

POLICY BRIEF:

The Trump Administration's Failure to Redesignate Countries for Temporary Protected Status

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ISSUE SUMMARY

The current administration has failed to exercise its authority to redesignate Temporary Protected Status, or TPS, in any of its decisions.¹ Most notably, the lack of redesignation breaks the status quo for three war-torn countries—Yemen, Syria and South Sudan—which had received redesignations and 18-month extensions in every previous TPS decision. The Trump administration's failure to redesignate raises serious legal questions as to whether the administration employed the proper legal analysis and procedure in these and any of its TPS decisions. The human consequences of failure to redesignate are dire—people who are more recently arrived from countries facing catastrophe and those who did not previously apply for TPS are unable to apply for protection, even though their need is just as acute. CLINIC conservatively estimates that at least 11,300 people have been affected by the administration's failure to redesignate.

I. CONGRESSIONAL INTENT AND REDESIGNATION AUTHORITY

Congress established TPS to provide life-saving protection to people in the United States who, if deported, would be at risk of harm or death to ongoing armed conflict, natural disaster or other extraordinary and temporary conditions.² Congress intended TPS to be the statutory embodiment of “safe haven,” providing protection to those who did not qualify for other forms of humanitarian relief but still represented a particularly vulnerable population.³ In addition to the authority and responsibility to extend TPS as many times as necessary to protect people from harm,⁴ Congress delegated the Secretary of the U.S. Department of Homeland Security, or DHS, the authority to simultaneously redesignate and extend TPS at decision dates.⁵

Redesignation allows the Secretary to add or modify the underlying grounds for a TPS designation depending on current country conditions⁶ and/or to change the specific date by which a person needs to be present in the United States for TPS eligibility.⁷ In this, redesignation is a crucial tool and logical outgrowth of Congressional intent: the need for protection from dangerous conditions does not change based on a person's date of entry to the United States or whether they had the knowledge or resources to previously apply for TPS.

II. HISTORIC USE OF REDESIGNATION IN TPS DECISIONS

Previous DHS Secretaries (and attorneys general prior to DHS's establishment) simultaneously extended and redesignated TPS consistently throughout the history of TPS, with redesignation as a standard part of TPS decision analysis.⁸ Analysis of a 20 year period of TPS decisions shows redesignation used across three administrations for at least seven different countries.⁹ In one of the most recent examples, DHS described the need and rationale for simultaneous extension and redesignation for Yemen in 2017:

[R]edesignation is warranted due to the continued deterioration of the conditions for civilians in Yemen and the resulting need to offer protection to individuals who have arrived in the United States after the eligibility cutoff dates.¹⁰

In another example in the 2016 Federal Register Notice for Syrian TPS, DHS similarly stated:

Over the past year, DHS and the Department of State (DOS) have continued to review conditions in Syria. Based on this review and after consulting with DOS, the Secretary has determined that an 18-month extension and redesignation is warranted because the ongoing armed conflict and other extraordinary and temporary conditions that prompted the January 5, 2015 redesignation continue to exist. Furthermore, the Secretary has decided the conditions warrant changing the "continuous residence" date so as to provide TPS protection to eligible Syrian nationals who arrived between January 5, 2015 and August 1, 2016.¹¹

III. TPS UNDER THE TRUMP ADMINISTRATION AND FAILURE TO REDESIGNATE IN ANY DECISION

Ten countries held TPS when the current administration took office and six of them have been terminated.¹² Affected individuals from these countries and advocates challenged these decisions in federal court, citing an underlying political agenda, racially-motivated decision making and failure to follow proper regulatory procedure.¹³ These terminations, however, are not the only TPS-related issues necessitating careful examination, oversight and accountability.

Prior to the current administration, three countries—South Sudan, Yemen and Syria—received 18-month extensions and redesignations at every previous decision date since their original designation.¹⁴ In its decisions for these three countries, which are currently considered some of the world's biggest humanitarian crises, the Trump administration sharply deviated from past practice, issuing 18-month extensions without redesignation.¹⁵ Consequently, recent arrivals from these catastrophic conflicts were precluded from applying for TPS. CLINIC conservatively estimates that at least 11,300 people have been affected, based on nonimmigrant visas issued since the last redesignation date for each country.¹⁶ Additionally, under this administration, Somalia, which previous administrations simultaneously extended and redesignated several times in the past, received an 18-month extension without redesignation.¹⁷

IV. ONGOING OVERSIGHT AND INVESTIGATION ON FAILURE TO REDESIGNATE

In Oct. 2018, the Government Accountability Office, or GAO, accepted a U.S. Senate request to investigate the failure to redesignate TPS for Syria.¹⁸ As of the date of this brief, it is uncertain when the GAO will complete its investigation and publish its findings. In Dec. 2018, 82 members of the U.S. House of Representatives sent a letter to the DHS Office of Inspector General requesting an investigation into the failure to redesignate TPS for Syria, Yemen and South Sudan, as well as other TPS issues.¹⁹ As of the publication date of this brief, the Inspector General's office has not yet issued a determination as to whether it will conduct this investigation, but has stated that it is "currently considering [the] request as part of [their] work planning process and evaluating the best way to proceed."²⁰

