Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities

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INTRODUCTION AND OVERVIEW

After ten years of implementing the Refugee Act of 1980 under interim regulations and amidst great controversy, the Immigration and Naturalization Service (INS) promulgated a final asylum rule on July 27, 1990. The new rule brought the United States formally into compliance with its international obligations and reflected its traditional commitment to protecting those seeking a haven from persecution. In the fourteen years since 1980, the United States has granted asylum to

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4. For purposes of this paper, "regulations" and "rules," promulgated under the statutory authority of an administrative entity, are synonymous.
61,465 cases and resettled another 1.462 million refugees from abroad.

The new rule mandated the establishment of a corps of professional asylum officers trained in international relations and international law, and access to a documentation center containing information on human rights. By early 1993, only two years after the Asylum Officer Corps began its work, the asylum program already needed an overhaul. Through fair and timely asylum processing, designers of the 1990 affirmative asylum procedures had hoped to achieve the program's twin goals of compassion and control: “compassion” through the prompt approval of meritorious cases and “control” by discouraging spurious or abusive claims. Instead, the backlog of asylum claims grew even faster than before, as did public concern over both abuses of the asylum system and problems associated with immigration in general.

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10. 8 C.F.R. § 208.1(b) (1993).

11. 8 C.F.R. § 208.1(c) (1993).


13. “Affirmative asylum program” refers to the INS adjudication of asylum applications that are filed voluntarily (“AFFIRMATIVELY”) by people ALREADY IN the United States (either legally or illegally), who have NOT been apprehended NOR charged by the INS and who are thus NOT in either deportation or exclusion proceedings before an Immigration Judge. During deportation or exclusion proceedings, however, an alien may raise the claim of asylum as a DEFENSE against deportation, hence the term “defensive asylum program” or “defensive asylum application.”

14. See Beyer, Affirmative Asylum Adjudication, supra note 7, at 279 (stating the twin goals of the new asylum program).

15. See Patrick J. McDonnell & William J. Eaton, Political Asylum System under
Some of these "problems with immigration" are as old as the republic itself, yet as current as recent arrivals advocating a narrowing of the door behind them. Other perceived problems are more time sensitive and are especially troubling in times of economic uncertainty. For instance, states such as California, Florida, and Texas (popular
destinations for both legal and illegal immigrants and refugees), increas-
ingly object to an immigration system they must help fund and admin-
ister, but cannot control.

These problems are not likely to go away. Congress has autho-
rized continuing high levels of legal immigration and increasing
numbers of people are applying for asylum in the United States, all in
the context of large scale global migration. Most experts agree this
migration is unlikely to abate over the next several decades.

People's motives for leaving their homelands are complex, but not
dissimilar from the reasons which drew the ancestors of most Americans
to migrate. This complexity reflects the complicated political, econom-
ic, social and other trends that alone, or in combination, have caused
recent mass migrations. These trends include ethnic tensions, civil strife,
targeted persecution, arms proliferation, environmental degradation, and
failing economies (especially in Eastern Europe and the Third World).

Even the political development most widely welcomed in the United
States, the fall of Communism, served to burden Western immigration
and asylum systems:

21. Frank Trejo, Rethinking Immigration: Near Record Influx, Publicized Incidents
Help Promote Calls for Reform, DALLAS MORNING NEWS, Jan. 1, 1994, at 1A.
23. See Immigration to U.S. in 1992 Soars 15 Percent to 810,635, BOSTON
GLOBE, Dec. 14, 1993, at 22 (stating that "Overall, the largest number of immigrants
were from Mexico (91,332), Vietnam (77,728), the Philippines (59,179), the republics
of the former Soviet Union (43,590), and the Dominican Republic (40,840) . . .").
Michael Hoefer, chief demographer for the INS, noted that 800,000 to 900,000 immi-
grants are expected each year over the next several years. Id.
24. See Martin Tolchin, Immigration Expert Who Takes Broad Approach: Doris
Marie Meissner, N.Y. TIMES, June 20, 1993, at A26 (asserting that to resolve the
serious problem of mass human migration, the United States must also attack the
disparities in human rights and standards of living that exist worldwide); see also Jim
Hoagland, Advice from a Goat Herder, N.Y. TIMES, May 4, 1993, at A21 (concluding
that international politics must recognize the effects of population flight from countries
where war, poverty, or persecution threaten millions of people).
25. See PAMELA REEVES, ELLIS ISLAND: GATEWAY TO
THE AMERICAN DREAM 12 (1991) (explaining that people migrated to America for numerous reasons including famine, political and religious persecution, forced departure, and most simply, for want of a better life).
26. See generally Ted Conover, The United States of Asylum, N.Y. TIMES MAG-
AZINE, Sept. 19, 1993, at 56 (discussing the circumstances that force individuals to
seek asylum or emigrate).
All wars are hell, but the most hellish tend to be civil wars, ethnic wars, wars of religion, or worse, a blend of all three, as in Bosnia. Lamentably, the demise of the Cold War has favored just those conflicts. Without pressure from the superpowers to keep them in check, ethnic rivalries have reignited with even more lethal fury . . . 27

