legislative policies used to encourage migration to the United States and make the processing of those migrants easier, both for the migrants and the immigration system. Part II details why the United States should take on this responsibility and what benefits it has for the international community. Part III reviews legislation presently in discussion or under consideration.

I. Past Aid to Cuban and Southeast Asian Immigrants

A. Cuban Adjustment Act

The action proposed in this Note for Afghan refugees and immigrants is not a blind grope in the dark or an unprecedented legal maneuver. The United States has taken very similar action in very similar circumstances before—most notably after the end of the Vietnam War.²¹ But even earlier than that, the United States sought to welcome Cuban refugees in the wake of Fidel Castro's revolution.²² Having taken such action in the past, we have a clear blueprint for the present, and while these measures would have been most effective if put into place before the American withdrawal, it is not too late for them to have a useful impact.

The Cuban Adjustment Act of 1966 (CAA) was an effort to smooth the way for incoming immigrants and refugees from Cuba.²³ Cuba was undergoing a chaotic regime change resulting from its revolution, with Fidel Castro seizing power from the existing Cuban government, and many Cubans who had opposed or were alarmed by the rhetoric of the incoming government fleeing the country. At the time, opposing communist regimes was *du jure* policy for the United States, so extending a hand to Cubans fleeing an incoming communist regime seemed logical.²⁴ Furthermore, Castro's announcement in 1965 that Cuban citizens were welcome to leave if their relatives in the United States came by boat to fetch them created a migration crisis for the United States.²⁵ Unlike the previous gradual flow of refugees, the population of Cuban exiles in the United States doubled in just a few months, and action was needed to process the wave of immigrants.²⁶

The United States passed legislation such that newly-arriving Cubans would be granted work authorization and green card status provided they a) had been admitted or paroled into the United States after January 1st,

21. Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, 89 Stat. 87.

22. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161.

23. *Id.*

24. *The Cuban Adjustment Act of 1966: Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 908 (2001) [hereinafter *Mirando por los Ojos*].

25. *Id.* at 904.

26. *Id.*

1959; b) had been physically present in the United States for two or more years (later amendments shortened this to one year); and c) were admissible to be a permanent resident of the United States.²⁷ Under the CAA, Cuban arrivals in the United States did not need to demonstrate they met the definition of a refugee, nor qualify under any of the immigrant visa eligibility categories in the Immigration and Nationality Act (INA).²⁸ Normally, a person applying to the United States as a political refugee must file for protection against involuntary return after arriving in the United States and prove a “well-founded fear of persecution” in their country of origin.²⁹ The success of such political asylum claims is estimated at between 15-30%.³⁰ Cubans applying under the CAA may circumvent this requirement if they meet the above criteria; they are not required to prove that they are refugees and are not generally asked about their fears of returning to Cuba.³¹ Cubans reaching American soil generally bypass the asylum system by being paroled into the United States, and under the CAA, they may stay indefinitely.³² This amounts to, and has been understood to be, an entitlement of permanent residence to all Cubans who can make it into the country.³³

The CAA also permitted the government to “adjust” the immigration status of an individual already in the country—such as from a “tourist” or “worker” to a “permanent resident.”³⁴ Adjustment allows a refugee to change their status without having to leave the United States, travel to a consulate, apply for immigrant status, and return as a permanent resident, as was required once the United States severed diplomatic relations with Cuba.³⁵ After the Cuban Revolution and the CAA, the Cuban population in the United States grew from 79,000 to 439,000 between 1960 and 1970,³⁶ illustrating how effective this policy was not only at processing Cuban immigrants to the United States, but encouraging others to come. Similar legislation passed now could have the same effect for Afghans, showing them that the United States is ready to welcome them and has a plan in place for processing their cases expeditiously.

The CAA also made it easier for Cuban refugees to obtain working status in the United States, which limited the burden on state and federal welfare systems by enabling Cuban refugees to support themselves.³⁷ For

27. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161.

28. Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89, 102 (2017).

29. *Mirando por los Ojos*, *supra* note 24, at 906.

30. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 718, 722, 722 (3d ed. 1995).

31. *Mirando por los Ojos*, *supra* note 24, at 906.

32. *Id.* at 907.

33. *Id.*

34. Keyes, *supra* note 28, at 103.

35. Roland Estevez, *Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1277 (2002).

36. Library of Congress, 1966: *The Cuban Adjustment Act of 1966*, <https://guides.loc.gov/latinx-civil-rights/cuban-adjustment-act> [https://perma.cc/ZW6M-M2MY] (last accessed Sept. 25, 2021).

37. Estevez, *supra* note 35, at 1278–79.

anyone hoping for long-term status in the United States, the ability to work and support themselves is critical. Permitting the same for incoming Afghan refugees would lessen potential strain on the country's welfare systems by allowing those able to find work to begin supporting themselves as soon as possible.

The purpose of the CAA “was to grant benefits to Cubans who had fled as refugees from the Fidel Castro government of Cuba.”³⁸ It sought also to “alleviate the administrative burden on both Cuban exiles who wanted to become U.S. permanent residents, and U.S. diplomatic facilities in Canada and Mexico that lacked the resources to process the visa applications of Cubans paroled into the United States.”³⁹ Under the humanitarian parole prescribed in the CAA, entrance to the United States is permitted “barring criminal or terrorism issues detected at the border—and defers more complicated admissibility and deportability issues to the adjustment stage, permitting sound adjudication of cases without further clogging the immigration court process.”⁴⁰ Similar legislation passed for Afghan refugees could expedite moving these individuals and families out of Afghanistan—or out of interim refugee camps or asylum centers in other countries—and get them to safety in the United States while their immigration case proceeds.

There are some arguments that the CAA, over five decades, came to support a population it was never meant to: wealthy Cubans not fleeing oppression under the Castro regime, but merely dissatisfied with Cuban politics and economic policy.⁴¹ These immigrants then sent remittances back to Cuba, which the Cuban government taxed, funding it to continue oppressing those left behind in Cuba.⁴² Real Cuban dissidents, claims one editorial in the *Miami Herald*, are able to make a case for political asylum without using the CAA.⁴³ However, there is little chance of this same issue presently with Afghanistan, as the country hurtles towards complete poverty, and with the Taliban's economic track record from the 1990s.⁴⁴ The sorts of economic refugees from Cuba lambasted by CAA critics are unlikely to emerge soon from Afghanistan, and continuing to adjust the policy as necessary in the coming decades would prevent even the shadow of unintended use of the policy.

Others may argue that such a policy will contribute towards “brain drain” in Afghanistan—that by encouraging Afghans to migrate to the

38. 12 I. & N. Dec. 699 (BIA 1968) at 2.

39. Joyce A. Hughes & Alexander L. Alum, *Rethinking the Cuban Adjustment Act and the U.S. National Interest*, 23 ST. THOMAS L. REV. 187, 194-97 (2011).

40. Keyes, *supra* note 28, at 104.

41. Miami Herald Editorial Board, *Repeal the Cuban Adjustment Act of 1966*, MIAMI HERALD (Apr. 17, 2016, 1:00 PM), <http://www.miamiherald.com/opinion/editorials/article72163832.html>.

42. *Id.*

43. *Id.*

44. See generally Vanda Felbab-Brown, *Pipe dreams: The Taliban and drugs from the 1990s into its new regime*, BROOKINGS (Sept. 15, 2021), <https://www.brookings.edu/articles/pipe-dreams-the-taliban-and-drugs-from-the-1990s-into-its-new-regime/> [https://perma.cc/A6CS-5TKM].

United States, the United States will lure away a critical class of Afghans: the educated, who are more likely to have the resources to emigrate.⁴⁵ The Taliban has already accused the U.S. of siphoning off its best and brightest.⁴⁶ It is true that a welcoming policy may allow some educated Afghans to emigrate who may have otherwise chosen to stay in Afghanistan. But it is also true that difficulty emigrating will fall hardest on the poor, who lack the resources of their wealthier peers, such as funds for long stays in third countries while their immigration case works through a severely backlogged U.S. immigration system.⁴⁷ Trapping those with limited resources under an abusive regime in hopes of preventing the educated class from fleeing seems an unfair way to handle the situation. It can just as easily be argued that significant portions of the educated class, with sufficient motivation to flee, will find a way to do so even without a smoother route to American permanent residency and citizenship. However, alternative options for poorer and less educated Afghans will be much harder to come by, and a liberal immigration policy from the United States may make the difference in their finding a place to resettle, or spending years in an overcrowded, underfunded refugee camp on the edges of Europe.

