An Examination of the USCIS Parole-in-Place Policy

The Rule of Unintended Consequences Always Prevails

By Dan Cadman [1]

On November 15, Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services (USCIS), issued a policy memorandum entitled "Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)" [2]

It's a hefty title, but the memo itself is hefty, weighing in at nine pages, much of which is dedicated to the rationale behind the policy, and much of the remainder to a highly detailed and technical explication of the statutory provisions of the Immigration and Nationality Act (INA) under which it is justified.

The memorandum directs that henceforward, aliens who are illegally present in the United States without having been admitted or paroled, and who are spouses, children, or parents of military members, reservists, or veterans, will be entitled as a class to "parole in place" — a term of art that encompasses grants of immigration parole to aliens who are already within the U.S., as opposed to those who are outside and granted parole to enter the country.

When contacted, representatives of USCIS indicated that the agency had no estimates of the number of persons who will be affected. However, given the depth and breadth of its reach, it will undoubtedly be many. *The New York Times*, in a recent article, prognosticates that it may affect "tens of thousands". [3]

A number of serious, significant concerns arise from a close reading of the memorandum, several of which are outlined below. Equally concerning is that USCIS officers themselves are aware of the shortcomings of the memo, yet it does not appear that either the administration or leadership in USCIS or its parent Department of Homeland Security (DHS) are taking steps to close the gaps.

The Policy Violates the Plain Language of the INA

It is interesting that a memorandum which has gone to such great lengths to parse the language of the INA in order to lay a foundation for the policy it enunciates, misses the critical point that the statute specifically states that aliens may be "temporarily paroled under such conditions as [the Secretary of Homeland Security] may prescribe *only on a case-by-case basis*." (emphasis added) [4]

As the memorandum ironically notes, when Congress intends a particular result, it says so. Had Congress intended for parole to be exercised on a broad basis and applied to whole classes of aliens—as opposed to a case-by-case basis—undoubtedly it would have used different language. Indeed, use of the word "only" would seem to reflect a strong congressional resolve that parole not be used as a substitute to bestow otherwise unavailable immigration benefits on whole classes of aliens. One is left to conclude that the Director of USCIS chooses to be a statutory strict constructionist only insofar as it furthers his purposes.

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By promulgating a policy in which USCIS examiners are deprived of their statutory obligation to consider the specific factors of each case before arriving at a decision on parole, and substituting instead a requirement to treat an entire class of aliens in a particular way, the Director's memorandum violates the law.

And it is clear that the intent was to remove from the examiners any discretion in issuing denials—that is most assuredly the reason for the language found at the beginning of the memorandum asserting that its purpose is "to ensure consistent adjudication of parole requests." How else can one interpret the phrase, when decisions truly made on a case-by-case basis, as the law prescribes, will inevitably be a mixed bag of approvals and denials determined on the merits of each individual's circumstances?

Policy Promulgation by Memorandum Violates APA Requirements

The Administrative Procedure Act (APA) [5] was enacted into law in 1946 in recognition of the power of the federal government, acting through its various agencies, to affect for better or worse the lives, rights, and responsibilities of citizens throughout the country. The APA established procedures which federal agencies are obliged to follow in undertaking regulations and policies which substantially affect the citizenry, to ensure that those agencies do not operate in the dark, do not act capriciously or arbitrarily, and to provide the public with the right to influence agency rules through examination and comment upon those rules before they are enacted. A publication called the Federal Register is the mechanism by which the public is alerted to agencies' intent to promulgate, change, or vacate rules, and is given a chance to review those rules and comment upon them—a process which agencies are required by law to undertake. [6]

Unfortunately, this administration has shown a troublingly cavalier attitude toward conforming to the requirements of the APA, when enunciating broad-based immigration-related policies. A prime example involves the promulgation of a series of "prosecutorial discretion" policies by the former Director of Immigration and Customs Enforcement, John Morton, which had wide applicability throughout the nation, but which sidestepped the APA (and thus the requirement to specifically outline the reach and consequences of the policy, as well as providing the public an opportunity to comment and be heard via the Federal Register) by being issued via internal memorandum, like the instant USCIS policy. With this memorandum, once again, we see the administration vitiating the public's right to review and comment upon the operation of its immigration agencies through shortcuts which do not conform to the requirements of law.