One year later, while Bosnia was still suffering, yet another killing field was added to the list of countries descending into chaos and brutality. In Rwanda, inter-ethnic tensions between the Hutus and Tutsis, fueled by the availability of surplus armaments, resulted in a horrendous bloodbath.28

Ethnic and nationalist tensions tend to produce the kind of repression, civil strife, and persecution upon which credible fears of return are based. They also contribute to increasing requests for asylum. These tensions not only increase migration to neighboring countries, but also increase immigration pressures in general.29 In a 1993 report, the United Nations High Commissioner for Refugees (UNHCR) estimates that over eighteen million refugees exist worldwide, up from 2.5 million in 1970 and eleven million in 1983.30

If, as another United Nations report recently stated, migration becomes “the human crisis of our age,”31 governmental reactions to it, including those of the United States, will serve as reflections of national character and fundamental values.32 On February 3, 1994, Attorney

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28. See Jennifer Parmelee, Fade to Blood: Why the International Answer to the Rwandan Atrocities Is Indifference, WASH. POST, Apr. 24, 1994, at C3 (recognizing the availability of advanced weaponry merely increased the number of victims of ethnic tensions).
29. See David Binder with Barbara Crossette, As Ethnic Wars Multiply, U.S. Struggles to Meet the Challenge, N.Y. TIMES, Feb. 7, 1993, at 1, 14 (noting that the end of the cold war created a power vacuum and long-suppressed ethnic and nationalist tensions emerged which threatened stability in many nations).
32. See Joel Kotkin, Is Fascism Back in Fashion?, WASH. POST, Jan. 2, 1994, at C4 (warning that without action from the nation’s lawmakers to curtail the rising
General Janet Reno and INS Commissioner Doris Meissner made a formal U.S. Administration proposal to fund changes in combatting illegal immigration, and comprehensive reform of the U.S. asylum system. At a minimum, these reforms provide an opportunity to tackle part of the challenge of continuing migration by reconfirming the U.S. commitment to protecting those fleeing from persecution in their homelands, while at the same time regaining the public's confidence by assuring it that the asylum system is not widely abused.

The proposed comprehensive asylum reform reflects the commitment candidates Bill Clinton and Al Gore made during the 1992 presidential campaign: "[E]ven in the post-Cold War era, people still flee political persecution," the Democratic team said in a joint policy book. The United States should "continue to offer the protection of political asylum regardless of our relationship with the countries fled." The President's concern over abuse of the affirmative asylum system led to his July 27, 1993 directive to the Department of Justice to review asylum processing and the February 1994 announcement.

Revised asylum regulations implementing the Administration's proposed asylum reforms were published for public comment on March 30, 1994. The proposed rule focuses on processing changes and procedural streamlining while, more importantly, maintaining untouched the adjudication standards and criteria of the July 1990 final asylum rule. The hope for the new regulations is to establish the fair and timely asylum processing which would finally achieve the twin goals of compassion

number of illegal immigrants, dormant nativist and xenophobic sentiments may spawn the development of neofascism in the United States).

33. See Press Release, Attorney General and the INS Commissioner Announce Two-Year Strategy to Curb Illegal Immigration, UNITED STATES DEP'T OF JUSTICE (Feb. 3, 1994) (stating that "strengthening our effectiveness in controlling illegal immigration will allow us to protect our country's historic legal immigrant tradition").

34. See id. (announcing the Justice Department's desire to improve the asylum process for bona fide refugees and reduce the abuse of the system by implementing new application procedures and increasing the number of INS asylum officers and immigration judges).

35. See GOVERNOR BILL CLINTON AND SENATOR AL GORE, IMMIGRATION, PUTTING PEOPLE FIRST 119 (1992) (outlining the immigration goals of President Clinton, which include, promoting fairness, nondiscrimination, and family reunification).

36. Id. at 119.


and control: approvals for meritorious asylum requests within sixty days of filing and timely denials within 180 days of filing. This system would also permit the removal from the United States of asylum applicants found ineligible for asylum. Thus, asylum would be available to those who needed it, yet not abused by those who don’t.

