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Tang Thi Thanh Trai Le

Notre Dame Law School, trai.t.le.2@nd.edu

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TANG THANH TRAI LE

The Legal Status of the Refugee in the United States

I. HISTORICAL CONTEXT

A. Introduction

Political asylum symbolizes a uniquely American ideal. The United States traces this attitude to its status as a country of immigrants—or, more precisely, as a country of refugees, seeing as how so much of its population emigrated in flight from some sort of persecution. As the Statue of Liberty proclaims: "Give me your tired, your poor,/your huddled masses yearning to breathe free,/The wretched refuse of your teeming shore,/Send these, the homeless, tempest-tossed to me;/I lift my lamp beside the golden door."¹ While the United States immortalized this invitation to sufferers of political and economic hardship in New York's harbor, though, it did not perceive a need to codify this guarantee in the statute books. In fact, until well into the twentieth century, the United States did not distinguish refugees from other immigrants.

World War II brought a major sea change in the way countries handled refugee issues, as countless numbers of displaced persons awaited resettlement. As a result, the United States began to distinguish refugees from general immigrants. Yet at first glance, the manner in which the United States has tackled refugee dilemmas appears an incoherent jumble, with problems only resolved in an ad hoc way. For instance, while the United States played an instrumental role in helping to draft the United Nations Convention Relating to the Status of Refugees,² which remains the basis for protection of refugees in the international community, it refused to bind itself to the Convention until it acceded to the subsequent Protocol sixteen years

TANG THANH TRAI LE is Professor of Law, University of Notre Dame Law School.

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1. Lazarus, "The New Colossus (1886)," in, *Emma Lazarus, Selections from Her Poetry and Prose* 40-41 (Morris U. Schappes ed. 1944). Note that the Statue of Liberty beckons victims of economic persecution at least as vigorously as victims of political persecution.

2. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137 (hereinafter "Convention").

later,³ and even then it did not pass legislation implementing the Convention standards for another thirteen years.⁴ Meanwhile, its domestic law provided little to protect refugees beyond sporadic use of the parole power to admit refugees from communist nations when the need arose.⁵

The breaking point for U.S. refugee policy, as with many other facets of U.S. policy, came with the Vietnamese debacle. An intense awareness of responsibility for the travails of the people the United States had attempted to protect for over a decade led Americans to accept large numbers of refugees from Indochina in the mid-1970s.⁶ The resulting disorganization convinced American policymakers that the U.S. simply could no longer continue to handle mass refugee flows in an unsystematic manner. In an effort to provide more consistency, Congress passed the Refugee Act of 1980, which established procedures for admitting refugees and handling asylum applications.⁷ Even after 1980, however, the United States chose to deal with some migration problems outside of the established procedures, including grants of special status to the Cuban migrants in 1980⁸ and to the asylum seekers from El Salvador in 1990.⁹

In 1957, author Robert Divine listed four driving forces of U.S. immigration policy, including economic analyses of the effect of immigrants; social factors, primarily those involving race or ethnicity; nationalistic tendencies to limit all immigration for the purported benefit of those already in the United States; and foreign policy considerations.¹⁰ These underlying motivations have proven remarkably stable throughout American history, both in general and with

3. Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 606 U.N.T.S. 267.

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

5. See *infra* nn. 35-36 and accompanying text.

6. From March 1975 to May 1979, "over 205,000 Indochinese refugees have entered the United States, primarily under the parole provision." Congressional Research Service, 96th Cong., 1st Sess., Review of U.S. Refugee Resettlement Programs and Policies 33 (Comm. Print 1979) (hereinafter *Refugee Resettlement Review*).

7. The Act itself stressed its goal of providing "a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States...." Refugee Act, *supra* n. 4, at § 101.

8. In June 1980, Cuban and Haitian migrants received "special entrant" status, whereby they could stay in the United States but could not apply for refugee status or asylum. In 1984, Cubans entering in this way became eligible for permanent resident status. See generally Norman L. Zucker & Naomi Flink Zucker, *The Guarded Gate: The Reality of America's Refugee Policy* 68 (1987); Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* at 186 (1986) (discussing "special entrant" status for Cubans and Haitians).

9. In 1990, in no small part due to lawsuits brought by El Salvadoran asylum applicants (see *infra* nn. 101-102 and accompanying text), Congress extended "temporary protected status" (thus preventing deportation) to Salvadoran nationals; see *infra* n. 277 and accompanying text.

10. Robert A. Divine, *American Immigration Policy 1924-1952* at 25 (1957).

regard to United States refugee policy; the major differences center on which factors receive the most emphasis at any particular time.

B. *U.S. Refugee Policy Before World War II*

The dominant attitude during this period permitted admission of refugees, as well as other immigrants, although domestic policy concerns occasionally compelled restriction. Before World War I, the United States essentially did not limit immigration admissions in general. The acute need for as much development as possible created a powerful incentive to accept as many people as possible. The federal government did not regulate immigration in any way until 1882,¹¹ and most of the restrictions between 1882 and 1917 largely centered on moral crusades to exclude "undesirables", including convicts and persons suffering from physical or mental illness.¹² These restrictions did not aim to significantly limit the volume of immigration, and thus did not particularly affect refugees.

The notable exception to this liberal policy concerned Chinese immigrants. In what current observers universally condemn as an episode of blatant racism, Congress passed the Chinese Exclusion Act of 1882, which, as the title implied, excluded all Chinese from entry.¹³ This extended in 1921 to an "Asiatic barred zone" covering immigrants from China, Japan, and Korea,¹⁴ as part of a system of worldwide quotas tied to census data of the racial makeup of the United States, in an attempt to maintain racial homogeneity and to explicitly limit immigration on a racial basis.¹⁵ The Chinese exclusion remained entrenched until 1943,¹⁶ when the U.S. lifted the ban in order to further its wartime foreign policy.¹⁷

Starting in 1917, the United States, mindful of the huge waves of immigrants crossing its borders, barred admission to persons likely to become "public charges" and established a literacy test for admission, although those people who could demonstrate that they had fled

11. For discussions of United States refugee law prior to World War II, see generally 2 Charles Gordon & Stanley Mailman, *Immigration Law and Procedure* § 33.01 (1993); Divine, *supra* n. 10, at 92-109; Lewis & Schibsky, "Status of the Refugee Under American Immigration Laws," 203 *Annals* 74 (1939).

12. See generally Vialet, "A Brief History of U.S. Immigration Policy (1980)," in Arnold H. Liebowitz, *Immigration Law and Refugee Policy* § 1.01 (1983); Lewis & Schibsky, *supra* n. 11, at 74.

13. The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882). See generally Ronald Takaki, *Strangers from a Different Shore: A History of Asian-Americans* 110-112 (1989).

14. Immigration Act of 1921, Pub. L. No. 67-5, 42 Stat. 5.

15. For a discussion of the determination of racial makeup, see Divine, *supra* n. 10, at 26-50.

16. Indeed, no significant movement for repeal even commenced until 1942. *Id.* at 147.

17. *Id.* at 152.

religious persecution did not have to pass the literacy test.¹⁸ The restrictive effect of the new laws became painfully evident in 1930, when, in the throes of the Great Depression, President Hoover ordered reinterpretation of the "public charge" requirement. The State Department complied by announcing that any immigrant unlikely to obtain a job upon arrival or to have other sufficient means of survival would receive exclusion as a "public charge".¹⁹ Not surprisingly, immigrant admissions plummeted in the wake of the reinterpretation; refugees particularly suffered because they had less likelihood of satisfying the "public charge" test than other immigrants.²⁰

The tragic climax of the domestic policy fixation came with the refusal to admit refugees fleeing Hitler's reign of terror. 67% of Americans opposed any increased admission of refugees in 1938;²¹ by 1939, despite Hitler's accelerated persecution, fully 83% of Americans, recognizing the potential scope of increased admissions and still fearful of economic competition, rejected any increased refugee admissions.²²

C. U.S. Refugee Policy During the Cold War

Two factors combined to convince the United States to pursue a more expansive refugee policy after World War II ended. First, the rejection of refugees fleeing persecution at Hitler's hands remained fresh in the minds of Americans, and the United States resolved not to refuse refugees from potential enemies again.²³ Second, the United States had rapidly ascended to a position of global leadership, necessitating it to lead in the response to the refugees the war created.²⁴ Thus, when the United States cast the Soviet Union as a direct threat to peace, the U.S. decided to admit as many refugees as possible from communist countries in order to emphasize its position as the leader of the "free world". That is, foreign policy considerations took on greater emphasis in relation to domestic concerns as refugee policy became a tool of containment.²⁵

18. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

19. Department of State, 3 *Press Releases* 176-77 (Sept. 11, 1930). See generally Divine, *supra* n. 10, at 78.

20. See generally Divine, *supra* n. 10, at 78.

21. "The Fortune Survey," *Fortune*, July 1938, at 80, in Divine, *supra* n. 10, at 96.

22. "The Fortune Survey," *Fortune*, April 1939, at 102, in Divine, *supra* n. 10, at 99.

23. 2 Gordon & Mailman, *supra* n. 11, § 33.01.

24. *Id.*

25. Divine, *supra* n. 10, at 109. For general discussions of the development of U.S. legislation pertaining to refugees from World War II to the passage of the Refugee Act of 1980, see generally Refugee Resettlement Review, *supra* n. 6; Anker & Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980," 19 *San Diego L. Rev.* 9 (1981); Cavosie, "Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law," 67 *Ind. L.J.* 411 (1992).

The United States quickly translated its newly perceived foreign policy interests into a major role in postwar international refugee issues. The United States played a pivotal role in the International Refugee Organization (IRO), the first international attempt to handle refugee concerns; the United States and United Kingdom accounted for 60% of the IRO budget.²⁶ The purposes of the IRO inevitably reflected the desires of its leading contributors. The IRO dealt primarily with refugees from World War II, especially those fleeing communist regimes in eastern Europe.²⁷

By 1949, the Secretary General of the United Nations had concluded that the problem of stateless persons required a more comprehensive solution; this new emphasis ultimately resulted in the drafting of the Convention Relating to the Status of Refugees.²⁸ The Soviet bloc, not wishing to validate the increasing exodus of its citizens, withdrew from the drafting of the Convention, saying that persons unwilling to return to their country of origin represented "traitors" and did not deserve any international protection.²⁹ This meant the Western countries had a free hand to shape the Convention to suit their own purposes. Therefore, the Western-inspired Convention focused on protecting the refugees from World War II and the ideological refugees of Eastern Europe as opposed to political refugees in general, "economic refugees" fleeing due to a deprivation of socioeconomic rights, or persons suffering from persecution as a result of famine, civil unrest, or natural disaster.³⁰ In addition, by leaving interpretation of the provisions, including determination of refugee status, to the member states, the United States could use the Convention for ideological purposes by assuming that any person fleeing a communist nation had a well-founded fear of persecution.³¹ Further, the Western countries carefully ensured that the duty of nonrefoulement would not entail a duty to grant asylum to qualifying refugees.³² Although it participated in its drafting, the United States

26. Leon Gordecker, *Refugees in International Politics* 25-26 (1987).

27. Id. at 26-27; Michael R. Marrus, *The Unwanted: European Refugees in the Twentieth Century* 343 (1985).

28. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law," 31 *Harv. Int'l L.J.* 129, 144 (1990).

29. See id. at 145.

30. See U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems at 5, U.N. Doc. E/AC.32/SR.5 (1950) (statement of Mr. Henkin, United States), reprinted in 1 Alex Takkenberg & Christopher C. Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* 175 (1990); U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 15, U.N. Doc. A/CONF.2/SR.21 (1951) (statement of Mr. Warren, United States), reprinted in 3 Takkenberg & Tahbaz, *supra*, at 401. See generally Hathaway, *supra* n. 28, at 149-50.

31. Hathaway, *supra* n. 28, at 150.

32. Cf. Office of the United Nations High Commissioner for Refugees, "Handbook on Procedures and Criteria for Determining Refugee Status" §§ 24, 25 (1979) (hereinafter Handbook).

never became a party to the Convention. In a very real sense, though, the Convention reflected the various goals of the United States; humanitarian protection of political refugees through the Convention became the goal of the United States, but only because it perceived the goal as furthering its foreign policy interest of containment.

