Lawyers Committee for Human Rights

REFUGEE PROJECT

The Implementation of the Refugee Act of 1980: A Decade of Experience

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Lawyers Committee for Human Rights

Since 1978 the Lawyers Committee has worked to promote international human rights and refugee protection in the United States and abroad. The Chairman of the Lawyers Committee is Marvin E. Frankel; Michael H. Posner is its Executive Director; William G. O'Neill is its Deputy Director; and Arthur C. Helton is the Director of its Refugee Project.

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I. Preface

Ten years ago this month, on March 17, 1980, the United States Congress enacted the Refugee Act of 1980.[1] This landmark legislation was the culmination of a decade-long effort to incorporate obligations assumed by the United States under an international refugee treaty, the United Nations Protocol relating to the Status of Refugees,[2] to which the U.S. became a party in 1968. The Refugee Act sought to establish a domestic legal framework for refugee protection, and to strike a balance of fairness in individual adjudications and executive discretion.

The decade since the enactment of the Refugee Act of 1980 has been largely a period of failure and neglect in implementation. Immigration enforcement priorities and foreign policy considerations have overwhelmed humanitarian responsibilities in refugee status determination. Planning and policy-making by the agencies have been reactive; the resources

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1. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

2. United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for the United States Nov. 1, 1968) (hereafter, "1967 Refugee Protocol.")

devoted to implementation have been inadequate. Increasingly, the federal courts have had to intervene to vindicate the rights of refugees. The purpose of the Refugee Act has, in many respects, been frustrated.

Congress, in enacting the Refugee Act, declared that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . . ."[3] This humanitarian purpose, however, has often been subverted by political considerations. Foreign policy has dominated refugee admissions from abroad -- the vast majority of those chosen for admission into the U.S. have been from the Soviet Union, Eastern Europe and Indochina. Such bias has also affected refugees who made their way to the United States and sought political asylum. While the average approval rate for asylum applicants under the Refugee Act has been about 25 percent, the rate for those applicants who fled from Communist or Communist-dominated countries has traditionally been from 50 to 80 percent, depending on the nationality.

Foreign relations considerations have been incorporated into the structure and doctrine of refugee protection. The State Department has the opportunity to present its views in every asylum case in the United States -- an institutional arrangement that predated the enactment of the

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3. Id.

Refugee Act. The Department has pursued this prerogative in a way which has promoted foreign policy goals and resulted in differential treatment in adjudications. Administrative jurisprudence in the United States has come recently to accept a distinction in terms of worthiness for refugee protection based on the form of government the claimant has fled from -- whether totalitarian, e.g., Afghanistan, or at least nominally democratic, e.g., El Salvador. Congress itself has succumbed to the temptation to respond in an ad hoc fashion when it recently enacted temporary legislation to presume the eligibility of certain refugee claimants from the Soviet Union and Indochina.

Immigration control priorities have also frustrated the humanitarian purpose of the Refugee Act. Refugee admissions and asylum adjudications are part of the immigration system in the United States: asylum is considered a defense to removal.[4] In one aspect of the procedure, asylum adjudicants are low-level functionaries who do not have the background or qualifications to second-guess the State Department's assessment of a case; in another aspect, asylum requests are decided by immigration hearing officers who also decide a full

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4. Other countries, such as Canada, France and Germany, have offices responsible for refugee status determinations that are separate from either the foreign or interior ministries.

array of alien status questions. Refugee interviews abroad are handled by essentially untrained immigration examiners. Consequently, adjudicators of asylum and refugee admissions applications generally take an improperly restrictive approach and fail to give claimants, most of whom are not assisted by legal counsel, the benefit of the doubt.

Remedial reforms are urgently needed. More qualified adjudicators are required, as well as better training and information on conditions in countries of origin. Rulemaking has been frustrated in recent years, and comprehensive guidance on criteria for refugee status determinations must be developed. More fundamentally, the humanitarian character of refugee determinations must be respected, and decision-making must be divorced from foreign policy and immigration enforcement priorities.

U.S. asylum policy has been compromised by emergency immigration measures which have become obsolete after the enactment in 1986 of legislation to control undocumented immigration by penalizing employers for hiring aliens not authorized to work. Despite the establishment of this new enforcement regime, which was intended to deter the illegal entry of aliens seeking employment, over 7,500 aliens remain detained in immigration jails under a deterrence policy established in 1981 to curtail irregular arrivals. Most of these detainees are applicants for political asylum from

countries such as Cuba, El Salvador, Afghanistan, Haiti, Sri Lanka and Ethiopia. This incarceration is a cruel penalty and occurs under onerous conditions, frequently in geographically remote locations with little or no access to the assistance of legal counsel. In another expression of this outdated deterrence policy, about 22,000 Haitians have been intercepted and summarily returned to Haiti in a program initiated in 1981 to curb arrivals. Only six Haitians intercepted under the Interdiction Program have been brought to the United States to file for asylum, and at least hundreds have been improperly returned to Haiti to face persecution.

The findings of this report are disturbingly clear. The Refugee Act of 1980 has not yet been implemented in a meaningful way. Justice Blackmun, in his 1987 concurrence in INS v. Cardoza-Fonseca,[5] found the responsibility of officialdom to be one of putting behind "the years of seemingly purposeful blindness by the INS [Immigration and Naturalization Service], which only now begins its task of developing the standard entrusted to its care." This responsibility has not been fulfilled, and the success of its achievement as well as the accomplishment of other necessary reforms will be the measure of compliance with the Refugee Act over the next several years. In that regard, the report recommends

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5. 480 U.S. 421, 452, 94 L.Ed.2d 434, 107 S.Ct. 1207 (1987).

legislative and executive measures to ensure that the promise of the Refugee Act of 1980 will finally be realized.

This report is based principally on the collective experience of the Lawyers Committee for Human Rights. Secondary sources are cited to confirm the findings of the Lawyers Committee. Also, an investigative mission was undertaken by Sheri A. Rickert, a staff attorney with the Lawyers Committee, from February 11 to 18, 1990. During the course of this mission, Ms. Rickert visited Houston, Texas and San Diego, California, and toured the Corrections Corporation of America detention facility in Houston and the Service Processing Center in El Centro, California.[6] She met with officials from the Immigration and Naturalization Service (INS) in Houston, including Leopoldo De La Torre, an Assistant District Director and in San Diego and El Centro, including Ed Kelliher, an Assistant District Director, and Hector Najera, Jr., a Supervisory Detention and Deportation Officer. She also met with representatives of nongovernmental organizations, including the Houston YMCA, the Texas Center for Immigrant Legal Assistance, Central American Refugee Centers (CARECEN),

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6. Lawyers Committee representatives had previously toured the Wackenhut detention facility in Queens, New York, in February of 1990.

Centro de Asuntos Migratorios (CAM), the El Centro Asylum Project, and several immigration lawyers.[7]

The Lawyers Committee wishes to express its appreciation to all those who assisted in or facilitated the preparation of this report. We also wish to note in that regard the cooperation provided by officials of the Immigration and Naturalization Service.[8]

The principal authors of this report are Jonathan R. Nelson, a lawyer with the law firm of Fried, Frank, Harris, Shriver & Jacobson in New York, New York, and Sheri A. Rickert, a staff attorney with the Lawyers Committee for Human Rights.

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7. In addition, Ms. Rickert interviewed several individuals from various countries who are currently applying for political asylum in the United States. Summaries of some of these cases, in addition to cases of those who are represented by Lawyers Committee volunteer attorneys, have been included in this report, using information from the interviews, the individuals' asylum applications, and interviews with the representing attorneys. Most of these individuals are in immigration court proceedings and risk being returned to their home countries in spite of their fear of persecution upon return. Therefore, the summaries do not include their full names and other details which would put them in danger of being identified and subjected to abuse by potential persecutors, unless the individuals gave express permission to do so.

8. In contrast, local immigration judges of the Executive Office for Immigration Review (EOIR) declined to discuss the subject matter of this report with representatives of the Lawyers Committee, apparently on the instructions of EOIR headquarters personnel.

The responsibility for the report's findings, conclusions and recommendations, of course, remains that of the Lawyers Committee.

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Director, Refugee Project
Lawyers Committee for Human Rights

March 1990

II. Introduction

The Refugee Act of 1980 (sometimes hereafter the "Refugee Act", the "1980 Act" or "Act") established important policies in the United States' conduct of asylum and refugee policy. In many respects, the policies of the Act represented significant departures from the refugee and asylum policy that had been in force before 1980. The interpretation and implementation of the Refugee Act of 1980 has been the subject of much scholarly attention. While many law review articles have been written on the subject, however, a relatively smaller number of court decisions have ruled upon aspects of the Act. This is largely because the Act, in the first instance, delegates the conduct and formulation of refugee and asylum procedures to the Immigration and Naturalization Service. The INS, in turn, has formulated its procedures in such a way as to leave most of the decision-making authority in asylum concerns within the discretionary powers of district directors and

immigration judges. The doctrinal limits on review as well as lack of structure imposed upon the exercise of discretion by INS officials, combined with the poverty and lack of language ability of most applicants for refugee protection, mean that only a relatively small proportion of cases decided adversely to applicants find their way to judicial review.

It is the aim of this report to assess the status of the Act's implementation a decade after enactment. This report is not intended to give a comprehensive description of developments during the 1980s; instead, it focuses on current implementation issues.

III. Principal Findings and Conclusions

The Refugee Act of 1980 was the product of a Congressional effort to develop in domestic law a new refugee standard and a new framework for the determination of refugee policy and claims. The three fundamental elements of the Refugee Act of 1980 were (1) the incorporation of international law standards into United States law through the adoption of an ideologically and geographically neutral standard for the determination of refugee status; (2) the creation of a standing program for the regular admission of overseas refugees to the United States on a continuing annual basis; and (3) the direction to the Attorney General of the United States to create uniform procedures to enable aliens to apply for asylum while in the United States or at its borders.

The Department of Justice has set up an interim administrative mechanism for asylum adjudications, and an ongoing overseas refugee admission program is operating. However, beneath the surface of the asylum and refugee admission processes there lie serious flaws which prevent aliens from taking full advantage of the opportunities offered in United States law.

One essential test of the procedures for granting asylum, for example, is whether they have results that appear to be ideologically and geographically neutral, as the Refugee Act directs. Statistics for grants of asylum show that the current Department of Justice procedures fail this test. Over the past decade, individuals who claim to be fleeing persecution by Communist-ruled states have been far more likely to be granted asylum than those people with claims of persecution that appear to be equally valid but who have come from countries that are politically allied with the United States.

The ideological and geographical bias in asylum adjudications derives from several major flaws in the Justice Department's implementation of the Refugee Act of 1980. Among these flaws is the failure of the Department of Justice to promulgate comprehensive administrative criteria to interpret the standards in the Refugee Act of 1980. In the absence of administrative guidance, immigration judges and other

adjudicators are left to exercise their own discretion in the conduct of hearings and in the formulation of substantive standards for judging the adequacy of persecution claims. Leaving such a wide field for the exercise of discretion creates an opening for decision-makers' biases and assumptions to operate in individual cases to produce ad hoc and inconsistent determinations.

Another flaw in the implementation of the Refugee Act is the influence of immigration control priorities. Immigration judges who are charged with evaluating persecution claims have often been recruited from the Immigration and Naturalization Service. Service with the INS, with its enforcement orientation, is widely perceived to socialize adjudicators with an anti-alien bias that predisposes them to disbelieve asylum claimants. These biases reveal themselves in the adjudicatory process through the application of overly restrictive criteria for asylum claims and procedural and evidentiary rulings that inhibit the full assertion of persecution claims. Comprehensive procedural rules and substantive guidelines would reduce the opportunity for asylum decision-makers to let their biases interfere with their evaluation of refugee and asylum claims. Training programs, at present inadequate, might also enhance the consistency and objectivity of asylum and refugee determinations.

One well-established practice compounds institutional biases already present. The regulations require INS examiners and immigration judges to request an opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs with respect to each asylum application. But instead of providing information on country conditions and human rights practices, a responsibility that frequently goes unfulfilled, the State Department sometimes offers views on whether the individual applicants concerned have been persecuted or have well-founded fears of persecution -- the ultimate legal issue in the adjudications. The State Department opinion letters sometimes have serious inaccuracies. They also generally reflect United States foreign policy interests -- that is, they have tended to lend more credence to claims of persecution from hostile or Communist-ruled states than from United States allies. They also have great influence with asylum decision-makers, thereby continuing the ideological and geographical biases which the Refugee Act of 1980 was designed to eliminate.

While asylum applicants may be represented by counsel at no expense to the government, no provisions are made for counsel for those who cannot afford to pay. Most asylum applicants go unrepresented by counsel. Those applicants who are represented by competent counsel have a substantially higher approval rate than those who have no lawyers. The lack

of counsel thus has the effect of sending many refugees back to face persecution in their homelands.

In addition, the general insufficiency of resources devoted to the adjudication of asylum and refugee admission claims has compromised the purpose of the Refugee Act. In the United States, only a few dozen immigration judges have been appointed to handle thousands of asylum claims. This results in a backlog of cases that can cause hearings on individual claims to continue over several years. A few score of INS examiners have been detailed to adjudicate asylum and refugee admission claims.

The problems of flawed implementation of the 1980 Act extend beyond the rules governing decision-making in individual applications for refugee status or asylum. Confronted with an immigration "crisis" early in the 1980s, interdiction and detention measures were instituted to deter certain arrivals. First, Haitians were interned and then intercepted in policies established in 1981. More recently, detention facilities have been established at the Texas border for Central Americans who are seeking asylum. Such interdiction and detention programs are inhumane deterrence measures which are incompatible with the purposes of the Refugee Act of 1980.

IV. Recommendations[9]

1. Since 1980, the United States has operated under interim regulations that provide insufficient safeguards against improper political influence and arbitrary decision-making in asylum and refugee admissions determinations. Criteria for refugee recognition should be set forth fully in permanent regulations in order to guide adjudicators and provide notice to asylum and refugee applicants and their counsel. Guidelines and instructions for adjudicators should be comprehensive, continuously updated, and readily available to the public. In addition, the BIA should publish its decisions on asylum in order to provide guidance to applicants and adjudicators.