I. BACKGROUND TO AFFIRMATIVE ASYLUM PROCESSING

Millions of people arrive in the United States each year, most legally, others illegally. While the vast majority of these people come to the United States for business or travel, others seek temporary or even permanent refuge or economic opportunity.

Those seeking asylum in the United States, though only a small portion of the number of refugees worldwide, overwhelm the U.S. asylum system as presently devised and funded. Although not yet a “flood,” new asylum applications are running significantly higher than the 70,000 expected annually in the program’s 1991 assumptions. In fiscal year (FY) 1992, 103,000 people filed asylum applications. New claims rose to 150,000 in FY 1993, a rate of 12,500 per month. During the first half of FY 1994, the INS received almost 74,000 new asylum applications. If this rate continues, applicants will file 150,000 new cases during FY 1994.

From its inception in early 1991, the new asylum program was underfunded and under-staffed. This is especially apparent when asylum


40. See Proposed Asylum Rule, supra note 38, at 14,780 (arguing that “[t]he existing system for adjudicating asylum claims cannot keep pace with incoming applications and does not permit the expeditious removal from the United States of those persons whose claims fail”).

41. STATISTICAL PACKAGE FOR FY 1992, infra note 52.

42. PRELIMINARY FY 1993 STATISTICAL PACKAGE, infra note 53.

43. See Asylum Division, Immigration & Naturalization Service, Fiscal Year 1994: Half-Year Statistical Package (Oct. 1993-Mar. 1994), (Washington, D.C. Apr. 1994) (stating that 73,757 new cases were filed during the first half of FY 1994). Of these, the top ten source countries, comprising 53,371 applications, or 72% of those filed during the first half of FY 1994, were Guatemala (19,216), El Salvador (9,490), Mexico (6,241), Haiti (4,194), China (4,130), Nicaragua (2,569), Honduras (2,166), India (2,118), Cuba (1,711), and Peru (1,536). Id. Importantly, over one-third (39%) of the applications being filed come from Salvadoran (13%) and Guatemalan (26%) nationals, while eight of the top ten nationalities filing for asylum in the United States comprising 64% of all applications filed so far in FY 1994 come from the Western Hemisphere, specifically, from Latin America and the Caribbean. Id.

44. See Management and Planning Staff, Justice Management Division,
caseloads and numbers of asylum adjudicators in the U.S. are compared to those in Western European countries.\textsuperscript{45} With only 150 asylum officers, the INS's diversion of staff to deal with other INS crises exacerbated initial start-up problems. INS prescreening of Haitians at Guantanamo Bay\textsuperscript{46} and the issuance of employment authorization documents for asylum-seekers in the United States both negatively impacted asylum officer productivity. As a result, the asylum program has become increasingly fair\textsuperscript{47} but decreasingly timely.\textsuperscript{48}

\textbf{United States Dep't. of Justice, Management of the INS Affirmative Asylum System, United States Dep't. of Justice 5} (Sept. 1993) [hereinafter JMD Report] (arguing that the Asylum Corps was inadequately equipped from its inception, forcing the Corps to play "catch-up from the very beginning").


<table>
<thead>
<tr>
<th>Country</th>
<th>Asylum Staff</th>
<th>1992 Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>3,500</td>
<td>438,191</td>
</tr>
<tr>
<td>Sweden</td>
<td>800</td>
<td>83,963</td>
</tr>
<tr>
<td>Netherlands</td>
<td>750</td>
<td>17,462</td>
</tr>
<tr>
<td>France</td>
<td>600</td>
<td>27,486</td>
</tr>
<tr>
<td>U.K.</td>
<td>500</td>
<td>24,610</td>
</tr>
<tr>
<td>Switzerland</td>
<td>500</td>
<td>17,960</td>
</tr>
<tr>
<td>Austria</td>
<td>100</td>
<td>16,238</td>
</tr>
<tr>
<td>Norway</td>
<td>400</td>
<td>5,238</td>
</tr>
<tr>
<td>U.S.</td>
<td>297</td>
<td>103,447</td>
</tr>
</tbody>
</table>

\textit{Id.}

46. \textit{See JMD Report, supra} note 44, at 5 (stating that "$[t]hese initial difficulties [in establishing the new Asylum Corps in 1991] were later compounded by disruptions in the program caused by the sudden influx of Haitian asylum seekers").

47. \textit{See JMD Report, supra} note 44, at i (arguing that "$[s]ince [April 1991], the Asylum Officer Corps has made significant progress in meeting its mandate to expeditiously process affirmative asylum claims while maintaining compassion and control"); Sarah Ignatius, \textit{National Asylum Study Project, An Assessment of the Asylum Process of the Immigration and Naturalization Service}, at 1 (Harvard Law School, Sept. 1993) (pointing out that "$[t]he first comprehensive nongovernmental study of the quality of decision-making of the INS asylum officer corps has found that overall it is a substantially more professional, informed, and impartial body of asylum decision-makers than the INS examiners who adjudicated asylum claims previously . . . .").

