

1994

United States Refugee and Asylum Policy: Toward a Coherent Immigration Policy

Bill McCollum

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

McCollum, Bill. "United States Refugee and Asylum Policy: Toward a Coherent Immigration Policy." *American University International Law Review* 9, no. 4 (1994): 203-212.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

UNITED STATES REFUGEE AND ASYLUM POLICY: TOWARD A COHERENT IMMIGRATION POLICY

The Honorable Bill McCollum*

It is increasingly difficult to distinguish political refugees from economic immigrants. Several factors have contributed to this development, notably the elimination of a relatively clear delineation between the free world and the communist bloc, as well as the globalization of communication and transportation. In light of these revolutionary changes, now is an opportune time for a fresh evaluation of both international and United States refugee and asylum policy.

The Geneva Convention Relating to the Status of Refugees¹ and the Protocol Relating to the Status of Refugees² are products of the post-World War II era.³ Even the Refugee Act of 1980⁴ is based on assumptions that in many cases are no longer valid. During the Cold War, a clear consensus existed about the political persecution from which refugees from communist countries sought escape. In addition, the very nature of a communist country's control over its population limited the number of people who succeeded in escaping.

Over the past several years, major refugee-producing situations have shifted from conflicts between communist and non-communist factions to civil wars, often within poorer nations and based on ethnicity.⁵ Some of

* B.A. 1965, J.D. 1968, University of Florida. The author was first elected to the House of Representatives in 1980 and presently serves on the Committee on the Judiciary where he is the ranking minority member of the Subcommittee on International Law, Immigration, and Refugees.

1. Geneva Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

2. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

3. See GIL LOESCHER, BEYOND CHARITY 76 (1993) (noting that the definition of "refugee" as used in the 1951 Convention does not fit the circumstances of the mass emigration from Third World countries occurring in the 1960s and 1970s).

4. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

5. See LOESCHER, *supra* note 3, at 12-13, 75, 85 (explaining that the changes in

the people fleeing these areas may in fact be escaping from individualized persecution, but many also seek to escape the general violence and to emigrate to a place that offers economic opportunities and personal freedoms.⁶ With the increasingly widespread knowledge that claiming refugee status—or seeking asylum—is an avenue to possible resettlement in a developed country like the United States, it becomes more and more difficult to sort the valid from the fraudulent claims.

Advanced international communication and transportation exacerbate the problem. People in the most remote regions of the world have access to radios, televisions, and telephones; as a result, they are exposed to pictures—frequently unrealistically rosy pictures—of life in developed countries, about which they previously may have known little or nothing. Seeking to escape violence and economic hardship and hoping for a “better” life, large numbers are using today’s easier and cheaper international transportation to migrate to economically developed countries. This response is a rational reaction to the conditions and options facing these people; but it complicates international and national refugee strategies and policies. Although most of these people are not refugees from individualized persecution, they are difficult to distinguish from those who are.⁷

Also contributing to the expanding number of refugees is the pressure to expand the definition of “refugee” to include broad groups of people who suffer discrimination—sometimes severe discrimination—because of cultural and social policies in some countries.⁸ While the international community should not condone such discrimination and should encourage amelioration of such policies, an expansion of the definition of “refugee” to include these groups would result in using the immigration laws of developed countries to address what we view as negative cultural characteristics of less developed countries. It also would increase significantly the number of persons eligible for refugee status. The cur-

the global refugee situation in the 1960s and 1970s resulted largely from civil strife and civil war that came with the end of colonialism in the Third World).

6. LOESCHER, *supra* note 3, at 16 (noting that factors causing people to flee their homelands include “political instability, social inequalities, poor economic opportunities . . . higher standards of living, jobs, or free communities”).

7. See LOESCHER, *supra* note 3, at 16-17, 141 (noting that it is increasingly difficult to differentiate between refugees and immigrants).

8. Cf. LOESCHER, *supra* note 3, at 140-41 (stating that there is no clear international definition of “refugee”). The traditional definition, embraced by the 1951 Convention and the 1967 Protocol, includes those people who flee persecution based on race, religion, nationality, social status, or politics. *Id.*

rent definition may need to be clarified, but it should not be broadened, and refugee status determinations must continue to be made on an individual basis.