2. Rules should also be issued to strengthen confidentiality for asylum claims (particularly in deportation proceedings); use international standards to determine refugee status (including authorization to work while a claim is pending, where the claim is not "clearly abusive" or "manifestly unfounded," throughout the duration of any administrative appeal or judicial review); use liberal protection criteria for those who have suffered persecution in the past and who have left countries in violation of an exit

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9. Elements of these recommendations appeared in Helton, Asylum and Refugee Protection in the Bush Years, in 1988 World Refugee Survey 25 (U.S. Comm. for Refugees 1989).

visa requirement; use a narrower definition of when a refugee should be denied protection because he or she has "resettled" elsewhere; and establish a procedure requiring that crewmen and stowaways be removed from their "conveyances" in order to have their claims determined. These are elements of rules proposed for public comment in April 1988 but not yet issued. Such rules should also make clear that a proper exercise of discretion requires a balancing of all relevant factors in each individual case, and that there are no mandatory grounds for denial of asylum.

3. The opportunity should be maintained for a full due process hearing for asylum applicants who are initially denied recognition as refugees. An administrative appeal and review in a federal court of adverse administrative decisions should also be preserved.

4. INS adjudicators should be centrally administered, high-level professionals capable of independent assessment and judgment on fact-sensitive cases which involve complex background conditions in the country of origin. Additional adjudicators should be hired and recruited generally from outside of INS. They also should be instructed in the law and history of human rights and refugees. Adjudicators should be given thorough professional training in their function, and training materials and curricula should be enhanced to emphasize further study of local cultural and political

conditions and the importance of due process, and to inculcate attitudes of open-mindedness and professionalism. In addition to initial instruction, asylum adjudicators should be exposed to a variety of perspectives through a creative continuing education program of guest lectures and in-service training seminars. The office of the United Nations High Commissioner for Refugees and nongovernmental expertise should be utilized as training resources.

5. Additional immigration judges should be hired and recruited generally from outside the INS. The members of immigration tribunals which hear asylum cases, whether at trial or on appeal, should be organized into separate sub-groups or tribunal "parts" devoted to hearing asylum cases. Recognizing that non-INS judges may have limited substantive knowledge of refugee law, a professional training program should be provided.

6. The State Department should discontinue its practice of providing opinions on the ultimate question to be decided in individual asylum cases -- whether the refugee has a well-founded fear of persecution. Should the Department wish to make information on general country conditions available to the adjudicator, then that information should be revealed as well to the refugee and his or her counsel.

7. Given the high stakes for the individual, indigent asylum applicants should be entitled to the assistance of free legal counsel, particularly in the immigration courts.

While the federal courts have declined to require the appointment of counsel generally in immigration cases, Congress could make provision for counsel in asylum cases by statute.

8. The quality of the processing of refugee claims from abroad must also be improved. Overseas INS posts should be staffed with sufficient personnel to permit refugee admissions adjudicators to spend a sufficient amount of time evaluating each application. Recruitment, training, and in-service instruction should be the same for refugee admissions adjudicators as for asylum adjudicators. Only permanent duty officers should conduct refugee status interviews. Also, the procedures by which such claims are examined must be improved in order to accord with basic notions of due process of law. Adverse decisions should be in writing and give reasons for the denial of refugee status so that an applicant can seek meaningful reconsideration or appeal. Oral interviews under oath should be recorded and a tape or transcript of the interview made available to each applicant. There should be a right to an administrative appeal from the adverse decision in every case, and a right to judicial review under appropriate circumstances. Cases decided previously under faulty criteria or procedures should be reviewed by the authorities as a matter of course.

9. Refugee status applicants abroad also should have meaningful access to counseling and advocacy with respect to

the U.S. admissions program. Protection for refugees should not depend on the wealth of the claimant or the happenstance of the availability of pro bono or public interest advocacy.

10. Alien interdiction and categorical detention programs, while generally intended to deter undocumented migration, specifically violate the rights of refugees. The focus of reform should not be on deterrence, which encourages refugees either to return to or stay in their home countries and run the risk of persecution, or to go elsewhere and shift the burden to other countries of asylum. Rather, the focus should be on establishing a fair asylum adjudication system. Resources should be committed to a sufficient level to ensure that adjudications are expeditious, without compromising basic fairness. The United States should end its use of deterrent measures like interdiction or abusive detention, and should condemn such practices when employed by other governments.

11. Specifically, detention of asylum seekers should not be automatic, and should be imposed only when necessary to protect the community at large or to avoid absconding. Detention facilities should not be located in areas where detainees will have difficulty finding or contacting counsel. Bond and release requirements should be standardized and fixed at the minimum levels necessary to prevent absconding. Generally, minors should not be detained.

12. The Haitian interdiction program should be immediately suspended. If it cannot be made fair through procedural reforms, then the program should be discontinued.

13. Congress should amend the withholding of deportation statute (section 243(h) of the Immigration and Nationality Act) to provide that the Attorney General shall not deport any alien to a country if the Attorney General determines that the alien has a well-founded fear of persecution in that country for the reasons stated in that section, thereby incorporating the international standard into domestic law.

14. A formal safe haven policy should be established for those individuals in the United States who would not be protected by even a generous interpretation of the refugee definition, but who nonetheless should not be forced to return immediately to their home countries (e.g., victims of natural disasters, innocent civilians caught in the cross-fire of a civil war, etc.). The first groups to be considered for temporary protection under the policy should be those who have fled disorder and civil strife in China, El Salvador and Guatemala.

15. Also, the establishment of a new immigration admissions program should be considered for groups not covered by the refugee definition but whom the United States might consider to be of special humanitarian concern and wish, therefore, to admit from abroad.

V. Legislative History of the Refugee Act of 1980

In recent decades, the United States has become a country of first refuge for large numbers of aliens fleeing persecution in other countries. It was not always so. During the first half of the twentieth century, mass dislocations of people occurred, for the most part, only in the eastern hemisphere. Thus, the United States did not become a party to the 1951 United Nations Treaty that governed refugee treatment and resettlement after the Second World War.[10] Instead, when the number of displaced persons in foreign countries grew burdensome, Congress, guided by humanitarian and United States foreign policy interests, enacted special laws authorizing the resettlement of a share of the overseas refugees in the United States.[11] These acts often included ideological or geographical requirements that restricted immigration status to specific groups of people whom the Congress wanted to admit.[12] These enactments also limited the number of individuals that could be admitted.

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10. United Nations Convention relating to the Status of Refugees, July 21, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (hereafter, "1951 Convention").

11. Anker & Posner, The Forty Year Crisis: A Legislative History of the Refugee Act of 1980, 19 San Diego L. Rev. 9, 12-17 (1981) (hereafter, "Forty Year Crisis").

12. Id.

Emergent circumstances occasionally confronted the executive branch with compelling reasons to aliens who were not otherwise eligible for admission to the United States. In these situations, the Attorney General relied upon his power to "parole" aliens into the United States.[13] Although the parole power was intended to be used for situations in which an individual's special circumstances required that he or she be admitted temporarily to the United States (as, for example, when a medical emergency occurred),[14] the Attorney General used the power to admit large groups of aliens in the 1950s and 1960s.[15] Because the exercise of the parole power by the Attorney General was discretionary, it was effectively beyond the scope of judicial review.

Congress also enacted an individualized remedy for the relatively few aliens located in the United States who claimed that they would be persecuted if they returned overseas. In 1952, Congress authorized the Attorney General to withhold deportation of any alien within the United States to any country in which, in the opinion of the Attorney General, the

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13. Id. at 15-17, 19-20, 26.

14. Id. at 15.

15. 2 C. Gordon & S. Mailman, Immigration Law and Procedure § 2.24Aa, at 2-184-85 (Matthew Bender 1989)(hereafter "Gordon & Mailman")

alien would be subject to "physical persecution."[16] The decision to withhold or not to withhold deportation was left by the statutory scheme entirely to the discretion of the Attorney General. As an administrative practice developed under the withholding of deportation statute, the authorities required applicants for withholding to demonstrate a clear probability that they would be persecuted abroad if they were deported to a particular country.[17] The creation of this standard was upheld by the courts as a matter within the discretion invested in the Attorney General by Congress.[18]

In 1968, the United States agreed to become bound by the provisions of the 1951 Convention when the Senate ratified the 1967 United Nations protocol which incorporated pertinent provisions of the 1951 Convention.[19] The 1951 Convention contained several important provisions which were at variance with United States refugee practices in 1967. For example, the 1951 Convention forbade countries to return refugees to

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16. Immigration and Nationality Act, Pub. L. No. 66-414, § 243(h), 66 Stat. 212 (1952) (codified as amended at 8 U.S.C. § 1253(h)).

17. Helton, Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise, 17 U. Mich. J.L. Ref. 243, 244 (1984) (hereafter, "Unfulfilled Promise").

18. See, e.g., Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967).

19. 1967 Refugee Protocol, supra note 2.

countries where they had a well-founded fear of persecution.[20] United States law permitted the Attorney General to return a refugee to such a country in the exercise of his discretion.[21] The 1951 Convention's definition of "refugee" required a person to establish only that he or she had a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," and was not disqualified by certain narrow exclusion clauses.[22] United States law required the alien to show a "clear probability" that he or she "would be subject to persecution on account of race, religion or political opinion."[23] In hearings before Congress, representatives of the Executive Branch assured Congress that ratification of the 1967 Refugee Protocol would not require amendment of United States law, because, inter alia, the Attorney General could exercise his discretion under the withholding of deportation statute in a manner that was

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20. 1951 Convention, supra note 10, art. 33)

21. Immigration and Nationality Act, § 243(h), 66 Stat. 212, as amended by Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (1966) (formerly codified at 8 U.S.C. § 1253(h)).

22. 1951 Convention, supra, note 10, art. 1(A).

23. Act of Oct. 3, 1965, § 11(f), 79 Stat. at 918 (amending withholding of deportation statute cited above at note 21) (emphasis added).

consistent with United States obligations under the treaty.[24]

In implementing United States obligations under the 1967 Refugee Protocol, however, the Executive Branch's deeds fell short of its promises. Although the INS set up a procedure for aliens to request asylum outside of deportation proceedings,[25] applicants for asylum and for withholding of deportation still were required to show "a clear probability" that they would be persecuted overseas. On appeal, courts generally upheld the INS's standard as being within the scope of the agency's administrative discretion.[26]

By the early 1970s, members of Congress began to realize that the INS was not going to modify its standards for withholding of deportation to conform to the standards of the 1951 Convention. It also became apparent, as the war in Indochina produced increasing displacement,[27] that some statutory framework for the regular admission of a normal, annual flow of refugees from abroad was desirable. Thus, during the decade of the 1970s, refugee legislation began to

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24. Unfulfilled Promise, supra note 17, at 243, 247 (1984).

25. Note, Political Bias in United States Refugee Policy Since the Refugee Act of 1980, 1 Geo. Immigr. L. J. 495, 508-09 (1986) (hereafter, "Political Bias").

26. See, e.g., Kashani v. INS, 547 F.2d 376 (7th Cir. 1977).

27. See Forty Year Crisis, supra note 11, at 30-31.

pages 28-29.

take shape. The culmination of this decade of legislative activity was the Refugee Act of 1980.[28]

In order to provide a permanent framework for assistance to overseas refugees and their overburdened host countries, Congress established the "normal flow" refugee admission program. In Section 201 of the Act,[29] Congress provided that refugees may be admitted during each fiscal year in a number to be set by the President, after consultation with Congress. During fiscal years 1980, 1981 and 1982, that number was set initially at 50,000 refugees per year.[30]

The Act provides that "normal flow" refugees "shall be allocated among refugees of special humanitarian concern to the United States . . . ." The addition of the word "humanitarian" to the phrase contained in the original Senate bill ("refugees of special concern to the United States") was a sign that Congress intended the "normal flow" refugee program to be used predominantly for the resettlement in the United States of persons whose individual humanitarian needs could be met by resettlement. However, the Act itself contains no guidelines

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28. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

29. Id., § 201(b), 94 Stat. at 103-05.

30. The actual number set by the President, after consultation with Congress, has been more than 50,000 in every year since the passage of the Act. See infra at pages 28-29.

as to what refugees are of "special humanitarian concern to the United States."

In the Act, Congress defined the term "refugee", and thereby identified the persons whom Congress intended to protect.[31] The new definition provided that a refugee is a person outside of his or her home country who has suffered "persecution" or who possesses a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[32] In essence, the definition provided in the Act incorporated the definition of "refugee" that was set forth in the 1967 Refugee Protocol. The new definition was enacted for the express purpose of bringing United States law into conformity with United States international treaty obligations.[33] The new definition also eliminated the geographical and ideological restrictions that had formerly applied to "conditional entry" aliens under the former provisions of the Immigration and Nationality Act.[34]

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31. Refugee Act of 1980, § 201(a), 94 Stat. at 102-03.

32. Id.

33. S. Rep. No. 256, 96th Cong., 1st Sess. 4, reprinted in 1980 U.S. Code Cong. & Admin. News 141, 144.

34. Id.

The Act established, for the first time, Congress's intention that applicants for asylum who were present in the United States, or who presented themselves at a land border or port of entry, be entitled to apply for asylum in the United States.[35] No numerical limitations were put on the number of persons who could apply for asylum within any period of time, although the Act permits only 5,000 asylees to adjust their status to permanent residents each year.[36] The Act required the Attorney General to establish a uniform procedure for passing upon an asylum application outside a deportation or exclusion proceeding.[37] The Act further provided that the grant of asylum was a matter within the discretion of the Attorney General, "if the Attorney General determines that such alien is a refugee within the meaning of" the Act's definition of "refugee."[38]

The Refugee Act of 1980 also prohibited the return of refugees to the countries from which they were fleeing. Section 203(e) amended Section 243 of the Immigration and Nationality Act (codified at 8 U.S.C. § 1253(h)) by removing

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35. Refugee Act of 1980, § 201(b), 94 Stat. at 105.