The United States took great pains to ensure that its domestic refugee policy reflected its foreign policy concerns. Although refugees still had to enter through the general immigration quota, the first legislation in the postwar period, the Displaced Persons Act of 1948,³³ "mortgaged" the immigration quotas to allow for admission of those displaced by World War II. The Immigration and Nationality Act (INA),³⁴ a landmark statute passed in 1952 establishing a framework for immigration policy, took two important steps with regard to refugees. The Attorney General received discretionary authority to parole any alien into the United States "for emergent reasons or for reasons deemed strictly in the public interest."³⁵ The United States would come to use this for mass paroles of communist refugees, although it did not utilize mass parole for non-communists.³⁶ The Attorney General also received discretionary authority to withhold deportation if the immigrant faced physical persecution.³⁷

In 1953, the United States, again attempting to "discharge responsibilities towards persons uprooted by the war" and to "make a gesture to the anti-communist preoccupation of the Cold War Era",³⁸ passed the Refugee Relief Act of 1953.³⁹ This allowed for the first time full-fledged entry of refugees above the quota limits. The law, however, limited eligibility to "refugees" in nations with anticommunist policies the United States sought to reinforce, "escapees" from a "Communist, Communist-dominated or Communist-occupied area", and "German expellees" from communist regions.⁴⁰ A 1957 act further consolidated the Cold War preoccupation by defining refugees as aliens fleeing a communist or communist-dominated country or an

33. Pub. L. No. 80-774, 62 Stat. 1009.

34. Pub. L. No. 82-414, 66 Stat. 163 (1952).

35. *Id.*, § 212(d)(5).

36. The most extensive uses of the parole power granted entry to Hungarians in the 1950's, Cubans in the 1960's and 1970's, and Indochinese after 1975. The United States did use the parole power to sporadically admit small numbers of refugees from non-communist nations, but this represented an undeniably secondary use of the power. See generally Zucker & Zucker, *supra* n. 8, at 55; Refugee Resettlement Review, *supra* n. 6, at 10-11.

37. INA, *supra* n. 34, § 243(h). This incorporated the standard used in the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987, an exception to a law which made exclusion of immigrants easier because it authorized deportation of noncitizens engaging in "subversive" activities.

38. Anker & Posner, *supra* n. 25, at 13.

39. Pub. L. No. 83-203, 67 Stat. 400.

40. *Id.*, §§ 2, 4. See Anker & Posner, *supra* n. 25, at 14.

area of the Middle East.⁴¹ These acts represented ad hoc solutions to refugee issues; the Immigration and Nationality Act Amendments of 1965 attempted to provide a more permanent statutory basis for refugee admissions by permitting the so-called "conditional entry" of certain aliens under the "seventh preference" designation.⁴² Borrowing from the 1957 act, conditional entry applied to those fleeing from a communist or communist-dominated area or from the Middle East on account of race, religion, or political opinion.⁴³ This preference, obviously, ran counter to the non-discrimination principle stated in Article 3 of the Convention, a principle deemed so crucial that signatories could not subject it to a reservation when becoming a party to the Convention.⁴⁴

In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees,⁴⁵ which incorporated the provisions of the Convention and extended them to all refugees regardless of time and location. Congress, however, passed no implementing legislation until 1980. By then, critics found that the previous statutory definitions proved "clearly unresponsive to the current diversity of refugee populations and does not adequately reflect the United States' traditional humanitarian concern for refugees throughout the world."⁴⁶ Defining "refugee" in accordance with the Convention, Congress thought, would represent a "significant humanitarian gesture"⁴⁷ and alleviate "the current immigration law's discriminatory treatment of refugees...."⁴⁸ Further, the continued use of the parole power to admit huge numbers of refugees frustrated Congress because Congress retained no meaningful role in the admission of refugees.⁴⁹

All of these problems led Congress to enact the Refugee Act of 1980, generally viewed as "the first comprehensive refugee legislation" enacted by the United States.⁵⁰ The Act essentially adopted the Convention definition of "refugee"⁵¹ and aimed to set U.S. refugee policy along a nondiscriminatory path, as advocates stressed

41. Pub. L. No. 85-316, 71 Stat. 639, 643 (1957).

42. Pub. L. No. 89-236, 79 Stat. 911.

43. Id., § 3.

44. Convention, *supra* n. 2, at Art. 42.

45. See *supra* n. 3.

46. H. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

47. 125 Cong. Rec. 37,241 (1979) (statement of Rep. Weiss).

48. S. Rep. No. 256, 96th Cong., 1st Sess. (1979), reprinted in 1980 U.S.C.C.A.N. 142.

49. See generally Anker & Posner, *supra* n. 25, at 12-20.

50. Refugee Act, *supra* n. 4; Stephen H. Legomsky, *Immigration Law and Policy* 832 (1992).

51. Refugee Act, *supra* n. 4, § 201. The Convention defines "refugee" as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country...." Convention, *supra* n. 2, at Art. 1, sec. A(2).

throughout the legislative history of the Act.⁵² The Act established a procedure of determining ceilings of refugees from each region that would gain eligibility for admission each year, with the admissions "allocated among refugees of special humanitarian concern to the United States...."⁵³ The President could only exceed these ceilings if admitting more refugees satisfied "grave humanitarian concerns or is otherwise in the national interest" and Congress assented.⁵⁴ Through these safeguards, Congress wished to emphasize admission through the regular ceilings rather than through the modified parole power.⁵⁵ In limiting entry to refugees of "special humanitarian concern" to the United States, Congress "intend[ed] to emphasize that the plight of the refugees themselves as opposed to national origins or political considerations should be paramount in determining which refugees are to be admitted to the United States."⁵⁶ Indeed, some members of Congress indicated that they would scrutinize the refugee quotas set under the Act so that the quotas would "be equitably distributed amongst the refugees of the world and will not be tainted with ideological, geographical or racial or ethnic biases...."⁵⁷

The Refugee Act also established for the first time procedures to cover claims of political asylum by migrants either in the United States or at the border, with the Attorney General receiving discretion to grant asylum to aliens establishing refugee status under the Convention definition.⁵⁸ The Act made nonrefoulement mandatory, as the Convention required, upon a determination that the "alien's life or freedom would be threatened...on account of race, religion, nationality, membership in a particular social group, or political opinion."⁵⁹

52. The Convention states that nations "shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." Convention, *supra* n. 2, at Art. 3. For evidence of congressional intent regarding eradication of discrimination with the Refugee Act, see, e.g., "The Refugee Act of 1979: Hearings on S.643 Before the Senate Committee on the Judiciary," 96th Cong., 1st Sess. 9, 11 (1979) (statement of Ambassador-at-Large Dick Clark, U.S. Coordinator for Refugee Affairs); S. Rep. No. 256, *supra* n. 48, at 141; H. Rep. No. 608, *supra* n. 46, at 1; 126 Cong. Rec. 4,501 (1980) (statement of Rep. Rodino).

53. Refugee Act, *supra* n. 4, § 201.

54. *Id.*

55. See H. Rep. No. 608, *supra* n. 46, at 4-5. In fact, the House construed "grave humanitarian concern", the criteria for emergency admissions, as limited to "situations where the refugees' lives are placed in immediate jeopardy, where their personal safety is threatened or where there is an imminent possibility of loss of freedom." *Id.* at 12.

56. *Id.* at 13. The Senate had used the phrase "special concern", but it shared similar attitudes about the need for evenhanded implementation. See S. Rep. No. 256, *supra* n. 48, at 146-47.

57. 126 Cong. Rec. 4,507-08 (1980) (statement of Rep. Chisholm).

58. Refugee Act, *supra* n. 4, § 201.

59. *Id.*, § 203(e).

II. COMPLIANCE RECORD

The provisions of the Refugee Act continue to form the underlying structure of U.S. refugee policy; the implementation of the Act represents the primary basis for judging the extent of United States compliance with the norms of the Convention. The following sections will evaluate the compliance record of the United States since passage of the Refugee Act by tracing the path of the potential refugee from the country of origin to final acceptance in the United States as a refugee.

A. *Alienage*

The Convention allows a person to claim refugee status only if the person is "outside the country of his nationality and is unable, or ...unwilling to avail himself of the protection of that country...."⁶⁰ This allows signatories to ignore the large number of people trapped in circumstances similar to those of refugees but who cannot escape their home countries.⁶¹ The United States holds its applicants for asylum to this prerequisite and eschews any more generous policy, but has taken a more liberal viewpoint regarding applicants for refugee status. Regarding refugee status, the United States does go beyond the Convention's alienage requirement in the Refugee Act by allowing persons to apply for refugee status from within the country of alleged persecution if the President has specified that country by law.⁶² Currently, the President has designated people living in Vietnam, Cuba, Haiti, and the former Soviet Union as eligible for refugee status in this manner.⁶³ Regarding asylum applicants, though, United States courts have determined that if an asylum applicant could have received the protection of the country of nationality in another region of that country, persecution in a section of the country has not demonstrated that the country of nationality is unable or unwilling to protect the person.⁶⁴ The asylum interpretation may run counter to the guidelines in the United Nations Handbook on Proce-

60. Convention, *supra* n. 2, at Art. 1(A)(2).

61. James C. Hathaway, *The Law of Refugee Status* 232 (1991).

62. 8 U.S.C. § 1101(a)(42)(B) (1988).

63. 58 Fed. Reg. 52214 (1993). A growing number of Haitians, skeptical of the prospects for peace and unable to exit the country because of the interdiction policy of the United States, have applied for refugee status in this way. The willingness and ability of the United States to admit worthy Haitian applicants will go a long way toward determining the effectiveness of this provision of the law. See Maass, "More Haitians Seeking Asylum: Problem May Accelerate as Nation's Residents Lose Faith," *Dallas Morning News*, Dec. 21, 1993, at 37A.

64. *Etugh v. INS*, 921 F.2d 36 (3rd Cir. 1990); *Matter of R-*, Interim Decision No. 3195 (BIA 1992).

dures and Criteria for Determining Refugee Status,⁶⁵ but it does not appear to contradict the plain language of the Convention definition.

B. *Return En Route*

For over a decade, the United States has intercepted Haitians on the high seas and forcibly returned them to Haiti, in order to decrease the number of Haitians entering the country. In 1981 President Reagan entered into an agreement with the Haitian government to "interdict" Haitian vessels bound for the United States, with the only refugee screening consisting of short interviews on Coast Guard ships.⁶⁶ In 1992, responding to a large increase in Haitian migration flowing from a military coup, President Bush ordered interdiction and return with no refugee screening whatsoever.⁶⁷ Although President Clinton had denounced the Bush policy during the presidential campaign,⁶⁸ the Clinton Administration continues to forcibly interdict all Haitian boats headed toward the United States.⁶⁹ This policy marks the second occasion that a Convention signatory has repatriated potential refugees without any screening.⁷⁰

Refugee advocates challenged the Bush policy in court, charging that the policy violated both U.S. law and the nonrefoulement provisions of the Convention. The U.S. Supreme Court ruled that the United States could interdict Haitians on the high seas and return them to Haiti without making any determination of refugee status.⁷¹ The Court ruled that the words "deport or return" in the section of the Refugee Act pertaining to withholding of deportation referred only to persons subject to deportation or exclusion hearings,⁷² thus refusing to give the Act extraterritorial reach.⁷³ The Court further argued that the word "refouler" in Article 33 of the Convention re-

65. Handbook, *supra* n. 32, § 91 ("The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality..... [A] person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.").

66. Agreement Signed at Port-au-Prince, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10,241.

67. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

68. See, e.g., Bill Clinton & Al Gore, *Putting People First: How We Can All Change America* 119 (1992).

69. See, e.g., Holmes, "Pressure Builds Over Return of Boat People to Haiti," *N.Y. Times*, Dec. 17, 1993, at A17.

70. Sontag, "Reneging on Refuge: The Haitian Precedent," *N.Y. Times*, June 27, 1993, sec. 4, at 1. The other occasion involved Italy's forcible return of Albanians in 1991.

71. *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993) (hereinafter *Sale I*).

72. *Id.* at 2561. Deportation refers to the process of removing an alien physically present within the United States. Exclusion refers to the process of barring an alien present at the border from entering the United States. Because the Haitians had not reached the border, they obviously had not gained the right to either a deportation or an exclusion hearing, at least technically.

73. *Id.* at 2560.

ferred to "a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination,"⁷⁴ and thus applied only to persons "on the threshold of initial entry."⁷⁵ The Court also looked at the negotiating history of the Convention and found that the parties did not intend for the word "refouler" to include persons beyond the territory of the country.⁷⁶

Refugee advocates chastised the Court's narrow interpretation of the Convention and warned that restrictive policies would become more widespread, both in the United States and abroad.⁷⁷ The UNHCR condemned the ruling as a "major setback to modern international refugee law."⁷⁸ In a technical legal sense, the United States may indeed not have undertaken an obligation to interpret the Convention more liberally than the terms require.⁷⁹ In fact, the Court's view of the proper scope of the nonrefoulement guarantee finds some support among refugee law experts.⁸⁰ Even if the ruling proves technically correct, though, it undercut the spirit of the nonrefoulement provision in Article 33 of the Convention, as the Court's opinion conceded.⁸¹ The decision, then, reflects an outgrowth of the "compassion fatigue" phenomenon which pervades the United States in a time of perceived social and economic difficulties.