B. Indochina Migration and Refugee Act

Congress passed similar legislation in the wake of the fall of Saigon and the end of the Vietnam War.⁴⁸ The Indochina Migration and Refugee Act of 1975 allocated funding of \$305 million for the Department of State and \$100 million for the Department of Health, Education and Welfare for the resettlement of Vietnamese and Cambodian refugees in the United States.⁴⁹ It furthermore financed the transportation, processing, reception, and resettlement costs of more than 130,000 Vietnamese evacuated during Operation Frequent Wind and granted parole by the Attorney Gen-

45. Leela Jacinto, *Taliban failures speed up Afghan brain drain, battering and already crippled economy (Part I)*, FRANCE 24 (Aug. 14, 2022, 2:20 PM), <https://www.france24.com/en/asia-pacific/20220814-taliban-failures-speed-up-afghan-brain-drain-battering-an-already-crippled-economy> [https://perma.cc/2ZT3-XB9D].

46. *Id.*

47. Leo Shane, *Plan to Boost Visas for Afghan Immigrants Not Enough, Advocates Warn*, MILITARY TIMES (Mar. 13, 2023), <https://www.militarytimes.com/flashpoints/afghanistan/2023/03/13/plan-to-boost-visas-for-afghan-allies-isnt-enough-advocates-warn/> [https://perma.cc/7RSX-Z5D6] (showing that refugees rapidly burn through cash trying to reach an immigration destination.); Jacinto, *supra* note 45 (showing that high demand for Pakistani visas for Afghan emigres has caused prices to skyrocket since the fall of Kabul.); Rahim Faiez, *Afghan refugees in Pakistan protest delay in US resettlement*, THE AP NEWS (Feb. 2023) <https://apnews.com/article/united-states-government-pakistan-7574d84a607ba284f362119f7863533b> [https://perma.cc/H3Y2-ZHHL]; see also Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, MIGRATION POL'Y INST. (Oct. 2019), <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point> [https://perma.cc/W797-VAAN].

48. Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, 89 Stat. 87.

49. *Id.*

eral.⁵⁰ Refugees had to pass a security check, but involuntary repatriation to Vietnam was not considered a viable option.⁵¹ In 1976, the bill was amended to provide additional funds to states for the public education of Vietnamese and Cambodian children who had fled to the United States.⁵² Later that year, it was amended again to include Laotian refugees as well.⁵³

At the time the Indochina Migration and Refugee Act (IMR) was under debate, it faced opposition primarily from Republican Congresspeople, who felt that the bill was too expensive and that incoming immigrants were not vetted intensely enough.⁵⁴ However, the bill passed, and we can see today there was no resultant crippling of the American economy and that the Southeast Asian refugees who came here have benefitted from it and became valuable members of American society⁵⁵. The refugees who took advantage of the IMR were in much a similar situation as Afghan refugees and asylees today, suffering the fallout of a failed war by the United States in their home country against an insurgent force. The IMR therefore serves as an excellent model for action today to provide similar help to Afghans. In the end, only two senators voted in opposition to the IMR, showing how

50. *Id.*

51. Philip Shenon, *Vietnam Agrees to Forced Return of Its Citizens From Asian Camps*, N.Y. TIMES (Oct. 3, 1991) <https://www.nytimes.com/1991/10/03/world/vietnam-agrees-to-forced-return-of-its-citizens-from-asian-camps.html> [<https://perma.cc/PWH4-DLHM>].

52. An Act to provide Federal financial assistance to States in order to assist local educational agencies to provide education to Vietnamese and Cambodian refugee children, Pub. L. No. 94-405 (1976).

53. *Id.*

54. CARL J. BON TEMPO, AMERICANS AT THE GATE: THE UNITED STATES AND REFUGEES DURING THE COLD WAR 163 (2008). Conservative senators felt the bill was too expensive, particularly with the rates of unemployment in the United States at that time.

55. Laura Harjanto and Jeanne Batalova, *Vietnamese Immigrants in the United States*, MIGRATION POLY INST. (Oct. 15, 2021), <https://www.migrationpolicy.org/article/vietnamese-immigrants-united-states/> [<https://perma.cc/TV4Z-45G6>] (stating that Vietnamese immigrants employed at a rate of 67% vs. 62% for U.S.-born citizens); Claire Wang, *Vietnamese American refugees who witnessed fall of Saigon urge U.S. to accept more Afghans*, NBC NEWS (Aug. 21, 2021), <https://www.nbcnews.com/news/asia-america/vietnamese-american-refugees-witnessed-fall-saigon-urge-us-accept-afgh-rcna1708> [<https://perma.cc/M5FE-M386>] (stating that Bee Nguyen, first Vietnamese-American representative from the state of Georgia, is the daughter of refugees evacuated after the fall of Saigon); *The Pithy*, VIET THANH NGUYEN, <https://vietnguyen.info/author-viet-thanh-nguyen> (last visited Mar. 17, 2023) (stating that Viet Thanh Nguyen, Pulitzer prize-winning American author, was evacuated from Vietnam as a child in 1975. His parents opened one of the first Vietnamese grocery stores in San Jose, CA, after their immigration); John Bunette, *Decades After Clashing With The Klan, A Thriving Vietnamese Community In Texas*, NPR (Nov. 25, 2018, 7:55 PM), <https://www.npr.org/2018/11/25/669857481/decades-after-clashing-with-the-klan-a-thriving-vietnamese-community-in-texas> [<https://perma.cc/TZD4-KM64>] (describing how Vietnamese immigrants in Houston initially faced hostility and violence from resentful U.S.-born Americans, but today are firmly a part of the city and its cultural atmosphere.); see also Agnes Constante, *How Southeast Asian American refugees helped shape America's resettlement system*, NBC NEWS (Aug. 12, 2020), <https://www.nbcnews.com/news/asia-america/how-southeast-asian-american-refugees-helped-shape-america-s-resettlement-n1187961> [<https://perma.cc/QL9Y-J65P>].

convincing the argument of the United States' responsibility proved.⁵⁶

Some felt, during the formation of the IMR, that due to the United States' long presence and involvement in Vietnam and Southeast Asia, there was a responsibility to provide for these emigres.⁵⁷ By this logic, it is virtually impossible to argue the United States does not have a similar duty to Afghans today. If we mark the 1961 Central Intelligence Agency's (CIA) covert missions in Vietnam (Operation 34-A) as the mark of the United States' military involvement in Vietnam, we can say that the United States was engaged in Vietnam for roughly 14 years.⁵⁸

By comparison, the War in Afghanistan entered its second decade in early 2021, before the troop withdrawal in August.⁵⁹ Such a long engagement, and efforts to ally with the democratic Afghan government, imply a solidarity with the Afghan people. This solidarity would create some responsibility to provide aid for those fleeing the American failure to establish a solid democratic government with the capacity to withstand assault by the Taliban.

The passing of the IMR led to a more relaxed American immigration policy overall, which ended with the commencement of the War in Afghanistan in 2001, when fear of terrorists inspired the United States to tighten its grip on who was allowed to immigrate to the United States.⁶⁰ In the wake of the Taliban's recapture of Afghanistan, it would be a mistake to allow revived fears of terrorism to prevent the United States from taking on these refugees and immigrants. The risk of Taliban-led or -sponsored terrorism efforts certainly exist but using it to abdicate the American responsibility to offer safety to Afghans fleeing the country would be a dereliction

56. *To Pass H.R. 6755 Authorizing Funds for Assistance to Refugees from South Vietnam and Cambodia*, GOVTRACK (May 16, 1975), <https://www.govtrack.us/congress/votes/94-1975/s186> [<https://perma.cc/2C9T-MUVQ>].

57. See, e.g., Admission of Refugees into the United States Part II: Hearing Before the Subcomm. On Immigration, Citizenship, & Int'l Law of the H. Comm. On the Judiciary, 95th Cong., 2d Sess. 178 (1978) (statement of Rep. Joshua Eilberg) ("It is apparent that the basic reason, apart from our traditional concern for refugees and human rights, for our responsibility for the refugees in that area, stems from our prolonged presence in Vietnam, and our utilization of the resources of Laos and Cambodia during the Indo-china conflict.").

58. David Lyons, *Lost Army's Final Battle is Waged in U.S. Courts; U.S.-sponsored Raiders Often Ended Up in North Vietnam's Prison. Now They Want Back Pay*, 18 NAT'L L.J. 9, ¶ 17-21 (1995).

59. See Eleanor Vassili, *An Afghan Marine Fought To Make His Homeland Safer. Now He Feels Like He Failed*, NAT'L PUB. RADIO (Sept. 5, 2021), <https://www.npr.org/2021/09/05/1033638675/afghanistan-kabul-marine-homeland-war-american-withdrawal> [<https://perma.cc/4J3M-DYWL>].

