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REFORMING THE ASYLUM PROCESS: AN AMBITIOUS PROPOSAL FOR ADEQUATE STAFFING

Stephen H. Legomsky*

Asylum is just one strand of United States immigration policy, but in the past few years no aspect of immigration policy has been more hotly debated in the United States or in other Western industrialized nations. Partly, this is because the subject matter is inherently volatile. Mostly, however, it is because the sheer volume of asylum claims has skyrocketed, both within the United States and worldwide.

Within the debates on asylum, the controversy has centered more around process than around substantive criteria. Almost everyone has legitimate complaints about the process. People differ over what the problems are, which of them are the most pressing, and what the best solutions would be—but practically everyone involved agrees the problems are serious.

There are two distinct adjudication systems now in place. One is a relatively informal system operated by the Immigration and Naturalization Service (INS) through specially trained Asylum Officers. The other is the formal procedure of the Executive Office for Immigration Review (EOIR), which consists of an evidentiary hearing before an immigration judge and a right of appeal to the Board of Immigration Appeals (BIA). The two systems intersect because a claim that is denied by the INS may be renewed *de novo* before an immigration judge. For this reason, it is often said that there are “two bites at the apple.”

So what are the problems? Well, it depends on whom you ask. Many people, including refugee advocates, emphasize impediments to fairness and accuracy. Historically, many believe, there has been either a foreign policy or an ideological bias in favor of those fleeing United States adversaries and against those who flee United States allies. How the demise of Communism and the resultant shifts in the alignments of

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nations will alter this pattern is only now beginning to unfold, and predictions are treacherous.

At the other end of the political spectrum are those whose principal concern is that the whole system is collapsing under the sheer weight of what has become a massive caseload. The numbers are overwhelming. From the beginning to the end of fiscal year 1993, the INS backlog rose from 200,000 to 300,000. It is now approaching 400,000. The EOIR does not have a precise count because it does not segregate out those exclusion and deportation cases in which asylum is claimed, but its asylum backlog appears to be in the thousands.

The main reason the backlogs concern people is that they contribute to delay. The argument is that delays encourage people to file unfounded asylum claims because they know that it will take years to complete the process and that in the meantime the applicants may remain in the United States and work. Therefore, more people file. As delays become longer, the incentive to file unfounded claims increases, more people act on that incentive, the backlog worsens, the delays get longer still, and the cycle continues.

Immigration experts disagree about the scale and the importance of that phenomenon, but even those of us who have usually taken the applicants' side of the argument must acknowledge the obvious: Millions of people want to come to the United States. If they know that an asylum claim will buy time in the United States, a large number of unfounded claims would not be a surprising result. Human nature will have to be made over before that ceases to be the case. Perhaps more important, the public—in part because of some regrettably sensationalized media accounts—*perceives* that to be the case, and the natural reaction of congressional and executive branch leaders has been to respond. So the practical question is not whether to address the problem, but how to do it in a way that will be not only effective, but also fair to the asylum claimants. For them, error can spell tragedy.

Varying solutions and partial solutions have been proposed. Recently, the INS formally unveiled its proposal, which calls for a filing fee with a waiver for those who cannot afford it; deferring work authorization for 180 days or until asylum is granted, whichever comes first; automatically referring asylum denials to immigration judges for deportation proceedings; and dispensing with Notices of Intent to Deny and with reasons for negative decisions on the theory that the case is going to be heard *de novo* by the immigration judge.

Other strategies have also been floated. They include several summary exclusion bills pending in Congress; elimination of referrals to the State

Department for advisory opinions; allowing only one bite at the apple; legalizing the oldest cases in the backlog; stepping up sanctions against attorneys when filings are found to be frivolous; going to a strict last-in-first-out system; making BIA appeals discretionary with the Board; restricting judicial review; and increasing the staffing resources.

So there is no shortage of possible scenarios. One might glean from the debates the impression that the United States must make a painful choice between sacrificing its sovereignty and sacrificing at least a portion of its commitment to procedural justice. We are told that the United States must either (1) open up its borders to anyone who arrives at a port of entry, mutters the word asylum, and stays forever because the system cannot process his or her claim; or (2) take short-cuts on procedural fairness and accept a high risk of erroneously returning people to persecution or even to death.

One should not concede that dilemma. The United States can have its sovereignty and still maintain a fair and humane asylum system, provided it is willing to invest adequate adjudicative resources *in the short term*. The United States is near the bottom of the list of popular asylum countries when it comes to level of adjudication resources per case. The United States tries to get by on a shoestring, and it seems surprised when it founders.

There are now some serious proposals to improve that position. There is talk of doubling the number of INS asylum officers from 150 to 300 and the number of immigration judges from 85 to 170. These would be very positive and important steps. By most projections, however, even doubling the number of adjudicators would do little more than stem further increases in the backlog, rather than appreciably cut into it. A dramatic quick hit is essential. Recognizing that the political realities make this highly unlikely, one should consider the following strategy for eliminating the INS backlog. (This is not appropriate for the EOIR, where other strategies would be more workable.)

First, someone should sit down and calculate the number of full-time adjudicators that it would take to wipe out, in one year, the entire INS backlog plus expected new filings during that year. Perhaps the INS has already done this tabulation. Assumptions are hazardous, but crude approximations are possible. Assume the INS asylum corps receives 150,000 new filings in the next year, to go with the 350,000 cases already in the backlog. Assume further, as INS Asylum Director Gregg Beyer has said, that adjudicators can reasonably be expected to decide 360 cases per year. It would then take about 1,400 adjudicators to de-

cide 500,000 cases in one year. Since there are now 150, the INS would have to hire another 1,250 for that year.

These 1,250 individuals could be recruited, fresh out of law school, for one-year terms as Justice Department fellows. The job climate is grim right now for graduating law students. Plenty of talented graduates would leap at the opportunity. The Fellows would receive the same training as the current INS asylum officers. At a cost of, say, \$40,000 per Fellow in salary and fringe benefits, the total project would require a one-time expenditure of \$50,000,000 (plus training and administrative costs). This approximation is crude, but it illustrates at least the order of magnitude of this one-time-only fix. Admittedly, limited building space would mean headaches for those who must provide work stations for these DOJ Fellows.

The obvious reaction will be that we cannot afford it. Such a response is not just incorrect, it is illogical. Unless one assumes that the backlogged claimants will some day be legalized—in which event this proposal is not recommended—then all those cases will have to be adjudicated eventually in any event. Thus, whatever it would cost to do this, the one certainty is that it will cost more to do it later. For one thing, to the extent the Department utilizes one-year fellowships, the cost per case is drastically reduced. The salary of a one-year Department Fellow fresh out of law school will be less than the salary of an experienced attorney holding a permanent career position. For another, to the extent that delays generate filings, a quick hit that wipes out the backlog reduces the total number of cases filed. Consequently, there should be both fewer cases to adjudicate and less cost per case. Nor is there any reason to believe that properly trained law school graduates, drawn from the cream of the crop, will lower the quality of the decision-making.

Besides, what is the alternative?