The United States indicated its willingness to extend interdiction strategies beyond Haiti when it intercepted three boats containing 659 Chinese immigrants in international waters off the coast of Mexico. Although INS officials and UNHCR officials screened the migrants before turning the rejected applicants over to Mexico for return to China, only one person survived both screening processes

74. *Id.* at 2564. Article 33 reads: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a political social group or political opinion." Convention, *supra* n. 2, at Art. 33(1). The Court arrived at this conclusion in part by wading through various definitions of "refouler" in two French-English dictionaries. *Sale I*, 113 S. Ct. at 2564 nn. 37-39.

75. *Sale I*, 113 S. Ct. at 2563.

76. *Id.* at 2567. The Court emphasized that the Dutch representative had this interpretation "placed on record", although the delegates did not explicitly adopt the interpretation, *id.* at 2566, and that the Swiss delegation may have conditioned its acceptance of the Convention on this interpretation as well. *Id.* at 2567 n. 44.

77. Sontag, *supra* n. 70, at sec. 4, 1.

78. *Id.*

79. 1 Atle Grahl-Madsen, *The Status of Refugees in International Law* § 67 (1966) ("[A] State does not commit any breach of its international obligations if its interprets and applies the provisions of a humanitarian convention literally and not liberally, always provided that it acts in conformity with the principle of good faith....").

80. See 2 Atle Grahl-Madsen, *The Status of Refugees in International Law* § 178 (1972) (Article 33 "may only be invoked in respect of persons who are already present — lawfully or unlawfully — in the territory of a Contracting State."); *id.*, § 210 ("[I]t is entirely permissible — as far as the Refugee Convention and the...Protocol are concerned — to prevent a refugee from entering the territory."). But see Guy Goodwin-Gill, *The Refugee in International Law* 74-76, 95 (1983).

81. *Sale I*, 113 S. Ct. at 2563.

and reached the United States.⁸² As it did with the Haitians, the United States successfully avoided having to confront a large number of asylum applicants through its high seas interdiction, but this policy obviously raises questions about United States compliance with the spirit, if not the letter, of the nonrefoulement provision in Article 33 of the Convention.⁸³

C. *Individualized Hearings and Detention of Asylum Seekers*

The person who successfully makes it to the border of the United States must have claims for asylum or nonrefoulement heard. The language of Article 1⁸⁴ and Article 33⁸⁵ logically implies that the United States cannot evade its duty by not individually hearing asylum claims of people at its borders.⁸⁶ On the other hand, the sheer number of people reaching the border and requesting asylum outstripped the ability of the United States to individually consider asylum claims.⁸⁷ As a result, the United States resorted to two questionable practices arguably contravening the letter and the spirit of the Convention: mass prejudgment of refugee and asylum claims and routine detention of asylum seekers.

1. Mass Prejudgment

Article 33 implicitly allows a state to return any person not qualifying as a refugee.⁸⁸ The United States chose to prejudice groups of

82. See, e.g., DePalma, "U.S. May Accept Some Chinese Stranded on Vessels Off Mexico," *N.Y. Times*, July 16, 1993, at A1; Rosenthal, "The U.S. Smashes a Peril," *N.Y. Times*, July 20, 1993, at A15.

83. China has fined or imprisoned illegal migrants repatriated to China, leading to charges that this amounted to persecution. Schmetzer, "Fleeing Chinese Peasants: Pressure on America?," *Chicago Tribune*, June 27, 1993, sec. 1, at 19.

84. Because the term "refugee" applies to a person, not a group, under Article 1, determinations of refugee status would have to evaluate individual cases, not group cases. See Convention, *supra* n. 2, at Art. 1.

85. Returning groups of people without individualized determination would risk return of legitimate individual refugees; a person becomes a refugee upon satisfying the definition, not when a state recognizes the refugee. See Convention, *supra* n. 2, at Art. 33; Handbook, *supra* n. 32, § 28 ("Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.").

86. Goodwin-Gill, *supra* n. 80, at 18-19.

87. The United States assumed at the time of passage of the Refugee Act that admission of 5,000 people annually through asylum would prove generous, even though backlogs existing at the time made that expectation unrealistic even then. Loescher & Scanlan, *supra* n. 8, at 180.

88. Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?," 26 *Va. J. Int'l L.* 857 (1986). One limited exception has arisen recently with the adoption of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46 Annex, 39 U.N. GAOR Supp. (No. 511 at 198), U.N. Doc. A/39/51 (1984). Article 3 of that document enjoins states from returning any person if "substantial grounds" suggest that the person would be subject to "torture", an act of "severe pain or suffering" under Article 1.

applicants in order to expeditiously evaluate the merits of a claim of refugee status and return those judged to have insufficient evidence of persecution or risk of persecution. Mass prejudgment of any sort proves troublesome enough,⁸⁹ and it becomes even more troublesome when coupled with blatant discrimination. Immigration and Naturalization Service (INS) officials in Florida refused to return Nicaraguan asylum applicants on account of potential persecution at the hands of the Sandinistas,⁹⁰ a decision backed up by the Attorney General.⁹¹ Asylum applicants from other countries (primarily Haiti, El Salvador, Guatemala, and Honduras), though, did not similarly benefit from mass treatment; rather, the United States engaged in a desperate quest to reject as many applicants from this region as possible.⁹² Applicants for refugee status from these countries fared no better; under the priority system employed by the United States within its regional ceilings for refugee admissions, countries not of foreign policy concern to the United States have not received designation, thus representing another mass prejudgment.⁹³

2. Detention of Asylum Seekers

Article 31 of the Convention requires that countries not detain asylum seekers unless investigatory purposes or a chance of disappearance or harm to public order compels detention of an individual.⁹⁴ In an ad hoc response to 125,000 fleeing Cubans in 1980, however, the United States indefinitely detained Cubans deemed dangerous, which generated fierce controversy.⁹⁵ When subsequently faced with large numbers of Haitians seeking asylum, the United States decided to detain the Haitians without bond.⁹⁶ The purpose centered not on national security but on deterrence of asylum seekers, even though Haitians represented fewer than two percent of the people entering the United States illegally.⁹⁷ Further, the

89. Compare Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers," 26 *Va. J. Int'l L.* 897, 901-02 (1986), with Hailbronner, *supra* n. 88, at 866-67, 880.

90. Zucker & Zucker, *supra* n. 8, at 93.

91. See *infra* n. 225 for the reaction of Attorney General Meese to the Nicaraguan migration.

92. This quest inevitably ended in the interdiction of asylum seekers from Haiti with little or no screening. See *supra* nn. 66-83 and accompanying text.

93. See *infra* nn. 128-131 and accompanying text.

94. Convention, *supra* n. 2, at Art. 31(1) ("The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees ... provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."); *id.* at Art. 31(2) ("The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized....").

95. See generally Helton, "The Legality of Detaining Refugees in the United States," 14 *N.Y.U. Rev. L. & Soc. Change* 353 (1986).

96. Zucker & Zucker, *supra* n. 8, at 179-80.

97. *Id.* at 163.

United States carefully detained Haitians in places where pursuit of asylum claims would prove virtually impossible due to the lack of counsel or interpreters.⁹⁸ This led to a ruling by the Supreme Court that the INS had violated its own regulations prohibiting discrimination in the application of detention.⁹⁹ The detention policy eventually extended to all asylum seekers, but still primarily focused on Latin Americans and never included applicants from eastern Europe.¹⁰⁰

In a case centering on detention of asylum seekers from El Salvador, a court detailed systematic abuses of those detained during the early 1980s.¹⁰¹ For instance, INS officials, contrary to stated INS policy, used threats, misrepresentations, subterfuges, and other forms of coercion in attempting to convince Salvadorans to sign voluntary departure forms, even when they expressed an unequivocal fear of return. Also, the agents denied the Salvadorans' right to counsel on many occasions, either directly or by holding the Salvadorans in remote locations, and by maintaining highly inaccurate lists of agencies providing legal assistance. Finally, INS officials placed a higher burden of proof on Salvadoran asylum applicants, due to their prejudice that the Salvadorans' claims lacked merit.¹⁰²

The case of the Haitian refugees detained indefinitely at the United States naval base at Guantanamo Bay because they had tested positive for HIV¹⁰³ represents the most recent and well-publicized incident of detention. Congress has barred immigrants with HIV from entry to the United States, but not refugees with the same problem. The law provides that a refugee with an excludable medical condition can receive admission "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."¹⁰⁴ The United States had never tested any other country's asylum seekers for HIV, creating a presumption that the exemption would apply.¹⁰⁵ At the request of other countries willing to accept refugees from Haiti in the wake of the overthrow of President Jean-Bertrand

98. *Id.* at 201.

99. *Jean v. Nelson*, 472 U.S. 846 (1985). The ruling represented the only non-employment case where the federal government was found to have discriminated on the basis of race or national origin. Little, "United States Haitian Policy: A History of Discrimination," 10 *N.Y.L. Sch. J. Hum. Rts.* 269, 280 (1993). The UNHCR had also suggested that the detention policy violated the Protocol. Helton, *supra* n. 95, at 358.

100. Loescher & Scanlan, *supra* n. 8, at 193; Zucker & Zucker, *supra* n. 8, at 205.

101. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom.*, *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

102. *Id.*

103. *Haitian Centers Council v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (hereinafter *Sale II*). 8 U.S.C. § 1182(a)(1)(A)(I) (Supp. IV 1992), the statute in force at the time of the case, made persons with "a communicable disease of public health significance" excludable. Congress amended the law in 1993 to expressly cover AIDS victims. 8 U.S.C.A. § 1182(A)(1)(A)(I) (West Supp. 1994).

104. 8 U.S.C. § 1157(c)(3) (1988).

105. *Sale II*, 823 F. Supp. at 1048.

Aristide,¹⁰⁶ however, U.S. officials tested the Haitians at Guantanamo Bay for HIV. Those who had passed the prescreening for refugee status but had tested positive for HIV remained at Guantanamo. As the court pointed out, this not only relegated the Haitians to live in squalid conditions,¹⁰⁷ it presented a health threat since the Guantanamo base lacked the proper facilities and personnel to properly handle people with HIV¹⁰⁸ and by holding all of the Haitians with HIV in one place, had one of them contracted a contagious life-threatening disease of some sort, the disease could easily have spread through the entire camp.¹⁰⁹ The court ruled that any detained person has a due process right to governmental conduct that did not become "deliberately indifferent to the personal needs of non-convicted detainees,"¹¹⁰ and that this detention constituted deliberate indifference to the health of the Haitians.¹¹¹ Also, the court disallowed the use of the ban on people with communicable diseases to Haitians with HIV; because the law did not receive strict enforcement, enforcing the ban against the Haitians constituted discrimination.¹¹²

While the court have sustained challenges to detention policies, questionable detention policies continue, particularly with regard to Haitians who reach the United States. The Haitians remain detained in rural facilities,¹¹³ with troublesome transfer policies,¹¹⁴ obsolete lists of available counsel,¹¹⁵ and a high degree of abuse that the government has delayed in resolving.¹¹⁶ While the United States indefinitely detains Haitians in Florida, the Cuban who recently emigrated to the United States by way of a daring flight only faced 48 hours of detention in the same facility.¹¹⁷ By detaining classes of asylum seekers without individual demonstrations of investigatory purposes, risk of disappearance, or a risk to security, the detention policies remain in tension with Article 31 of the Convention. The use of detention to deter Latin American asylum seekers also impacts on the rule against discrimination in Article 3 of the Convention.

106. *Id.*

107. See *id.* at 1037 for a poignant description of the condition of the camp.

108. *Id.* at 1038.

109. *Id.* at 1039.

110. *Id.* at 1044.

111. *Id.*

112. *Id.* at 1048.

113. "Haitians Suffer from Isolation in Rural Jails," *N.Y. Times*, June 28, 1993, at A8.

114. Little, *supra* n. 99, at 279.

115. *Id.* at 284.

116. *Id.* at 284-85.

117. *Id.* at 289.

D. Procedures for Determining Refugee Status and Asylum

Procedurally, states must enact sufficient procedures to fulfill their obligations to genuine refugees.¹¹⁸ The Convention leaves the specific procedural details, however, to the states.¹¹⁹ Indeed, apart from the limitation on restricting the free movement of people with pending claims¹²⁰ and perhaps the need for the procedures to maintain independence from general immigration law,¹²¹ states retain a free hand so long as the procedures conform to the general good faith requirement.¹²² These limitations form the backdrop for an analysis of the procedures both for admitting refugees overseas and for recognizing as refugees and granting asylum to persons inside the country or at the borders.

1. Refugee Status Procedures

Under the Refugee Act, the United States has separate procedures for evaluating claims for refugee status from outside the United States and for evaluating asylum claims inside the United States. The refugee admissions program starts from the designation of ceilings for admission from each region of the world. The President proposes the ceilings, and, after consultation, Congress establishes the ceilings, usually following the recommendations of the President. As the numbers presented later will attest, the total ceilings reflect a commitment to admit a significant share of the world's refugees.¹²³ The numbers also indicate, though, that the use of regional ceilings within the overall ceiling results in a structure where refugees from certain regions enjoy an unfair procedural advantage over refugees from other regions.¹²⁴ This raises questions about whether the use of regional ceilings complies with the nondiscrimination mandate of Article 3 of the Convention.