36. Id. § 209, 94 Stat. at 106.

37. See S. Rep. No. 256, 96th Cong., 1st Sess. 9, reprinted in 1980 U.S. Code Cong. & Admin. New 141, 149.

38. Refugee Act of 1980, § 201(b), 94 Stat. at 105.

the Attorney General's former discretion with respect to withholding of deportation of an alien to any country in which the alien "would be subject to persecution on account of race, religion or political opinion" and by broadening the grounds for withholding of deportation to include threat to life or freedom on account of nationality or membership in a particular social group.[39] The legislative history of the Act makes it clear that the amendments to the withholding of deportation statute were intended to bring that statute into compliance with the prohibition in Article 33 of the 1967 Refugee Protocol against the refoulement of refugees.[40]

VI. Overseas Admission Program

Although the Refugee Act provided that "normal flow" overseas refugee admissions would be limited initially to 50,000 refugees per year,[41] President Carter, after consultation with Congress, set the 1980 cap for overseas

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39. Id. § 203(e), 94 Stat. at 107.

40. "The Conference substitute adopts the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S. Code Cong. & Admin. News 160, 161. See Refugee Protocol, supra note 19, art. 33.

41. Refugee Act of 1980, § 201(b), 94 Stat. at 103-05.

refugee admissions at 234,200.[42] The Reagan administration reduced the cap to 70,000 refugees per year in 1985 and 1986.[43] Each year's ceiling for overseas refugees is divided among the various regions of the world. The allocation, which is made by the President, reflects the same ideological and geographic preferences that refugee admissions prior to the Refugee Act of 1980 reflected. Thus, for example, of the 95,505 refugees approved abroad for admission into the United States in fiscal year 1989, over 94% (89,971) were from Laos, Cuba, Czechoslovakia, Romania, Bulgaria, Afghanistan, Hungary, Cambodia, the Soviet Union, Poland, Ethiopia, and Nicaragua.[44]

Refugees are processed according to a system of priorities developed by the State Department and the INS. Those of higher priorities are admitted first, until the ceilings have been reached. The six priorities, in descending order, are: (1) "exceptional cases" either of refugees in immediate danger of death or of compelling concern to the U.S., (2) former U.S. government employees, (3) family reunification,

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42. Presidential determination No. 80-17 of May 1, 1980, 45 Fed. Reg. 29,785, reprinted in 2 Gordon & Mailman, supra note 15, § 2.24Ab, at 2-188.10.

43. 2 Gordon & Mailman, supra note ___, at 2-188.10.

44. Helton, A Comparative Perspective: Refugee Protection in the United States (paper presented at the Canadian Bar Association Continuing Legal Education Committee's seminar on Canadian immigration law and policy) (Feb. 1990) (hereafter, "Comparative Perspective").

(4) other ties to the U.S., (5) more distant family relations, and (6) those with no ties with the U.S. but who are otherwise of national interest.[45]

The INS has offices overseas which rule on applications for refugee admissions. The Department of State and voluntary agencies under contract to the Department accept and preliminarily screen applications. Each applicant 14 years or older appears before an INS officer for an inquiry under oath into the basis for his or her application.[46] Applicants whose applications are denied are typically not informed of the basis of the decision denying them refugee status.[47] They have only limited rights of administrative reconsideration, based on the introduction of new evidence, and no settled right of judicial review. No transcript is made of INS processing interviews, and INS files are not made available to aliens for examination.[48]

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45. Lawyers Comm. for Human Rights, Refuge Denied: Problems in the Protection of Vietnamese and Cambodians in Thailand and Admission of Indochinese into the United States 86 (1989) (hereafter, "Refuge Denied").

46. 2 Gordon & Mailman, supra note 15, at 2-188.18-19.

47. Refuge Denied, supra note 45, at 100. This practice appears to conflict with the INS's own regulations. 8 C.F.R. § 103.3(a)(1) (1989) provides that "Whenever a formal application or petition filed under § 103.2 is denied, the applicant will be given written notice setting forth the specific reasons for the denial."

48. Refuge Denied, supra note 45, at 100, 101.

A useful illustration of the overseas process is found in the admissions program in South East Asia. More than half of the overseas refugee admissions allocated each year since 1980 have been set aside for Southeast Asians. Although most Southeast Asian refugee applications are submitted by Indochinese staying in Thailand, as of October 1988 the INS had stationed only eight INS officers there.[49] The small number of INS officers deployed to process applications from such a large number of overseas refugees results in very little time being available for the consideration of each application.[50]

The INS system of reviewing refugee applications in Thailand lacks many procedural safeguards that could ensure that refugee determinations were made on the basis of accurate information and a clear understanding of the information presented. INS officers assigned to Thailand often have little or no training in Indochinese languages, cultures and history. Frequently, the INS assigns temporary duty officers to Thailand to serve for 60-90 day periods. Such temporary duty officers do not have prior experience in dealing with Indochinese refugees, and do not stay in Thailand long enough to become proficient in processing Indochinese refugee applications. A review of 200 applications denied by temporary duty officers

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49. Id. at 102.

50. Id. at 100.

was conducted in January 1988. This review overturned approximately 50 percent of the temporary duty officers' previous rejections.[51]

VII. Asylum and Non-Refoulement Provisions

Pursuant to its mandate, on June 2, 1980, the Justice Department adopted interim regulations effective then. The regulations establish procedures to enable aliens to apply for asylum in the United States, or at a border, outside of an exclusion or deportation proceeding.[52]

A. Interim Procedures and Criteria.

Under the procedures, an alien applies for asylum by filing Form I-589 with the local INS District Director who has jurisdiction over the alien. If exclusion or deportation proceedings have already been instituted with respect to the alien, a request for asylum on Form I-589 may be filed with the docket clerk of the local office of the immigration judge. Requests for asylum filed after the institution of proceedings are also considered, by regulation, to request withholding of exclusion or deportation.[53]

Under INS procedures, an asylum applicant who is not in deportation or exclusion proceedings is to be examined in

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51. Id. at 102-03.

52. See 8 C.F.R. Part 208 (1989).

53. 8 C.F.R. § 208.3 (1989).

person by an immigration officer with respect to his or her application.[54] The interview is to be conducted in a non-adversarial manner. Thus, while the immigration officer may permit counsel to accompany the asylum applicant, the officer is not required to permit counsel to examine the applicant to bring out elements of the applicant's experiences which have not been elicited by the immigration officer's questions.

INS regulations require District Directors and immigration judges to request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs ("BHRHA") of the Department of State in all asylum cases.[55] BHRHA opinions may be prepared after consultation with the State Department desk officer for the country involved.[56] Because the country desk officer is closely involved in the conduct of diplomacy with the country concerned, his or her recommendations to the BHRHA may be influenced by foreign

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54. 8 C.F.R § 208.6.

55. 8 C.F.R. § 208.7.

56. See Hanley, Meili & Parker, An Analysis of the Formulation of the State Department Advisory Opinion, Immigr. J. 19, 20 (July-Dec. 1984) (hereafter "Advisory Opinion Analysis").

policy concerns of a non-humanitarian nature.[57] The advisory opinions are usually short and often deliver conclusory opinions as to whether or not the State Department believes that the asylum applicant has a well-founded fear of persecution.[58] Opinions are not currently issued in every case, but if one is issued, the State Department recommendation is sent to the pertinent District Director or immigration judge. If a decision is based in whole or in part upon a State Department opinion, regulations require that the opinion be made a part of the record of proceeding unless it is classified. However, an asylum applicant has an opportunity to inspect, explain and rebut the Department of State opinion only if it is included in the record.[59] Thus, if the opinion is classified, or if the decision-maker believes he or she did not

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57. Indeed, the State Department has expressed the view that BHRHA should continue to be asked to deliver an advisory opinion in every asylum case, to ensure its awareness of applications with foreign policy ramifications. It has also criticized a proposal that the Asylum Policy and Review Unit of the Justice Department disseminate country specific information on human rights conditions, on the ground that evaluations inconsistent with State Department views might compromise U.S. foreign policy interests. See discussion at pages 40-41, infra. See also Political Bias, supra note 25, at 541-43; Preston, "Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Law Obligations?", 45 Md. L. Rev. 91, 116-128 (1986).

58. See Advisory Opinion Analysis, supra note 56, at 20.

59. 8 C.F.R. § 208.8.

base the decision upon the opinion, the asylum applicant may be unable to review the State Department opinion in his or her case.

If an alien's application for asylum is denied by a District Director, the alien has no right of appeal at that stage. However, if the alien is unlawfully within the United States, an order to show cause is issued simultaneously with the notice of denial,[60] instituting exclusion or deportation proceedings against the individual. In that case, the application for asylum will be considered by the immigration judge and deemed also to be a request for withholding of deportation or exclusion.[61]

Exclusion and deportation hearings are held on the record under oath.[62] Applicants may be represented by counsel, although no lawyer is appointed for an applicant who cannot retain counsel.[63] The Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply to

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60. This procedure was instituted by the INS Central Office to all Service field offices in a cable dated February 23, 1989. The text of the cable is reproduced in Interpreter Releases, Vol. 66, No. 17, May 1, 1989, p. 480.

61. 8 C.F.R. § 208.3(b).

62. 8 C.F.R. §§ 3.32, 3.34.

63. 8 C.F.R. § 3.15.

hearings before Immigration Judges.[64] As the Department of Justice has adopted very few regulations to govern the conduct of exclusion and deportation hearings, an immigration judge has great discretion to determine such matters as what discovery, if any, will be allowed, what evidence shall be allowed in the record, and what role counsel may take in the proceedings.[65]

Upon the conclusion of a hearing on an asylum application, the immigration judge is required to deliver an oral or written decision. In most cases, the immigration judge is required to include a discussion of the evidence and a finding as to deportability, as well as reasons for granting or denying the application for asylum and withholding determinations.[66] Either side may appeal a decision of an immigration judge to the Board of Immigration Appeals.[67] If the Board upholds a finding ordering an alien to be deported or

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64. See A. Helton, Manual on Representing Asylum Applicants 141 (Dec. 1984).

65. See, e.g., 8 C.F.R. § 3.33 (making depositions subject to an immigration judge's discretion). See also Anker, Determining Asylum Claims in the United States 3 (exec. summ. ed. Jan. 1990) (unpub. paper in authors' files).

66. 8 C.F.R. § 242.18(a). While regulations governing decisions in exclusion hearings appear to require less discussion by the immigration judge as to the basis for his or her decision, in practice reasons are generally given for asylum and withholding determinations. See 8 C.F.R. § 236.5(a).

67. 8 C.F.R. §§ 3.36, 236.7, 242.21(a).

excluded, or denying a claim to asylum or withholding of deportation or exclusion, the individual affected may appeal that determination to the appropriate United States Court.[68]

Different standards of proof apply to applications for withholding of deportation or exclusion, on one hand, and applications for asylum, on the other hand. Under the withholding of deportation statute,[69] the Attorney General is statutorily required to withhold deportation or return of an alien to a country "if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion."[70] Following a pattern set before passage of the Act, the Board of Immigration Appeals determined that this phrase should be interpreted to require the alien to demonstrate "a clear probability" that he or she would be persecuted in another country in order to prevail in a claim for withholding of deportation.[71] This interpretation was upheld by the United

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68. 8 U.S.C. §§ 1105(a) and (b).

69. 8 U.S.C. § 1253(h).

70. Refugee Act of 1980, § 203(e), 94 Stat. at 107 (emphasis added).

71. In re Acosta, Interim Dec. No. 2986 (BIA 1985). Compare Kashani v. INS, 547 F.2d 376 (7th Cir. 1977) and Lena v. INS., 379 F.2d 536 (7th Cir. 1967).

States Supreme Court in Stevic v. Sava.[72]

In contrast to the withholding of deportation standard, the Refugee Act of 1980 requires the Attorney General to base asylum determinations on whether an applicant had shown that he or she had suffered persecution or has "a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion . . . ."[73] Although the INS originally applied the "clear probability" standard to applications for asylum under the Act,[74] the United States Supreme Court held in INS v. Cardoza-Fonseca[75] that the "well-founded fear of persecution" standard for asylum claims is a more generous standard that requires but demonstration of a "reasonable possibility" of persecution, and that might, for example, be met if an applicant should demonstrate a ten percent probability that he or she would be subject to persecution abroad.[76]

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72. 468 U.S. 407 (1984).

73. Refugee Act of 1980 § 201(a), 94 Stat. at 102-03 (codified at 8 U.S.C. § 1101(a) (42)) (emphasis added).

74. In re Acosta, Interim Dec. No. 2986 (BIA 1985).

75. 480 U.S. 421, 440 (1987).

76. Id. at 431 (quoting 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966)).

B. The Difficulties of Issuing a Final Rule.

The interim regulations adopted by the Department of Justice to govern asylum adjudications vested the responsibility of examining requests in INS examiners and immigration judges. In the effort to move to a final rule, drafts of final regulations were circulated in the 1980's between the INS and Department of State for comments and proposed revisions. Two versions of proposed rules were published, on August 28, 1987, and April 6, 1988. The Attorney General has yet to promulgate a final rule.

A recurring issue in negotiations over final rules has been the State Department's role in the assessment of asylum applications. In an unpublished 1982 study of asylum adjudications, INS cited several problems created by the initial interim regulations. The report claimed dissatisfaction with the procedure for soliciting advisory opinions from BHRHA, as INS officers reported that BHRHA consistently failed to issue opinions within the 45 day period allowed. More significantly, the backlog created by understaffing at BHRHA led to the issuance of form letter opinions, and even later to the issuance of an affixed sticker that indicated no opinion but referred the adjudicants to the Department's Country Reports. The issuance of form letters, combined with misconceptions among INS officers as to the authority of the advisory opinion, created a situation contrary

to the goals of the 1980 Act. According to the INS study, this situation effectively granted presumptive asylum status to members of certain nationalities, and presumptive denials to others. As a solution, INS recommended that the regulations be changed so that BHRHA only review politically sensitive and/or complex cases, as a means of alleviating BHRHA's case load and improving attention given individual cases.

The Department of State opposed the INS recommendation. Rather than create a narrow category of applications which BHRHA would assess, the State Department proposed to eliminate the asylum officers' discretion to make a decision without the advisory opinion. The Department felt it was important that it have the opportunity to comment in every case in order that it be able to provide current information and so that it would immediately be apprised of any case having foreign policy ramifications.

As the inter-agency discussions progressed, INS acquiesced in a proposal that the Asylum Policy and Review Unit (APRU), established in 1987 in the Department of Justice,[77] assume the task of providing information to asylum adjudicators on pertinent country conditions. These reports would use information provided by the State Department, as well as by other sources.