This rising tide of migrants is a relatively new phenomena that was not apparent at the time of the Geneva Convention, the 1967 Protocol, or the Refugee Act of 1980. The Refugee Act of 1980, for example, subject to certain exceptions, allowed a maximum number of annual refugee admissions of 50,000⁹ and a maximum number of annual asylum claims of 5,000.¹⁰ In reality, the total number of refugees and asylees granted permanent resident status in the United States swelled to over one million in the decade of the 1980s; in comparison, less than half of that number of claims were granted in the prior decade.¹¹ In fiscal year 1993, an additional 150,000 or more individuals applied for asylum, continuing a sharply upward trend in asylum applications in recent years¹² that has resulted in an asylum claim backlog of nearly 330,000.¹³ In fiscal year 1994, moreover, the United States will admit as many as 121,000 refugees,¹⁴ and an additional 150,000 or more individuals will apply for asylum should recent trends continue.¹⁵

This tide of immigrants is placing severe strains on many countries that have generous refugee and asylum policies. Although the basic

9. Immigration and Nationality Act § 207(a), 8 U.S.C. § 1157(a) (1988).

10. *Id.*, at § 209(b), 8 U.S.C. § 1159(b) (1988). A 1990 amendment increased the number of asylum adjustments to 10,000. Immigration Act of 1990, Pub. L. No. 101-649, § 104(a)(1), 104 Stat. 4978 (to be codified as amended at 8 U.S.C. § 1159(b) (1990)).

11. U.S. IMMIGRATION AND NATURALIZATION SERVICE, 1992 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 88 (Oct. 1993) [hereinafter 1992 INS YEARBOOK].

12. *Id.* at 83.

13. See *Asylum Applications Filed with the INS FY 1993 (Preliminary)*, U.S. IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM DIVISION (Dec. 21, 1993) [hereinafter INS ASYLUM APPLICATIONS] (reporting that the number of applications filed in FY 1993 was 150,386, and at the end of FY 1993, the total backlog was 329,817), see also U.S. IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION INITIATIVE: COMPREHENSIVE ASYLUM REFORM 4 (Feb. 9, 1994) (stating that the backlog of applications is growing in FY 1994 at a rate of 10,000 new cases per month). The backlog at the end of FY 1994 is expected to reach 450,000 cases, while another 100,000 cases will be added beginning January 1995 as a result of the December 1990 settlement of *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). *Id.*

14. U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 1994, REPORT TO THE CONGRESS 4 (1993).

15. 1992 INS YEARBOOK, *supra* note 11, at 83.

objective of providing refuge to victims of persecution remains valid, the agreements and laws designed to meet that objective must be reviewed and amended.

Reevaluation of refugee law and policy in the United States should be an integrated element of a general review of immigration policy. A fair, coherent, and consistent U.S. immigration policy should encompass all persons coming into this country, regardless of their reasons. While giving refugees and asylees a high priority, such a policy should envision how all newcomers will fit into the continuing growth and development of the United States and its culture.

Although current U.S. immigration policy is neither coherent nor consistent,¹⁶ at its foundation is the consensus of a vast majority of U.S. citizens that the number of people coming to the United States should be controlled.¹⁷ Most Americans would agree that while immigration in moderation is a positive and enriching force, immigration out of control swamps health, education, and welfare systems, contributes to unemployment of citizens, and exacerbates social strife and tension.¹⁸ The challenge, then, is to develop a coherent immigration policy that encourages controlled immigration. The objective of such a policy should be assimilation and unity.

Assimilation is a positive, even an essential, two-way exchange. As the immigrant becomes "Americanized," the American culture also evolves and absorbs elements of the immigrant's culture. The point of controlled immigration and assimilation is not to remain exactly as we are. It is to continue to mix together, sharing some fundamental views and characteristics and the ability to communicate.

Historically, the United States has witnessed waves of immigrants, with crests followed by troughs.¹⁹ When the numbers reach too high for assimilation, there tends to be a backlash followed by a reduction in numbers; assimilation progresses, and the numbers start rising again.²⁰

16. See Don Barnett, *Their Teeming Shores: Analysis of Impact of Refugee Act of 1980*, 45 NAT'L REV. 51 (Nov. 1, 1993) (explaining the "incoherence" of U.S. refugee policy).