60. Victoria Rapaport, *The Politicization of United States Asylum and Refugee Policies*, 11 SCHOLAR 195, 209-212; see also Seth M. M. Stodder & Nicolle Sciara Rippeon, *State and Local Governments and Immigration Laws*, 41 URB. L. 387, 387 (2009); For a report specifically addressing the increase in use of immigrant detention, see Dora Schriro, *Immigration Detention Overview & Recommendations* 1, 2 (Oct. 6, 2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<https://perma.cc/G44Y-DGF8>] ("The Report describes the policy, human capital, informational, and management challenges associated with the rapid expansion of ICE's detention capacity from fewer than 7,500 beds in 1995 to over 30,000 today.").

of duty to a nation with which we have been intimately involved for the last twenty years.

Assuming then that it is possible for the United States to implement legislation to ease the path of Afghan emigres, and that similar legislation has been passed before, for what reason should it be done now? There is no one and nothing in the international community, or in Afghanistan, itself which could *force* the United States to take this action. Why go through the effort, why take on the responsibility? Because the threat to Afghans is particularly acute for groups which the United States has made explicit efforts to shield from discriminatory harm at home; because Afghanistan has been our ally and many of the Afghans now at risk relied on the United States' promises and presence for safety; because the entire international community benefits when countries take responsibility for displacement, and when wealthier countries lead the pack in giving shelter to refugees and asylees.⁶¹

II. Logic for Implementation

A. Necessary Aid to Vulnerable Populations

Any claims the “new Taliban” has made that they are modernized and reoriented from the “old Taliban” of the 1990s ring false in the face of the ratcheting down already taking place across Afghanistan.⁶² While all Afghan citizens now face harsh treatment at the hands of the Taliban government, and people across all walks of life are seeking to escape from their rule, there are populations particularly vulnerable to abuse by the fundamentalist government. Many of these are populations the United States has enacted legal protectors for at home, and advocated for abroad: women, the queer community, the disabled, as well as religious and ethnic minorities.⁶³ When the CAA was adopted in 1966, it was motivated in part by a

61. When wealthier countries decline to assist in handling a refugee crisis, the cost tends to fall on less wealthy countries who are simply nearby. Will Tizard, *Afghan Women Refugees Stranded In Pakistan See No Future*, RADIO FREE EUR. (Mar. 15, 2023, 9:30 AM), <https://www.rferl.org/a/afghanistan-pakistan-women-education-refugee-camp-work-islamabad/32310451.html> [https://perma.cc/MG5C-WUK4] (stating that Afghan refugees hoping for eventual passage west live in unsanitary conditions in tent camps in Pakistan); Kelly O'Donnell & Kathleen Newland, *The Iraqi Refugee Crisis: The Need for Action*, MIGRATION POL'Y INST., 1, 2, https://www.migrationpolicy.org/pubs/MPI-The_Iraqi_Refugee_Crisis_The_Need_for_Action_011808.pdf [https://perma.cc/BHF9-GS8E] (stating that during the Iraq refugee crisis, massive refugee camps spawned in Syria, Jordan, and other neighboring states who could ill afford the cost of caring for them. Host countries fear refugee populations settling permanently in countries unprepared to manage that scale of immigration); Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?*, 110 CALIF. 897, 915 (stating that of an estimated 2.6 million Afghan refugees produced since the fall of Kabul, approximately 2.2 million are in Pakistan and Iran). See Faiez, *supra* note 47; see also Discussion of Iraqi refugees in Sweden, *infra*.

62. Introduction, *supra*; see also *Who are the Taliban?*, BBC NEWS (Aug. 12, 2022), <https://www.bbc.com/news/world-south-asia-11451718> [https://perma.cc/2QAN-G95J].

63. U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. XIX; Equal Pay Act of 1963, 29 U.S.C. § 206(d) (prohibiting discrimination in the form of

desire to protect persecuted populations.⁶⁴ Congress, in passing the CAA, expressed a desire to “aid [the] persecuted peoples” of Cuba.⁶⁵ If the United States was then concerned for the plight of Cubans, we must now be concerned for the plight of Afghans.

The Taliban is perhaps most known for its repressive treatment of women during its past rule: refusing to let girls attend school; to let women work; to let any adult woman leave the house without a male guardian; mandatory burqas—a garment that covers a woman head to toe, with netting across the eye slit;⁶⁶ and a ban on women attending sporting events.⁶⁷

pay discrepancies based on sex); Civil Rights Act of 1964, 78 Stat. 241 (defining discrimination based on race, color, religion, sex, national origin as unconstitutional); Civil Rights Act of 1968, 82 Stat. 73 (applying the Bill of Rights to Native American tribes; prohibiting discrimination concerning the sale, rental, and financing of housing based on race, religion, national origin, and beginning in 1974, sex; permitting the prosecution of any individual who “willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . . any person because of his race, color, religion or national origin.”); Pregnancy Discrimination Act of 1978, 92 Stat. 2076 (prohibiting employer discrimination on the basis of pregnancy status); Civil Rights Restoration Act 102 Stat. 28 (1987) (stipulating that recipients of federal funds must comply with civil rights laws in all areas, not just in the particular program or activity that received federal funding); Americans with Disabilities Act, 104 Stat. 327 (1990) (prohibiting discrimination based on disabilities; requiring reasonable accommodation of disabilities by employers; establishing minimum accessibility requirements on public facilities); Violent Crime Control and Law Enforcement Act, 28 U.S.C. §994 (1994) (requiring increased criminal penalties for crimes committed on the basis of the actual or perceived race, color, religion, national origin, ethnicity, or gender of the victim); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 123 Stat. 2190, §§ 4701-4713 (2009) (expanding hate crime laws to include action taken against the victim on the basis of their actual or perceived gender or sexuality, and eliminates the requirement that the victim have been partaking in a federally-protected activity); see generally *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (holding that the Civil Rights Act of 1964 applies also to discrimination based on gender identity [specifically to transgender individuals] and sexuality); *Equality and Non-discrimination*, UNITED NATIONS AND RULE L., <https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/> [<https://perma.cc/3UH6-H24G>] (last visited Dec. 5, 2021); see generally Margaret E. McGuinness, *Human Rights Reporting as Human Rights Governance*, 59 COLUM. J. TRANSNAT'L L. 364 (2021) (depicting that the United States requires nations receiving aid or military support to show a minimum commitment to human rights).

64. *Mirando por los Ojos*, *supra* note 24, at 908.

65. H.R. Rep. No. 89-1978, at 4 (1966).

66. Marcus Yam, *As Afghans Try to Figure Out Taliban's New Rules, Burqas Are Barometer of Sorts*, LOS ANGELES TIMES (Aug. 23, 2021), <https://www.latimes.com/world-nation/story/2021-08-23/as-afghans-try-to-figure-out-talibans-new-rules-burqas-serve-as-a-barometer> [<https://perma.cc/J83U-N7JZ>].

67. Associated Press, *Taliban Decree an End to Forced Marriages in Afghanistan*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/12/03/world/asia/taliban-women-marriage.html> [<https://perma.cc/K7FF-84N3>]; Associated Press, *100 Girls' Schools In Afghan Capital Are Ordered Shut*, N.Y. TIMES (June 17, 1998), <https://www.nytimes.com/1998/06/17/world/100-girls-schools-in-afghan-capital-are-ordered-shut.html> [<https://perma.cc/A88Z-Q33T>]; *Some of the Restrictions Imposed by Taliban on Women in Afghanistan*, REVOLUTIONARY ASS'N WOMEN AFGHANISTAN (Dec. 4, 2021), <http://www.rawa.org/rules.htm> [<https://perma.cc/QA9W-EG7C>]; see *Women in Afghanistan: The Violations Continue*, AMNESTY INT'L (Nov. 11, 1997), <https://web.archive.org/web/20061119134557/http://web.amnesty.org/library/Index/ENGASA110051997?open&of=ENG-398> [<https://perma.cc/F69J-YQA9>]; see also Somak Adhikari, *Taliban Ban IPL Broadcast Over Presence of Women Spectators in Stadiums*,

Women under the Taliban of the 1990s had very few rights, and so as the Taliban once again begins enacting edicts over Afghanistan, the world is watching to see if Afghan women will be forced to return to the oppressive treatment of the past. Already, women have been sent home from work and school, and Taliban officials have beaten women protesting for their rights.⁶⁸ Female reporters have received death threats and even been forced to flee their homes.⁶⁹ The women who have fled Afghanistan have done so in terror of a return to the past, and those who have stayed speak apprehensively of the future, girding themselves for a fight.⁷⁰

The United States has had our own struggle with women's rights, but in the 21st century, has purported to support broad-reaching gender equality and the protection of women's rights both at home and abroad.⁷¹ Therefore, when we look at the treatment of women in Afghanistan, if we are to live up to our own ideals of equality, do we not have some responsibility to provide an escape for women fleeing the treatment of the Taliban?