In addition to the regional ceilings themselves, the United States favors refugees from certain countries within these regions as well. Refugees must typically interview with INS officials at designated locations. The INS currently maintains field offices in Mexico City,

118. See Handbook, *supra* n. 32, § 189 ("It is obvious that, to enable States parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified.").

119. See *id.* ("It is ... left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.").

120. Convention, *supra* n. 2, at Art. 31.

121. Goodwin-Gill, *supra* n. 80, at 148.

122. 1 Grahl-Madsen, *supra* n. 79, § 125. The Handbook recommends that states use systematic procedures administered by qualified, experienced personnel with explicit instructions and should allow the person to fully present the case and to consult the UNHCR office, but even those recommendations do not bind states. Handbook, *supra* n. 32, §§ 190, 192.

123. See *infra* nn. 208-210 and accompanying text.

124. See *infra* nn. 211-221 and accompanying text.

Moscow, Rome, Vienna, Frankfurt, Athens, Nairobi, New Delhi, Bangkok, Singapore, and Hong Kong, and officials make "circuit rides" to conduct interviews at other designated ports.¹²⁵ These locations place a heavy burden on applicants from disfavored regions, who must travel a great distance to reach a processing center.¹²⁶ More importantly, the United States processes refugees according to a system of priorities. The six priorities, in descending order, include: (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 unification, (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.¹²⁷ Except for situations where a refugee's life faces immediate danger, the United States must specify the country within a region before it will accept any refugees from that country under the regional ceiling.¹²⁸ The countries specifically singled out in 1992 included: from Africa, Liberia, Ethiopia, Somalia, and Sudan; from East Asia, Laos and Vietnam; from Eastern Europe, Romania and Albania; from Latin America, Cuba and Haiti; and from the Near East, Iraq, Iran, and Afghanistan.¹²⁹ This indicates that the United States will admit refugees of lower priorities from countries it disapproves of (Somalia, Iraq, Cuba) or has special commitments to (Laos, Vietnam) at the expense of applicants from other countries where similar persecution may exist. Some observers have concluded that the priority system has not received sufficient congressional scrutiny, and has helped further discriminatory implementation of the Refugee Act.¹³⁰

2. Asylum Procedures

A person may either file for asylum independently or may file when the INS commences deportation or exclusion proceedings. When a person in the United States or at the border applies for asylum or withholding of deportation, the claim goes before a member of the corps of Asylum Officers, a division of the INS Office of Refugees,

125. U.S. Department of State, Bureau of Refugee Programs, *World Refugee Report* 168 (1992).

126. Zucker & Zucker, *supra* n. 8, at 85. Regulations provide that if the distance proves too impracticable for the applicant, the person may apply preliminarily at the designated consular office. 8 C.F.R. § 207.1(a) (1993).

127. Robinson & Frelick, "Lives in the Balance: The Political and Humanitarian Impulses in U.S. Refugee Policy," 1990 *Int'l J. Refugee L.* 293, 300 (special issue).

128. A further breakdown of priority designations for fiscal year 1993 appears in Refugee Reports, Dec. 31, 1992, at 6.

129. Administration's Proposed Refugee Admissions Program for Fiscal Year 1993: Hearing Before the Subcommittee on International Law, Immigration and Refugees of the House Committee on the Judiciary, 102d Cong., 2nd Sess. 10-16 (1992) (statement of Jewel Lafontant-Mankarious, Ambassador-at-Large and U.S. Coordinator for Refugee Affairs, Department of State).

130. See, e.g., Zucker & Zucker, *supra* n. 8, at 81.

Asylum, and Parole.¹³¹ Asylum officers interview every applicant for asylum.¹³² The officer must engage in a nonadversarial interview, and in privacy if the applicant so requests.¹³³ Through the interview, the Asylum Officer seeks to "elicit all relevant and useful information"¹³⁴ about the applicant, in accordance with the Handbook standard that "the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner."¹³⁵ The applicant has a right to have counsel present and to present affidavits and witnesses.¹³⁶ The applicant may submit other corroborating evidence for thirty days after the interview.¹³⁷ The Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the State Department may contribute to the record considered by the Asylum Officer; the applicant must receive all nonclassified information the BHRHA provides and have the opportunity to respond.¹³⁸

If an asylum application arises in the context of a deportation or an exclusion hearing, an Immigration Judge, one of the people the Attorney General has designated to handle immigration claims, has exclusive jurisdiction.¹³⁹ An applicant rejected by an Asylum Officer may renew the application before the Immigration Judge once a deportation or exclusion hearing commences.¹⁴⁰ The Immigration Judge reaches a decision using the same standards as Asylum Officers, but may first conduct an adversarial evidentiary hearing to resolve factual matters.¹⁴¹ The applicant has a right of appeal to the Attorney General; the Attorney General has created the Board of Immigration Appeals (BIA) as the appeal mechanism and appoints its

131. 8 C.F.R. §§ 208.1(b), 208.2(a) (1993).

132. 8 C.F.R. § 208.9(a) (1993).

133. 8 C.F.R. § 208.9(b) (1993).

134. *Id.*

135. Handbook, *supra* n. 32, § 196. One commentator argues that the U.S. language proves "profoundly different" from the Handbook standards. Robinson, "A Paradox of Asylum Law — The More Due Process, the Harder the Case," 28 *Willamette L. Rev.* 833, 838 (1992). A fair definition of the word "elicit", though, suggests that the Asylum Officer should do more than serve as a "receptacle for the applicant's evidence". Any problems, then, would flow from implementation, not regulatory authorization. For an analysis of the performance of Asylum Officers, see National Asylum Study Project, Excerpts from the National Asylum Study Project's Interim Assessment of the Asylum Process of the Immigration and Naturalization Service (1992), in *Asylum and Inspections Reform: Hearing Before the Subcommittee on International Law, Immigration, and Refugees of the House Committee on the Judiciary*, 103d Cong., 1st Sess. 384-85 (1993) (hereinafter *Asylum and Inspections Reform*).

136. 8 C.F.R. § 208.9(b) (1993).

137. 8 C.F.R. § 208.9(e) (1993).

138. 8 C.F.R. § 208.11 (1993).

139. 8 C.F.R. § 208.2(b) (1993).

140. 8 C.F.R. § 208.18(b) (1993).

141. 8 C.F.R. § 242.17(c)(4) (1993); see Robinson, *supra* n. 136, at 841. The more adversarial nature in comparison to the interview by the Asylum Officer undoubtedly reflects a prejudgment about applicants who have either waited until a deportation or exclusion hearing to file for asylum or who did not receive approval from an Asylum Officer.

members.¹⁴² In a deportation case, appeal beyond the BIA goes directly to a Federal Circuit Court of Appeals; in an exclusion case, the applicant may file for habeas corpus relief in a Federal District Court.¹⁴³

In evaluating the claim, the Department of Justice has established the following standard of review:

[T]he Asylum Officer or Immigration Judge shall not require the applicant to provide evidence that he would be singled out individually for persecution if: (A) He establishes that there is a pattern or practice in his country of nationality or last habitual residence of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) He establishes his own inclusion in and identification with such group of persons such that his fear of persecution upon return is reasonable.¹⁴⁴

In accordance with the asylum statute, an asylum applicant need only provide a "reasonable basis" of proof of refugee status to become eligible for discretionary asylum;¹⁴⁵ appellate courts will only reverse a factual determination if no reasonable factfinder could have decided as it did.¹⁴⁶ The Attorney General can refuse to exercise this discretion, but must exercise favorable discretion "in the absence of any adverse factors."¹⁴⁷ If a court finds such factors, though, an appeals court can only reverse a discretionary denial if an abuse of discretion occurred.¹⁴⁸ The Asylum Officer or Immigration Judge must reject claims for asylum or withholding of deportation if the evidence indicates that the applicant persecuted others in the country, has a conviction for a particularly serious crime and represents a danger to the community, or reasonably presents a danger to the national security.¹⁴⁹ In accordance with the nonrefoulement statute, the applicant

142. See Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 204-05, 227 (3d ed. 1992); Thomas Alexander Aleinikoff & David A. Martin, *Immigration: Process and Policy* 111-12 (2d ed. 1991).

143. *Id.*

144. 8 C.F.R. § 208.13(b)(2)(i) (1993). But see Refugee Reports, Oct. 29, 1993, at 12 (full National Asylum Study Project report concluded over 50% of Asylum Officers required singling out in violation of regulations).

145. The Supreme Court settled on the "reasonable basis" test in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

146. *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992).

147. *Matter of Pula*, 19 I & N Dec. 467 (BIA 1987).

148. *Rojas v. INS*, 937 F.2d 186, 189-90 (5th Cir. 1991).

149. 8 C.F.R. §§ 208.13(c), 208.14(c), 208.16(c) (1993). Appeals courts have recently affirmed those mandatory exclusion provisions in the context of nonrefoulement for an applicant convicted of an aggravated felony. See, e.g., *Mosquera-Perez v. INS*, 3 F.3d 553 (1st Cir. 1993). The BIA could invoke the security grounds to exclude Omar Abdel-Rahman, connected to various terrorist activities abroad and later implicated in the World Trade Center bombing, without abusing its discretion. *Ali v. Reno*, 829 F. Supp. 1415 (S.D.N.Y. 1993).

must demonstrate a clear probability of persecution in order to receive nonrefoulement,¹⁵⁰ and once again appellate courts will only reverse if no reasonable factfinder would have decided as it did.¹⁵¹ The Attorney General has no discretion, however, to deport to the country of persecution once the applicant gains eligibility under the statute.¹⁵²

The crucial procedural controversy involves the role of the State Department in the process. Diplomats and desk officers who compile the BHRHA reports, understandably influenced by foreign relations concerns, will play down persecution in countries the U.S. wishes to maintain good relations with and play up persecution elsewhere.¹⁵³ As a result, asylum decisions exhibit this bias because Asylum Officers and courts almost always follow the State Department determinations. In fact, 96% of cases decided by Asylum Officers conformed to the State Department opinion,¹⁵⁴ and a study of Immigration Judge rulings also found great deference to the opinions of the State Department.¹⁵⁵

In an effort to decrease this foreign policy influence in decision-making, regulations now direct the INS to gather information from other "credible sources, such as international organizations, private voluntary agencies, or academic institutions,"¹⁵⁶ "disseminate to Asylum Officers information on persecution of persons in other countries,"¹⁵⁷ and to "maintain a documentation center with information

150. *INS v. Stevic*, 467 U.S. 407, 440-41 (1984).

151. See *supra* n. 147.

152. See *supra* n. 151.

153. Sexton, "Political Refugees, Nonrefoulement and State Practice: A Comparative Study," 18 *Vand. J. Transnat'l L.* 731, 756 (1985).

154. Ignatius, "Haitian Asylum Seekers: Their Treatment as a Measure of the I.N.S. Asylum Officer Corps," 7 *Geo. Imm. L.J.* 119, 123 (1993), quoting GAO, *Asylum: Uniform Applications of Standards Uncertain — Few Denied Applicants Deported* (1987).

155. Anker, "Determining Asylum Claims in the United States," 2 *Int'l J. Refugee L.* 252, 258 (1990). For statistical analysis of asylum adjudications and further illustration of a foreign policy bias in the process, see *infra* nn. 222-231 and accompanying text. This should not suggest that some courts do not comprehend the biases of the State Department and react accordingly. For instance, the court in *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990), *rev'd* on other grounds *sub nom.*, *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), placed even greater emphasis on a State Department letter and country report of political persecution in Guatemala because the United States had good relations with Guatemala and the State Department accordingly had an incentive to downplay political persecution occurring there. A few courts, citing the desire of the Refugee Act to abolish discrimination in the asylum process, have questioned any use of information from those responsible for foreign policy when considering discretionary denials of asylum. See *Doherty v. INS*, 908 F.2d 1108, 1121 (2nd Cir. 1990), *rev'd* on other grounds, 112 S. Ct. 719 (1992), where the appeals court said the U.S. interest in good relations with England should not have affected the determination of whether a person's request to be deported to Ireland should have received approval.

156. 8 C.F.R. § 208.12(a) (1993).

157. 8 C.F.R. § 208.1(c) (1993).

on human rights conditions.”¹⁵⁸ The INS has begun to compile the nongovernmental information through use of “master exhibits” on specific subpopulations of people subject to persecution, so that parties wishing to use nongovernmental documents have a ready reference.¹⁵⁹ The applicant must receive any information the Asylum Officer relies upon and have a chance to rebut the information.¹⁶⁰ The injection of information from other sources, though, may not have much effect on bias toward official governmental findings.¹⁶¹ A study of Immigration Judges found that they routinely ignored data from nongovernmental sources.¹⁶² In fact, one appellate court has gone so far as to say that it would not consider reports of human rights abuses from any source other than the U.S. government or the U.N., saying it could not adequately gauge the motivations of the people drawing up the other reports.¹⁶³ This court stated that even though the official sources may suffer from political bias, the judiciary has little ability to weigh the accuracy of the official assessments, so it cannot legitimately challenge them.¹⁶⁴ For the most part, then, the State Department has retained an important role in the asylum procedure.