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77. 52 Fed. Reg. 11043 (Apr. 7, 1987)

The State Department strenuously objected to APRU's dissemination of country condition information, and it questioned the Department of Justice's competence in the area. The State Department also raised the possibility that APRU's assessment would not follow that of the State Department, thereby creating a danger of embarrassment to the Department and a possible compromise of US foreign policy interests.

In its 1982 study of asylum procedures, the INS also found other problems. There were no comprehensive guidelines, which resulted in inconsistencies in adjudication standards. INS adjudicators lacked proper training. The INS also was faced with a huge backlog of asylum claims, created in part by the lack of uniform standards.

In order to alleviate these problems, the INS study proposed the establishment of a refugee/asylum officer corps for the adjudication of both asylum and withholding of deportation applications, which would follow uniform standards. Officers within the corps would be specially trained.

The proposal to establish an asylum officer corps was favored by some within the Department of Justice, but has continued to be a source of contention in the rule-making process. The proposal which was ultimately agreed upon was one which would alter the structure and lines of authority in the INS by placing asylum officers under a central authority,

instead of under local district directors. This was accepted by the INS in 1987, when a proposal was published which took the jurisdiction of asylum claims away from immigration judges and placed it solely in the hands of such asylum officers. However, after it was decided that the jurisdiction of immigration judges should not be curtailed, INS district directors objected to the centralization of the officer corps. An impasse resulted.

The failure of the agencies involved to agree to final regulations, despite years of efforts, was brought home in October of 1988. Former INS Commissioner Alan Nelson sent a memorandum to the then Acting Attorney General requesting a set of 35 changes, many of significance. This occurred after Attorney General Meese had issued instructions to APRU to have final asylum regulations promulgated, and after discussions of an implementation date had already commenced. While these new INS objections were discounted by the State Department, which requested that the Attorney General not reopen discussions, INS continued to request additional review. This latest INS proposal sought to reopen a number of issues which had already been extensively reviewed, including changes in the proposed organizational structure which would place INS Asylum Officers

under a centralized authority, and the appropriate role of APRU in reviewing INS decisions.[78]

VIII. Practice Under the Refugee Act

The INS's implementation of the Refugee Act of 1980 has been characterized by bureaucratic inertia and institutional antipathy to some of the Act's basic precepts. The Executive Office for Immigration Review does not provide immigration judges with sufficient training, resources and independence to properly adjudicate asylum claims.[79] Together, these factors have denied thousands of refugees the benefits they were promised.

A. Issues Concerning Implementation.

1. State Department Opinion Letters.[80]

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78. On July 10, 1989, the Administrative Conference of the United States (ACUS) recommended that a new Asylum Board be established within EOIR exclusively to adjudicate all asylum claims. Under the ACUS proposal, the Asylum Board would consist of an adjudication division, an appellate division, and a documentation center. The documentation center would provide country condition information from governmental and non-governmental sources to asylum adjudicators, and the State Department's role would be modified to participating in the training of asylum adjudicators and delivering opinions on "sensitive" cases.

79. Congress has also failed to provide the resources necessary to implement the Act in conformance with its legislative intent.

80. For discussion regarding the BHRHA procedure in asylum cases in general, see discussion in Section VII - Asylum and Non-Refoulement Provisions.

INS regulations require District Directors and immigration judges to obtain an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State in all asylum application cases. In some cases, the State Department only provides a short, conclusory statement in a form letter when it does not find that the asylum applicant has a well-founded fear of persecution.[81] No detailed explanation is provided in the form letter for this conclusion. Only on rare occasions does an advisory letter refer to facts relevant in an individual case. Generally, the form letters do not provide specific background information on the particular case addressed and frequently give legal conclusions - not advisory opinions on country conditions or other factual matters as apparently contemplated by the regulations.[82]

The State Department is more likely to issue a negative form letter when the asylum applicant is from a country whose government is favored under current U.S. foreign policy, regardless of that country's human rights record. Because of this tendency, such conclusory pronouncements by the

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81. The State Department may also simply place a sticker on the inquiry letter, indicating that the BHRHA has no information on that case and referring the adjudicator to the State Department's Country Reports.

82. See Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976).

State Department have served to promote an ideological bias which the Refugee Act of 1980 was designed to eliminate.

Immigration adjudicators generally follow BHRHA pronouncements.[83] In In re Salim,[84] the BIA suggested that immigration judges give "significant weight" to a State Department conclusion that an asylum applicant would be persecuted. The Board noted that the BHRHA had recommended that the application in question be denied for policy reasons, which the BIA ultimately did.[85] This precedent decision illustrates the importance placed on the opinion letter, and the impact a positive letter can have on the issuance of an asylum grant.[86] Negative opinions have no less consequence.

One somewhat celebrated case involves Tamas Koppany, a lawyer from Hungary who defended individuals accused of political and economic crimes under the Communist regime. In

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83. According to a 1987 report of the General Accounting Office of Congress, the Department of Justice (INS and EOIR) concurred in the State Department advisory opinion in the issuance of decisions in 96 percent of cases. U.S. Gen. Accounting Office, Pub. No. GGD-87-33BR, Asylum: Uniform Application of Standards Uncertain -- Few Denied Applicants Deported (Jan. 9, 1987).

84. Interim Dec. No. 2922 (BIA 1982).

85. The policy ground was that the applicant had used fraudulent documents to come to the United States. This holding was later overruled in In re of Pula, Interim Dec. No. 3033 (BIA Sept. 22, 1987).

86. More recent opinions show that the BIA still takes into account State Department opinion letters in individual cases. See, e.g., In re Izatula, Interim Dec. No. 3127 (BIA Feb. 6, 1990).

October of 1986, he fled Hungary with his wife and daughter, after learning that government officials were preparing to file false charges against him and have him arrested. Mr. Koppany and his family came to the United States and applied for political asylum while the Communist regime was still in power.

The State Department issued a negative advisory opinion, on the bases that 1) the applicant did not belong to an organization hostile to the Hungarian government, 2) he had not suffered prior persecution before he left, 3) there was an inconsistency concerning when he obtained a visa, and 4) the fact that his wife returned to Hungary one month after they arrived in the United States. His wife had submitted an affidavit explaining that she had returned only because her mother was gravely ill, and that she had managed to enter with no documents and without revealing her husband's identity. The district director issued a letter stating that he intended to deny the application based solely on the State Department letter. The applicant submitted additional information and requested a second opinion, which the BHRHA issued, again stating that the applicant had failed to establish a well-founded fear of persecution upon return to Hungary. The letter continued:

> This opinion is based on our analysis of country conditions and other relevant factors, plus an evaluation of the specific information provided in the applicant. We do not have independent information about this applicant.

On November 13, 1987, the district director denied Mr. Koppany's request for asylum, stating in his letter only that the additional evidence submitted was considered, and that the BHRHA's second advisory opinion was attached for Mr. Koppany's information. The letter concluded that Mr. Koppany had until December 30, 1987, to leave the U.S. voluntarily, or deportation proceedings ould be instituted. However, the Justice Department reviewed the case, and in an unusual ruling, granted Mr. Koppany's application on January 20, 1988, stating that the family's fear of going back to Hungary was "well founded."

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An even more recent case involves an Iranian student leader who learned that the Islamic Revolutionary Guard was looking for him as a result of his activities on behalf of students' rights. Several friends and members of his family had been arrested and killed by the Guard. He escaped from Iran and came to the United States, where he applied for asylum.

The State Department's advisory opinion asserted that the applicant did not have a well-founded fear of persecution upon return to Iran, "specifically" because he was not persecuted in Iran because of his political views, and it did not believe that he would be persecuted if he returned. The State Department also questioned his "credibility," alleging that he had entered the United States with an inappropriate immigrant intent. The letter concluded:

> "This opinion is based on our analysis of country conditions and other relevant factors, plus an evaluation of the specific information provided in the applicant. We do not have independent information about this applicant."

The letter does not refer to any specific country condition in order to counter the applicant's testimony, and does not evaluate the application using information on which the State Department could arguably have an expertise. The credibility determination was not a proper function of the State Department. The INS district director has issued the applicant a letter stating that he intends to deny his application, solely on the basis of the State Department's letter. Reconsideration has been sought and has been pending for nine months.

BHRHA opinion letters can also contain seriously erroneous information. In addressing the case of an Afghan applicant, the State Department informed the immigration judge that "all Afghans fleeing Afghanistan and entering Pakistan are given refugee status by the Pakistan authorities." However, a letter from the Office of the United Nations High Commissioner for Refugees (UNHCR) concerning the same case quotes a cable from the UNHCR branch office in Pakistan and states that "Afghans without travel/identity documents may be charged with illegal departure and detained for one year." Fortunately, in this case, the applicant had an attorney who requested information from the UNHCR. Most pro se applicants would be unaware of this possible source of information.

2. Recruitment and Training of Asylum Adjudicators.

Asylum adjudicators in the INS are under the direction of local District Directors. They also are known by their more general title of "examiner," and they are responsible for other functions within the INS, such as adjustment of status and citizenship determinations.

Most of the current examiners have had experience enforcing immigration laws and removing those who do not have valid documentation from the United States. One examiner who had recently returned from an INS training program said that the training faculty had sought to emphasize the differences in the functions of inspections and asylum adjudications. INS itself seems to have concerns whether this enforcement mentality is carried forward, at least to some extent, to the responsibility of refugee status determinations.

Asylum adjudicators are provided with training by the INS, and the Lawyers Committee notes that such training has recently included lectures by representatives of the UNHCR and the Human Rights Watch Committees (a nonprofit international human rights organization). One examiner who was interviewed by the Lawyers Committee commented that he had signed up for and was receiving publications from the Watch Committees concerning country conditions. No arrangements have been made by INS, however, to systematically disseminate to asylum

adjudicators information on conditions in countries of origin from nongovernmental sources.

One INS official also told the Lawyers Committee that the most serious problem with the asylum adjudication process is the lack of resources. He stated that his office receives too many asylum applications for the available number of asylum adjudicators to determine. He added that there is not enough money, detention space or judges to handle the process.

3. Recruitment, Training and Tenure of Immigration Judges.

Recently, some immigration judges have been hired from outside the INS. This may reduce the likelihood of immigration enforcement bias within the system. However, it has the concomitant effect of recruiting judges who have no prior experience in immigration law. Beginning judges attend a week-long conference which includes lectures on general immigration law and procedure and participation in mock hearings. The law and procedure of asylum adjudication are apparently but a small part of this course. There is no formal training module provided on asylum adjudication. The judges also attend an annual conference, which in the past has included occasional speakers on asylum adjudication from various organizations as well as private practitioners.

Immigration judges are provided with less than adequate resources. The Lawyers Committee was able to review a

list of the resources which are provided, and this list fell far short of that which any conscientious asylum adjudicator would need. The materials relevant to asylum adjudication included copies of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, the Immigration and Naturalization Act, the portion of the Code of Federal Regulations which deals with Aliens and Nationality, BIA decisions, and the State Department Country Reports. The EOIR headquarters office indicated that judges have access to law libraries, usually within the same building, and computerized legal research. The EOIR also noted that judges receive into evidence other relevant sources of information, such as Amnesty International Country Reports, when such material is introduced in a specific case.[87]

The materials provided to immigration judges provide only limited, and in some cases biased, guidance on

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87. The fact that judges receive in evidence country conditions information from sources other than the State Department Country Reports is little consolation for the majority of cases in which asylum seekers are not represented. An asylum applicant appearing before the court pro se is not likely to know about, much less have access to, basic country condition documents that will support his or her case. Therefore, immigration judges should be provided with general reference resources in addition to the State Department Country Reports. Concerns about relying upon non-record evidence in the adjudication of cases could be addressed through the device as offical notice which is a well-established tenet of administrative law. K. Davis, Admin. L. Treatise § 15:1 ff. (2d ed. 1980).

adjudicating asylum claims. Nongovernmental materials were also noticeably absent. Given the immigration judges' function of providing an objective decision concerning asylum applications, and the limited training provided concerning this function, more reference resources are necessary.

Immigration judges also lack independence. The Attorney General, who is the chief enforcement officer under the Immigration and Nationality Act, has authority over the BIA and immigration judges. Immigration judges are granted no certain tenure -- they serve at will. This uncertainty of tenure was a reason why immigration judges who were contacted by the Lawyers Committee were extremely hesitant - and actually refused - to speak with representatives of the Committee in connection with this report. The EOIR headquarters states that it is the Attorney General's overall rule not to allow interviews of government personnel by the public. The reason given for this policy is to prevent confusion and the dissemination of misinformation.

Under the current adjudication system the Lawyers Committee believes that immigration judges should be allowed to freely discuss policy and procedures, including problems that they perceive. Immigration judges may understandably be hesitant to raise concerns with those who have control over their jobs, since they have no job security. They should be allowed to speak publicly about their jobs, and provided with

sufficient job security to enable them to suggest improvements in the system without fear of jeopardizing their employment.[88]

4. Access to Legal Counsel.

Under the present system, the assistance of counsel is a virtual necessity for an asylum applicant to have his or her claim fairly considered.[89] Counsel assists claimants in articulating the claim in English, in maneuvering through the complexities of the U.S. immigration bureaucracy, and by acting as a general interlocutor between the applicant

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88. In addition, there is no effective means for the public, including practicing attorneys, to complain about the conduct of a particular judge. Complaints addressed to the Chief Immigration Judge (CIJ) are not effective. In one instance, an immigration judge in New York flagrantly abused his discretion and refused to give an asylum seeker a hearing adjournment in order to obtain legal counsel. The BIA reversed the judge's decision on October 12, 1988, and specifically noted in its opinion that "the record suggests that the determinative factor for the immigration judge's decision was his impending vacation . . . ." When the Lawyers Committee on April 18, 1989, asked the CIJ to take appropriate disciplinary action against the judge, not only did the CIJ decline, suggesting that the BIA decision reflected a sufficient remedy, but he also sent copies of the refusal to all the other immigration judges. Such treatment can only discourage counsel in the bringing of similar complaints in the future.