Queer Afghans also speak in fear of coming brutality. Rumors have spread through the community of the Taliban tricking gay Afghan men by pretending to offer them an escape from Afghanistan.⁷² Queer Afghans have entered a tenuous existence of constant fear: whether they will be imprisoned or killed, whether their neighbors or family might turn them over, whether they can alter themselves and their behaviors enough to go undetected.⁷³ Transwomen describe growing beards and lesbians talk about presenting themselves more femininely to avoid suspicion.⁷⁴ Life before the Taliban was still difficult. Homosexuality was illegal, and queer

INDIA TIMES (Sept. 21, 2021), <https://www.indiatimes.com/news/world/taliban-ban-ipl-broadcast-over-presence-of-women-spectators-in-stadiums-549937.html> [https://perma.cc/3GBM-ML23]; see generally Nancy Hatch Dupree, *Women and the Taliban in Fundamentalism Reborn? Afghanistan and the Taliban* 145–66 (1998).

68. See Franklin, *supra* note 9; See also CBS NEWS, *supra* note 9.

69. See Ali M. Latifi, 'Why are you out?': Afghan Women Journalists Recall Taliban Sweep, AL-JAZEERA (Sept. 14, 2021), <https://www.aljazeera.com/news/2021/9/14/afghanistan-women-journalists-taliban-media-reporters> [https://perma.cc/3AKC-FHGU]; see also Eliza Relman, *Taliban Leader Sits Down with a Female Afghan Reporter for an In-Person TV Interview as Part of The Militant Group's Effort to Project Moderation*, BUS. INSIDER (Aug. 17, 2021), <https://www.businessinsider.com/taliban-female-afghan-reporter-in-person-tv-interview-project-moderation-2021-8> [https://perma.cc/4JFD-3TBA].

70. See Gannon, *supra* note 17; see also Samya Kullab, *A Rebel, a Bureaucrat: The Women Who Stayed in Afghanistan*, SEATTLE POST-INTELLIGENCER (Nov. 5, 2021), <https://www.seattletimes.com/nation-world/a-rebel-a-bureaucrat-the-women-who-stayed-in-afghanistan/> [https://perma.cc/5YFJ-B5XE].

71. See generally Antony J. Blinken, Secretary of State, Address at the 17th Annual International Women of Courage (IWOC) Awards Ceremony (Mar. 8, 2023) (video and transcript available on State Department website).

72. Ritu Mahendru, 'The Taliban Will Have No Mercy': LGBTQ+ Afghans Go Into Hiding, THE GUARDIAN (Sept. 20, 2021), <https://www.theguardian.com/global-development/2021/sep/20/taliban-lgbtq-afghans-go-into-hiding> [https://perma.cc/L9XG-GPNY].

73. See generally *id.*

74. *Id.*; Emma Graham-Harrison, *Deported Gay Afghans Told to 'Pretend to be Straight'*, THE GUARDIAN (Feb. 25, 2017), <https://www.theguardian.com/uk-news/2017/feb/25/afghanistan-gay-asylum-seekers-home-office-illegal-homosexuality> [https://perma.cc/T8J9-CBXL].

Afghans faced discrimination and distrust from the wider Afghan community, but with the Taliban back in power, many have gone completely into hiding.⁷⁵ One gay Afghan man describes the palpable fear within the community: “[w]e don’t hang out together any more the way we used to. We are scared that we will get caught if we meet, have a party or sing songs.”⁷⁶ Many have lost work or have been forced to relocate and assume new identities, leaving them struggling to make rent or pay for food.⁷⁷ Another man describes his belief that he will be “forced to emigrate in illegal ways to escape death and hunger” soon.⁷⁸

In the interest of following through with our own claim that the queer community is deserving of personhood, the United States offering queer Afghans refuge in America would be a powerful gesture. Right now, there is nothing the United States can do to change the Taliban’s stance on queer Afghans, beyond the usual international condemnation of measures that criminalize homosexuality and other queer identities. However, we can take action to make it easier for queer Afghans to resettle in the United States and create a life where they do not face imprisonment or death for who they are or who they love.

Disabled Afghans are facing an increasingly hostile atmosphere as well. Many Taliban members hold the view that disabilities are a punishment from God for the sins of the parents, and have little sympathy for the disabled.⁷⁹ One Afghan disability advocate describes her fear that parents strapped for cash and struggling to provide food in Afghanistan’s devastated economy may choose to prioritize non-disabled children.⁸⁰ Disabled activists who have successfully fled Afghanistan are pleading with receiving countries to hear their voices and make it easier for disabled Afghans to immigrate.⁸¹

Racial and religious minorities too, are watching the Taliban with great apprehension. The Taliban is largely composed of members of Afghanistan’s largest ethnic group, the Pashtun, and follow a severe interpretation of the Sunni branch of Islam.⁸² The previous Taliban government was known to target members of the Hazara racial minority, and many today

75. Mahendru, *supra* note 72; see also John O’Donnell, ‘Just give us our money’: Taliban push to unlock Afghan billions abroad, *REUTERS* (Oct. 29, 2021), <https://www.reuters.com/world/asia-pacific/just-give-us-our-money-taliban-push-unlock-afghan-billions-abroad-2021-10-29/> [<https://perma.cc/43L9-7NXX>] (depicting how Taliban considers LGBTQ individuals as inherently in violation of Sharia).

76. *Id.*

77. *Id.*

78. *Id.*

79. Jessica Murray, *Disabled Afghans in Special Jeopardy, Warns Exiled Campaigner*, *THE GUARDIAN* (Sept. 6, 2021), <https://www.theguardian.com/world/2021/sep/06/disabled-afghans-in-special-jeopardy-warns-exiled-campaigner> [<https://perma.cc/S7E5-2PF8>].

80. Chris Stokel-Walker, *An advocate for disabled Afghans on her harrowing escape and her concern for disabled Afghans under Taliban rule*, *BUS. INSIDER* (Sept. 5, 2021), <https://www.businessinsider.com/disabled-afghans-are-at-grave-risk-under-taliban-rule-activist-warns-2021-9> [<https://perma.cc/M8SZ-XCNX>].

81. *Id.*; Murray, *supra* note 79.

82. *BBC NEWS*, *supra* note 62.

anticipate that persecution to begin again.⁸³ The hardline Islamic group also opposes religious minorities in Afghanistan. In particular, Sikhs, Christians, and Hindus have faced discrimination and even violence.⁸⁴ Although these religious groups had existed relatively peacefully for much of Afghanistan's history, during the Taliban's regime of the 1990s, Taliban Supreme Leader Mullah Omar encouraged the lynching of Afghan Christians and destruction of churches.⁸⁵ Sikhs and Hindus were forced to identify themselves with a yellow mark,⁸⁶ and all non-Muslims were required to pay the *jizya*, a tax on anyone not of the Islamic faith.⁸⁷ During the Taliban's previous rule, large numbers of Sikhs and Hindus migrated to India and other nations to escape Taliban persecution.⁸⁸ All of these are groups covered under United States domestic law as "protected groups" who may not be discriminated against on the basis of their immutable characteristics, which includes a person's religious faith.⁸⁹

All of these groups are facing a heightened risk of discrimination and violence from the incoming regime. If the United States is genuine in our belief that these vulnerable groups need and deserve protection, then we have an interest in providing a refuge for these Afghans who will otherwise find themselves trapped under a hostile government with their most basic human rights at risk of violation.

B. Alliance with Afghanistan and the Harm Principle

America's 20-year war in Afghanistan was, in part, an exercise in nation-building: an effort to turn Afghanistan into an American-style democracy and install a government that would function on its own once

83. Saphora Smith, *In Afghanistan's 'Moment of Reckoning,' the Taliban Lead a Harsher-Than-Promised Crackdown*, NAT'L BROAD. CORP. (Sept. 23, 2021), <https://www.nbcnews.com/news/world/afghanistan-s-moment-reckoning-taliban-lead-harsher-promised-crackdown-n1279862> [<https://perma.cc/ER9F-BD4A>]; see also Latifi, *supra* note 69, at 9.

84. See generally Rhea Moghul, *Afghanistan's Religious Minorities Live in Fear of Taliban, Brace for Persecution*, AM. BROADCASTING CORP. (Aug. 29, 2021), <https://www.nbcnews.com/news/world/afghanistan-s-religious-minorities-live-fear-taliban-brace-persecution-n1277249> [<https://perma.cc/WL6L-DTGP>]; see also Mathias Gebauer, *A Community of Faith and Fear*, SPIEGEL INTERN'L (Mar. 30, 2006), <https://www.spiegel.de/international/christians-in-afghanistan-a-community-of-faith-and-fear-a-408781.html> [<https://perma.cc/HLF7-3UWB>].