E. Substantive Refugee Status and Asylum Determinations

Substantively, states incur an obligation under the Convention to confer refugee status on people they decide meet the Convention criteria. States, however, retain discretion to determine whether the person falls under the Convention or not, provided that they interpret the Convention in good faith and in a nondiscriminatory way. The 1980 Refugee Act has adopted the Convention definition of “refugee”.¹⁶⁵ Determination of how the United States has chosen to inter-

158. *Id.*

159. 58 Fed. Reg. 26165 (1993).

160. 8 C.F.R. § 208.12(a) (1993).

161. A preliminary assessment by the National Asylum Study Project of the new Asylum Officer corps found that many officers denied applications using State Department information contradicting more recent and reliable evidence. National Asylum Study Project, “Excerpts from the National Asylum Study Project’s Interim Assessment of the Asylum Process of the Immigration and Naturalization Service (1992),” in, *Asylum and Inspections Reform*, supra n. 136, at 384-85. Perhaps in response to this reflexive reliance on the State Department opinions, a bill currently before Congress proposes to do away with individual State Department opinions altogether. H.R. 3363, 103d Cong., 1st Sess. § 201 (1993).

162. Anker, supra n. 156, at 257.

163. *M.A. v. INS*, 899 F.2d 304, 313 (4th Cir. 1990) (en banc). Despite the new asylum regulations, appeals court judges still routinely rely on State Department judgments. See, e.g., *Khano v. INS*, 999 F.2d 1203 (7th Cir. 1993) (State Department opinion that Syrian Christians not subject to religious persecution relied on); *Yacoub v. INS*, 999 F.2d 1296, 1298 (8th Cir. 1993) (State Department opinion that Egyptian Christians not subject to religious persecution relied on). For a potential congressional response to this reliance, see supra n. 162.

164. *M.A.*, 899 F.2d at 313.

165. 8 U.S.C. § 1101(a)(42) (1988).

pret the Convention definition involves examining judicial review of refugee decisions. Courts, especially the Supreme Court, have chosen to interpret the Convention more restrictively in recent years, thereby providing the executive branch with legal authority to limit obligations under the Convention.

1. Well-Founded Fear

The Handbook elaborates a two-part test - subjective and objective - for judging when a fear proves "well-founded".¹⁶⁶ United States courts have generally followed this pattern of evaluating the fear of a potential refugee.¹⁶⁷ Subjectively, the applicant must demonstrate a genuine fear of persecution, which brings claims of credibility into question. Although in the large majority of cases courts find enough of a subjective fear to require a complete consideration of the objectivity of the fear, if courts doubt the genuineness of the fear, they will deny the application without bothering to make a detailed evaluation of the objective merits of the case.¹⁶⁸ Objectively, the applicant must present specific facts which can prove that a reasonable person in the applicant's person would fear persecution.¹⁶⁹

2. Persecution

A person fleeing danger in a country does not necessarily run from the type of danger called "persecution". International bodies and theorists have espoused widely disparate explanations of what constitutes persecution.¹⁷⁰ The Handbook states that the Convention envisioned that "a threat to life or freedom" or "other serious violations of human rights" would amount to persecution.¹⁷¹ United

166. Handbook, *supra* n. 32, §§ 37-38.

167. See *Cuadras v. INS*, 910 F.2d 567 (9th Cir. 1990); *Balazoski v. INS*, 932 F.2d 638 (7th Cir. 1991); *Ravindran v. INS*, 976 F.2d 754 (1st Cir. 1992); *Huaman-Cornelio v. BIA*, 979 F.2d 995 (4th Cir. 1992); *Alsheweikh v. INS*, 990 F.2d 1025 (8th Cir. 1993).

168. See, e.g., *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1000 (9th Cir. 1988) (Salvadoran who lived in El Salvador 6 months later than time of alleged persecution); *Alvarez-Flores v. INS*, 909 F.2d 1, 5 (1st Cir. 1990) (Salvadoran who lived in El Salvador 4 years after time of alleged persecution); *Castillo v. INS*, 951 F.2d 1147 (9th Cir. 1991) (Nicaraguan who lived in Nicaragua 5 1/2 years after time of alleged persecution); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256-57 (9th Cir. 1992) (Nicaraguan who transformed initial claim of one incident of interrogation into a tale of threats, beatings with injuries, 6 to 7 arrests, and 3 detentions). These cases indicate that the subjective test of well-founded fear has more vitality than some analysts have suggested. For arguments for a purely objective test, see 1 Grahl-Madsen, *supra* n. 79, § 76; Hathaway, *supra* n. 61, at 65-67.

169. *Matter of Mogharrabi*, 19 I & N Dec. 439 (BIA 1987).

170. See Goodwin-Gill, *supra* n. 80, at 39 (life or freedom plus other rights, depending on the seriousness of the violation, the nature of the restriction, and the connection between the restriction and a rights deprivation); Hathaway, *supra* n. 61, at 109-117 (four-tier test for persecution based on rights derived from international covenants).

171. Handbook, *supra* n. 32, § 51.

States courts have come far short of establishing such a thorough theoretical construct, naturally preferring to consider the problem more narrowly in the context of individual cases. Courts concur that any significant curtailment of life or freedom will amount to persecution. Courts have ruled, though, that short-term detention by totalitarian regimes did not constitute persecution;¹⁷² only when imprisonment stretched for a period of several months had the detention surpassed the threshold for persecution.¹⁷³ Also, punishment of crime will not amount to persecution unless the punishment flowed from an "improper governmental motive".¹⁷⁴ Enforcement of military conscription will not qualify either unless the enforcement becomes "disproportionately severe" or the conscription requested proves "contrary to the basic rules of human conduct."¹⁷⁵

The Supreme Court has hinted that persecution would represent a "seemingly broader concept" than "life or freedom".¹⁷⁶ A few lower courts have concurred, embracing a broad concept of persecution. One extended the definition to "punishment ... that any country does not recognize as legitimate."¹⁷⁷ Another summed up relevant precedent and concluded that harm alone would suffice.¹⁷⁸ Generally, however, courts have required a substantial degree of harm before they have classified the harm as "persecution". For instance, economic deprivation will constitute persecution only if it resulted from a governmental act specifically aimed at the person or group and the deprivation sharply curtails the ability to earn a livelihood.¹⁷⁹ And although various groups may persecute (the authorities, other sup-

172. See *Kubon v. INS*, 913 F.2d 380, 388 (7th Cir. 1990) ("brief confinement for political opposition to a totalitarian regime does not necessarily constitute persecution"); *Zalega v. INS*, 916 F.2d 1257, 1260 (7th Cir. 1990) (detention for short time with no mistreatment not necessarily persecution).

173. *Osaghae v. INS*, 942 F.2d 1160, 1163 (7th Cir. 1991) (Nigerian with record of political opposition imprisoned for several months).

174. See *Mabugah v. INS*, 937 F.2d 426, 429 (9th Cir. 1991), where a Filipino faced charges initiated by the Marcos regime of misappropriating corporation funds to a political party. The court ruled that since the Aquino government had continued the prosecution, the prosecution in all likelihood stemmed from no improper motive. See generally Handbook, *supra* n. 32, § 56 (punishment for crime not in and of itself persecution).

175. Handbook, *supra* n. 32, §§ 169, 171. This means that the government must know of the person's belief and structure the military request and punishment accordingly. *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990). One court recently found a conscription request to violate these standards when a Salvadoran had received a command to participate in an assassination or possibly face death himself. *Barraza-Rivera v. INS*, 913 F.2d 1443, 1452 (9th Cir. 1990).

176. *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984).

177. *Osaghae*, 942 F.2d at 1163.

178. *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986).

179. See *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) (Haitian driven into hiding by threats on life severely impaired in ability to earn livelihood and persecuted); *Zalega v. INS*, 916 F.2d 1257, 1260 (7th Cir. 1990) (Polish person fired by government and restricted from acquiring more land could still earn substantially the same living and insufficiently deprived for persecution).

porters of the regime, the military, the government, and other groups the government proves "unable or unwilling to control"),¹⁸⁰ if the government has the will and the ability to protect an individual, harm inflicted by another group will not constitute "persecution".¹⁸¹

An examination of these decisions indicates, then, that while the United States may not have engaged in a frontal assault on the Convention conception of "persecution", its courts have nibbled at the edges through strict interpretations of the term in some cases.

3. Civil or Political Status

Even if a person faces persecution, the persecution must have occurred (or must occur in the future) "on account of race, religion, nationality, membership in a particular social group."¹⁸² This has proven increasingly unavailing for modern-day victims of generalized violence, who cannot prove individualized or group-specific persecution.¹⁸³ United States courts have zealously labored to keep refugee status within the narrow bounds of civil or political status delineated in the Refugee Act. A recent Supreme Court decision, *INS v. Elias-Zacarias*, confirms an ominous trend by U.S. courts to require an even stronger connection than formerly required between the persecution and one of the five enumerated grounds.¹⁸⁴ The Court, through an opinion written by Justice Scalia, ruled that in order to demonstrate persecution on account of the political opinion of neutrality, the applicant must prove that the persecutors wished to punish the neutrality and must not have had any other purpose for their persecution.¹⁸⁵ It also noted that the victim must prove that the persecution occurred on account of the victim's political opinion, not the political opinion of the persecutor.¹⁸⁶ The ruling prompted a dissenting opinion which remarked that "the narrow, grudging construction

180. *Adebisi v. INS*, 952 F.2d 910, 913-14 (5th Cir. 1992).

181. *Id.* at 914.

182. 8 U.S.C. § 1101(a)(42) (1988).

183. Gunning, "Expanding the International Definition of Refugee: A Multicultural View," 13 *Fordham Int'l L.J.* 35, 58 (1990).

184. 112 S. Ct. 812 (1992). The case involved an 18-year-old Guatemalan who was asked by armed, uniformed, and masked guerrillas to join their forces and had refused. When they promised to return, he fled, fearing either persecution by the guerrillas for refusing to join or retaliation by the government if he joined the guerrillas. After reaching the United States, the guerrillas had returned to his home to look for him on two occasions.

185. *Id.* at 816-17. This does not require, however, an affirmative statement of belief by the victim; even when an applicant lied to potential persecutors about the applicant's political opinion, the applicant may have the ability to prove persecution on account of political opinion. *Rivas-Martinez v. INS*, 997 F.2d 1143, 1147 (5th Cir. 1993).

186. *Elias-Zacarias*, 112 S. Ct. at 816 ("If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion.").

of the concept of 'political opinion' proved inconsistent with a more liberal ruling regarding likelihood of persecution issued five years earlier by the Court.¹⁸⁷

An examination of recent case law reveals that courts have indeed applied this "narrow, grudging construction" in cases involving all five enumerated grounds. One court held that as long as a government cooperates with members of other races and nationalities, the court would presume that the government punishes members of a particular minority race or nationality for legitimate reasons and thus has not persecuted an individual applicant on account of race or nationality.¹⁸⁸ Regarding religion, if a government has the will and capability to prosecute groups that persecute people on the basis of religion, the persecuted people cannot claim refugee status.¹⁸⁹ Similarly, if the government persecutes but has non-religious motivations for its actions, courts will not find persecution on account of religion.¹⁹⁰ Courts have interpreted "particular social group" rather narrowly, and rejected most claims to membership in a particular social group.¹⁹¹ Finally, the Supreme Court decision itself exhibits the narrow interpretation now given to "political opinion".¹⁹²

187. *Id.* at 818 (Stevens, J., dissenting). Justice Stevens wrote the majority opinion in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the case he referred to. *Cardoza-Fonseca* held that "well-founded fear" as set out in the Refugee Act did not require that a person more likely than not prove such fear; Justice Stevens argued that the lower standard required a more lenient evaluation of whether a refusal to join the armed forces constituted a political opinion. *Id.* at 818-19.

188. *Matter of T-*, Interim Decision No. 3187 (BIA 1992) (Tamil in Sri Lanka not subject to persecution on account of "ethnicity" because the Sri Lankan government cooperated militarily and politically with other Tamil groups).

189. See *Elnager v. INS*, 930 F.2d 784 (9th Cir. 1991) (Christian in Egypt not subject to persecution on account of religion because government did not persecute on account of religion, would provide an adequate remedy for any harm, and would protect him from radical groups who would persecute him on account of religion).

190. See *Matter of R-*, Interim Decision No. 3195 (BIA 1992) (Sikh in Punjab region of India persecuted by policemen to obtain names of members of guerrilla group, so not persecuted on account of religious beliefs); *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (conscientious objector not subject of religious persecution when conscripted unless government knew of religious belief and required military service anyway). But see *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992) (since Iranian religious law prescribes death for belief in Christianity, Christian subject to religious persecution despite "low profile" of belief).