17. Ronald Brownstein and Richard Simon, *Hospitality Turns into Hostility*, L.A. TIMES, Nov. 14, 1993, at A1, A5 (reporting a 1992 summer poll finding that two-thirds of Americans believed immigration should be reduced, as opposed to one-third of Americans who felt that way in 1965).

18. See *id.* (noting a tendency in Americans to protest immigration when the economy is in a downturn).

19. See *id.* (describing immigration patterns in the U.S. since the 19th century).

20. *Id.*

Currently, we are riding an immigration wave that continues to rise without a crest in sight.²¹

The optimal rate of immigration varies with one's perspective. For instance, ranchers in the 1800s saw vast, empty plains well-suited to grazing cattle; Native Americans, on the other hand, saw ancestral hunting grounds taken over by immigrants. Later, these ranchers saw their vast, unfenced range lands partitioned off into farms by new immigrant farmers, who saw open spaces with plenty of room for cultivating crops. Today, immigrants see space and opportunities that may not be available to them in their home countries,²² while current U.S. citizens see overcrowding as well as competition for jobs, education, and government assistance.²³

Some of the tension over the number of immigrants admitted to the United States results from an increasing population that is competing for jobs and resources.²⁴ Much of the population growth in the United States is attributable to immigration.²⁵ Since the federal government is supposed to have control over immigration, citizens and state and local governments become frustrated when the federal government appears unwilling or unable to exert such control.

Some opposition to high rates of immigration results from cultural differences. Resentment rises when residents perceive immigrants as coming to the United States not to become Americans, but to exploit America. In the vast majority of cases, this is an unfair perception, but it is one that is fostered when systems to promote assimilation break down or come under attack. For instance, bilingualism is divisive when it promotes a "right" to be taught in one's native language, as opposed to an "opportunity" to be taught in English so that one can learn English. Also divisive are requirements to print government documents, such as voting ballots, in languages in addition to English.

21. See 1992 INS YEARBOOK, *supra* note 11, at 16 (presenting a summary of immigration patterns in the United States, a chart reflecting immigrants admitted to the United States from 1900 through 1992, and indicating no discernible end to the current immigration wave).

22. See LOESCHER, *supra* note 3, at 18 (comparing the poor economic and political circumstances of most refugees with the prosperity of the United States).

23. See Brownstein, *supra* note 17, at A4 (explaining that the new concern over immigrants is the cost of providing government services and welfare).

24. See *id.* at A4 (recognizing that the concern over losing jobs to legal and illegal immigrants still remains in the minds of U.S. residents).

25. See *id.* at A4 (noting that the increasing population growth is attributable to the rising number of immigrants).

Since the objective of our immigration laws is to control and moderate the flow of newcomers to the United States, and more people want to immigrate than can be assimilated, what should those laws require and what should the priorities be?

First, a comprehensive ceiling should be set for all immigrants. The number should be as generous as is consistent with paced absorption and assimilation of new residents. It also should take notice of the fact that while illegal immigration can and must be greatly reduced, it will not be totally eliminated. Second, the countries of origin of those admitted to the United States should reflect, at least to some extent, the current population. This should be done in a way that neither absolutely shuts out any region nor gives any region a relative lock on disproportionate percentages of immigration.

Third, the order of priority for those admitted should be: (1) spouses and children of citizens; (2) persons seeking refuge and asylum from political or ethnic-based persecution; (3) persons with skills and talents that would enrich the United States and help the economy and development of the United States; (4) persons who may not have the skills and talents of the previous category, but who wish to come to the United States to make a better life for themselves and their families; and (5) limited extended family members.

The first category of immigrants should be unlimited to preserve unity of the nuclear family, which is and should continue to be the basis for American society and culture. All of the other categories should have limits that reflect their priority in the scheme of immigration policy. Not every refugee, not every skilled person, not every hardworking person seeking a better life, and not all extended family members can come to the United States. The numbers are just too overwhelming. We should acknowledge that up front and honestly. Nor can we solve all the world's problems through immigration; but we can have a rational, compassionate, and constructive immigration policy that is consistent with our country's national interests.