RECOMMENDATIONS FOR OVERSIGHT AND ACCOUNTABILITY

1. The DHS Inspector General should grant Congress's investigation request regarding the administration's failure to redesignate TPS for any country, in addition to the other TPS issues raised in the request.
2. Congress must question, investigate and obtain an explanation from DHS for its failure to redesignate TPS for Yemen, Syria and South Sudan, as well request and evaluate relevant State Department recommendations on redesignation and the number of people who may have benefited from redesignation. The failure to redesignate these countries was a sharp deviation from past practice and a break in status quo.
3. Congress must also question, investigate and obtain an explanation to understand if and how DHS, under the current administration, evaluated the need for redesignation at every TPS decision, including the Somalia extension and the terminations.

General Oversight Analysis: Tools for oversight and accountability include the Freedom of Information Act requests; GAO investigations; Inspector General investigations; Congressional oversight including data and informational requests from agencies and committee hearings; litigation; investigatory reporting; among others. CLINIC recommends those conducting oversight and accountability work engage in careful evaluation of the proper vehicle and survey and consult with the current field of advocacy to determine how to best move forward on strategy.

ENDNOTES

- 1 In the TPS context, a “designation” refers to the original decision to grant TPS. An “extension” refers to a decision to extend a country’s TPS designation. “Redesignation” refers to the authority to add or change the grounds for a country’s TPS designation and the authority to move forward the dates by which a person needed to be in the United States in order to apply for protection.
- 2 Jill Wilson, *Temporary Protected Status: Overview and Current Issues*, CONGRESSIONAL RESEARCH SERVICE (Oct. 10, 2018), <https://fas.org/sgp/crs/homesecc/RS20844.pdf>.
- 3 *Id.*
- 4 *See generally* INA § 244 (there are no prohibitions in the statute as to how many times a country be designated for TPS or receive extensions).
- 5 *See* INA § 244(b)(1); *see also* INA § 244(c)(1)(A)(i) (requiring that “the alien has been continuously physically present since the effective date of the *most recent designation* of the state”) (*emphasis added*).
- 6 *See e.g.*, 78 Fed. Reg. 36223 (June 17, 2013), www.federalregister.gov/documents/2013/06/17/2013-14101/extension-and-redesignation-of-syria-for-temporary-protected-status.
- 7 *See* INA § 244(b)(1); *see also* INA § 244(c)(1)(A)(i) (requiring that “the alien has been continuously physically present since the effective date of *the most recent designation* of the state”) (*emphasis added*).
- 8 Examples of notices simultaneously extending and redesignating TPS for seven different countries over a 20-year span. *See, e.g.*, 62 Fed. Reg. 16608 (April 7, 1997), www.federalregister.gov/documents/1997/04/07/97-8925/extension-of-designation-and-redesignation-of-liberia-under-temporary-protected-status-program; 64 Fed. Reg. 61128 (Nov. 9, 1999), www.federalregister.gov/documents/1999/11/09/99-29249/extension-and-redesignation-of-sudan-under-the-temporary-protected-status-program; 66 Fed. Reg. 46288 (Sept. 4, 2001), www.federalregister.gov/documents/2001/09/04/01-22152/extension-and-redesignation-of-somalia-under-temporary-protected-status-program; 69 Fed. Reg. 60168 (Oct. 7, 2004), www.federalregister.gov/documents/2004/10/07/04-22707/extension-and-re-designation-of-temporary-protected-status-for-sudan; 76 Fed. Reg. 2900 (May 19, 2011), www.federalregister.gov/documents/2011/05/19/2011-12440/extension-and-redesignation-of-haiti-for-temporary-protected-status; 78 Fed. Reg. 1866 (Jan. 9, 2013), www.federalregister.gov/documents/2013/01/09/2013-00051/extension-and-redesignation-of-south-sudan-for-temporary-protected-status; 78 Fed. Reg. 36223 (June 17, 2013), www.federalregister.gov/documents/2013/06/17/2013-14101/extension-and-redesignation-of-syria-for-temporary-protected-status; 82 Fed. Reg. 859 (Jan. 4, 2017), www.federalregister.gov/documents/2017/01/04/2016-31003/extension-and-redesignation-of-the-republic-of-yemen-for-temporary-protected-status.
- 9 *Id.*
- 10 82 Fed. Reg. 859 (Jan. 4, 2017), www.federalregister.gov/documents/2017/01/04/2016-31003/extension-and-redesignation-of-the-republic-of-yemen-for-temporary-protected-status.
- 11 81 Fed. Reg. 50533 (Aug. 1, 2016), www.federalregister.gov/documents/2016/08/01/2016-17933/extension-and-redesignation-of-syria-for-temporary-protected-status.
- 12 Temporary Protected Status (TPS) and Deferred Enforced Departure (DED), <https://cliniclegal.org/tps>.
- 13 *Challenges to TPS terminations*, (updated April 18, 2019), <https://cliniclegal.org/resources/challenges-tps-terminations>.