191. For examples of subpopulations ruled not to constitute a "particular social group," see, e.g., *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1577 (9th Cir. 1986) (young, working class, urban males); *DeValle v. INS*, 901 F.2d 787, 793 (9th Cir. 1990) (families of different deserters); *Arriaga-Barrientos v. INS*, 925 F.2d 1177, 1180 (9th Cir. 1991) (military membership); *Gomez v. INS*, 947 F.2d 660 (2nd Cir. 1991) (young women on grounds that they represented targets of rape); *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 240 (2nd Cir. 1992) (expatriated or poor Yemeni Moslems); *Ravindran v. INS*, 976 F.2d 754, 761 (1st Cir. 1992) (Tamil males 15 to 45); *Bastanipour*, 980 F.2d at 1132 (Iranian drug traffickers). *Contra Matter of Toboro* No. A23 220 644 (BIA Mar. 12, 1990) (homosexuals qualify); *Gebremichael v. INS*, 1993 WL 473428 (1st Cir.) (families qualify); *Zamora-Mutel v. INS*, 905 F.2d 833, 838 (5th Cir. 1990) (unions qualify).

192. See *supra* nn. 185-188 and accompanying text.

In the end, however, the stricter scrutiny of whether persecution occurred on account of one of the five enumerated categories illustrates less any lack of compliance with the Convention definition on the part of the United States than the shortcomings of the Convention definition itself.

4. Cessation

Finally, if conditions in the country have changed to the extent that the threat of persecution has effectively ceased, a person cannot claim refugee status.¹⁹³ The coincidence of a large backlog of asylum cases and the sudden end of the Cold War have transformed this provision into a welcome tool to limit asylum claims in recent years. The Board of Immigration Appeals took "administrative notice" of the political changes in many countries and denied asylum claims unless the applicant could provide evidence indicating a fear of persecution despite the new regimes.¹⁹⁴ This has spawned several challenges to the use of the general administrative notice. One challenge concerned whether the generalized notice could serve as the exclusive means for deciding a case.¹⁹⁵ Another dispute revolves around whether the BIA must inform the applicant of its intent to take notice of the change in conditions and provide an opportunity to respond to the notice.¹⁹⁶ Another debate takes up the related question of whether the potential to have a case reopened to respond to new evi-

193. Convention, *supra* n. 2, at Art 1(C)(5). U.S. law also allows termination of asylum if the person no longer qualifies as a refugee as a result of changed conditions in the previous country of residence. 8 U.S.C. § 1158(b) (1988).

194. See, e.g., *Kacmarczyk v. INS*, 933 F.2d 588 (7th Cir.), cert. denied, 112 S. Ct. 583 (1991). In *Kacmarczyk*, three asylum applicants had faced harassment by the Polish government in the early 1980's due to their pro-Solidarity activities. Immigration Judges separately denied all three applications. The BIA separately affirmed the three decisions in 1990, using the same notice of Solidarity's role in the Polish government as of 1989 to rule that even if the applicants had possessed valid claims, their refugee status would have ceased.

195. Courts have ruled that the BIA may use the general notice in more than one individual case as long as it does not become the exclusive means of judging the merits of a case. *Rhoa-Zamora v. INS*, 971 F.2d 26 (7th Cir. 1992), cert. denied sub nom., *Esquivel-Berrios v. INS*, 113 S. Ct. 1943 (1993). If courts considered only the general notice of change in conditions, this would contradict the duty under the Convention to individually adjudicate asylum claims. See *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023 (9th Cir. 1992), where the court ruled that use of a completely generalized notice in response to a Nicaraguan's claim that the change in government would not stop future persecution does not provide a sufficient basis for cessation.

196. Compare *Kapcia v. INS*, 944 F.2d 702, 705-06 (10th Cir. 1991) (if the applicant can reasonably anticipate that the BIA would bring the change of government into consideration, no notice required), with *Castillo-Villagra*, 972 F.2d at 1038-39 (if the government seeks to take notice of issues resting on questionable assumptions, such as assuming that the rise to power of Violeta Chamorro in Nicaragua necessarily meant that the Sandinistas could not persecute people with impunity, it must warn the applicant and provide the opportunity to respond). The BIA recently interpreted *Castillo-Villagra* to say that knowledge of new conditions and knowledge of the BIA's ability to take notice suffices. *Matter of H-M- et al.*, Interim Decision No. 3204 (BIA 1993).

dence adequately protects an applicant when the BIA takes administrative notice without providing an opportunity to rebut the notice.¹⁹⁷

F. Rights Upon Resettlement

In contrast to the roadblocks barring initial acceptance as a refugee, once a refugee settles in the United States, the U.S. takes great pains to fulfill the obligations it incurs under the Convention with regard to accepted refugees.¹⁹⁸ The refugees the United States accepts for resettlement become eligible for a wide array of services under statute. Refugees qualify for employment, housing, education, cash, food, and medical care programs.¹⁹⁹ The U.S. readily provides such assistance because it wishes refugees to become self-sufficient as soon as possible; thus, the overwhelming emphasis of the resettlement statutes centers on providing employment for refugees.²⁰⁰ In fact, federal regulations require that if 55% or more of the eligible refugees in a state receive cash and medical assistance (CMA), 85% of the money provided to the states for refugee social services must go toward employment services.²⁰¹ Statutes also place the burden on U.S. officials to establish housing and education programs that provide refugees with fulfillment of these "basic needs".²⁰² A refugee may receive CMA if the refugee proves need and does not qualify for assistance under other programs.²⁰³ The U.S. may condition this assistance on the participation of the refugee in a job search, including acceptance of any "appropriate" job offer.²⁰⁴

The major question regarding these resettlement programs has revolved around whether the amount of funding the federal government provides for the programs adequately accounts for the needs of refugees admitted by the federal government. This question, U.S. officials have discovered, involves a delicate balancing act. Once refugees exhaust their eligibility under the refugee-specific programs,

197. Castillo-Villagra, 972 F.2d at 1029-30 (BIA must grant motion to reopen if notice taken without warning). See generally Frasher & Tran, Note, "Administrative Notice in Political Asylum Appeals: Does the Motion to Reopen Preserve the Alien's Due Process Rights?," 69 *Notre Dame L. Rev.* 311 (1993).

198. Generally speaking, accepted refugees enjoy most of the rights of nationals of the host country. See Convention, *supra* n. 2, at Arts. 4, 8, 13-28, 34 for these obligations. Voting rights represents a conspicuous exception, but a few advocates have proposed that the U.S. grant the right to vote to certain aliens residing in the country. Rosburg, "Aliens and Equal Protection: Why Not the Right to Vote?," 75 *Mich. L. Rev.* 1092 (1977).

199. For an overview of this eligibility and a comparison to the eligibility of aliens in general, see Kurzban, *supra* n. 143, at F-1.

200. The legislation authorizing resettlement programs stresses that "employable refugees should be placed on jobs as soon as possible after their arrival in the United States." 8 U.S.C. § 1522(a)(1)(B)(i) (1988).

201. 45 C.F.R. § 400.146(a) (1992).

202. 8 U.S.C. § 1522(a)(2)(C) (1988).

203. 8 U.S.C. § 1522(e)(1) (1988); 45 C.F.R. § 400.56 (1992).

204. 45 C.F.R. § 400.75(a) (1992).

they will receive general welfare benefits if necessary. If the government gives refugees too much early assistance, the refugees will become too dependent on receiving public assistance, meaning more refugees will enter the welfare system and the indirect costs of admitting refugees to the United States will increase.²⁰⁵ This belief, in combination with budgetary restraints, has led the United States to decrease the amount of money it devotes to refugee resettlement, reasoning that while refugees still receive enough assistance to facilitate their entry, the cutbacks provide an added incentive to obtain employment as quickly as possible. Thus, in fiscal year 1986 the federal government spent \$6,629 per refugee in direct resettlement expenditures, but by fiscal year 1990 that amount had decreased to \$3,185, and that level has remained fairly constant since then.²⁰⁶ While the decreases have not yet reached dangerous levels, further decreases would jeopardize the well-being of resettled refugees.

G. Statistical Analyses

Focusing on some of the statistical data released over the years will help in evaluating whether the United States has lived up to the substantive promises of the Convention. In general, the figures demonstrate that the United States has made a praiseworthy effort to admit a substantial number of refugees over the years. From 1975 to 1990, the United States accepted 1,478,184 refugees, either through the regular refugee program or through a grant of asylum.²⁰⁷ This places the United States first by an enormous margin in terms of total number of refugees admitted for resettlement, and fourth in the world in terms of refugees resettled per capita.²⁰⁸

In terms of sheer numbers, then, the United States has shouldered its burden of accepting its share of the world's refu-

205. See David S. North, *Refugee Earnings and Utilization of Financial Assistance Programs* 28-29, 37 (1984). This study evaluated the 1975 refugee influx from Indochina and found that the refugees left the welfare rolls only slowly over a period of years, resulting in federal government expenditures of \$706.3 million, only 27% of which represented direct spending on refugee programs by the Office of Refugee Resettlement.

206. The data used to make this assessment come from various sources. The number of refugees admitted per year and the resettlement appropriations from fiscal years 1986 through 1992 come from S. Rep. No. 316, 102d Cong., 2nd Sess. 4 (1992). The refugee admissions numbers for fiscal years 1992 and 1993 come from the same source, but reflected the allocated ceilings rather than actual admissions. The fiscal year 1994 ceiling comes from 58 Fed. Reg. 52213 (1993). The fiscal year 1993 resettlement appropriation combines the \$381.5 million initial appropriation ("Congress Gives Green(ish) Light to Private Resettlement Program; Implementation Set to Begin in January," *Refugee Reports*, Oct. 1992, at 2) and the \$27 million supplemental appropriation (Pub. L. No. 103-37 (1993)). The fiscal year 1994 appropriation also comes from Pub. L. No. 103-37 (1993).

207. U.S. Committee for Refugees, *World Refugee Survey-1992*, 36 (1992).

208. *Id.*

gees.²⁰⁹ Ironically, however, the large numbers have brought attention to the problem of discrimination in admissions levels. For example, some analysts have wondered how the United States could claim that admitting Haitian refugees would overburden it.²¹⁰ Examining the statistics of refugee admissions and asylum acceptances will bring U.S. compliance with Article 3 of the Convention into question.

1. Refugee Status Approvals

Currently, 19.7 million people around the world have left their homelands and either have status as refugees or have applied for political asylum.²¹¹ Approximately 5.4 million of these refugees fled African nations, 7.2 million fled Asia, primarily from Afghanistan and Iraq, 883,000 fled from Central and South America, and 4.3 million came from the former Soviet Union and Eastern Europe, largely from the former Yugoslavia.²¹² Against this background, in fiscal year 1994 the United States set a total ceiling of 120,000 for refugee admissions.²¹³ The U.S. set the ceiling for African admissions at 7,000; for the Near East, 6,000; for East Asia, 45,000; for Latin America, 4,000; and for the former Soviet Union and Eastern Europe, 55,000.²¹⁴ The numbers suggest disproportionately low ceilings for some regions, particularly Africa, and disproportionately high ceilings for other regions, particularly East Asia and the former Soviet Union.

These ceilings have combined with the priority system to transform refugee admissions even more into a creature of U.S. foreign policy.²¹⁵ Only about 20,000 people from Africa have received ap-

209. A few scholars, though, have grumbled that the U.S. and other developed countries could do much better. See, e.g., Peter & Renata Singer, "The Ethics of Refugee Policy," in Mark Gibney (ed.), *Open Borders? Closed Societies? The Ethical and Political Issues* 111, 128 (1988) ("It would not be difficult for the nations of the developed world to move closer to fulfilling their moral obligations to refugees. There is no objective evidence to show that doubling their refugee intake would cause them any harm whatsoever.").

210. Shacknove, "American Duties for Refugees: Their Scope and Limits," in Gibney, *supra* n. 210, at 138.

211. These numbers come from the report recently published by UNHCR. "UN: 44 Million Refugees Fleeing Ethnic Wars," *Chicago Tribune*, Nov. 11, 1993, at A2; "U.N. Report: Refugees Struggle Amid Racism," *USA Today*, Nov. 10, 1993, at 6A.

212. *Id.*

213. 58 Fed. Reg. 52213 (1993).