48. \textit{See Lizette Alvarez & Lisa Getter, Asylum: The Magic Key: U.S. Ill-Equipped to Weed Out Opportunists, Miami Herald, Dec. 15, 1993}, at 1A [hereinafter \textit{Asylum: the Magic Key}] (stating that from the day the Asylum Corps started hearing cases, the backlog of claims was already at 114,000 and was expected to reach one million by the next summer).
Without additional resources, administrative streamlining and other reform,\(^49\) the U.S. asylum program appears destined to fall further and further behind.\(^50\) In early FY 1994 (i.e. October-December 1993) only about three in ten new asylum applicants were being scheduled for interviews; more than 10,000 applications each month were going directly into a backlog that could include over one million people before the system is finally brought under control.\(^51\) Consequently, the number of unadjudicated cases grew from 114,000 (representing a ten year accumulation) in April 1991, to 224,000 by the end of FY 1992,\(^52\) to 330,000 by October 1, 1993 (the start of FY 1994),\(^53\) to almost 380,000 by the end of March 1994.\(^54\)

Overburdened, the system is ripe for fraud and abuse.\(^55\) Some migrants with little or no legitimate fear of persecution are claiming asylum primarily to legitimize and/or prolong their stay in the United States.\(^56\) Increasingly, others use the asylum system just to get into the "work authorized" backlog,\(^57\) thus circumventing the 1986 immigration

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49. See Regarding Proposals to Amend Our Asylum Process, Testimony of Chris Sale, Acting INS Commissioner: Before the Senate Judiciary Comm., Subcomm. on Immig. & Refugee Affairs (May 28, 1993) (on file with The American University Journal of International Law and Policy) (arguing that administrative and regulatory reforms as well as enhanced resources are necessary to remedy the asylum situation).

50. See Maria Puente, Asylum System Snowed Under, USA TODAY, Oct. 20, 1993, at 2A (noting that two problems with the asylum system are that numerous applicants are never interviewed, many cases are never officially decided and that "most applicants [who] are denied . . . are never deported . . . [while] nearly everyone gets a work permit and permission to remain here, eligible for asylum or not." Id.; Alvarez & Getter, Asylum: The Magic Key, supra note 48, at 1A (arguing that because of the overload in the asylum system, it is not working).


55. See Tim Weiner, Pleas for Asylum Inundate System for Immigration: Abuse is Called Rampant, N.Y. TIMES, Apr. 25, 1993, at A1 (noting that many agree that the asylum system is not working properly, but give varying reasons for its failure).

56. See Michael Hedges, Cleric in Probe Defied INS Ban, WASH. TIMES, Mar. 5, 1993 (quoting Benedict Ferro, INS director in Rome, Italy as saying "alien smuggling through New York's John F. Kennedy Airport, "has passed the crisis level, with hundreds of aliens with bogus documents or no documents at all arriving and claiming asylum"").

57. See Alicia di Rado, Scams Victimize Mexicans Seeking U.S. Work Permits,
controls on illegal entry and unauthorized employment. Most asylum-seekers, even those in the United States illegally, are eligible for work permits within ninety days of filing a "non-frivolous" asylum claim. For those going into the backlog, these permits are authorized solely on the basis of written asylum applications mailed into the INS with the applicants' purported identity. For them, none of this is corroborated by an interview with a government official.

Calls for reform by Congress, the Administration, and various segments of the public began in earnest after the media vaguely linked several terrorist incidents in early 1993 to allegedly faulty U.S. asylum processing. Initially, strong public concern and swift Congre-
sional action typified the response to these problems. Both the House and Senate subcommittees concerned with asylum policy conducted hearings in the Spring of 1993. Senator Edward M. Kennedy, Chairman of the Senate Subcommittee on Immigration and Refugee Policy, remarked that “[t]he asylum system has broken down, and it’s up to Congress and the Administration to fix it.” The House asylum reform bill was marked up and referred to the full House Committee on the Judiciary on October 20, 1993. By April 1994, “at least 150 pieces of immigration legislation [we]re pending in Congress,” including comprehensive immigration reform packages from both parties, as well as several more narrowly focused amendments.