The Policy Is Flawed

First, the policy outlined by the memorandum is extraordinarily broad in that it encompasses not only active duty members of the military, but "the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve", to quote from the memorandum itself. [7] However, it does not require that those selected reservists have actually served in hostile theaters of operation, nor even gone on active duty for any specific period of time beyond the bare minimum obligations (by way of example, a cumulative period of one year, or for the duration of a call-up if serving in a hostile theater of operation). Why should reservists who have not actually made sacrifices on behalf of the nation be placed in a privileged position over other citizens who may also be married to aliens present in the U.S. without admission?

Second, the policy does not require that the "former members" of the armed forces or selected reserve have received honorable discharges in order for their family members to benefit, which is curious. An individual could, theoretically, serve as a reservist for a period of two weeks, receive a less-than-honorable discharge by the military for any of a number of disciplinary reasons, and still avail him- or herself of the policy, assuming he or she were married to an illegal alien. [8] Why would one reward malingerers or misfits?

Certainly it is easy enough to distinguish between the honorably discharged and all others for purposes of granting or denying parole—the type of military discharge is listed on the individual's discharge form, DD-214.

It is dismaying to think that the administration would be so indiscriminate. It is a slap in the face to those who are honorably discharged, and flies in the face of the avowed purposes of the memorandum: recognizing the sacrifices of our armed forces members and veterans.

Readers may think that these concerns are minimal, or that the shortcomings described will surely be ameliorated by the immigration examiners charged with administering the policy and adjudicating requests that flow from it. Not so. The

author encourages readers to read the excellent blog by John Feere, the Center's Legal Policy Analyst, describing a conversation he had on this matter with a USCIS staff member. [9]

The Policy Doesn't Achieve its Aims

The memorandum states, as a primary basis for promulgation of the parole-in-place policy, that "some active members of the U.S. Armed Services, individuals serving in the Selected Reserve of the Ready Reserve and individuals who have previously served in the U.S. Armed Forces or Selected Reserve of the Ready Reserve face stress and anxiety because of the immigration status of their family members in the United States," and that "Military preparedness can potentially be adversely affected if active members of the U.S. Armed Forces and individuals serving in the Selected Reserve of the Ready Reserve, who can be quickly called into active duty, worry about the immigration status of their spouses, parents and children."

But it is difficult to comprehend how a grant of parole that is limited to one year in duration, and which must be reviewed and re-granted on an annual basis, does much to relieve the stress of a G.I. serving on active duty in a remote, perhaps hazardous, duty location. And, as Mr. Feere noted, what "stress" is there to consider for retired military members and reservists?

One is left to wonder when the other shoe will drop and examiners will be directed to place these newly-paroled aliens into the front of the adjudicative line, as a class, for purposes of other benefits such as immediate relative petitions and adjustment of status, to which they would otherwise not have been entitled but for the grant of parole. [10] And will USCIS officers then also be directed to suspend their exercise of judgment in examining the specifics of those petitions and adjustment applications to ensure that the individuals are entitled to the benefits as a matter of both law and discretion? This leads to the next concern:

The Policy Will Inadvertently Encourage Fraud

This memorandum contains within it the seed of significant unintended adverse consequences. Illegal aliens will not be slow to understand that marrying a military (or former military) member gets them a foot in the door through parole; and second, that parole is the first in a series of benefits dominos that will drop, culminating in obtaining coveted "green card" status. And here is the harsh reality: soldiers and sailors can be brave as lions, noble toward their comrades, and fiercely loyal to their units, yet outside military matters be no better or worse, no smarter or dumber than their civilian counterparts. Many will get involved in sham marriages whose sole purpose is to obtain resident alien status for the alien they marry. They will do it for money with little recognition of the potential consequences. The fact that these G.I.s also, by virtue of the marriage, become entitled to various military benefits such as housing and dependent-family allowances, etc., will act as a further inducement to ill-considered acts of fraud. [11]