214. *Id.*

215. The figures in this paragraph represent compilations of data from fiscal years 1986 through 1992. The data for fiscal years 1986 through 1989 come from U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service* 1986 at 41 (1987); U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service* 1987 at 49 (1988); U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service* 1988 at 49 (1989); and U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization*

proval of applications for refugee status from fiscal years 1986 to 1992, and approximately two thirds of that total consists of applicants from communist Ethiopia. The U.S. has accepted applications from less than 14,000 Latin Americans, and virtually all accepted applications came from Cubans. Less than 50,000 refugee status approvals came from the Near East, almost exclusively from Afghanistan, Iran, and, in the wake of the Gulf War, Iraq. These totals contrast with almost 250,000 acceptances each during that time period from East Asia and the Soviet Union and close to 50,000 from Eastern Europe. To sum up, then, the United States approved refugee applications from over 600,000 people from either communist countries or other countries whose political systems the United States disapproved of, while it accepted less than 5,000 refugees from all other countries.²¹⁶ These numbers underscore how the refugee admission process has in practice ignored the call of Article 3 and worked primarily to benefit refugees from certain countries independent of the level of persecution refugees from each country have suffered.²¹⁷

Some explanations advanced to explain the discrepancy soften this conclusion, while others do not. First, the estimated 2.5 million Palestinian refugees from the Near East fall under a separate U.N. refugee program and typically do not desire resettlement in a different region. Second, more than 50% of the refugees specifically singled out by the UNHCR as needing resettlement do resettle in the United States.²¹⁸ Third, the United States will often stress the superiority of repatriation and regional solutions for refugees from distant places such as Africa. The United States, however, has tended to use this argument selectively, only emphasizing alternative solutions when doing so buttresses its prejudgment not to admit refugees from

Service 1989 at 51 (1990). Data from fiscal years 1990 through 1992 come from INS figures published in *Refugee Reports*, Dec. 21, 1990, at 13; *Refugee Reports*, Dec. 30, 1991, at 13; and *Refugee Reports*, Dec. 31, 1992, at 13.

216. For purposes of this calculation, countries designated as communist or of special concern to the United States included all of the Eastern Europe and the U.S.S.R., Angola, Ethiopia, Hong Kong, China, Cambodia, Laos, Vietnam, Afghanistan, Iran, Syria, Iraq (only fiscal years 1991 and 1992), Libya, Cuba, and Nicaragua.

217. This result accords with the conclusion of a study finding no correlation between rights abuses in a country and chances of admission to the United States as a refugee. Gibney et al., "USA Refugee Policy: A Human Rights Analysis Update," 5 *J. Refugee Stud.* 33, 40-41 (1992).

218. Administration's Proposed Refugee Admissions Program for Fiscal Year 1993: Hearing Before the Subcommittee on International Law, Immigration, and Refugees of the House Committee on the Judiciary, 102d Cong., 2nd Sess. 42 (1992) (statement of Warren Zimmerman, Director, Bureau of Refugee Programs, Department of State). Recently, the United States has committed to accept approximately 10,000 Bosnians for admission under the refugee ceiling for the former Soviet Union and Eastern Europe. The UNHCR designated those Bosnians for resettlement due to their status as former detainees, torture victims, or female victims of violence. *Refugee Reports*, Sept. 30, 1993, at 5.

the country.²¹⁹ For instance, when ceilings proved higher than the number of actual refugees from a region, the United States, when it perceived a foreign policy benefit from admitting people from that region anyway, would accept people with spurious refugee claims in order to fill the ceiling for that year.²²⁰

2. Asylum Decisions

The foreign policy emphasis in determining which asylum claims the United States will encourage or discourage has inevitably resulted in stark contrasts in asylum acceptance rates.²²¹ Roughly 80 percent of persons granted asylum came from communist countries or countries whose political systems the United States disapproved of, although the majority of applicants came from other countries. This disparity would have proven even greater had asylum adjudicators not, at the behest of the State Department, toughened the standards for those from Eastern Europe and Nicaragua in the wake of the political changes there.²²² Had the United States not successfully kept many cases from adjudication through detention or interdiction, the gap would have swelled even further.²²³

The United States has attempted to make two explanations for the distinction, neither of which proves satisfying. First, it has argued that applicants from communist nations fled "totalitarian" countries, which it claimed persecuted to a greater extent than the "authoritarian" countries most applicants came from.²²⁴ This argument betrays the foreign policy prism through which policymakers

219. Zucker & Zucker, *supra* n. 8, at 50.

220. *Id.* at 85, citing Weiss Fagen, "U.S. Refugee Admissions: Processing in Europe," 4 *Migration News* 3-4, 8-10 (1985). For instance, applicants from the Soviet Union and Eastern Europe would qualify under more lenient standards at the end of the calendar year, as INS officials treated the ceiling figure as a quota it would fill every year.

221. As with the numbers on refugee status applications, the following numbers recount the adjudication of asylum cases from fiscal years 1986 through 1992. The data for fiscal years 1986 through 1989 come from Statistical Yearbook 1986, *supra* n. 216, at 49; Statistical Yearbook 1987, *supra* n. 216, at 57; Statistical Yearbook 1988, *supra* n. 216, at 57; and Statistical Yearbook 1989, *supra* n. 216, at 59. The data for fiscal years 1990 and 1992 come from INS figures published in *Refugee Reports*, Dec. 21, 1990, at 12; *Refugee Reports*, Dec. 30, 1991, at 12; and *Refugee Reports*, Dec. 31, 1992, at 12. For distinctions between communist countries and other countries of foreign policy concern to the United States and other nations, see *supra* n. 217.

222. See *supra* n. 195 and accompanying text.

223. As a result of the Haitian interdiction program, only 28 of the 24,559 people interdicted from 1981 through September 1991 came to the United States to pursue an asylum claim. Benoit & Kornhauser, "Unsafe Havens," 59 *U. Chi. L. Rev.* 1421, 1451 (1992). For a discussion of deterrence through detention, see *supra* nn. 96-97 and accompanying text.

224. The U.S. nearly enshrined this distinction into law. In 1986, responding to an observation by Attorney General Edwin Meese that U.S. law should distinguish communists from other refugees, Justice Department officials drafted rules providing that the U.S. would presume that migrants from "totalitarian" nations possessed a well-founded fear of persecution. Zucker & Zucker, *supra* n. 8, at 143.

viewed the refugee problem. A General Accounting Office study found that among applicants who had recounted threats to their lives or torture, arrest, or imprisonment in their home countries, 3% of applicants from El Salvador received approval compared to 55% for applicants from Poland and 64% for applicants from Iran.²²⁵ Any distinction between "totalitarian" and "authoritarian" governments, then, do not justify the large differences in asylum acceptance rates between the two.

Second, the United States has insisted that most people from Latin America seek asylum for economic reasons, thus justifying lower approval rates for applicants from impoverished countries.²²⁶ This argument flies in the face of volumes of statistical data to the contrary. The large majority of applications for asylum come from countries with the worst human rights abuses.²²⁷ Specific analyses of the number of people leaving El Salvador²²⁸ and Haiti²²⁹ each year have shown that increases in departure from each country closely correlated to increases in the amount of political persecution occurring in each country. Therefore, although a recent revamping of the INS asylum adjudication procedure resulted in some improvement in asylum acceptance rates from previously disfavored nations,²³⁰ the asylum adjudication process continues to largely reflect the foreign policy concerns of the United States.

III. PROSPECTS FOR FUTURE PROTECTION: PROPOSALS FOR REFORM

Like many other Western countries, economic difficulties in the U.S. have combined with budget limitations to create a degree of "compassion fatigue" toward immigrants in general, including refugees. The stories highlighting skyrocketing numbers of asylum applicants²³¹ and the implication of asylum applicants in several notorious terrorist incidents²³² have exacerbated these concerns and spurred many proposals to reform refugee law.

The reform proposals generally center on dealing with two eventualities not foreseen by the Convention. First, the reform proposals

225. Ignatius, *supra* n. 155, at 124, quoting GAO, *Asylum: Uniform Applications of Standards Uncertain — Few Denied Applicants Deported* app. II at 42 (1987).

226. See Loescher & Scanlan, *supra* n. 8, at 178-79 for rationalizations regarding Haitians routinely applied to Latin American migrants.

227. Gibney et al., *supra* n. 218, at 40-41.

228. Zucker & Zucker, *supra* n. 8, at 224.

229. Benoit & Kornhauser, *supra* n. 224, at 1451.

230. See National Asylum Study Project, *supra* n. 162, at 384-85 (improved acceptance rates for Haitians, Guatemalans, and Salvadorans).

231. In fiscal year 1993, the INS accepted 147,200 initial applications for asylum, by far the most ever. *Refugee Reports*, Oct. 29, 1993, at 16 (quoting INS figures).

232. This included those accused of the World Trade Center bombing and an accused assassin of a CIA employee. See, e.g., *Asylum and Inspections Reform*, *supra* n. 136, at 2 (statement of Rep. Mazzoli).

seek to find a legally effective way to handle and reject a large number of people claiming refugee status, arguing that the emphasis on meticulous individualized decisionmaking emphasized in the Convention arose from a world with much fewer people demanding asylum.²³³ Second, the reformers aim at establishing procedures applicable to refugee seekers illegally in a country, a phenomenon not foreseen by the Convention, which focused on a known refugee population.²³⁴ Proponents of reform acknowledged these difficulties and sought to implement structural changes consistent with the general goals of the Convention, even though the reforms generally would decrease the number of refugees accepted by the United States, because increasing refugee flows risk backlash legislation undermining the Convention regime. The current proposals have received characterization both as necessary reform aimed at avoiding more draconian limitations and as evidence of the backlash itself.

A. *Refugee Allocation Shifts*

To this point, refugee allocations have remained relatively constant both in terms of the absolute number of people admitted as refugees and in terms of the regional ceilings.²³⁵ While Congress has not yet challenged these ceilings, one Representative expressed displeasure with the current ceilings at the most recent congressional hearings reviewing ceilings proposed by the President. He asked, "Should we continue the [resettlement] programs from the Soviet Union? Should we continue programs in Southeast Asia after all these years, when they are in fact immigration programs rather than refugee programs?"²³⁶ So far, the administration has successfully maintained that the high ceilings for the former Soviet Union and East Asia will decrease in coming years as Jews in the former Soviet Union face lesser risks of persecution and the special Indochinese admission program attempting to fulfill American obligations from the Vietnam War fades away, but that family unity concerns compel high admissions for the present.²³⁷ The United States could, however, include relatives of refugees within the general immigration program, while reserving the numbers allocated for refugee admissions to the most deserving applicants.

233. Martin, "Reforming Asylum Adjudications: On Navigating the Coast of Bohemia," 138 *U. Pa. L. Rev.* 1247, 1252 (1990).

234. *Id.* at 1255 & n. 15.

235. For the current ceilings, see *supra* nn. 214-215 and accompanying text.

236. *Refugee Reports*, Sept. 30, 1993, at 2 (quoting statement in congressional hearing of Rep. Mazzoli).

237. *Id.*

B. Streamlining of Asylum Procedures

The Clinton Administration currently contemplates regulations which would directly refer denied asylum applicants to an Immigration Judge rather than force the INS to initiate a separate proceeding before the application goes to an Immigration Judge.²³⁸ The Clinton Administration has also proposed limiting BIA review of decisions of Immigration Judges to cases presenting "novel questions of law or good grounds for appeal."²³⁹ Neither of these proposals, however, promises to have much of an effect on streamlining procedures.²⁴⁰

C. Limitations on Admission Through Asylum

These proposals have taken shape in two statutes currently pending before Congress. The first statute represents a combination and modification of previously advanced statutes, and has bipartisan sponsorship in the House of Representatives.²⁴¹ The second statute represents the proposal of the Clinton Administration, which also enjoys bipartisan sponsorship.²⁴²

1. Preinspection at Foreign Airports

The preinspection provision in the House bill would establish stations at three of the ten foreign airports with the largest number of persons directly departing for the United States²⁴³ and at three of the ten foreign airports with the largest number of undocumented immigrants directly departing for the United States²⁴⁴ for preinspection of passengers heading to the United States. By uncovering persons lacking proper documentation at foreign airports, the United States would effectively preclude their passage to the United States by forcing them to pursue their asylum claims in that country.

The preinspection proposal encounters two difficulties which make its implementation prospects dim. First, countries will exhibit great reluctance to allow the United States to prescreen passengers at their airports, especially when one of the primary goals of doing so

238. *Refugee Reports*, Oct. 29, 1993, at 2-3.

239. *Id.* at 3.

240. The BIA reviews approximately 2,500 to 3,000 asylum cases a year. Martin, *supra* n. 234, at 1313-14 (citing BIA data). In fact, many of these cases receive abbreviated treatment already. Limitation of BIA review, then, would only marginally impact on the efficiency of asylum decisionmaking.

241. H.R. 3363, 103d Cong., 1st Sess. (1993) (sponsored by Rep. Schumer and Rep. McCollum).

242. S. 1333, 103d Cong., 1st Sess. (1993) (sponsored by Sen. Kennedy, Sen. Simon, Sen. DeConcini, Sen. Feinstein, Sen. D'Amato, Sen. Byrd, Sen. Graham, Sen. Breaux, Sen. Boxer, and Sen. Simpson).