The Clinton Administration also moved quickly. On July 27, 1993, President Clinton announced a series of initiatives “designed to significantly reform the asylum, admission, and exclusion process in the United States.” He set a September 30 deadline for the Department of Justice to submit to him a plan for reform of the U.S. affirmative asy-

64. See Congress Probes Asylum, Inspections Shortcomings, 70 INTERPRETER RELEASES 581-87 (May 3, 1993) (detailing the April 27 Subcommittee hearing in the United States House of Representatives); see also 70 INTERPRETER RELEASES 738-40 (June 7, 1993) (discussing the May 28 Senate Subcommittee hearing on asylum reform).


68. Republicans Call for Immigration, Asylum Reform, REFUGEE REPORTS, Vol. XV, No. 3 (March 31, 1994), at 1-8; see also, The House Wednesday Group, Please Take a Number: Or Why Political Asylum Doesn’t Work, Immigration Background Report No. 1, Oct. 1, 1994, at 13 (giving its preliminary recommendations for asylum reform).

At that time, little consensus existed on the best way to fix the system. Those calling for change suggested increased resources, comprehensive review, and even statutory reform, with little agreement as to which, or how much of each, would work best.

The INS unveiled its draft proposal at an October 15, 1993 briefing, saying it preserved "the best parts of the current asylum system while safeguarding against abuses." Doris M. Meissner began work as the new INS Commissioner the following week, vowing to make asylum one of her top three priorities. The Justice Department published its revised regulatory changes for public comment on March 30, 1994. Officials hoped that the final rule could be published and become effective in 1994.

Creating a reform system that prevents or deters abuse, while quickly and fairly adjudicating all new cases involves at least two competing challenges: (1) Dealing with increasing numbers of people on the move across international borders while reaffirming the U.S. commitment to international and national refugee principles; and (2) Assuring the

70. Id. at 1,004.
72. See Asylum & Inspection Reform: Hearing Before the Subcomm. on Int'l Law, Immig., and Refugees of the Comm. on the Judiciary of the House of Representatives, 103d Cong., 1st Sess. 265 (1993) (testimony of Warren Leiden, Executive Director, American Immigration Lawyers Association) [hereinafter House Testimony] (stating that the Association recommends "comprehensive review and reform," and is encouraged by the attention paid by the Clinton Administration to improving the asylum program).
73. See H.R. 2602, 103d Cong., 1st Sess. (1993) (proposing a statutory comprehensive plan of action to deal with the asylum problem).
74. INS Announces Administrative Asylum Reform Package, 70 INTERPRETER RELEASES 1,361 (Oct. 18, 1993) [hereinafter Reform Announcement].
76. Proposed Asylum Rule, supra note 38, at 14,779.
77. James Rupert, World's Welcome Strained By 20 Million Refugees: Xenophobia Surging, UN Commissioner Says, WASH. POST, Nov. 10, 1993, at A32 (quoting a U.N. agency as arguing that an exploding global population of refugees is overwhelming the humanitarian tradition of giving asylum). This article also noted that
American people that their borders are secure, that their immigration laws are not being abused, and that ineligible migrants, including failed asylum-seekers, are removed in a timely manner.

II. CHALLENGES

A. THE CHALLENGE OF REFUGEE PROTECTION: SAFEGUARDING THE SPIRIT OF REFUGEE LAW AND ASYLUM PRINCIPLES

1. Asylum as a Fundamental Human Right

World War II and the holocaust shamed the world into formalizing a basic international legal framework for protecting refugees. "Disregard and contempt for human rights . . . [and] barbarous acts which outraged the conscience of mankind,"78 caused the United Nations to include the right to seek and enjoy asylum from persecution in the 1948 Universal Declaration of Human Rights.79 The 1951 United Nations Convention relating to the Status of Refugees80 and its 1967 Protocol81 further elaborated this right and the corresponding obligations for both applicants and States Party. The United States signed the 1967 Protocol in 1968, thus committing itself to the international regime of refugee protection.82

More recently, the widespread disregard for human rights around the world has created a slightly different crisis for national governments, including the United States. When dealing with a world where persecution stems from a variety of sources and circumstances, how does one follow the laudable precepts of the refugee conventions when faced with rising numbers of asylum-seekers over a sustained period of time?

"one out of every 125 people in the world has been forced out of his or her normal life and home by civil war, persecution or violence . . . . 19.7 million refugees live outside their home countries, more than eight times the number two decades ago, and another 24 million are displaced within their own borders." 7d.