89. The United States General Accounting Office issued a fact sheet entitled Asylum: Approval Rates for Selected Applicants, Pub. No. GGD-87-82FS, (June 1987), which suggests, using 1984 data, that an asylum applicant is more than twice as likely to obtain asylum from the INS district directors if represented, and three times as likely to obtain asylum from immigration judges if represented.

and the system. The general immigration statute provides that any person in exclusion or deportation proceedings has the privilege of being represented by counsel, at no expense to the Government.[90] Representation is often provided by public interest legal or volunteer lawyer groups.

A survey by the Lawyers Committee of the ten largest volunteer lawyers groups in the U.S. shows that in 1989, these groups combined handled approximately 850 cases, some of which were affirmative applications before the district directors.[91] In fiscal year 1989, the INS reported the filing of 101,679 asylum cases and the EOIR reported the filing of 18,950 asylum cases. While some of the applicants involved in these cases were represented by private counsel, most individuals seeking asylum cannot afford to hire a private attorney. Clearly, only a small percentage of all asylum applicants are represented by legal counsel.

Moreover, not all of the asylum seekers who had lawyers had adequate representation. At the El Centro facility in California, aliens generally are deported in groups of 20 - 25 at a single consolidated hearing. Attorneys are allowed to

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90. 8 U.S.C. § 125(b)(2).

91. The largest number of cases (204) were undertaken by the Lawyers Committee. Some of the programs surveyed, not including the Lawyers Committee, are limited in terms of the nationalities served.

meet with these individuals during the proceeding, but in the few hours allotted, such legal counseling can provide but a limited safeguard.[92]

5. General Due Process Considerations.

The absence of adequate notice and a meaningful access to the adjudicatory process renders proceedings unfair for many asylum seekers. An illustration is provided in current practice at the border in southern Texas. Legal representatives in the region report that asylum seekers generally do not understand that they have been placed in deportation proceedings. The Orders to Show Cause (OSC) which commence the proceedings are printed only in English, and most asylum seekers in the area do not understand or read English. Many have had no formal education. Once they are released from detention, they ordinarily must move to another area to find a place to live and work. Most do not realize that they need formally to change venue if they move. Thus, released detainees may inadvertently fail to appear at hearings in Harlingen, Texas.

These procedural defaults are illustrated in the case of Ms. Campos who was a member of the Nationalist Party in Honduras. Her son Jose was arrested at their home in April 1978 for a robbery which he did not commit. Soon after he was arrested and while he was still under police custody, a

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92. Preparation of properly-completed individual asylum claim generally requires a minimum of 25 to 40 hours, or longer, depending on the complexity of the case.

neighbor came to Ms. Campos' home and informed her that Jose was being severely beaten.

Ms. Campos went to the police station and spoke to the chief of the Direccion National de Investigaciones (DNI), who was also a prominent Liberal party member. Ms. Campos further described the events as follows:

> "The DNI Chief said that if I would do as he said and become a Liberal Party member, my son would be released and no further harm would come to my family. He told me that if I refused to do as he said, I would die. When I refused to say anything against the Nationalist Party, the Chief became angry and beat and raped me in the interrogation room. My daughter was with me and witnessed the attack. The door to the room was bolted so she could not leave and no one could come in to help me."

The Chief finally told Ms. Campos that if she paid a fine, she could have her son back, and he let her go. When she returned to the police station with the money, she announced that she was going to the offices of the newspaper, La Prensa, to report the Chief's abuse of her and her son. A judge who was also a Liberal Party member called Ms. Campos into a room with the DNI Chief, and threatened her by saying that if she did not join the Liberals and forget about going to the newspaper, she would be in trouble. When Ms. Campos persisted in her determination to give information to the paper, the Chief put a gun to her throat and said he would kill her if she did not promise not to go. She gave them her promise.

The next day, Ms. Campos did go to the newspaper, which printed an article about the incident specifically referring to the Chief and the Judge. Two days later, both of them were fired from their positions. Starting the same night, and continuing over the next seven days, the police and DNI officers who were connected to the Chief and the Liberal Party began harassing Ms. Campos and her family by throwing stones and firing gunshots at her house. She recognized most of the officers from the Chief's office. The family finally left town after midnight one night and moved to another town.

Liberal Party forces continued to look for them. After the family had lived in Santa Rosa de Copan for three months, an individual who they believe was a Liberal Party member attempted to run down Ms. Campos' daughter with his car. Ms. Campos moved again three days later. In 1979, Ms.

Campos learned that a neighbor had paid a man to kill her and her family. The man told her that the neighbor was connected to the Liberals within the local police force, and that the DNI Chief who had attacked Ms. Campos had put out the word that he wanted the family dead. The man warned them to move away and they did so on the same night.

In 1983, the wife of a friend again told Ms. Campos that the DNI Chief knew where they were and that their lives were in danger. They started moving from neighborhood to neighborhood within the same city. They also started receiving anonymous threatening letters. Her son, Jose, was beaten by masked men on three different occasions, and each time he was left for dead. He finally left Honduras on January 12, 1989. The following day, a man and a woman came to Ms. Campos' house and demanded that she tell them where her son had gone. They beat her when she refused to answer their questions and they threatened to burn her home and kill her family. Ms. Campos' house was burned that night, while she and her children were staying in a friend's home. She left for the United States on January 14, 1989.

Ms. Campos entered the United States near Brownsville, Texas. She traveled to Houston and presented herself to the INS, and received a notice to appear before them. At her second appearance, she was given an application for political asylum. She took the application to a notary public in Houston, who filled it out for them for a fee. She was afraid to tell the notary what had happened to her and her family because she was afraid the Liberal Party members would come to the United States and kill them. According to Ms. Campos, the judge before whom she appeared informed her that there were no grounds stated in the application which would provide a basis for political asylum. The judge provided her with a list of available legal service organizations, one of which is currently assisting Ms. Campos in her case.

The Lawyers Committee found that Ms. Campos did not have any knowledge of the asylum process or even of the nature of the documents which she had been carrying. In response to our inquiry, an INS official stated that Ms. Campos had been placed in deportation proceedings when she had entered without valid documents. Ms. Campos was probably given an Order to Show Cause as to why she should not be deported, including an order to appear at a deportation hearing. These Orders to Show Cause are printed only in English, and Ms. Campos, like many Central Americans, does not know English. She also has received no formal education, and does not know how to read or write in Spanish. No attempt was made by the INS to explain to her what was happening or the nature of the proceedings being instituted against her.

If Ms. Campos had not filed an asylum application, she probably would have had a deportation order issued against her in absentia. If she had later been caught, she would have been immediately deported unless an attorney had intervened and filed a motion to reopen her case. Ms. Campos states that if she and her family are forced to return to Honduras, they will be killed.

Another prevalent problem with fairness in asylum adjudication involves the adequacy of interpretation. In El Rescate Legal Services, Inc. v. EOIR,[93] the plaintiffs alleged that the EOIR's failure to require full interpretation of immigration court proceedings deprives asylum applicants of due process under law. The plaintiffs in this case who spoke little or no English were subject to deportation proceedings.

In November of 1989, a federal judge ruled that the entire proceedings in the immigration court are to be interpreted. The court went on the explain in a memorandum opinion issued on December 14, 1989, that the failure to interpret the entire immigration court proceedings for the benefit of the alien undermines their right to be present during their hearing. Aliens are often unable to interact meaningfully with counsel and assist in their own defense. The court found that an interpreter is essential to the fundamental fairness of immigration proceedings, and particularly where aliens seek political asylum.[94]

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93. 272 F. Supp. 557 (C.D. Cal. 1989).

94. 727 F. Supp. at 561, 562.

B. The Restrictive Application of Criteria.

The Board of Immigration Appeals' initial attempt to apply the Stevic "clear probability" standard in asylum adjudications provides a well-documented example of the Justice Department's overly restrictive application of refugee criteria.[95] Yet the decision in Cardoza-Fonseca distinguishing the "well-founded fear" asylum standard from the Stevic standard did not end the BIA's efforts at restrictive interpretation. After Cardoza-Fonseca, the BIA eased its standard of proof in asylum cases slightly.[96] However, the Board simultaneously shifted the focus of its analysis to the requirement that asylum applicants demonstrate that the risk of harm to them derives from one of the grounds for persecution specified in the "refugee" definition.[97] In particular, the BIA has, in several cases, improperly narrowed the category of persecution on the basis of political opinion or social group membership. The Ninth Circuit Court of Appeals has repeatedly overturned restrictive BIA opinions on the basis that they

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95. See discussion at pages 37-38, supra.

96. In re Mogharrabi, Interim Dec. No. 3028, at 11 (BIA June 12, 1987) (deleting one word from the standard announced in Acosta).

97. See Note, A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases, 75 Va. L. Rev. 681, 699-705 (1989) (hereafter, "BIA Analysis").

applied an inappropriately narrow view of persecution on the basis of political opinion.[98] Outside the Ninth Circuit, however, the Board of Immigration Appeals continues to apply its unduly restrictive definition of "refugee."[99]

The BIA has particularly narrowed the definition of "refugee" in several precedent decisions relating to Salvadorans who have unwillingly become involved in the civil war in El Savador.[100] In these decisions, the BIA has held, inter alia, that when an alien claims that his general moral convictions justified his refusal to serve in a military that engages in actions that violate international human rights standards, the alien must show not only that such violations have occurred, but that they represent the policy of the

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98. See Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989); Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988); Sanchez-Trujillo, 801 F.2d 1571 (9th Cir. 1986); Zayas-Marini v. INS, 785 F.2d 801 (9th Cir. 1986); Del Valle v. INS, 776 F.2d 1407 (9th Cir. 1985); and Argueta v. INS, 759 F.2d 1395 (9th Cir. 1985). See also M.A. A26851062 v. USINS, 858 F.2d 210 (4th Cir. 1988), reh. en banc granted, 866 F.2d 660 (1989).

99. The INS sometimes succeeds in creating a split in appellate decisions in this way. Compare Perlera-Escobar v. EOIR, 894 F.2d 1292, No. 89-5064 (11th Cir. Feb. 20, 1990) (slip op.) and Novoa-Umania v. INS, ____ F.2d ___, No. 89-1623 (1st Cir. Feb. 15, 1990) (slip op.) with Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989).

100. See Helton, Recent BIA Jurisprudence in Salvadoran Asylum Cases, Immigr. L. & Proc. Rep. at A3-163 (1988).

foreign government;[101] that in such situations, the applicant must present "at a minimum" evidence of condemnation of military action by international governmental bodies, not merely by nongovernmental organizations;[102] that an alien who had escaped from guerrillas after being forcibly recruited by them and participating in a raid, could not claim that the guerrillas were persecuting him on the basis of political opinion, because the guerrillas had a right to discipline him as a deserter;[103] that the same alien's fear of retribution by the government for involuntarily taking part in a guerrilla raid could not constitute fear of persecution, since the government had the right to punish rebels;[104] that an alien who claims a fear of persecution based on a position of neutrality in a civil war must show that he has articulated and affirmatively made a decision to remain neutral prior to the deportation hearing and that he has received some threat or could be singled out for persecution because of his neutrality

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101. In re A-G, Interim Dec. No. 3040 (BIA Dec. 28, 1987), reversed & remanded sub nom. M.A. A26851062 v. U.S. INS, 858 F.2d 210 (4th Cir. 1988), reh. en banc granted, 866 F.2d 660 (1989).

102. Id.

103. In re Maldonado-Cruz, Interim Dec. No. 3041 (BIA Jan. 21, 1988), rev'd sub nom. Maldonado-Cruz v. U.S., 883 F.2d 788 (9th Cir. 1989).

104. Id.

opinion;[105] and that an alien who had fought against guerrillas, both as a member of the national police and as a guard at the United States Embassy, could not claim that his fear of retribution by the guerrillas was a fear of persecution, because the dangers faced by police officers are not related to their political beliefs.[106] In each of these cases, the BIA has narrowed the definition of political opinion from the conventional boundaries given to that concept by the United Nations High Commissioner for Refugees.[107] A very recent decision of the BIA involved a successful Afghan asylum applicant whose case seemed to parallel many Salvadoran cases denied by the BIA. The decision distinguishes between refugees who flee from totalitarian governments (Afghanistan) and other equally persecuted individuals who flee countries in which citizens allegedly have an opportunity to seek change in the political structure of the government by peaceful means (El

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105. In re Vigil, Interim Dec. No. 3050 (BIA Mar. 17, 1988).

106. In re Fuentes, Interim Dec. No. 3065 (BIA Apr. 18, 1988).

107. Office of the United Nations High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, paras. 80-86, at 19-21 (1979). Although not legally binding, the Handbook is used as a guide for construing not only the 1951 Convention and the 1967 Refugee Protocol, but also the Refugee Act of 1980. See INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).

Salvador) -- a doctrinal distinction not recognized under international humanitarian standards.[108]

The restrictive application of criteria is illustrated in the case of R. Cruz, a single mother with two children, from Canton San Julian, El Salvador. Ms. Cruz states that this town is occupied by the military, and that in the town you have to be very careful of what you say and do because the soldiers watch you constantly. They kill people for no apparent reason. In the same town, both the guerrillas and the soldiers go to the houses asking for food or water, and the people have no choice but to give it to them. Both groups are merciless if they think that you are against them.

Ms. Cruz had a cousin named Mario who lived near her, and who was more like a brother since they spent a lot of time together. Beginning in early 1987, the soldiers would go to Ms. Cruz's home and ask if she or her family had seen any guerrillas and whether they helped them or gave them any information. The guard made the accusations that Mario was against the government, and that he and his family were assisting the guerrillas by feeding them. Ms. Cruz told the Lawyers Committee that her cousin was not involved in anti-government activity, although both she and Mario did feed the guerrillas when they demanded food.

In June of 1987, the military guard returned. This time they found Mario, and ordered the rest of the family to go into their homes and not to come outside. Mario's mother found him after the guard left. The soldiers had broken Mario's arm, and killed him by shooting him in the face.

Because of what had happened to her cousin, Ms. Cruz believed that she too could be in danger, and she decided to leave Canton San Julian. She went to work near San Salvador at a children's orphanage, which is part of a refugee camp run by the Lutheran Church. On several occasions, in April and July, 1988, and from November 1988 until January 1989, soldiers from the local battalion went to the camp and said that they thought the children were the children of members of the guerrillas, rather than of the people in the camp. They questioned Ms. Cruz very closely as to where she lived and what she did. They asked her why they never saw her going home at night - which indicated to her that she and the other workers in the camp

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108. In re Izatula, Interim Dec. 3127 (BIA 1990).

were being watched. They also asked her other questions about the operations in the camp.