85. Gebauer, *supra* note 84, at 4–5.

86. Emma Graham-Harrison, *Afghanistan: Dozens Killed in Attack on Kabul Sikh Temple*, THE GUARDIAN (Mar. 25, 2020), <https://www.theguardian.com/world/2020/mar/25/afghanistan-dozens-killed-in-attack-on-kabul-sikh-temple> [<https://perma.cc/F6NA-QSMA>]; see generally Balpreet Singh, *Plight of Sikhs and Hindus in Afghanistan*, WORLD SIKH ORG. CANADA (Retrieved Apr. 16, 2021), <https://d3n8a8pro7vhmx.cloudfront.net/jakara/mailings/2144/attachments/original/afghansikhs.pdf?1587524919> [<https://perma.cc/K8FL-NT8Z>].

87. Singh, *supra* note 86, at 2.

88. Graham-Harrison, *supra* note 86; see also Nahid A. Kabir, *The Economic Plight of the Afghans in Australia, 1860–2000*, 44 ISLAMIC STUD. 229, 229 (2005) (noting migration patterns of Afghans to Australia between 1980–2001).

89. Vassili, *supra* note 59.

the United States had withdrawn.⁹⁰ The United States therefore sought to foster a positive relationship with the new government in Afghanistan, partnering with them as they tried to create a shift in Afghan politics and statecraft.⁹¹ During the course of this experiment, the United States asked the Afghan people to put their trust in the United States: that the United States would help protect them from the Taliban, and create a democratic Afghan government, and give the Afghans the tools they needed to keep it going once the United State was gone.⁹² Having now failed on all three counts, there is only one thing left the United States can offer our one-time allies: an escape from the fallout of our war in Afghanistan against the Taliban.

The United States' departure from Afghanistan in the wake of its collapse is an admission of the failure of nation-building there and an acceptance that the United States did not and cannot "fix" Afghanistan, nor export our own values and systems onto another country. The United States represented to Afghanistan that we could come in, work with them for a few years, and leave a functioning democracy behind when we left.

The harm principle is an assertion that "the act of harm alone creates the special duty to aid those civilians harmed."⁹³ Applied to this context, the principle states that a State has specific duties to refugees when those

90. *The U.S. War in Afghanistan*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/timeline/us-war-afghanistan> [https://perma.cc/5GXL-LBYP] (last visited Mar. 17, 2023) (stating that President Bush calls for a Marshall Plan-style reconstruction of Afghanistan as part of the War in Afghanistan); *Afghanistan War*, HISTORY.COM, <https://www.history.com/topics/21st-century/afghanistan-war> [https://perma.cc/5VET-GV9Z] (last visited Mar. 17, 2023) (showing a shift to reconstruction leads to the first democratic election in Afghanistan in 2004 and the creation of a new Afghan constitution); David Zucchino, *The U.S. War in Afghanistan: How It Started, and How It Ended*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/article/afghanistan-war-us.html> [https://perma.cc/79EZ-A86A] (stating that the U.S. mission in Afghanistan evolves from war to democracy-building); Steven Innskeep, *A Mission To Give Afghans Democracy Became A Bid To Repair America's Own*, NAT'L PUB. RADIO (Aug. 17, 2021), <https://www.npr.org/2021/08/17/1028481201/a-mission-to-give-afghans-democracy-became-a-bid-to-repair-americas-own> [https://perma.cc/WG3E-TRQJ] (showing a failure of U.S. effort to democratize Afghanistan).

91. Zucchino, *supra* note 90 (arguing that early success in Afghanistan led to the installation of a democratic government, more accessible education for women and girls, and creation of hospitals, but corruption in the new government was rampant); Jamil Jaffer & JD Rosenthal, *America Must Uphold Our Promise to Afghan Allies*, THE HILL (Mar. 13, 2022), <https://www.msn.com/en-us/news/politics/america-must-uphold-our-promise-to-afghan-allies/ar-AA18ysKB> [https://perma.cc/F4YR-B5CJ]; see also Mark N. Katz, *The U.S. and Democratization in Afghanistan*, MIDDLE EAST POL'Y COUNCIL (Oct. 22, 2010), <https://mepc.org/commentary/us-and-democratization-afghanistan> [https://perma.cc/NGF4-V7GM] (citing failures of U.S. efforts at democratization in Afghanistan); see also U.N. Security Council, *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, U.N. Doc. S/2001/1154 (Dec. 5, 2001); see also S.C. Res. 1383, ¶ 1, U.N. Doc. S/RES/1383 (Dec. 6, 2001) (endorsing the Bonn Agreement).

92. Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk": Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSNAT'L L. 819, 822–24 (2006).

93. William Y. Chin, *Invasions and Civilians: The Special Duty of the United States to Aid Civilian War Sufferers Produced by U.S. Military Intervention*, 5 HUM. RTS. & GLOBAL-

refugees result from that State's armed involvement in another State.⁹⁴ Philosopher Michael Waltzer phrased it by saying that "states have an obligation toward a group of people who, but for a state's actions, were displaced."⁹⁵ Through its invasion of Afghanistan, its failure to create a stable government, its subsequent withdrawal, and the resulting re-conquest of the Taliban, the United States has been involved in causing harm to both civilians, and to those who worked with the United States military. Therefore, because our government caused this harm, we have a responsibility to take action to prevent further harm by aiding the civilians put in harm's way.

Considering the logic of the Indochina Migration and Refugee Act—that the United States had an obligation to Southeast Asian refugees in the wake of our long military involvement in the area—it is hard not to come to the same conclusion about Afghanistan.⁹⁶ William Chin argues in his paper on civilian victims of United States military intervention that as an unmatched, interventionist power, the United States has a duty to care for civilians affected by its military engagements abroad.⁹⁷ This is something of an international law application of the harm principle: because of our nation's power and resultant capacity to cause harm, we have a duty to ensure we mitigate that harm by caring for those affected by our actions. It is unfathomably, callously irresponsible for the United States to pursue our own interests abroad—such as the dismantling of the Taliban regime and the capture of Osama bin Laden—while taking no responsibility or reparative action for the civilians of the countries into which the United States has marched our armies—civilians who are directly and often severely impacted by the American presence. Afghan civilians have experienced upheaval and loss not only because of the American invasion of Afghanistan, but now our failure to prevent the Taliban from retaking control. The Seventh Circuit asserted that if a state places a person in a position of danger and then fails to protect the person, the State is not a passive presence, but an active participant in creating that harm.⁹⁸ To argue that the United States did not create harm for individuals who worked with or assisted the United States armed forces, or the democratic Afghan government, who are now facing retributive persecution by the Taliban, is myopic. These individuals are being pursued exclusively or primarily based on their cooperation with the United States and with the US-backed Afghan government.⁹⁹ Not only those who worked with the United States and our

IZATION L. REV. 3, 6 (2014); *see also* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 49 (Basic Books, Inc. 1983).

94. Chin, *supra* note 93, at 6; *see also* WALZER, *supra* note 93, at 49.

95. *Id.*

96. Tom Syring, *Beyond Occupation: Protected Persons and the Expiration of Obligations*, 17 ILSA J. INT'L & COMP. L. 417, 429 (2010).

97. Chin, *supra* note 93, at 3–4.

98. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

99. *Afghanistan: Taliban Kill, 'Disappear' Ex-Officials*, HUM. RTS. WATCH (Nov. 30, 2021, 9:30 AM), [https://www.hrw.org/news/2021/11/30/afghanistan-taliban-kill-disappear-ex-officials#:~:text=\(New%20York\)%20%E2%80%93%20Taliban%20forces,in%20a%20report%20released%20today](https://www.hrw.org/news/2021/11/30/afghanistan-taliban-kill-disappear-ex-officials#:~:text=(New%20York)%20%E2%80%93%20Taliban%20forces,in%20a%20report%20released%20today) [https://perma.cc/9DQU-JBM5]; Barbara

allies, but any who took on careers or a lifestyle opposed by the Taliban, under the auspices of American protection, are now facing threats as the Taliban reasserts control over the country.¹⁰⁰ The United States was not a passive actor in the harm now facing these individuals—we were a participant.