243. H.R. 3363, *supra* n. 242, § 301.

244. *Id.* The specific airports involved would depend on the volume of passengers headed to the United States, the ability of the airports to handle preinspection, and the willingness of the country to allow preinspection by the United States.

centers on burdening that country with more asylum applicants.²⁴⁵ Second, if the country has a record of persecuting refugees or returning refugees to the country of persecution, if the U.S. removed passengers in those countries in a cursory fashion it would effectively violate the Convention, because the preinspection by the U.S. would indirectly result in the return of some legitimate refugees.²⁴⁶ The law attempts to account for this latter concern by establishing two separate safeguards, which may prove more illusory than real. First, any country the U.S. establishes a preinspection station in must maintain "practices and procedures ... in accordance with" the Convention.²⁴⁷ Second, the country must not have served as the source of a significant number of refugees in the past five years.²⁴⁸

2. Summary Exclusion

The most debated asylum reform concerns expedited exclusion of persons seeking entry to the United States. The Clinton bill and the House bill take similar approaches to the issue. Any person seeking entry to the United States who presents a document misrepresenting a material fact, or who had presented a document upon boarding but did not present any documents upon arriving at the United States,²⁴⁹ would become excludable.²⁵⁰ Exclusion would occur immediately unless the applicant expressed a desire to apply for asylum.²⁵¹ At that point, immigration officials would transfer the person to an Asylum Officer.²⁵² The Asylum Officer would immediately interview the person; the Clinton bill would allow the person a right of "consultation" with another person, but only prior to the interview and provided that the consultation not delay the interview.²⁵³ The Asylum Officer would determine if the person had a "credible fear" of persecution, upon which the person could enter the United States and pursue an asylum claim.²⁵⁴ This decision would receive immediate review by

245. Asylum and Inspections Reform, *supra* n. 136, at 43 (statement of Rep. McCollum).

246. *Id.*

247. H.R. 3363, *supra* n. 242, § 301.

248. *Id.*

249. S. 1333, *supra* n. 243, § 2.

250. *Id.* The House bill would extend this exclusion to any person lacking proper documentation. H.R. 3363, *supra* n. 242, § 101.

251. S. 1333, *supra* n. 243, § 2. The House bill would also delay exclusion if the applicant expressed a fear of persecution. H.R. 3363, *supra* n. 242, § 101.

252. H.R. 3363, *supra* n. 242, § 101. Under the Clinton bill, this Asylum Officer would have to have at least one year of experience in handling asylum claims. S. 1333, *supra* n. 243, § 2.

253. S. 1333, *supra* n. 243, § 2.

254. *Id.*; H.R. 3363, *supra* n. 242, § 101. The Clinton bill defines "credible fear" as: 1) a substantial likelihood that the statements of the applicant were true, and 2) a substantial likelihood that in light of those statements and the situation in the country of alleged persecution the person could establish eligibility for refugee status. S. 1333, *supra* n. 243, § 2. The House bill would require that the applicant's statements

another official.²⁵⁵ This decision would face no judicial review except for habeas corpus review essentially confirming the identity of the person in question.²⁵⁶

The proposal has raised a large number of questions, all of which illustrate that summary exclusion may prove unworkable or unfair (or both). The first centers on the ability of Asylum Officers to fairly make credible fear determinations in places like airports. Empirically, screening officials in other countries attempting these programs have made faulty decisions.²⁵⁷ Although advocates of this reform have touted the expertise of Asylum Officers,²⁵⁸ Asylum Officers still tend to rely too greatly on the State Department or their own opinions in making decisions.²⁵⁹ Indeed, in this context Asylum Officers would exclusively rely on their own knowledge of conditions in countries, which would inevitably result in prejudgments.²⁶⁰ Second, the credible fear standard could do either too much or too little to exclude people. Empirically, countries employing similar schemes have excluded only a small percentage of applicants.²⁶¹ If this proved true in the United States, the expense of establishing the screening process might outweigh the benefits. On the other hand, the INS has implied that it believes two-thirds of asylum applicants would not survive summary exclusion.²⁶² This raises grave concerns that the

more likely than not be true, but would only require a "significant possibility" of refugee status to establish a credible fear of persecution. H.R. 3363, supra n. 242, § 101.

255. Under the House bill another Asylum Officer would conduct this review. H.R. 3363, supra n. 242, § 101. The Clinton bill would establish another group of people with training equivalent to Asylum Officers but independent from the INS to review the decision of the Asylum Officer. S. 1333, supra n. 243, § 2.

256. Id., § 4; H.R. 3363, supra n. 242, § 101.

257. Martin, supra n. 234, at 1371 (referring to study of similar procedures in several European countries).

258. See, e.g., Asylum and Inspections Reform, supra n. 136, at 140 (statement of Gene McNary, former Commissioner, Immigration and Naturalization Service) (Asylum Officer corps "has received many accolades and been recognized by United Nation's High Commissioner for Refugees, as a model to be emulated by the rest of the world"); id. at 117 (statement of Chris Sale, Acting Commissioner, Immigration and Naturalization Service) (Asylum Officer corps "has received favorable reviews from the refugee advocacy community" and thus "we have a model in place ... that would enable us" to institute summary exclusion).

259. See supra n. 162 (study finding overreliance of Asylum Officers on State Department opinions); *Refugee Reports*, Oct. 29, 1993, at 13 (discussing government study finding that Asylum Officers do not review any outside information for lack of time).

260. See Asylum and Inspections Reform, supra n. 136, at 444 (statement of Lloyd Lochridge, Chair, American Bar Association Coordinating Committee on Immigration Law); Martin, supra n. 234, at 1333 (unless Asylum Officers well informed, removing checks on discretion — in this case State Department opinions — leads to more biased judgments).

261. Martin, supra n. 234, at 1371 (citing studies finding 25% exclusion rate in Germany and 10% exclusion rate in Canada).

262. Asylum and Inspections Reform, supra n. 136, at 74 (statement of Sale) (favorably comparing credible fear determination for detention, where 33 percent of applicants meet the credible fear burden).

"credible fear" standard erected as an additional hurdle for asylum applicants to leap over could exclude too many people with legitimate refugee claims. Third, neither bill explicitly says that people will receive notification of a right to apply for asylum,²⁶³ which creates the possibility that legitimate refugees will face return because they did not know what rights they possessed. Fourth, the lack of the presence of counsel at the credible fear interview (even if the person may consult with another person beforehand) could inhibit the ability of the person to present the strongest possible case for admission into the country under the credible fear test.²⁶⁴ These two objections illustrate the potential that legitimate refugees might prove uniquely susceptible to exclusion, while the people with dubious claims might pass the screening only because they received advance "coaching". Fifth, the limits in the bills on judicial review may not survive constitutional scrutiny.²⁶⁵ Lastly, large-scale summary exclusion may simply encourage people to enter the country through a land border, over which the United States has less control.²⁶⁶

3. Time Limits for Asylum Applications

The House bill, in addition to the preinspection and summary exclusion provisions, contains proposals for a more complete overhaul of the entire system. The most potentially far-reaching of these changes would require any person wishing to apply for asylum to file a notice of intent to apply for asylum with the INS within 30 days of arrival in the United States,²⁶⁷ and to file the application itself within 60 days of arrival.²⁶⁸ A person could file for asylum after that time only if the person could present clear and convincing evidence of a change in circumstances in the country of origin making the person newly eligible for refugee status.²⁶⁹ The proposal targets the people who stay in the country for substantial periods of time but only apply for asylum when deportation proceedings commence, largely as a delaying tactic.

Proposals to cut off eligibility for asylum after a set time period have generated fierce controversy. Critics argued that people just ar-

263. Id. at 443 (statement of Lochridge).

264. See id. at 236 (statement of Arthur C. Helton, Director, Refugee Project, Lawyers' Committee for Human Rights) (asylum applicants in summary exclusion proceeding should have access to counsel and the UNHCR, including lists of available free legal services).

265. Id. at 279 (statement of Warren R. Leiden, Executive Director, American Immigration Lawyers Association).

266. Id. at 184 (statement of Katherine L. Vaughns, Associate Professor of Law, University of Maryland School of Law).

267. H.R. 3363, supra n. 242, § 201. The initial version of the bill proposed a 7-day time limit to file a notice to apply for asylum. H.R. 1679, 103d Cong., 1st Sess. § 2 (1993).

268. H.R. 3363, supra n. 242, § 201.

269. Id.

living in the United States would not have sufficient legal acumen to file a notice to apply for asylum so quickly.²⁷⁰ Further, the refusal to hear asylum claims because of an artificially imposed procedural deadline regardless of the potential merits of the claim violates Article 33 of the Convention.²⁷¹ Proponents have responded that Article 31 places an affirmative duty on refugee seekers to immediately come forward upon entered the country, and that persons failing to do so cannot claim any of the rights granted by the Convention.²⁷² Article 31, however, merely authorizes states to impose "penalties" for not reporting, not return to a country of persecution.²⁷³ Therefore, a rigid time bar of this nature, while an attractive means to strike at questionable asylum claims, does not square with the Convention.

D. Expanded Protection for Refugees

The Convention definition, adopted in the Refugee Act, encompasses a lower percentage of refugees today, because it does not cover victims of generalized violence.²⁷⁴ As a result, countries have come under increasing pressure to adopt policies to assist the people who do not qualify as refugees under the Convention. The United States has taken some steps in this regard, particularly when it can do so without making any open-ended commitment to admitting a large number of people into the country.

The United States remains the leading contributor to the U.N. High Commissioner for Refugees, whose mandate extends to people not strictly refugees under the Convention.²⁷⁵ Also, in 1990 the United States passed an amendment giving the Attorney General discretion to extend "temporary protected status" (which prevents deportation) to nationals of states where either "(A) the Attorney General finds that there is an ongoing armed conflict...", "(B) ... there has been an earthquake, flood, drought, epidemic, or other environmental disaster...", or "(C) the Attorney General finds that there exist extraordinary and temporary conditions...."²⁷⁶ Currently, the United

270. See, e.g., *Asylum and Inspections Reform*, supra n. 136, at 163 (statement of Robert Rubin, Assistant Director, Lawyers' Committee for Civil Rights of the San Francisco Bay Area).

271. See id. at 187 (statement of Vaughns) (returning legitimate refugees for failure to meet procedural deadline violates non-refoulement guarantee of Convention); id. at 241 (statement of Helton) (return of refugees under these circumstances would violate international guarantee of individualized determination of refugee status).

272. *Refugee Reports*, Oct. 29, 1993, at 9 (citing remarks made in congressional hearing by Rep. Mazzoli).

273. Convention, supra n. 2, at Art. 31(1).

274. See supra n. 186 and accompanying text.

275. In 1991, the United States contributed just under \$200 million to UNHCR, comprising 22.4% of total contributions. U.S. Department of State, supra n. 126, at 173.

276. 8 U.S.C.A. § 1254a (West Supp. 1993). The statute required that nationals of El Salvador receive this status.

States extends this temporary protected status to citizens of Liberia,²⁷⁷ El Salvador,²⁷⁸ Bosnia,²⁷⁹ and Somalia.²⁸⁰ The ultimate success of temporary protected status, though, will probably depend on the ability to make these countries safe and habitable again, as the Deputy High Commissioner for Refugees pointed out in a recent speech.²⁸¹ In addition to extending temporary protected status, then, the U.S. has sought to discourage huge flows of potential refugees by attempting to provide international protection for potential refugees within the borders of their countries. This worked successfully with regard to the Kurdish population in northern Iraq.²⁸² These efforts illustrate that the United States has taken small steps to move refugee law beyond the increasingly narrow strictures of the Convention. They also show, however, that the U.S. has no desire to grant full refugee status to people not satisfying the Convention definition; any further progress to protect these people on a permanent basis will come slowly.

IV. CONCLUSION

The Cold War era brought a shift in United States refugee policy from an emphasis on domestic policy to an emphasis on foreign policy.²⁸³ This meant that a large number of refugees could gain entry to the United States, but only if the refugees came from countries of foreign policy concern to the United States. The end of the Cold War and domestic economic stagnation have returned domestic and nationalistic factors to the forefront in the refugee debate. The case law and proposed legislation indicate that the United States may become less of a haven for refugees than before. Still, anti-immigrant attitudes, although widespread, have not extended universally, and refugee advocacy groups remain quite vocal and continue to thwart more aggressive attempts at restriction. Therefore, while the United States may adopt screening procedures not contemplated by the Convention, it will not likely forsake its time-honored tradition of accepting refugees in the future.

277. 58 Fed. Reg. 7898 (1993).

278. 58 Fed. Reg. 32157 (1993).

279. 58 Fed. Reg. 40676 (1993).

280. 58 Fed. Reg. 48898 (1993).

281. M. Douglas Stafford, *New Strategies for Refugees in the 1990s*, 25 *Refugees* 10, 12 (1992).

282. Paul Glastis, "Huddled Masses: Anxious Americans Want New Restrictions and Tougher Enforcement," *U.S. News & World Report*, June 21, 1993, at 38.

283. See *supra* n. 10 and accompanying text for a discussion of the four driving forces of U.S. immigration policy throughout its history.