According to Ms. Cruz, people who work for the churches or refugee organizations in El Salvador are considered subversives. Therefore, she believes she is considered a member of a subversive organization. Ms. Cruz also worked with the church's youth group, which cooked for the displaced, gave bible classes, and visited bereaved families whose members had been imprisoned or murdered. This group, she says, is also considered subversive.

On the night of December of 1988, a bomb leveled the church and the office supply store which was located next to the building where Ms. Cruz slept. Ms. Cruz had been assigned to stay in a dormitory located in the office supply store, but fortunately, she decided not to sleep there since it was located too far from where she worked.

In January of 1989, the soldiers appeared in the camp for a third time and again harassed Ms. Cruz and her co-workers. They stated that if Ms. Cruz continued to work for the church, she would be "disappeared" or killed. Due to this harassment and the bombing, Ms. Cruz decided to leave, and went to her mother's home in San Jorge. In March of 1989, Ms. Cruz decided to leave El Salvador, because she had no choice but to work for the church in order to support her children and mother, and she was afraid that if she continued this work she would be arrested and killed. She left her two children in El Salvador.

Ms. Cruz is still afraid that if she returns, she will be questioned by the military, arrested and possibly killed because of her work with the Lutheran Church. If it were not for the soldiers and the government threat that they pose to those who work for the church, Ms. Cruz would return to El Salvador.

Ms. Cruz came to the United States, was picked up by the Immigration and Naturalization Service, and detained for one month. She was subsequently released from detention and has filed an asylum application.

According to her attorney,[109] Ms. Cruz's application

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109. Because the decision was given orally, and the transcribed opinion is not yet available, the Lawyers Committee was unable to review a written transcript of the proceedings.

was denied by the immigration judge because he did not believe she has a well-founded fear of persecution. He stated that there was no evidence that the Salvadoran government persecutes returnees. He acknowledged that top religious officials are persecuted, but he found that church members are not singled out. A church witness at the hearing testified that in a civil war situation, anyone can be subjected to danger. However, the judge relied on the State Department report to counter this testimony, and referred to its statement that in El Salvador there is a guaranteed right to religious freedom. He concluded that in this case, the individual was not singled out for her religious beliefs, as she was only a babysitter for an orphanage. The judge also found that her reason for leaving El Salvador was economic, not political. Ms. Cruz's case is currently on appeal before the Board of Immigration Appeals.

C. The Danger of Discretion.

The Refugee Act clearly puts the decision on a refugee's claim for asylum within the discretion of the Attorney General.[110] However, that section also requires the Attorney General to establish a uniform procedure for asylum applications. The regulations which establish procedures for asylum requests do not, for the most part, define or limit the discretion to be exercised by the Attorney General or delegatees of his discretionary power in any way.[111] The regulations otherwise leave the District Directors and immigration judges who must decide difficult questions relating

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110. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 96th Cong., 1st Sess., 94 Stat. 102, 105 (1980).

111. One exception is a rule that provides that a District Director may, in his discretion, deny a request for asylum if a third country has offered asylum to an applicant. 8 C.F.R. § 208.8(f)(2)(1989).

to refugee protection without guidance as to how they should exercise their discretion in such cases.[112]

The Board of Immigration Appeals, likewise, has provided relatively little guidance to asylum adjudicators as to how they ought to exercise their discretion. Indeed, almost all of the Board's published decisions dealing with asylum applications uphold denials of asylum.[113] BIA members defend the practice of publishing more decisions denying asylum than granting asylum on the basis that they do not want to create a "blueprint" for asylum claims.[114] However, this practice has the end result of providing adjudicators with numerous instances of when asylum should not be granted, and only scarce instances of when a grant of asylum is warranted. Therefore, an adjudicator who does not want a decision reversed by the BIA will follow the more certain route of denying an application than of granting a case where there may be no authority. The practical result of the record left by published BIA decisions

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112. See Comment, The US Political Asylum Program: An Administrative Analysis, 9 Chicano L. Rev., 16, 35-36, 45-46 (1988).

113. BIA Analysis, supra n. 97, at 706.

114. Id.

is a near-void of useful guidance to applicants and asylum adjudicators in the asylum process.[115]

One of the particular problems that has resulted, in part, from the INS's failure to structure discretion is the extent to which asylum adjudicators have allowed political bias to influence their decision-making. This problem permeates the adjudicatory system. One of the express purposes of the Act was to "eliminate[] the geographical and ideological restrictions" that had limited eligibility in prior United States refugee programs to anti-communists and persons fleeing chaos in the Middle East.[116] Asylum approvals, however, are skewed in favor of persons who are fleeing from Communist-ruled countries.[117] INS statistics for 1989 asylum application approvals demonstrate the same bias. While 91% of the Soviet (109 of 120), 57% of the Czechoslovakian (47 of 83), 81% of the Chinese (98 of 121), 30% of the Polish (285 of 946), 66% of the

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115. Unreported Board decisions contain somewhat greater guidance with respect to the manner in which discretion ought to be exercised by asylum decision-makers. See Helton, The Proper Role of Discretion in Political Asylum Determinations, 22 San Diego L. Rev. 999, 1006-09 (1985). However, unreported BIA decisions have no precedential weight. 8 C.F.R. § 3.1(g)).

116. S. Rep. No. 96-256, 96th Cong., 1st Sess. 4 (1979).

117. See, e.g., Political Bias, supra note 25, at 495; Comment, Discrimination in Asylum Law: The Implications of Jean v. Nelson, 62 Ind. L. J. 127, 142-43 (1986) (hereafter, "Asylum Discrimination").

Ethiopian (456 of 692), and 26% of the Nicaraguan (3,617 of 14,103) cases received asylum, the INS granted only 2% of the Salvadoran (337 of 14,198), 4% of the Haitian (3 of 85), and 2% of the Guatemalan (67 of 3,392) cases.[118]

D. Inconsistency and Bias.

The Refugee Act does not countenance differential treatment regarding individuals on the basis of their nationality.[119] However, as discussed above, inconsistency and bias permeate adjudications.

During the late 1970s and early 1980s, Haitians were subjected to a program of mass deportation by INS authorities, and were thus deprived of constitutional, statutory, treaty and administrative law rights.[120] Beginning in 1981, INS began to incarcerate Haitians who came to the United States by boat and failed to go through normal immigration channels. In June of 1981, a week of mass "exclusion" hearings were held to determine whether Haitian boat people were admissible to the U.S., or whether they should be removed. Many of these hearings were held behind locked doors in courtrooms from which

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118. Comparative Perspective, supra note 44, at 4.

119. Jean v. Nelson, 472 U.S. 846, 86 L. Ed. 2d 664, 105 S. Ct. 2992 (1985).

120. Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), modified sub nom. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). See Asylum Discrimination, supra note 117, at 147.

counsel were barred. The Creole translators who were present at these hearings were so inadequate that the Haitians could not understand the proceedings nor be informed of their rights. Pursuant to these hearings, many Haitians were judged to be excludable from the U.S., and became subject to immediate deportation.[121] During the time of the Haitian detentions, aliens of no other nationality were detained in this manner. The Supreme Court ultimately held that INS regulations required the INS to act in a way that was neutral with respect to an individual's nationality, and remanded the case for consideration of whether the INS's conduct had been neutral.[122] At this juncture, however, the Haitians in question had been released from detention.

Salvadoran asylum seekers have also faced harsh treatment by U.S. immigration authorities. In Orantes-Hernandez v. INS,[123] a class of Salvadorans residing within the United States who had been taken into custody by INS brought an action challenging well established policies and practices of psychological and physical coercion by U.S. Border

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121. Jean v. Nelson, 711 F.2d 1455, 1462-63 (11th Cir. 1983) (panel), rev. in part, dism'd in part and remanded, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd in part, 472 U.S. 846, 86 L. Ed. 2d 664, 105 S.Ct. 2992 (1985).

122. Jean v. Nelson, 472 U.S. 846, 86 L. Ed. 2d 664, 105 S. Ct. 2992 (1985).

123. 685 F. Supp. 1488 (C.D. Cal. 1988).

Patrol agents. In April of 1988, a federal judge permanently enjoined the INS from coercing Salvadoran detainees into signing voluntary departure agreements and required the INS to notify Salvadoran detainees of their right to political asylum and facilitate their right to appear by counsel in deportation proceedings.

However, following entry of the injunction, border patrol agents did not always provide the required notice of rights and information about the free legal services mandated by the injunction. Detainees were denied access to telephone facilities, preventing most detainees from communicating with attorneys. The INS also refused to permit local non-profit agencies to provide detainees with self-help materials in Spanish, as contemplated by the injunction. The INS falled to provide the detainees with writing materials and, even confiscated pens and pencils from the detainees. The district court issued an order of contempt, finding that the INS has clearly violated the provisions of the injunction, and this order is now on appeal.

Congress itself may have at least temporarily injected a nationality bias into refugee recognition procedure. In 1989, a provision, termed the "Lautenberg Amendment," was enacted as Section 559D of the Foreign Assistance

Appropriations Act for FY 1990.[124] Under the Amendment, the Attorney General must allow certain Soviet and Indochinese nationals to qualify for refugee status if they assert a fear of persecution, and if they show a "credible basis for concern about the possibility of such persecution." Certain categories of people are eligible for the provision's special consideration, including Soviet Jews and evangelical Christians, and residents of Vietnam, Laos or Cambodia.[125]

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124. Pub. L. No. 101-167.

125. The administrative guidance issued pursuant to the Amendment may serve as a model for the promulgation of comprehensive criteria for refugee status determinations.

IX. Issues of Access to Protection

A. The Haitian Interdiction Program.

In 1980, the Mariel boat lift brought more than 125,000 Cubans to the United States seeking asylum. When several thousand Haitians came to the United States in a similar manner the following year, the Reagan administration initiated measures to stop their arrival. Accordingly, in an exchange of diplomatic notes with the government of Haiti, the United States obtained permission for United States Coast Guard vessels patrolling the Caribbean to intercept vessels that appeared to be carrying illegal immigrants to the United States.[126] Under this program, U.S. Coast Guard personnel are allowed to stop and board Haitian and unflagged vessels on the high seas, determine if their passengers are undocumented aliens bound for the United States, and if so return them to their country of origin, i.e., Haiti. Since the inception of the interdiction program, 364 boats have been intercepted and returned to Haiti.

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126. See generally Mariam, International Law and the Preemptive Use of State Interdiction Authority on the High Seas: The Case of Suspected Illegal Haitian Immigrants Seeking Entry into the U.S., 12 Md. J. Int'l L. & Trade 211 (1988).

According to the bilateral agreement, an INS examiner and interpreter are stationed on board a designated Coast Guard cutter to interview the intercepted Haitians. If a person is found to have a reasonable fear of returning to Haiti, that person is to be taken to the United States to seek asylum in accordance with refugee law. As the agreement states: "It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."

Yet, of the 21,461 Haitians who have been intercepted since the beginning of the program, only 6 have been taken to the United States to apply for asylum. As detailed in a recent Lawyers Committee report, including the cases of individual Haitians who were interviewed by the Lawyers Committee, the INS inquiry does not work in practice to determine whether there is a claim to refugee status.[127] Systematic and thorough procedures have not been used.

Some of the deficiencies of this program can be seen in the case of one Haitian boat, the "St. Isidore." The St. Isidore left Cherisab, a village on the island of La Gonave, located in the bay of Port-au-Prince, on March 17, 1989, with 182 people on board, according to INS records. It

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127. These cases are discussed in a briefing paper published in February, 1990. See Lawyers Comm. for Human Rights, Refugee Refoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement (Feb. 1990).

reached Cuba on March 20, where it was reprovisioned and repaired. Nine days later, it set sail. It was intercepted on March 31, 1989, at 6 p.m. by the Coast Guard cutter Decisive. The Lawyers Committee was able to review on a confidential basis the INS questionnaires used to record interviews with the interdicted Haitians. The questionnaires reflect that of the 17 questions contained on the form, only the following six were consistently asked and answers noted:

- What is your name?
- Where were you born?
- What is your date of birth?
- What is your current address?
- Why did you leave Haiti?
- What kind of work do you do?

Some of the answers given by the Haitians clearly warranted further questioning by the INS officer interviewing the Haitians. For example, to the question "Why did you leave Haiti?," the following are reflected in the forms:

- "No work; people are dying."
- "No money; no husband; fires in area of residence."
- "To save my life; parents deceased; no money."
- "No food; no money; people are being burned; cannot live."
- "Cannot work; people are dying and being burned; people are being robbed."
- "Cannot live; was sick; mother's house burned; got beat up for no reason."
- "Cannot live; children cannot go to school; cannot return to Port-au-Prince."
- "Cannot live; no parents; cannot help five children; lost two kids by gunfire; brother-in-law killed."

Although the guidelines provide for a private interview if there is any indication of a refugee claim, unequivocal statements by the Haitians of fear of return to Haiti were apparently disregarded. To the question "Have you or your family been mistreated by authorities in Haiti," one person answered that her "cousin and uncle had spent five years in jail." When asked if there were any reasons why she could not return to Haiti, she answered, "I have problems there."

The forms show that several Haitians stated in no uncertain terms that they could not go back to Haiti or Port-au-Prince. To the question "Why did you leave Haiti?," they answered:

- "Country is difficult; cannot live; no money; people are dying and being burned; cannot go back to Port-au-Prince."

- "Cannot work after finishing school, people being set on fire; cannot return to Port-au-Prince; lost three brothers; spent three years in prison for nothing; cannot go back to Port-au-Prince."

- "Misery; cannot live in Haiti; parents killed; cannot work; country in bad shape; cannot go back."

Despite these alarming answers, no further amplification or clarification was noted, and all were summarily returned to Haiti on April 2, 1989.