Nor will every sham marriage be entered into knowingly by both participants. Among the saddest phenomena that seasoned immigration officers become aware of is what might be called one-sided frauds: the alien (often the male) induces the citizen to believe that love is reciprocal, and is willing to live in a relationship that at its essence is a lie, for as long as is necessary to transition from parole to conditional residence to permanent residence, after which the alien leaves as quickly as possible. Often these relationships are unstable and involve elements of control if not outright domestic violence. There is no reason to think that members of our armed services will be spared this scenario, which manifests itself among the civilian population with regularity.

The Policy Decreases Critical Infrastructure Security

Another significant unintended adverse consequence of the policy is that it opens the door to illegal aliens being provided access to secure military facilities throughout the United States. This is another of the ironies implicit in the memorandum, given that it is the Department of Homeland Security which is responsible by law for protection of the nation's critical infrastructure—there is an entire DHS directorate dedicated to that mission.

We should not be so naïve as to think that each scenario involving parole-in-place will be a soldier marrying a harmless illegal alien, perhaps one brought here as a child, who is "practically American." The policy equally applies to members of the military marrying aliens from virtually any country in the world, and whose purpose in acquiring a U.S. military spouse may be to facilitate espionage, terrorism, or organized crime, or simply routine marriage fraud for a green card. [12]

Assuming such aliens are granted parole, and they most assuredly will be under the generous terms of the memorandum, it is not unreasonable to assume that their spouses will insist on obtaining for them military dependent cards granting them access to the military post so that they can avail themselves of PX or commissary privileges. They may even be housed on base at government expense. But what else will they have access to, once inside the secure perimeter? And is there any reason to believe that a simple background check by USCIS, which in truth consists of little more than automated agency checks, is adequate to the task of preventing national security threats from taking advantage of this policy, knowing as they surely must that it will gain them accesses not initially apparent on the surface of the memo? [13]

Conclusion

It is no wonder that announcement of the memorandum was met with dismay and distrust by representatives of several organizations, some of whom saw it as another example of "amnesty by drips" notwithstanding the president's disavowals that he is unlawfully doing through executive action that which he cannot accomplish through suasion of our properly constituted legislators. [14]

But amnesty by drips may not adequately describe the cumulative nature of what is going on throughout our federal immigration agencies under the DHS umbrella in this administration.

A more accurate description may be that of a python eating a pig: first it strangles the pig. Then it unhinges its jaws, and uses its massive fangs to draw in the animal bit-by-bit until the entire corpus has been ingested.

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End Notes

[1] *Author's Note: It is unusual when writing for the Center for Immigration Studies to insert personal details, observations, etc. in anything except blogs, where of course there is greater latitude given their informal nature. I am claiming an exception here, though, because I can easily envision that if I do not, some readers of this article will claim I exhibit an anti-military bias or that I do not show sufficient empathy for service members or their families. That is emphatically not true. I come from a military family: my father was a career officer—a "lifer" in the vernacular—who spent nearly three decades of his life on active duty in the army through several wars and theaters of conflict, during one of which he was seriously wounded. I am proud of my father and of his service. My siblings and I were all born on different military installations; I spent my formative years traveling domestically and abroad as our family followed my father from post to post, except during his hardship tours when no family was permitted and we remained stateside anxiously awaiting his return. From birth to the age of 18, I was always around soldiers, in and around military bases and, of course, lived side-by-side with other military families. I know intimately what life inside the military bubble is like, and am deeply sympathetic to the sacrifices made by our armed forces members, as well as their spouses and children.*

[2] A PDF copy of the policy memorandum may be found on the website of the Center for Immigration Studies, at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf

[3] Julia Preston, "Immigrants Closely Tied to Military Get Reprieve", *The New York Times*, Nov. 25, 2013, http://www.nytimes.com/2013/11/16/us/immigrants-closely-tied-to-military-get-reprieve.html

[4] Readers may see INA § 212(d)(5)(A), codified as 8 U.S.C. § 1182(d)(5)(A), at http://www.law.cornell.edu/uscode/text/8/1182, although you will be obliged to scroll considerably far down the statutory provision in order to find it.