Any progress in developing and implementing a coherent, effective immigration policy is dependent on controlling illegal immigration. Total elimination of illegal immigration is neither practical nor necessary, but it can and must be reduced from the current overwhelming numbers. As of fiscal year 1992, there were an estimated 3.4 million foreign nationals

illegally residing in the United States.²⁶ Each year an estimated 300,000 additional aliens illegally enter or remain in the United States.²⁷

Critical elements to any successful effort to control illegal immigration include improved strategies and increased resources for the Border Patrol, strengthened employer sanctions using a fraud-resistant work authorization document, severely-restricted availability of government benefits to illegal aliens, and additional resources for the Investigations Division of the Immigration and Naturalization Service. Another essential element of effective immigration control is reform of our asylum system. Ideally, the United States and the international community should pursue comprehensive reform in conjunction with a fundamental review of refugee policy.

Asylum fraud is widespread and growing. Under the current system, simply saying the magic word "asylum" gives an alien access to the U.S. asylum adjudication system. Because of the huge volume of asylum claims, massive backlogs, resultant processing delays, and limited detention facilities, the Immigration and Naturalization Service has no choice but to allow the majority of asylum claimants to enter or remain in the country. Some of these individuals have valid asylum claims, many do not. In either case, they are given temporary work authorization pending adjudication of their claims.

Without a prompt review to sort out patently invalid claims, a very clear incentive exists for persons who illegally enter the United States or who are already illegally in the United States to claim asylum, obtain a work authorization, and then melt back into the general population. The delays that result from asylum abuse are injurious to individuals with valid claims. Moreover, this system strips the United States of any control over who enters or remains in the country, which can cause grave security risks. The INS does not know who these people are, and while most pose no physical danger, some have been terrorists and members of organized crime syndicates.

The current system also encourages the victimization of aliens by organized smuggling rings. Smugglers have transported hopeful migrants on boats with abominable sanitary and living conditions, have held migrants hostage until family or friends pay ransom, and have beaten

26. ROBERT WARREN, STATISTICS DIVISION, U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES, BY COUNTRY OF ORIGIN AND STATE OF RESIDENCE: OCT. 1992 (1994).

27. *Id.*

and even killed those who fail to pay. Many of these smuggled aliens are sold into indentured servitude, sometimes as prostitutes.²⁸

The asylum route for bypassing United States immigration controls is being increasingly publicized and utilized, as evidenced by the tremendous increase in asylum applications over the last few years. In 1987, over 26,000 affirmative asylum applications were filed.²⁹ That number increased to about 74,000 in 1990, to 104,000 in 1992,³⁰ and to 150,000 in 1993.³¹ A specific example of the increasing use of asylum claims further illustrates the situation: the number of asylum applications from Mexican nationals increased from 614 in fiscal year 1992 to 6,192 for fiscal year 1993; an additional 6,241 asylum applications were filed in the first half of fiscal year 1994 alone.³² The current asylum system was not designed to process this volume of asylum claims, and the backlogs are growing.

Whether one has a valid, questionable, or baseless claim to refugee status, current laws and procedures encourage persons to bypass international refugee processing. Under the aegis of either the U.S. State Department's Refugee Bureau or the United Nations High Commissioner for Refugees, persons can fly directly to the United States or other resettlement countries to apply for asylum there. This result is a nonsensical outcome of a well-intentioned policy. It is yet another reason why international refugee policies require fundamental review.³³

One of the several legislative initiatives introduced to address the asylum problem include a comprehensive bill developed by Chairman Romano Mazzoli (D-KY) of the Immigration Subcommittee, Congress-

28. See *Alien Smuggling: Hearing before the Subcomm. on International Law, Immigration, and Refugees of the Comm. on the Judiciary*, 103rd Cong., 1st Sess. 60 (1993) (statement of Chris Sale, Acting Commissioner, Immigration and Naturalization Service).

29. 1992 INS YEARBOOK, *supra* note 11, at 83.

30. *Id.*

31. INS ASYLUM APPLICATIONS, *supra* note 13.

32. ASYLUM DIVISION, IMMIGRATION AND NATURALIZATION SERVICE, FISCAL YEAR 1994 STATISTICAL PACKAGE 4 (October 1993-March 1994) (1994).