The continued operation of the Haitian interdiction program will inevitably result in the return of refugees who have a well-founded fear of persecution in Haiti. Haitian refugees are simply not likely to reveal their claims in the brief encounters with officials provided under the interdiction program. Given a proper forum, however, it is quite likely that many of the Haitians who are returned to Haiti, characterized by U.S. authorities as "economic migrants," would state a compelling claim for political asylum. As the individual cases detailed in the Lawyers

Committee report suggest, at least hundreds of refugees have been wrongfully returned to Haiti over the course of the program and denied protection in violation of refugee law.[128]

The Lawyers Committee in its February 1990 report, Refugee Refoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement,[129] made the following recommendations:

> 1. The Haitian interdiction program should be suspended immediately while the procedures recommended below are implemented. If the program cannot be made fair in terms of access to refugee protection, then it should be discontinued.
>
> 2. Sufficient personnel and resources should be devoted to the interviewing process on board the Coast Guard vessels to ensure that each Haitian has the opportunity for a careful and comprehensive interview. Adequate training and information on conditions in Haiti should be available to the interviewers.
>
> 3. The interviews conducted on the Coast Guard cutters should be held in private and recorded to ensure a full record for subsequent oversight. The Haitians should be advised on an individual basis of the confidential nature of the interviews.

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128. The U.S. Government's practice of returning fleeing Haitians to Haiti without a hearing and without an adequate opportunity to state a claim for political asylum was challenged inconclusively in a suit brought before the United States District Court for the District of Columbia. Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985), aff'd, 809 F.2d 794 (D.C. Cir. 1987).

129. Copies of this paper are available from the Lawyers Committee.

4. A comprehensive questionnaire should be developed and administered in its entirety. Answers given should be followed by questions designed to elicit clarifications. The benefit of the doubt should be given to asylum seekers in the interviews.

5. Questions and ambiguities should be resolved in favor of the Haitians. One method which could be used to provide the requisite benefit of the doubt is to employ two interviewers, one from the INS and another from outside the agency.* In the Haitian interdiction program are preliminary assessments aimed at determining access to the asylum procedures, not refugee status adjudications. If there is a fear of return manifested in these preliminary proceedings, the Haitians in question should be taken to the United States and permitted to apply for asylum before an immigration judge in exclusion proceedings. Guidance should be sought by interviewers from officials in Washington only if a preliminary determination has been made to return to Haiti those persons with colorable claims for refugee protection.

6. An independent observer should be on-hand to monitor interdiction procedures, even

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* Under Canadian procedures, for example, two-person panels are used to determine access to the asylum process. One of the panel members is an immigration inspector and the other is a member of the Convention or Refugee Determination Division who has received special training. The concurrence of only one panel member is needed to accord access to the asylum process. Precedents for such an approach in the Haitian interdiction program can also be found in the establishment of the Asylum Policy and Review Unit in the Department of Justice in 1987, see 52 Fed. Reg. 11043 (Apr. 7, 1987), and the Department's release and repatriation review procedure that has been used since 1987 for Cuban detainees in the United States. In both instances, these refugee-related activities were located outside of the Immigration and Naturalization Service.

if only on a periodic basis. This could be an official of the office of the United Nations High Commissioner for Refugees whose presence could help ensure that the principle of non-refoulement is respected.[130] The assignment of government-funded independent counsel on board the Coast Guard vessels to advise and assist intercepted Haitians should be considered.

7. The vessels of the intercepted Haitians should be towed back to Haiti as provided in the interdiction agreement. If this is not feasible and the vessels are destroyed, assistance should be provided to returnees and boat owners through non-governmental channels to help them integrate back into their communities and continue their livelihoods.

8. When the vessels are intercepted within 12 miles of the United States shore, that is, within U.S. territorial waters, the Haitians should be taken to the U.S. and permitted to apply for asylum.

9. An in-country refugee rescue mechanism could be established in Haiti to provide immigration status for Haitian refugees. In order to ensure access to this safeguard, non-governmental organizations could be incorporated into this process to identify potential applicants. Such an in-country procedure, however, is not a substitute for a fair opportunity to seek asylum in the United States or elsewhere.

B. Stowaways.

The INS has taken the position that aliens who stow away on U.S. vessels and who claim asylum when they are

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130. A similar arrangement has been made under the Comprehensive Plan of Action relating to Indochinese refugees whereby UNHCR officials monitor screening determinations by local authorities in the countries of temporary refuge.

discovered by the crew may apply for asylum at the vessel's first United States port of call. However, the INS and BIA have relied upon the language of 8 U.S.C. § 1323(d) to deny stowaways a hearing before an immigration judge.

The Court of Appeals for the Second Circuit has disagreed with this position of the INS and the BIA. In a 1983 opinion,[131] the court found that the provision of the Refugee Act of 1980 requiring the INS to establish a uniform procedure for political asylum applications was not inconsistent with the statute denying an exclusion hearing to alien stowaways, because, inter alia, an asylum hearing is limited as to scope and specific as to purpose. The Second Circuit noted the INS's policy argument that affording stowaways the procedural right to a hearing on their applications for political asylum might encourage other overseas aliens to evade INS procedures requiring them to apply for refugee status at a United States Embassy. While the Second Circuit did "not lightly cast aside" the INS's argument, the Court pointed out, inter alia, that the Attorney General is prohibited from deporting or returning alien refugees as a matter of statutory law as well as of treaty law.[132] The Court went on to explain that:

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131. Yiu Sing Chun v. Sava, 550 F. Supp. 90 (E.D.N.Y. 1982), rev'd, 708 F.2d 869 (2d Cir. 1983).

132. Id., 708 F.2d at 875-76. 1983).

> Finally, our construction of the statute and the regulations is aided to some extent, if not guided, by what we perceive to be the dictates of procedural due process. We say this full well knowing that the alien seeking initial admission is requesting a privilege and has very limited rights regarding his application. . . . But a refugee who has a "well-founded fear of persecution" in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned may well enjoy some due process protection not available to an alien claiming only admission. Because the severity of harm to the erroneously excluded asylee outweighs the administrative burden of providing an asylum hearing, if the regulations did not do so already the INS arguably would be required to provide a hearing before an immigration judge to determine whether applicants for asylum are, in fact, refugees within the meaning of the act.[133]

The District Court for the Central District of California later agreed with the Second Circuit,[134] stating that "both treaty and statutory rights grant to an asylee-refugee a protectible interest which is sufficient to trigger procedural due process requirements."[135]

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133. Id. at 876-77 (citation and footnotes omitted).

134. Fang Sui Yau v. Gustafson, 623 F. Supp. 1515, 1517 (C.D. Cal. 1985).

135. The courts appear to be taking an inconsistent position with respect to refugees whom the Attorney General deems to pose a national security threat, holding that such individuals are not entitled to a

Footnote Continued

In 1989, the INS implemented a new policy of classifying as a stowaway any alien who lacks proof that he or she was admitted on an airplane and paid for the flight. Many refugees who escape to the United States to seek protection from persecution fall into this category. They frequently do not have the opportunity to obtain legal travel documentation in their home countries since they are fleeing life-threatening situations. If they first travel to a third country, they often stay in the third country just long enough to obtain facilities to travel onward since they have no long-term financial resources. Many refugees therefore obtain irregular documentation, and then use it to secure airplane tickets. Frequently, they destroy all such documentation on the plane while it is en route to the United States believing this necessary to avoid being returned to their home country.

Aliens who are classified as stowaways are detained by the airline carrier on which they arrive, apparently under the

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135. Footnote Continued From Previous Page

hearing on claims for political asylum. See Azzouka v. Sava, 777 F.2d 68 (2d Cir. 1985), cert. denied, 479 U.S. 830 (1986). Given the non-refoulement provisions of the 1967 Refugee Protocol and fundamental notions of due process, such an alien should be granted a hearing to determine whether there are "reasonable grounds" for regarding the refugee as a security risk and therefore excluded from protection on that basis. Cf. Yiu Sing Chung v. Sava, 708 F.2d 869 (2d Cir. 1983); Fang-Sui Yau v. Gustafson, 623 F. Supp. 1515 (C.D. Cal. 1985).

statutory authority of 8 U.S.C. § 1323(d). The practice in the New York District, for example, is to hold the aliens at hotels near JFK Airport, under the supervision of a private security service. Some carriers hold the detainees at the transit lounge in the airport during the day, and take them to hotels at night.

This policy and procedure raises several concerns. One is the issue of access. In New York, for example, INS has agreed to distribute notices to so-called stowaways of the availability of legal services,[136] but has refused to disclose the identity of individuals held under carrier custody. The lack of direct contact obviously makes other potential problems difficult to verify.

Other concerns, which are aggravated by the lack of access, include questions regarding the treatment of stowaways while they are under airline custody and whether they are being accorded the settled right to a hearing before an immigration judge.[137] While it is still early in its implementation, available information indicates that this procedure may risk the denial of fundamental rights to asylum seekers.

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136. This procedure is currently in the process of being implemented, so factual data concerning its effectiveness is not yet available.

137. See Yiu Sing Chun v. Sava, 708 F.2d at 869, discussed supra at pages 76-78.

X. Deterrent Measures

A. The Detention Policy.[138]

Under the 1951 Convention, the United States is obligated not to penalize refugees who are unlawfully in U.S. territory, and not to restrict their movements unnecessarily. However, in 1982, the INS instituted a policy under which undocumented aliens seeking political asylum are categorically detained upon arrival, pending the evaluation of their refugee claims. Under the applicable regulations, those who are detained can be considered for parole only for "emergent reasons," which is narrowly defined as involving a serious medical condition,[139] or if release in an individual alien's case would be "in the public interest."[140] In order for release to be in the public interest, the alien must not pose a security risk or a risk of absconding, and must: 1) be a pregnant woman, 2) be 18 years of age or younger, 3) have close family relatives who have filed a visa petition on behalf of the detainee, 4) be a witness in a U.S. judicial,

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138. A detailed discussion of the INS detention policy is provided in The Detention of Asylum Seekers in the United States: A Cruel and Questionable Policy, a briefing paper issued by the Lawyers Committee for Human Rights in December 1989 (hereafter, "Detention of Asylum Seekers"). Copies of the paper are available from the Lawyers Committee.

139. 8 C.F.R. § 212.5(a)(1).

140. 8 C.F.R. § 212.5(a)(2).

administrative or legislative proceeding, or 5) one whose "continued detention is not in the public interest as determined by the district director." District Directors have narrowly construed the last category, and have rarely granted parole under this provision.

This policy has been especially burdensome for those individuals seeking political asylum, since in fleeing persecution they generally are unable to obtain valid travel documents. They are detained upon arrival when they present themselves as asylum seekers to immigration officials at the border or a port of entry. Although subject to exclusion proceedings, they are entitled to apply for political asylum. Unless they fall within one of the above categories, they must remain incarcerated pending a final decision on their cases, including appeals to the BIA and review in federal court. This process can take anywhere from three months to well over a year to conclude.

The detention policy was ostensibly instituted to discourage aliens from attempting to enter the United States without legal documentation,[141] but it effectively penalizes asylum seekers who face serious harm, including imprisonment or death, if they return to their country of origin.

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141. 147 Fed. Reg. 30,044 (1982).

Detainees are held in government as well as private contract facilities. As of October, 1989, according to INS, 7641 aliens were in agency custody, including 2232 Cubans, 739 Nicaraguans, 655 Haitians, 497 Mexicans, 476 Salvadorans and 77 Afghans. Apart from the Mexicans, most of the others are likely to apply for political asylum, although precise figures on this point are not available from the agency. Somewhat less than 30 percent are in excusion preceedings; the remainder are in deportation proceedings. Over 10 percent of those detained are females, and about 3 percent are minors. Over 25 percent have been confined for over 6 months.

One major difficulty faced by detainees is obtaining access to counsel. Many detention centers are located in remote locations, making access to counsel at least problematic and oftentimes impossible. In some locations, there are not enough local attorneys to provide pro bono assistance to interned aliens. Other detention camps lack a sufficient number of telephones to permit communication between the detainees and their attorneys. Telephone access that is available usually is limited to collect, out-going calls. Generally, detention facilities make no provision whereby attorneys can call a detainee, or even leave a message to have the detained client return the call. Attorneys must rely on security personnel to produce a detainee for an interview, and in some instances counsel have reported having to wait several

hours for their clients to be brought to them.[142] Such difficulties not only make representation in a single case unnecessarily burdensome, but also discourage volunteer attorneys from accepting cases.

Immigration detainees are treated the same as, and often worse than, incarcerated criminals. At the larger detention centers, non-criminal aliens may be detained in the same facility as criminals, and even in the same rooms. Although women and men are separated, they generally are kept in dormitory-style rooms and have no privacy.

In one detention facility toured by Lawyers Committee representatives, the only activities that were available were watching television, reading books (not available in all languages represented by the detained population), and exercising on stationary equipment located in the dormitories. There was no provision for outdoor exercise activity. Due to space limitations, detainees were not allowed to have visitors, except attorneys and religious representatives, during their

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142. Reasons provided for such delays have included assertions that the detainee was involved in a card game and refused to come when called by the security officer, the attorney arrived during a security count, or an attempted escape or other security-related incident has just occurred and officers were unavailable to bring the detainee until the situation was stablized. See also A.B.A. Coord. Comm. on Immigr. L., Lives on the Line: Seeking Asylum in South Texas passim (July, 1989).

first 30 days of detention. Detainees generally appeared bored and sometimes despondent -- many who were seen by Lawyers Committee representations were sleeping in their cots in mid-afternoon. Attorneys representing asylum applicants detained at this facility have been told by their clients that they are bored, depressed, and that they can only think about what has happened to them and worry about the families they have left behind.[143]

Experience prior to the Cuban and Haitian migrations of the early 1980s shows that detention is not necessary to monitor the location of illegal aliens who have applied for asylum.[144] To the contrary, the "deterrence" rationale

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143. Many detainees at this facility have expressed concern about lack of proper medical treatment. While medical equipment and staff personnel appear to be sufficient, detainees encounter numerous difficulties in obtaining treatment. One medical worker acknowledged that a major problem was communication, given that the medical staff does not speak all the languages represented in the detained population. Usually, another detainee is available to act as a translator, though the worker acknowledged that this too could be problematic if a detainee does not want other detainees to know about a medical condition. To obtain medication and treatment detainees must go through a screening process and be checked by a nurse before they are allowed to see a doctor. If the nurse refuses to sign them up to see the doctor, or simply fails to do so, the detainee has no other recourse. The doctor, in her sole discretion, decides whether the medical condition can be treated with available medication or whether the detainee should be referred to a specialist or hospital for further treatment.