Already the United States has recognized some responsibility to care for those who may be targeted for assisting American efforts: in 2009, Congress created the special immigrant visa (SIV), available for Afghans and Iraqis who had aided the American military in their respective countries.¹⁰¹ The creation the SIV was solidly bipartisan, but so too was the criticism later sent to President Obama when Congress felt the SIVs were not functioning well, and that the legislation needed to be reformed to better serve our Afghan and Iraqi allies.¹⁰² The Afghan SIV was granted to Afghans who were employed by or on behalf of the United States government in Afghanistan for at least one year.¹⁰³ Congress was authorized to grant up to 1,500 SIVs per year but has never come close to that number, despite high levels of demand.¹⁰⁴ In 2011, Congress granted only three SIVs.¹⁰⁵ Several amendments adjusted the paperwork requirements and

Marcolini, Sanjar Sohail & Alexander Stockton, *The Taliban Promised Them Amnesty. Then They Executed Them.*, N.Y. TIMES (Dec. 4, 2021), <https://www.nytimes.com/interactive/2022/04/12/opinion/taliban-afghanistan-revenge.html> [https://perma.cc/DE4C-8AEE]; Eric Cunningham & Claire Parker, *Taliban Hunting for ‘Collaborators’ in Major Cities, Threat Assessment Prepared for the United Nations Shows*, THE WASH. POST (Aug. 20 2021), <https://www.washingtonpost.com/world/2021/08/20/taliban-hunt-collaborators-united-nations/> [https://perma.cc/6UBH-VYFD]; Jurist Staff, *Afghanistan dispatches: ‘Anyone on the Taliban’s blacklist is in great danger.’*, JURIST (Oct. 26, 2021), <https://www.jurist.org/news/2021/10/afghanistan-dispatches-anyone-on-the-talibans-blacklist-is-in-great-danger/#:~:text=they%20find%20them,Anyone%20on%20the%20Taliban’s%20blacklist%20is%20in%20great%20danger,their%20families%20would%20be%20arrested> [https://perma.cc/JK7L-DUWZ].

100. George Packer, ‘I Know the Government Fell, But I Never Fell’, THE ATLANTIC (Mar. 10, 2022), <https://www.theatlantic.com/international/archive/2022/03/afghanistan-withdrawal-left-behind-women-soldiers/627022/> [https://perma.cc/3Q7F-TF7W] (showing how women who served in the military now fear Taliban reprisal); Sara Cardine, *UC campuses rallied to host at-risk Afghan scholars fleeing the Taliban in 2021 – but can they keep them?*, DAILY PILOT (Feb. 17, 2023), <https://www.latimes.com/socal/daily-pilot/news/story/2023-02-17/uc-campus-rallied-to-host-at-risk-afghan-scholars-fleeing-the-taliban-but-wil-funds-run-out> [https://perma.cc/L7UQ-2C7H]; Hamed Ahmadi, *Afghan Fulbright Scholars Have Been Left With No Clear Path Forward*, HUFFPOST (May 2, 2022), https://www.huffpost.com/entry/afghan-fulbright-scholars-no-clear-path_n_621d2fade4b0d1388f1923cc [https://perma.cc/CS6L-WCLB] (stating that former Fulbright scholars in Afghanistan at risk of Taliban reprisals for association with the West); see Mahendru, *supra* note 72 (showing how queer Afghans who were previously more open are now having to change their behavior to escape Taliban notice).

101. Nadia Abramson, *Wasting My Time in the Waiting Line: Solutions for Improving the Afghanistan and Iraq Special Immigrant Visa Programs*, 55 VA. J. INT’L L. 483, 491 (2015).

102. *Id.* at 490–91.

103. *Id.* at 491.

104. *Id.* at 494–95.

105. Lindsey Mulholland, *Berger International Speaker Series with Betsy Fisher: Refugee Resettlement and Immigration Solutions after the U.S. Withdrawal from Afghanistan*, CORNELL U. (Sept. 28, 2021), <https://vod.video.cornell.edu/media/Berger+International+Speaker+Series+with+Betsy+FisherA+Refugee+Resettlement+and+Immigration+>

other functional aspects of the SIV program to increase their efficiency, in part by shortening the processing time for applications.¹⁰⁶ It has not been extremely effective.¹⁰⁷ Complex bureaucratic requirements and conflicting national anti-terrorism policy made the SIVs by and large a failure.¹⁰⁸ However, the desire to help our allies abroad and the sense of responsibility towards them was there.

From a domestic political perspective, there is broad public support for aiding our Afghan allies. CBS News/YouGov polling from earlier this year revealed that “81 percent of Americans say the U.S. should help its Afghan allies come to the U.S.” and that “56 percent of Americans believe that the number the U.S. should resettle each year be at minimum of 95,000.”¹⁰⁹ The American public believes in helping displaced Afghans and feels a responsibility towards those affected by our involvement in Afghanistan, so a bipartisan effort to pass legislation towards this goal should not be an onerous task for Congress.¹¹⁰

Rather than try to continue amending the failed SIV program, it is time to take alternative legal action. The blueprints for legislation that can provide concrete help to the Afghans in need exist already—both the Cuban Adjustment Act and the Indochina Migration and Refugee Act provide ample ground on which to begin building an Afghan-tailored program for accepting refugees, asylees, and others fleeing the incoming Taliban regime. This expanded coverage from the SIV program should cover not only those who worked directly with the United States during its occupation of Afghanistan, but all those affected by the chaos and oppression of the Taliban. The United States became embroiled in this war and then left our allies woefully unprepared to handle the problem themselves.¹¹¹ It is time now to take responsibility for that harm and do what we can to ameliorate it.

Solutions+after™he+U.S.+Withdrawal=from+Afghanistan/1_nmzszlzlzr [https://perma.cc/MGL3-Y2QB].

106. Abramson, *supra* note 101, at 493–94.

107. *Id.* at 494.

108. *Id.* at 494–509.

109. IRC: As Biden Administration Sets Refugee Admissions Cap at 125,000, Afghan Parolees Remain Without Resettlement Services, INT’L RESCUE COMM. (Sept. 22, 2021), <https://www.rescue.org/press-release/irc-biden-administration-sets-refugee-admissions-cap-125000-afghan-parolees-remain> [https://perma.cc/Z2K7-T6AU].

110. Press Release, As Biden Administration Sets Refugee Admissions Cap at 125,000, Afghan Parolees Remain Without Resettlement Services (Sept. 23, 2021) (on file with Rescue.org).

111. Paulina Smolinski, *How U.S., Afghan governments failed to adequately train Afghan security forces after spending \$90 billion over 20 years*, CBS NEWS (Feb. 28, 2023), <https://www.cbsnews.com/news/afghanistan-security-forces-us-failures-special-inspector-general-report/?intcid=CNI-00-10aaa3a> [https://perma.cc/6ECB-LJ2H] (stating that Afghan President, Ashraf Ghani, did not even believe the U.S. was genuine about withdrawing a mere five months prior to the pullout); Liptak et al., *supra* note 4; Ameline, *supra* note 5.

C. Benefit to the International Community

In the aftermath of World War II, the international community began to coalesce around the idea of global ethical norms and a concerted effort to work together. The United Nations embodies these goals and has spoken often about the need for human rights, just treatment, and an end to aggressive warfare. The legal duty to care for refugees and asylees is extremely limited, but the international community has attempted to impress a sense of moral obligation on those nations able to take on refugees during a crisis.¹¹² Inspired by the wave of post-WWII refugees and the many who faced persecution or felt unsafe returning to previously Nazi-held territory, the United Nations passed the 1951 Convention relating to the Status of Refugees,¹¹³ although the United States is not a party.¹¹⁴ In the following years, the international community has sought to expand international norms and laws protecting and provided for refugees.¹¹⁵ The preamble of the United Nations Refugee Convention expresses the necessity of global cooperation in providing for refugees to avoid undue burden on certain countries.¹¹⁶ In this preamble, the United Nations “has recognized the international scope and nature cannot therefore be achieved without international co-operation.”¹¹⁷ On the 50th anniversary of the Convention, signatory states “unanimously declared that ‘the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and effective responsibility and burden-sharing among all States.’”¹¹⁸

The United Nations’ record in acting in line with these goals is somewhat less than inspirational. At too many turns, the United Nations and its member states have failed to take substantive, effective action to prevent humanitarian crises, and have been ineffective in mitigating ongoing situations. For instance, the Dublin II protocol requires an asylum claim to be processed by the country into which the asylees first entered, thereby placing a far heavier burden on states with nearer ports of entry to source countries—such as Italy and Greece, contending with waves of migration from Africa—rather than spreading that burden more equitably throughout Europe.¹¹⁹ A country like Iceland or Norway has very little to fear in the way of refugee waves because the odds of any refugees reaching them without first entering another European country is so low due to their location and distance from most ongoing conflicts. There is no organized method for ensuring that the duty of caring for refugees is shared, and past efforts

112. Patrick Wall, *A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?*, 29 INT’L J. REFUGEE L. 201, 207 (2017).

113. *Id.* at 206, n.20.

114. Syring, *supra* note 96, at 429.

115. Wall, *supra* note 112, at 202–03.

116. *Id.* at 208, n.29.