79. Id. art. 14.1.
80. CRSR, supra note 6.
81. Id.
82. Protocol, supra note 6; see also, President's Report on Immigration, supra note 69, at 53 (stating that the right to flee prosecution and seek asylum "is a fundamental commitment of both the US Government and the international community").
2. Seven Basic Elements of U.N./U.S. Refugee/Asylum Protection

The U.S. asylum system, like that of other nations, adheres to seven main principles of international and current national asylum law. In summary, these principles claim that: (1) anyone, from anywhere, at any time, regardless of the manner of entry or immigration status, may apply for asylum in the United States; (2) asylum officials should not reject asylum seekers at the frontier (3) asylum officials should not

83. See CRSR, supra note 6, art. 28 (excepting terrorists and others who may pose a threat to national safety, security or public order).

84. See Immigration and Nationality Act of 1952 § 208, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1158) [hereinafter INA] (imposing no time constraints on applying for asylum); But see CRSR, supra note 6, art. 31 (requiring that asylum seekers should "present themselves without delay to [government] authorities").

85. See art. 14.1, Universal Declaration of Human Rights, supra note 78 (stating that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution"); art. 31.1, CRSR, supra note 6 (indicating that states should not impose penalties, on account of refugees illegal entry or presence in their territory). Article 31.1 also notes that refugees must present themselves without delay to authorities and show good cause for their illegal entry or presence. Id.; see also INA, supra note 84, § 208a (holding that "[t]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum . . . ").

86. See U.N. Declaration on Territorial Asylum, G.A. Res. 2312, U.N. G.A.O.R., 22d Sess., Supp. No. 16, at 81, art. 3, U.N. Doc. A/6716 (1968) (noting that "[n]o [refugee] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution [and that] [e]xception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population . . . "); CRSR, supra note 6, art. 3 (stating that "[n]o 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 in a particular social group, or political opinion"); OFFICE OF THE UNITED NATIONS HIGH COMMISS-IONER FOR REFUGEES, Conclusions on the International Protection of Refugees adopted by the Executive Committee[hereinafter UNHCR ExCom Conclusions], Conclusion No. 5 (XXVIII), "Asylum," ¶ (d) (appeal[ing] to Governments to follow, or continue to follow, liberal practices in granting permanent or at least temporary asylum to refugees who have come directly to their territory"); see also id. Conclusion No. 6 (XXVIII), "Non-Refoulement," ¶ (c) ("reaffirm[ing] the fundamental importance of the observance of the principle of non-refoulement—both at the border and within the territory of a State—of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees"); id. Conclusion No. 22 (XXXII), "Protection of Asylum Seekers in
penalize refugees\(^\text{87}\) for attempting or succeeding in illegally entering the United States;\(^\text{88}\) (4) asylum officials should not return refugees to a country where they fear persecution on account of race, religion, nationality, membership in a particular social group, or political opinion;\(^\text{89}\) (5) government procedures for determining refugee status should be fair and timely, and include an appeal;\(^\text{90}\) (6) asylum officials should allow asylum seekers to remain in the United States pending the completion of their asylum processing;\(^\text{91}\) and (7) asylum officials should approve

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Situations of Large-Scale Influx," § II.A. (noting that "in all cases, the fundamental principle of non-refoulement—including non-rejection at the frontier—must be scrupulously observed"); INA, supra note 84, § 243(h)(1) (holding that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion"). See generally 8 C.F.R. § 208.16 (1994) (discussing procedures relevant to withholding of deportation claims); INS v. Stevic, 467 U.S. 407 (1984) (holding that an alien with a clear probability of persecution will avoid deportation under § 243(h) of the Immigration and Nationality Act of 1952).

87. See CRSR, supra note 6, art. 31 (qualifying this element by providing that refugees must "show good cause for their illegal entry or presence"). But see INA, supra note 84, § 208 (allowing for non-rejection at the frontier without any qualification); Compare UNHCR ExCom Conclusions, supra note 86, No. 44 (XXXVII), "Detention of Refugees and Asylum-Seekers" (noting that detention of some asylum-seekers is permitted in order "to verify identity, to determine the elements on which the claim to . . . asylum is based, to deal with cases where . . . asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead [government] authorities . . ., or to protect national security or public order") with INA, supra note 84, §§ 274C(a)(1)-(2) (providing for a similar analysis of reasons for detention as the UNHCR ExCom Conclusions).

88. See supra note 87 and accompanying text (discussing various methods of evaluating whether to place an asylum-seeker under detention); see also Matter of Pula, 1987 BIA LEXIS 10; 19 I. & N. Dec. 467 (1987) (stating that while an alien's manner of entry is a discretionary factor to consider in adjudicating U.S. asylum applications, it is by itself insufficient to sustain an INA Section 208 discretionary denial of asylum).