144. See Detention of Asylum Seekers, supra note 138, at 13-14.

underlying the present detention policy shows that the INS intends detention to be perceived as precisely the type of penalty forbidden by the Refugee Protocol. In many cases, detention in an INS camp may impose conditions upon a detainee that are as harsh as he could have expected as a consequence of political persecution in his home country.[145] Moreover, detention is far more expensive to the taxpayer than a policy of monitored release would be.[146] These detention practices are therefore unnecessary, expensive and inhumane.

Abdi Hassan Mohammed is a twenty-year-old Muslim from Somalia. He is a member of the Marjeetan tribe which is based in Northeastern Somalia. In September 1982, Abdi's father was arrested by the government and sentenced to 17 years in Godka prison for his alleged involvement in an anti-government group, the Somalia Salvation Democratic Front (SSDF). The allegations rested entirely on his tribal affiliation. During his incarceration, no one was allowed to visit him. In March 1986, after he had been in prison for three and a half years, Abdi's family received a letter from the government saying that his father had died in Godka prison. The letter did not state the cause of his death.

Between 1985 and 1986, Abdi participated in several anti-government demonstrations and distributed anti-government pamphlets, in reaction to the government's persecution of the Marjeetan clan. In May of 1986, not long after his father died in prison, Abdi managed to escape the police when they intervened in preparations for a demonstration. The police shortly thereafter went to his home and arrested him, and Abdi believes that two fellow students arrested during the preparations may have told the police where he lived.

Upon arrest, Abdi was detained for seven days, during which time he was tortured repeatedly. His captors burned him

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145. Id. at 28-29.

146. Id. at 29-30.

on the chest and back with white-hot steel rods. They demanded to know the identities of the leaders of his tribe and the activities they planned against the government. They placed Abdi in complete darkness in a pool of water that was extremely cold and of considerable depth. They left him struggling to remain afloat for 20-minute intervals. In the interim they interrogated him about the SSDF, threatening to return him to the water if he did not answer their questions. As a 16-year-old student living in the city, Abdi knew very little about the country-based SSDF.

Abdi was then brought to a court and charged with anti-government activity. He was not provided a lawyer. He was sentenced to ten years at Lanta Buro prison, and warned that if he ever engaged in anti-government activity again, he would be executed. At Lanta Buro, prisoners were forced to do labor in fenced-off areas outside the prison. In November of 1989, Abdi hid at a labor site and escaped once the other prisoners were returned to the prison.

Abdi fled to Southern Somalia and then travelled by ship to Egypt. Since he feared the possibility of being returned to Somalia by Egyptian authorities, Abdi obtained a false passport which he used to travel to the United States. Upon his arrival at JFK on January 2, 1990, Abdi was placed in detention at the Wackenhut detention facility.

While at Wackenhut, Abdi has been unable to sleep during the night, as he remains disturbed by his experiences in Somalia. He sometimes manages to sleep for a few hours following breakfast. Abdi says that he feels cold and is in pain all over his body. Despite almost daily assurances by the nurses that he will be examined by a doctor, he has been seen by a doctor only once, at which time he was given a tablet for pain in his salivary glands. The doctor did not provide a general examination. In mid-February, Abdi was given an injection by a nurse, who failed to explain the nature or purpose of the injection.

Abdi often eats only bread because he does not trust the food. Abdi's protestations over the food reflect his anguish at being detained. Abdi, in his frustration, has exclaimed that in Somalia "they arrested me, and tortured me, and forced me to work for nothing. I escaped and travelled through Egypt, but when I finally come to the United States, they make me stay here [at the detention facility]."

The Lawyers Committee has recently published a briefing paper concerning the detention policy which makes the following recommendations:[147]

> 1. The executive should promulgate regulations revising its policy of mandatory detention of excludable aliens to include the following:
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> * Release while an individual is awaiting the determination of an asylum application should be available in the absence of a finding that release would pose a danger to the community or that there is a likelihood that the alien will abscond. Reasonable conditions of release such as bond or reporting requirements, may be imposed to prevent absconding. For example, pro bono representation and sponsorship arrangements with voluntary agencies and individuals for Haitian asylum seekers under a release plan ordered by a federal court in 1982 resulted in subsequent court appearance rates of over 95 percent in New York.[148]
>
> * The executive should devote sufficient resources and sophistication to insure that asylum claims are fairly and expeditiously adjudicated.
>
> * The conditions of detention must comply with the standards promulgated by the American Correctional Association, including providing for adequately trained personnel and sufficient recreational facilities in both INS and private contract facilities.
>
> * Minors should not be detained if a relative or unrelated guardian is willing to take custody. Detention of minors in local jails or other secure facilities should be prohibition. A

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147. Detention of Asylum Seekers, supra note 138.

148. See generally Helton, The Most Ambitious Pro Bono Ever Attempted, 12 Human Rights 18 (ABA, Fall 1984).

program of foster care under the auspices of voluntary agencies would be more appropriate.

2. Congress should address the issue by enacting legislation to clarify the temporary nature of detention in exclusion and deportation cases. A measure like H.R. 2921, which was introduced in the last Congress, would require the INS to revise its unlawful and inhumane detention policy. H.R. 2921, "clarifies" the "temporary" nature of the detention of arriving aliens. The bill would require the Attorney General to provide for the release of excludable and deportable aliens, unless the release would pose a danger to any other person or to the community, or if there is a reasonable likelihood that the alien will abscond.

Failing executive action, Congress should also pass measures to remedy the conditions under which aliens are detained, guarantee access to counsel, prohibit the detention of minors, and provide for the standardization of release requirements and bond amounts, as indicated above.

3. Courts should not hesitate to address the issues surrounding the detention of aliens. Judicial challenges to the detention policy are difficult because the courts have frequently deferred to the executive branch of the government in matters concerning immigration enforcement and the admissibility of aliens. In 1953, the Supreme Court in the Mezei case, 345 U.S. 206 (1953), specifically upheld the authority of the Attorney General to detain aliens that the immigration law denominated excludable. However, both domestic and international law have undergone significant development since then. The lower federal courts' reluctance to question earlier precedents or to create judicial restrictions on the reinstitution of detention have hampered efforts to bring the treatment of undocumented aliens in line with the extended protection that the Constitution has been held to provide since the early 1950's. The Mezei decision is a historical anomaly that belongs to a foregone era. Judicial intervention should occur where warranted.

B. Employment Authorization.

Regulations mandate that employment authorization be given to each alien who has filed a non-frivolous application for asylum.[149] However, in neglect of its own rules, the INS frequently denies or delays requests for employment authorization, a practice which has the effect of discouraging asylum seekers from requesting protection as refugees in the United States.

One means which some INS officials use to deny work authorization is to characterize the individual's application as "frivolous." While there may be a potential for abuse of the asylum process by aliens entering the United States solely to find work, the response should be to establish a fair and efficient asylum adjudication procedure, not to attack the ability of asylum seekers to subsist.

Documentation from one case in Houston illustrates the potential abuse by the INS in its determinations as to what constitutes a non-frivolous claim. In this case, the asylum application was filed with the immigration judge and the State Department issued a positive opinion letter. Over two months after the request was filed, the District Director issued the applicant work authorization pending the hearing on the merits. Five weeks later, the applicant was awarded asylum by

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149. 8 C.F.R. § 274a.12(c)(8).

the immigration judge, and the INS reserved the right to appeal the decision to the BIA.

After receiving asylum, the applicant was notified by letter that the INS was denying work authorization. The letter stated that "after careful review of your request for asylum, the opinion letter issued by the U.S. Department of State, Bureau of Human Rights and Humanitarian Affairs, and the decision rendered by the Immigration Judge, it has been determined that you have failed to demonstrate that your request for asylum is non-frivolous in nature."

Since the INS had previously granted work authorization on the basis of the same asylum application, the State Department had issued a positive letter, and the immigration judge had granted asylum, it is difficult to imagine why the INS subsequently found the application to be frivolous. The applicant's legal representative spoke to the INS examiner in a telephone conversation, who stated that she had denied authorization "because we [INS] appealed." This appeal was later withdrawn. The legal representative then spoke to the examiner's supervisor, who stated that she found this to be a "borderline case" and that she thought the examiner was right in issuing a denial, but in the end the supervisor granted the work authorization.

The right of asylum applicants to employment authorization is also being undermined by the amount of time it

takes for approval of employment authorization applications. In New York, for example, INS representatives currently advise asylum applicants that it may take up to sixty days for employment authorization to be granted or renewed. Most employers will not hire applicants during the period that it takes to get authorization, and will temporarily lay someone off during the period in which a renewal is pending, due to the employment laws that now apply to hiring aliens. The situation is even more intolerable for those who have been granted asylum. Even though no question as to their right to work authorization exists, they too have to wait for a period of up to 60 days for the documentation required by employers to ensure compliance with INS regulations.[150]

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150. As the agency has defaulted in implementing an adequate employment authorization mechanism, the federal courts have had to intervene. In Diaz v. INS, 648 F. Supp 638 (E.D. Cal. 1986), a preliminary injunction was issued enjoining the District director from 1) considering the strength of the asylum application in deciding whether to grant work authorization after the initial determination that the application is non-frivolous, 2) considering an alien's manner of entry in deciding whether to grant work authorization, 3) denying work authorization because the alien failed to seek apparent safe haven in a third country or because the alien is not responsible for the economic support of others, and 4) revoking work authorization until the adjudication process for the asylum claim has been completed or abandoned. In Ramos v. Thornburgh, Civ. No. Tx-89-42-CA (E.D. Tex., July 22, 1989) (slip op.), a

Footnote Continued

XI. Other Sources of Humanitarian Protection

The Refugee Act of 1980 was designed to provide protection to a class of persons defined by the 1951 Convention and the 1967 Refugee Protocol, namely, persons who have suffered persecution or who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or a political opinion. This definition focuses on the particular characteristics of individual persons that cause them to suffer at the hands of a foreign government or other foreign agents. The definition excludes other people who may, nonetheless, merit temporary protection in the United States.

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150. Footnote Continued From Previous Page

federal judge granted a preliminary injunction ordering the issuance of temporary work authorization to one asylum applicant where the request for work authorization had been pending without a decision for more than 60 days, and to several others unless the INS official made a finding that the underlying asylum applications were "indisputably meritless," or "lacks an arguable basis in law or fact." In Alfaro-Orellana v. Ilchert, 720 F. Supp. 792 (N.D. Cal. 1989), a motion for summary judgment was granted, requiring the INS to interpret the regulations so as to provide work authorization from the time that the asylum application is determined to be nonfrivolous until either the application is abondoned by the alien or there is a final adverse decision. In Najera-Banja v. Blackman, No. CV89-2320 (E.D.N.Y), the Lawyers Committee and American Civil Liberties Union are currently requesting injunctive relief to require INS to establish procedures for the regular and prompt granting of work permission in New York.

A. Safe Haven Policy.

A formal safe haven program in the United States is needed. A comprehensive mechanism should be established to provide protection for categories of undocumented persons who might otherwise be deported to their home countries to face civil war or other life-threatening conditions. This mechanism should also provide temporary work authorization, so that these same individuals will not be forced to return to a dangerous situation due to an inability to subsist under current immigration employment controls.

There has been much debate over the past several years[151] about the need for a new safe haven policy in the United States for the protection of individuals who do not qualify under law as refugees. Traditionally, such protection has been accorded through grants of Extended Voluntary Departure Status by the Attorney General and Secretary of State. Over the past 29 years, thirteen different nationality

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151. See U.S. Catholic Conference, Toward New U.S. Statutory Standards for Those Who Flee Crises: Humanitarian and Political Responses (1988); Lawyers Comm. for Human Rights, A Preliminary Discussion of Considerations in Enacting Temporary Refuge Legislation (1987) (hereafter, "Preliminary Discussion"); Refugee Policy Group, Safe Haven: Policy Responses to Refugee Like Situations (1987). Congress in 1981 passed a resolution urging that the Reagan Administration consider civil strife in El Salvador in relation to extended voluntary departure. Pub. L. No. 97-113, § 731, 95 Stat. 1519, 1557 (1981).

groups have been given this administrative status which protects against forced removal.[152]

The need for a new safe haven policy has also been sharpened by employment controls which were introduced as an immigration reform measure in 1986. Employers are prohibited on pain of sanction from hiring persons (including aliens) who cannot furnish appropriate documentation showing that they are authorized to work.[153] Undocumented persons who before may have been able to secure effective protection as a result of inconsistent agency enforcement and bureaucratic inefficiency now have difficulties in subsisting as a result of the new employment controls.

B. Humanitarian Admissions.

Since 1952, the Attorney General has had the power to "parole" aliens temporarily "for emergent reasons or for reasons deemed strictly in the public interest." This authority was used to admit refugees from overseas, including Hungarians in 1957; Cubans in the 60's and 70's, and Indochinese in the late 70's. More than 800,000 aliens were

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152. Preliminary Discussion, supra note 151, at appendix 1. The Attorney General's recent program of one-year deferred departure for Chinese nationals present in the United States as of June 5, 1989, could be considered a species of extended voluntary departure.

153. 8 U.S.C. § 1324. See Helton, A Gap in the Immigration Law, Wash. Post, Aug. 19, 1987, at A23.

granted refuge under this procedure before 1980. In the Refugee Act, Congress stipulated that the Attorney General may not use a parole to bring in categories of aliens who are not refugees. Thus, there is no longer a basis with which to admit groups of a given nationality under the applicable parole authority.

Perhaps a new humanitarian admissions category is needed for individuals who cannot be protected even under a generous interpretation of the Refugee Act or who have no means to receive immigrant status under conventional immigration quotas.[154] Any such proposal would raise sensitive questions. Should those admitted under this new category receive fewer benefits than refugees to improve prospects for enactment or would such an arrangement give officials an incentive to classify legitimate refugees in this new category to avoid the fiscal expense? Should those admitted be part of the immigration quotas or of the annual refugee ceiling?

Arriving at the answers may be difficult, but such answers may also provide the only solution for some who are suffering under foreign regimes but who are not currently protected under the Refugee Act.

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154. See Refugee Policy Group, Of Special Humanitarian Concern: U.S. Refugee Admissions Since Passage of the Refugee Act (1985) (memo).