117. Convention relating to the Status of Refugees pmb., July 28, 1951, 189 U.N.T.S. 137.

118. Wall, *supra* note 112, at 207–08.

119. Syring, *supra* note 96, at 419.

to implement a genuine legal requirement to do so, such as a proposal by former Secretary-General of the U.N., Trygve Lie, that all member states should agree to resettle a certain number of refugees to avoid a disproportionate burden falling on states with proximity to conflict, have been rejected by U.N. member states.¹²⁰ Certain protection obligations—such as non-refoulement (forcible return to a state where the individual faces persecution)¹²¹—only arise once a person has entered a state’s territory and made a legal claim, after which the burden falls squarely on that state.¹²² In short, although the entire community benefits from global collaboration in refugee assistance, many states see a benefit in merely free-riding on other states’ contributions—usually those states that are closest to the source of the refugee influx.¹²³ But this attitude is harmful not just to the individual refugees but to the international community as a whole.

While the United States did not prevent the crisis now unfolding in Afghanistan—and debates about whether it could have will rage for years—it has a chance now at least to ameliorate some of the damage. Already a surge of emigres from Afghanistan is underway. Many are flowing through Serbia and Greece, seeking refuge in Europe.¹²⁴ Nearly half of the 5,000 refugees currently passing through Serbia are Afghans.¹²⁵ If the United States does not take action, nearby states will be forced to manage this flood of refugees, many of whom may become prey for recruit-seeking terrorist organizations or human traffickers.¹²⁶ The international community will lose more faith in the ability and willingness of United Nations member states to live up to the ideals espoused in its refugee treaties and conventions.

The United States has abdicated its responsibility for refugees in the past. During the Iraq War in 2007, when vast numbers of Iraqis were flee-

120. Wall, *supra* note 112, at 207–08.

121. ALEXANDER BETTS, PROTECTION BY PERSUASION: INTERNATIONAL COOPERATION IN THE REFUGEE REGIME 6 (2009).

122. Wall, *supra* note 112, at 208.

123. See BETTS, *supra* note 121, at 27.

124. See Elisa Oddone, *Afghans Are Among Thousands Of Migrants Hoping To Reach Europe Via Serbia*, NAT’L PUB. RADIO (Sept. 26, 2021), <https://www.npr.org/2021/09/26/1025135970/afghan-refugees-migrants-serbia-europe> [https://perma.cc/2N29-GRQF].

125. *Id.*

126. Alexandra Bro, *Fleeing Home: Refugees and Human Trafficking*, COUNCIL ON FOREIGN RELATIONS (Dec. 31, 2019), <https://www.cfr.org/blog/fleeing-home-refugees-and-human-trafficking> [https://perma.cc/7J5B-3XAT]; Ann Speckhard, *How Dragging Our Feet on Refugees Creates More Terrorists*, N.Y. TIMES (Sept. 29, 2015), <https://www.nytimes.com/2015/09/29/opinion/how-dragging-our-feet-on-refugees-creates-more-terrorists.html> [https://perma.cc/6EXV-ZKWH] (stating that individuals left to languish in refugee camps are more susceptible to radicalization than those who are quickly resettled); see Courtney Kube & Carol E. Lee, *ISIS infiltrated a refugee camp to recruit fighters. Inside the Biden admin’s plan to stop it.*, ABC NEWS (Oct. 6, 2022), <https://www.nbcnews.com/news/world/isis-syria-al-hol-camp-population-reduced-biden-administration-plan-rcna50877> [https://perma.cc/C6DH-CED9].

ing the country, the United States took in a mere 1,608 Iraqi refugees.¹²⁷ By contrast, the small Swedish town of Sodertalje took in itself more Iraqi refugees than the entirety of the United States and Canada combined by 2008.¹²⁸ However, the refusal of other countries to share the burden began to turn public sentiment in Sweden, leading to tighter restrictions on refugees and winnowing asylum claim acceptances from 80% to around 20%.¹²⁹ Repatriations, both voluntary and forced, were made to Iraq and Syria.¹³⁰ Sweden stepped up to its international duty to care for refugees, but the rest of the international community was content to free-ride and let Sweden bear the burden, despite the United States' leading role in the Iraq War. As a result, Sweden felt it could no longer be as open to refugees and its stricter requirements led to the return of individuals who were persecuted or otherwise unsafe in their home countries.¹³¹

When Sweden put pressure on the United States by pointing to the case of Sodertalje, the United States did take action to increase our intake of Iraqi refugees and give preferential treatment to Iraqi interpreters and translators seeking resettlement in the United States.¹³² The United States did not have a legal responsibility to act on Sweden's push to do more for the Iraqi refugee community, but it benefitted the United States' position on the world stage to be seen doing its share. Perhaps there was a sense of moral obligation tapped into by Sweden's urging. Many of these Iraqis were refugees because of the turmoil in Iraq caused by the United States' war, and in this sense, the United States was the "but for" cause of their flight from their home state. It is not difficult to see how this creates a sense of responsibility to care for the resultant refugees.

The entire international community benefits when wealthier, more stable countries step up during a refugee or immigration crisis. European Commissioner Ylva Johansson has already spoken out on the issue, claiming Europe has a "moral duty" to help Afghan refugees.¹³³ The internecine bickering among European countries during the migration crises of 2015 and 2016 prolonged the problem and led to massive migrant camps wherever refugees could put their things down, notorious for hygiene problems and crime.¹³⁴ Nor has the United States been a welcoming doorstep for refugees and immigrants in recent years. The Serbian refugee population, which swelled during the bloody Serbian civil war, was handled predomi-

127. Jorgen Hildebrandt, 'Little Baghdad' thrives in Sweden, NAT'L BROAD. CORP. (June 19, 2008), <https://www.nbcnews.com/id/wbna25004140> [<https://perma.cc/29GE-3BAT>].

128. See generally *id.*

129. *Id.*

130. *Id.*

131. Hildebrandt, *supra* note 127.

132. Syring, *supra* note 96, at 429.

133. Oddone, *supra* note 124.

134. See Jonathan Clayton & Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (Dec. 30, 2015), <http://www.unhcr.org/en-us/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> [<https://perma.cc/Y69K-5KK4>].

nantly by three neighboring countries: Lebanon, Turkey, and Jordan.¹³⁵ The massive, uncontrolled influx of refugees into countries without sufficient infrastructure to process them resulted in the refugee population “dramatically depressing wages and inflating rental prices, while depleting what public services are available for health and education.”¹³⁶ By creating a clear and simple route to permanent residency and citizenship in the United States, we can prevent pile-ups of emigrees in haphazard camps and an undue burden of migration on poorer countries surrounding Afghanistan, which have neither the infrastructure nor the funds to adequately handle the scale of movement going on in the area.¹³⁷

We cannot rely on other countries to shoulder the work for relocating Afghan emigrees. The countries surrounding Afghanistan lack the United States’ coffers and infrastructure, and many are already grappling with anti-immigrant sentiment bred during earlier influxes of migrants and refugees. Serbia, through which many Afghans are passing en route to Europe, has granted only three people refugee status, and temporary residency on humanitarian grounds to just two unaccompanied children.¹³⁸ Furthermore, the countries bordering Serbia have often refused to let migrants pass through into the European Union, using at times violent measures to push migrants back into Serbia.¹³⁹ Greece, which functioned as a funnel during the 2015–16 migrant crisis, is ramping up efforts to prevent Afghans from using it as a gateway to Western Europe, marked by the construction of 25 new miles of fencing along its border with Turkey.¹⁴⁰ It has recently opened a new refugee camp in Samos designed to hold 3,000 people, but Greece’s history with operating refugee camps, such as the Vathy and Moria camps, has been dismal, and conditions there were described by Greece’s own prime minister as a “disgrace to human dignity.”¹⁴¹ Legislation like the CAA could help get emigrees like these into the United States to have their case processed, rather than leaving them to languish in underfunded border camps or overcrowded refugee holding sites, or paying human smugglers to get them through border countries into the European Union.

A strong commitment by the United States to resettling Afghan refugees would also bolster the United States’ standing in surrounding countries that otherwise would take on an outsized portion of refugees purely due to their proximity to Afghanistan.¹⁴² Greater stability in these coun-

135. Wall, *supra* note 112, at 203.

136. *Id.*

137. Oddone, *supra* note 124; *see also* Wall, *supra* note 112.

138. Oddone, *supra* note 124.

139. *Id.*

140. Karolina Tagaris, *Greece says will not allow ‘uncontrolled’ migrant flows from Afghanistan*, REUTERS (Oct. 2, 2021), <https://www.reuters.com/world/europe/greece-says-will-not-allow-uncontrolled-migrant-flows-afghanistan-2021-10-01/> [<https://perma.cc/LGV7-4Z76>].