33. Notably, current laws make it virtually impossible for the United States to be a country of first asylum for any large-scale group of people. For persons who reach United States shores, processing essentially becomes a matter of permanent resettlement, rather than a matter of determining who in the group qualifies as a refugee, who among that subgroup needs permanent resettlement, and who resettle in the United States. This situation puts the United States in the untenable position of asking other countries to provide first asylum while being unable to do so itself. This should be corrected.

man Charles Schumer (D-NY), and myself.³⁴ This bill, H.R. 3363, takes a three-pronged approach to reforming the process and reducing fraud: the bill would expedite exclusion of aliens who do not have a credible asylum claim, streamline the affirmative asylum process, and require the establishment of pre-inspection stations at foreign international airports.

More specifically, the McCollum portion of H.R. 3363 would establish a system for prompt review, using a liberal standard, of an alien's asylum claim where the alien is caught trying to enter the United States with no documents, invalid documents, or by evading immigration authorities. The process would apply to such persons whether they are seeking to enter the United States by air, land, or sea. A specially-trained asylum officer would determine, subject to immediate supervisory review, whether the alien meets the threshold standard of a credible fear of persecution. Aliens who meet that standard would be referred to the regular process for adjudicating asylum claims; aliens who do not meet the standard would be excluded immediately.³⁵

The Mazzoli portion of the bill would reform the asylum adjudication process by establishing a new system for applying for provisional asylum and for adjudicating those claims. An alien would be required to file a notice of intent to seek asylum within thirty days after entering or coming to the United States, with an exception for cases where it is demonstrated "by clear and convincing evidence" that there has been a change in circumstances in the asylum seeker's home country that affects eligibility for asylum. Newly-established procedures would provide for a hearing before a specially trained asylum officer for all asylum claims, and eliminating *de novo* review by immigration judges. The overall process would be streamlined, with strong protections for persons who have valid claims and strong penalties for those who do not.³⁶

The Schumer portion of H.R. 3363 focuses primarily on increasing pre-inspection by U.S. immigration officers at foreign airports to prevent the arrival of undocumented or fraudulently documented aliens. Identification of such aliens prior to boarding airplanes bound for the United States would reduce the number of persons abusing the asylum system to gain admission to the United States. The legislation also establishes a carrier consultant program under which a roving team of immigration inspectors would travel to foreign airports that do not have pre-inspec-

34. H.R. 3363, 103rd Cong., 1st Sess. (1993).

35. *Id.* § 101.

36. *Id.* §§ 201-204.

tion stations to assist air carriers in screening passengers' travel documents.³⁷

The Clinton Administration has proposed regulatory and limited legislative changes, many of which could be helpful. These changes, however, do not go far enough. Under one potentially positive proposal, work authorization would not be provided for 150 days after applying for asylum, which would be an effective deterrent if adjudications of new asylum applications can be completed in that time.³⁸ Addressing the 330,000-case backlog is another matter. The additional resources requested in the fiscal year 1995 budget³⁹ are much-needed, but insufficient to resolve the problem. Legislative changes, along the lines of the Mazzoli/McCollum/Schumer bill, are necessary.

The Clinton administration also has introduced an expedited exclusion legislative proposal,⁴⁰ but this proposal would establish a system for reviewing credible fear determinations that would be more cumbersome and time-consuming than the McCollum proposal. If all individuals subject to review under this system could not be detained pending a final determination, then the expedited exclusion provision would be useless. The administration's proposal also is limited to persons arriving by air or, if arriving by sea, who are apprehended before they touch land. This proposal has very limited utility in states like Florida or in cases of organized smuggling of aliens by boat, such as the recent wave of Chinese boats that included the *Golden Venture*.

Cultural diversity is positive and enriching, but unity is essential to the health and progress of our nation. As a constantly evolving nation, the United States must control the direction and speed of its evolution to maintain unity. Substantive, effective legislation to reform our asylum laws is vital to gaining that control. This legislation should be the first step toward a comprehensive reevaluation—by both the United States and the international community—of refugee policy in the context of broader immigration concerns. Failure to meet this challenge will threaten public support for immigration, refugee admissions, and asylum.

37. *Id.* § 301.

38. 59 Fed. Reg. 14,779 (1994) (proposing rules and procedures for the adjudication of applications for asylum or withholding of deportation and for employment authorization).

39. PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT, FY 1995, H.R. DOC. NO. 179, 103d Cong., 2d Sess. 202-205 (1994).

40. H.R. 2836, 103rd Cong., 1st Sess. (1993).