[5] The APA is codified at Title 5 of the United States Code, Subchapter II. http://www.archives.gov/federal-register/laws/administrative-procedure/

[6] 5 U.S.C. § 551 states in pertinent part, "(a)(1) Each agency shall separately state and currently publish in the Federal

Register for the guidance of the public…(D) substantive rules of general applicability adopted as authorized by law, *and statements of general policy or interpretations of general applicability formulated and adopted by the agency.*" (emphasis added)

[7] "Selected Reservists of the Ready Reserve" are simply those reservists who are obligated to commit a certain number of hours each month engaged in drills and military readiness tasks, as well as going on active duty for a minimal period of weeks per year.

[8] It is important to understand that any discharges from the military under other-than-honorable conditions, including even general discharges, always involve some kind of unacceptable behavior. For a brief description of the types of military discharges, see, for example, Ryan Guina in the online journal The Military Wallet, http://themilitarywallet.com/types-of-military-discharges/

[9] Jon Feere, "Obama's New Military-related Amnesty Raises Questions", Dec. 9, 2013, Center for Immigration Studies, http://www.cis.org/feere/obamas-new-military-related-amnesty-raises-questions

[10] Parolees become exempt from the exclusions found in the INA at 212(a)(9)(B) [codified as 8 U.S.C. 1182(a)(9)(B) http://www.law.cornell.edu/uscode/text/8/1182], otherwise known as the 3/10 year bar to admission. This provision prohibits illegal aliens from becoming permanent residents until they have waited out of country for either three or ten years, depending on the length of illegal residence, except in cases of extreme hardship. The Obama administration has already negated the law by creating a waiver for such illegal aliens before they submit their green card applications. With this policy families of the military will not need the waiver nor demonstrate hardship because under current interpretations of the law, parolees are construed to have been admitted and are thus exempt from the bar.

[11] See, for instance, Mandy Locke, "Soldiers charged in marriage fraud", News Observer.com, Oct. 7, 2009, http://www.newsobserver.com/2009/10/07/129654/soldiers-charged-in-marriage-fraud.html

[12] Aliens from nearly every country of the world illegally cross our northern and southern borders constantly; much more commonly than many Americans think; and it is, or should be, a cause for alarm. In true bureaucratic fashion, there is even a DHS acronym assigned to such crossers: OTMs (Other-than-Mexicans).

[13] The danger of unfettered access to a military base should be taken seriously, and has already resulted in arrests and convictions of aliens for attempted terrorism (see, e.g., the Associated Press story, "5 Men Found Guilty of Plotting to Kill Fort Dix Soldiers" Dec. 22, 2008, http://www.foxnews.com/story/2008/12/22/5-men-found-guilty-plotting-to-kill-fort-dix-soldiers/). There is also the infamous case of Army Major Nidal Hasan, who killed 13 soldiers and civilians and wounded 32 others in his rampage at Fort Hood, Texas (see, e.g., Bill Mears, "Fort Hood shooting jury recommends death penalty for Nidal Hasan", Aug.29, 2013, http://www.cnn.com/2013/08/28/us/nidal-hasan-sentencing/).

[14] See, e.g., Lourdes Medrano, " 'Parole in place': Obama's illegal-immigration order stokes amnesty worries", *Christian Science Monitor*, Dec. 9, 2013, http://www.csmonitor.com/USA/Politics/2013/1209/Parole-in-place-Obama-s-illegal-immigration-order-stokes-amnesty-worries