89. Art. 33, CRSR, supra note 6; INA, supra note 84, § 243(b)(1).

90. UNHCR ExCom Conclusion, supra note 86, No. 8 (XXVIII), "Determination of Refugee Status," ¶ (e); UNHCR ExCom Conclusion, supra note 86, No. 30 (XXXII), "The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum," ¶ (f); 8 C.F.R. § 208.9, 17, 18 (1994); see INA, supra note 84, § 106 (stating that decisions of immigration judges are appealable to the Board of Immigration Appeals and then to the U.S. federal circuit courts).

91. See UNHCR ExCom Conclusion, supra note 86, No. 8 (XXVIII), "Determination of Refugee Status," ¶ (e)(vii) (stating that "[t]he applicant should be permitted to remain in the country pending a decision on his initial request by the competent
asylee applications according to a neutral, nonideological, nongeographical, nondiscriminatory definition of "refugee/asylee," without regard for foreign policy or immigration implications.

3. Loss of Public Consensus on the Definition of a "Refugee"

One of the more troubling aspects of U.S. asylum processing since the end of the Cold War is the loss of consensus on the definition of refugee. Before 1980, and informally for several years thereafter, the Cold War colored the U.S. definition of "refugee." This definition

authority . . . .

92. See art. 31, CRSR, supra note 6, (excepting those who are "firmly resettled" in another country, who have engaged in the persecution of others, or, as proposed, those who can be returned to a "safe country" they passed through en route to the United States).

93. See art. 1.A(2), CRSR, supra note 6, (defining the term "refugee"); UNHCR ExCom Conclusion, supra note 86, No. 15 (XXX), "Refugees Without an Asylum Country," ¶ (a), (d) (noting that "[s]tates should use their best endeavors to grant asylum to BONA FIDE asylum-seekers," and "[d]ecisions by States with regard to the granting of asylum shall be made without discrimination as to race, religion, political opinion, nationality or country of origin"); UNHCR ExCom Conclusion, supra note 86, No. 22 (XXXII), ¶ II.A.1 & II.B.2(e) (stating that "[i]n situations of large-scale influx, asylum-seekers should be admitted to the State in which they first seek refuge . . . without discrimination as to race, religion, political opinion, nationality, country or origin or physical incapacity," and "there should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity"); see also BASIC [ASYLUM] LAW MANUAL, OFFICES OF THE GENERAL COUNSEL AND OF ASYLUM, INS HEADQUARTERS 46-47 (Feb. 1991) (stating that "Foreign policy and border enforcement considerations . . . ., or the fact that an individual is from a country whose government the United States supports or with which it has favorable relations . . . . [or] whether the United States agrees with the political or ideological beliefs of the individual, [are] not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the standard for determining [refugee eligibility] must be applied in the same manner for all nationalities").

94. See American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (portraying that the high denial rates for many groups of asylum-seekers coming from noncommunist countries of origin were often challenged in the courts, frequently with some success). The court also noted that "the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." Id. at 799; see also Gregg A. Beyer, The Evolving United States Response to Soviet Jewish Emigration, 3 INT'L J. REFU-
stressed ideology and geography (i.e., "persons fleeing from communist or communist dominated countries, or countries in the Middle East")\textsuperscript{55} and mirrored many U.S. foreign policy preoccupations. This situation resulted in applicants from communist countries usually gaining asylum at rates significantly higher than those from other countries. The Cold War definition had many points in its favor: it was easy to understand; relatively simple to adjudicate; and generally, although not universally, supported by the public, Congress, and successive administrations. Most Western European countries followed a similar policy.\textsuperscript{95}

On the other hand, Cold War policies often conflicted with the non-ideological definition of refugee contained in the 1951 United Nations Convention as adopted by the United States in 1980. Adoption of that definition implied that concerns about foreign policy and immigration control should not enter into domestic asylum eligibility determinations\textsuperscript{97} and that the United States must offer asylum to all people with well-founded fears of certain kinds of persecution, regardless if the

\textsuperscript{55} GEE LAW 30-59 (1991) (arguing that it was not until 1988 that guidance was finally promulgated by the Attorney General mandating use of a "worldwide adjudication standard" based strictly on the UN/1980 refugee definition). This was done via an August 4, 1988 letter from then Attorney General Edwin Meese, III to Lt. General Colin Powell, Assistant to the President for National Security Affairs (the so-called "Meese-Powell Letter"). \textit{Id.} at 32. By late 1989, Congress had reacted to this change by passing "the Morrison-Lautenberg Amendment," easing statutory eligibility for certain designated categories of preferred applicants for entry into the United States as refugees. \textit{Id.} at 39.