141. *Id.*

142. *See generally* Harvard Immigration and Refugee Clinical Program, *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security, & Building the U.S. Economy Through Refugee Admissions*, 5 TEX. A&M L. REV. 155 (2017).

tries means greater stability in the Middle East overall and therefore less foothold for groups like al Qaeda and ISIS-K to expand. Ensuring that refugees are protected and can find stability and integration into a new state decreases their chances of being drawn into terrorist organizations and thereby further decreasing global stability and security.¹⁴³ The United States thus benefits not only from strengthening political ties with surrounding countries, but also from denying terrorist groups the chaotic political instability in which they thrive. Moreover, an early and firm commitment by the United States may encourage other capable nations to take similar action and thus prevent a repetition of migrant crises past. No state wants to be the first to step up and then look back to see no one else is following suit—this is the conundrum in which Sweden found itself during the Iraq War.¹⁴⁴ If the United States takes this first step, and other countries see they will not be alone if they enact a more liberal policy towards Afghan refugees and immigrants, they may be more willing to do so.

Moreover, Afghans will try to get into the United States whether or not such legislation is passed. The largest flood of Cuban immigrants took place before CAA was passed, and that legislation was passed in part to process the vast numbers of Cubans already arriving in the United States.¹⁴⁵ Cuba's proximity to the United States, as well as its previous warm political relations, might have made the United States a more obvious choice for a home-in-exile for Cubans in opposition to Castro than for Afghans now fleeing the Taliban. However, many who chose to work with the American military may decide that the long trip to the United States is worth the effort. For those Afghans who already speak English, and who may have years of experience working with Americans, the United States makes sense as a refuge. The country would do well to prepare a legislative plan before the arriving refugees, asylees, and immigrants, and would thus avoid a potential immigration crisis as happened in 1965.

It is a failure of global governance when a person becomes stateless. It is the duty of all capable states to take action to ensure the many Afghan refugees around the world do not face effective statelessness, being unable or unwilling to return to a country under the brutally oppressive rule of the Taliban. This duty lies most urgently on the part of the United States, whose armed involvement in Afghanistan had a hand in creating the present crisis.

III. Passed and Proposed Legislation

As of March 2023, there are several pieces of legislation currently under consideration, as well as policy changes and budget requests to assist with caring for new Afghan arrivals. Any of these would also be a

143. BETTS, *supra* note 121, at 7.

144. Hildebrandt, *supra* note 127.

145. *Mirando por los Ojos*, *supra* note 24, at 905 (noting that the “freedom flights” of Cubans to America began in 1965, and responding to the 45,000 Cuban refugees who arrived, Congress passed the Cuban Adjustment Act in 1966).

move in the right direction in providing for Afghans, but a comprehensive overall aid package with legislation would better serve the needs of new arrivals.

In the House of Representatives, the Improving Access for Afghan Refugees Act (H.R.4736), introduced by Representative Jackie Speier (D-CA) in July 2021, requires the Department of State to provide priority refugee status to eligible habitual residents of Afghanistan.¹⁴⁶ The bill imposes three requirements on anyone seeking such priority status. The applicant must be someone who:

- (1) has suffered persecution or has a well-founded fear of persecution and worked in a specified field that makes the individual a target of persecution on account of race, religion, or other characteristics;
- (2) was employed for at least one year in Afghanistan by U.S.-based media or nongovernmental entities or an entity that received a contract or grant from the U.S. government; or
- (3) is the beneficiary of a visa petition sponsored by a relative who is a U.S. citizen or permanent resident The State Department may also provide priority status to other groups of individuals who are nationals and residents of Afghanistan.¹⁴⁷

Individuals admitted under this priority status would not count towards annual refugee caps.¹⁴⁸ The bill also sought to limit wait times by stipulating that “all steps of the approval process under the U.S. government’s control” should be completed within six months of the application’s submission, barring extenuating security concerns.¹⁴⁹ This bill has been referred to the House Committee on the Judiciary but has seen no further movement since summer 2021. It presently has 46 co-sponsors.¹⁵⁰

In the Senate, the WELCOMED Act (S. 2783) was introduced in late September 2021 by Senator Jeff Merkley (D-OR) and makes available refugee assistance benefits such as resettlement to any Afghan national (or stateless individual who last resided in Afghanistan) given humanitarian parole into the United States on or after July 1, 2021.¹⁵¹ This bill has been referred to the Committee on Finance.¹⁵² It has a pair bill in the House (H.R.5168) under the same name.¹⁵³ It has seen no movement since its referral and currently has zero co-sponsors.

On August 7, 2022, Senator Amy Klobuchar (D-MN) proposed the Afghan Adjustment Act, which currently has nine co-sponsors.¹⁵⁴ Under this Act, Afghan eligibility for Special Immigrant Visas (SIV) is expanded and the Department of Homeland Security is authorized to grant such visas to Afghan nationals who served in the Afghan Air Force or other qualifying

146. H.R. 4736, 117th Cong. (2021).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. S. 2783, 117th Cong. (2021).

152. *Id.*

153. H.R. 5168, 117th Cong. (2021).

154. S. 4787, 117th Cong. (2022).

entities.¹⁵⁵ Currently, SIVs are available only to those who worked for, or on behalf of, the United States government. The proposed Act also requires the Department of State to (a) respond to the inquiries of Congresspeople on specific applications from Afghan nationals; and (b) establish an office in Afghanistan to issue visas, “if no U.S. embassies are operational in Afghanistan.”¹⁵⁶ Finally, the Act requires the president to create a task force to “develop and implement a strategy to assist Afghan nationals who qualify for admission to the United States.”¹⁵⁷ However, the Act stalled out at the end of last year.¹⁵⁸

The House has its own version of the Senate’s Afghan Adjustment Act, introduced in August 2022 by Representative Earl Blumenaur (D-OR).¹⁵⁹ This bill is identical to the Senate version.¹⁶⁰ It currently has 145 co-sponsors and has been referred to subcommittees on the Judiciary and on Immigration and Citizenship.¹⁶¹

On November 8, 2021, the Department of Homeland Security announced that it would waive filing fees and streamline the immigration process for Afghan evacuees looking to resettle in the United States.¹⁶² However, this applies only to individuals who worked directly with the United States military and “are asking for work and residency permits following their evacuation from their home country.”¹⁶³ Others, deemed to be at-risk in Afghanistan, are being permitted to enter under temporary humanitarian parole before their visa applications are processed.¹⁶⁴

These steps should not be dismissed entirely, but a comprehensive piece of legislation would be a far more effective, more efficient response. Several of the above measures—such as humanitarian parole, which grants entrance into the United States for only two years—are only stopgap measures or deal only with those Afghans who worked directly with the American government, and they should be overtaken with stronger legislative action to fully address the scope of Afghan migration. If we rely solely on what has already been proposed—assuming, for argument, that all these proposals become law—in two years’ time we will need to deal with many Afghans whose humanitarian parole has run out. These proposals also do

155. *Id.*

156. *Id.*

157. *Id.*

158. Farnoush Amiri, *Afghan refugees in US face uncertainty as legislation stalls*, AP NEWS (Dec. 30, 2022), <https://apnews.com/article/afghanistan-politics-united-states-government-political-refugees-fddb9f66f09f133c6365823df9e28743> [<https://perma.cc/MX2F-BMXT>].

159. H.R. 8685, 117th Cong. (2022).

160. *Id.*

161. *Id.*

162. Lauren Berg, *DHS Waives Fees to Expedite Afghan Resettlement In US*, LEXISNEXIS L.360 (Nov. 8, 2021), <https://www.law360.com/articles/1438923/dhs-waives-fees-to-expedite-afghan-resettlement-in-us> [<https://perma.cc/2RME-SUJW>].

163. *Id.*

164. Grace Dixon, *At-Risk Afghans May Enter US Under Humanitarian Provision*, LEXISNEXIS L. 360 (Aug. 21, 2021), <https://www.law360.com/articles/1415810/at-risk-afghans-may-enter-us-under-humanitarian-provision> [<https://perma.cc/UN4X-GAMF>].

not provide funding for states to manage an influx of new permanent residents, nor do they address work permits. The will to aid these Afghans exists, both in the government and among the American people—it is time for Congress to pass legislation.

Conclusion

The United States should pass legislation to expedite processing of Afghan immigrants, refugees, and asylees into the United States, as well as to shorten the length of time needed for them to gain permanent residence and working permits. These types of actions have been taken in the past, most notably after the end of the Vietnam War, and the United States' long involvement in Afghanistan confers a responsibility to care for those victims of the United States' failure to secure the democratic Afghan government against the advances of the Taliban. The United States has a chance now to offer shelter to vulnerable and persecuted Afghan populations and to help stabilize the global migrant situation by taking responsibility and granting safe haven to Afghan emigres. This legislation must be passed quickly and without reservation; the situation in Afghanistan deteriorates by the day, and Afghans looking to leave the country urgently need a place to go. There is no longer time for delay, and Congress has several blueprints off which to work, so there is no excuse for not taking action to help our allies. Lives depend on it.