- 14 Syria Federal Register Notices: 78 Fed. Reg. 36223 (June 17, 2013), www.federalregister.gov/documents/2013/06/17/2013-14101/extension-and-redesignation-of-syria-for-temporary-protected-status; 80 Fed. Reg. 245 (Jan. 5, 2015), www.federalregister.gov/documents/2015/01/05/2014-30871/extension-and-redesignation-of-the-syrian-arab-republic-for-temporary-protected-status; 81 Fed. Reg. 50533 (Aug. 1, 2016), www.federalregister.gov/documents/2016/08/01/2016-17933/extension-and-redesignation-of-syria-for-temporary-protected-status; South Sudan Federal Register Notices: 78 Fed. Reg. 1866 (Jan. 9, 2013), www.federalregister.gov/documents/2013/01/09/2013-00051/extension-and-redesignation-of-south-sudan-for-temporary-protected-status; 79 Fed. Reg. 52019 (Sept. 2, 2014), www.federalregister.gov/documents/2014/09/02/2014-20709/extension-and-redesignation-of-south-sudan-for-temporary-protected-status; 81 Fed. Reg. 4045 (Jan. 25, 2016), www.federalregister.gov/documents/2016/01/25/2016-01387/extension-of-the-designation-of-sudan-for-temporary-protected-status; Yemen Federal Register Notices: 82 Fed. Reg. 859 (Jan. 4, 2017), www.federalregister.gov/documents/2017/01/04/2016-31003/extension-and-redesignation-of-the-republic-of-yemen-for-temporary-protected-status.
- 15 82 Fed. Reg. 44205 (Sept. 21, 2017), www.federalregister.gov/documents/2017/09/21/2017-20174/extension-of-south-sudan-for-temporary-protected-status; 84 Fed. Reg. 13688 (April 5, 2019), www.federalregister.gov/documents/2019/04/05/2019-06746/extension-of-the-designation-of-south-sudan-for-temporary-protected-status; 83 Fed. Reg. 9329 (March 5, 2018), www.federalregister.gov/documents/2018/03/05/2018-04454/extension-of-the-designation-of-syria-for-temporary-protected-status; 83 Fed. Reg. 40307 (Aug. 14, 2018), www.federalregister.gov/documents/2018/08/14/2018-17556/extension-of-the-designation-of-yemen-for-temporary-protected-status.
- 16 In order to determine the number of people who would have been eligible to apply for TPS had it been redesignated, relevant sources would include the number of newly filed and pending asylum cases and nonimmigrant visas granted between the most recent redesignation date and what would have likely been the new redesignation date based on past practice (had TPS been redesignated). Relevant asylum information is not publicly available. An analysis of available data for nonimmigrant visas granted for Syria, Yemen and South Sudan between last redesignation date and what would have been the most recent redesignation date for the respective countries had TPS been redesignated shows that at least 11,300 people have been affected. *See* Nonimmigrant Visa Statistics, U.S. Dept. of State, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html>.
- 17 *See* 66 Fed. Reg. 46288 (Sept. 4, 2001), www.federalregister.gov/documents/2001/09/04/01-22152/extension-and-redesignation-of-somalia-under-temporary-protected-status-program; 78 Fed. Reg. 1866 (Jan. 9, 2013), www.federalregister.gov/documents/2013/01/09/2013-00051/extension-and-redesignation-of-south-sudan-for-temporary-protected-status; 83 Fed. Reg. 43695 (Aug. 27, 2018), www.federalregister.gov/documents/2018/08/27/2018-18444/extension-of-the-designation-of-somalia-for-temporary-protected-status.
- 18 Letter from Orice Williams Brown, Managing Director Congressional Relations, Government Accountability Office (Oct. 4, 2018), on file with author.
- 19 Rep. Jimmy Gomez Leads 82 House Democrats in Calling for Investigation on TPS Termination, (Dec. 4, 2018), <https://gomez.house.gov/news/documentsingle.aspx?DocumentID=426>.
- 20 Letter from John V. Kelly, Senior Official Performing the Duties of the Inspector General, Office of Inspector General, U.S. Department of Homeland Security to Jimmy Gomez, Representative, U.S. House of Representatives et al. (Feb. 7, 2019), (on file with author).

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