\textsuperscript{95} \textit{See} Joyce C. Vialet, \textit{A Brief History of U.S. Immigration Policy} 16 (Congressional Research Service 1991) (stating that "[t]he Act of September 11, 1957, sometimes referred to as the 'Refugee-Escapee Act,' provided for the admission of certain aliens ... as well as 'refugee-escapees,' defined as persons fleeing persecution in Communist countries or countries in the Middle East"). This was the basis for the definition of "refugee" incorporated in the Immigration and Nationality Act from 1965 until 1980. \textit{Id.}

\textsuperscript{96} \textit{See generally} Claudia M. Skran, \textit{The International Regime: The Historical and Contemporary Refugee Context of International Responses to Asylum Problems, in Refugees and the Asylum Dilemma in the West} (Gil Loescher ed., 1992) (discussing the methods taken by Western European countries to define and implement a refugee policy); Norman L. Zucker \& Naomi Flink Zucker, \textit{From Immigration to Refugee Redefinition: A History of Refugee and Asylum Policy in the United States}, 4 \textit{J. Pol'y History} 54, 54-70 (1992) (arguing that American immigration, refugee, and asylum policy, is separable into five distinct periods).

\textsuperscript{97} \textit{See House Testimony}, \textit{supra} note 72, at 11 (stating that after years of dissatisfaction with INS asylum adjudication, Congress passed the Refugee Act of 1980 and did away with the old, politicized system of asylum by requiring INS to establish a new program with a new approach).
persecution be at the hands of friends of the United States or foes. This new definition complicated the job of asylum adjudicators and arguably has not yet gained widespread understanding or acceptance by the general public. As a result, the tentative consensus on the definition of refugee, especially as it relates to asylum, seems to have evaporated with the Cold War. 98

The July 1990 final asylum rule sought to address this problem by: (1) reaffirming the neutral refugee definition; (2) separating INS asylum adjudication functions from other branches of the Service; (3) increasing the training of asylum officers; (4) creating the Resource Information Center to collect, produce and disseminate information culled from a variety of sources about human rights conditions around the world; and (5) diminishing the role of the State Department in deciding domestic asylum claims.

B. THE CHALLENGE OF CONTROL

Tension exists in all asylum processing systems between the sovereignty and security needs of the host-nation and the needs of individual asylum seekers. The international refugee regime (incorporated into U.S. asylum law) suspends many barriers to admission into the United States. 99 Notes one observer about asylum law: "No other provision of the INA opens such a broad potential prospect of U.S. residency to aliens without the inconvenience of prescreening or selection." 100 Asylum, by the nature of its necessary exemptions, is open to abuse.

Since 1990, one form of abuse has accelerated: applicants filing spurious claims are increasingly clogging the system. For this reason, many


The push to restrict immigration comes as the rigid, cold-war asylum policies of the past have undergone an incomplete reform. From the 1950's to 1989, U.S. asylum policy could be reduced to a simple maxim: people fleeing communist dictatorships had an open door; people fleeing right-wing regimes did not. With the end of the cold war, the ideological glue that held that policy together evaporated. Nothing coherent has replaced it except a backlog of claims that have suffocated the immigration bureaucracy."

Id.

99. Supra notes 85-88, 91; see INA, supra note 84, § 208(a) (supporting a broad and open U.S. policy regarding asylum procedure).

people believe that current asylum statutes inadequately ensure control over our national borders and that U.S. officials should restrict access to our asylum procedures.\textsuperscript{101} To some critics, most asylum-seekers are merely illegal entrants attempting to violate U.S. immigration laws. Although some people undoubtedly exploit the current system, the extent of this abuse remains unclear.

Statistics on U.S. affirmative asylum applicants do not support the charge that asylum, \textit{per se}, is a magnet to migrants from all over the world. Of the ten countries from which most asylum applicants came in FY 1993 (see below), almost all are undergoing various manmade or natural calamities, and almost all applicants are nationals from within this hemisphere who have rather large numbers of fellow countrymen already in this country. By comparison, few asylum applicants have come from comparatively stable countries, even from those neighboring the "top senders." For instance, many asylum-seekers in the United States arrive from Peru and Colombia but not from Chile or Venezuela, nor even from neighbors like Ecuador, Bolivia and Brazil with areas of grinding levels of poverty. Similarly, large numbers of Guatemalans and Salvadorans still apply for asylum, but few apply from neighboring Costa Rica and Panama.

From a review of widely respected sources of human rights information, one can see why most U.S. asylum applicants come from these countries.\textsuperscript{102} This, however, does not exclude the possibility that some people, even from countries with widespread human rights problems, will fabricate persecution claims, knowing that others from their country have legitimately gained entry into the United States.

\textsuperscript{101} See, \textit{e.g.}, 139 CONG. REC. S2535-36, S2544-45 (daily ed. Mar. 9, 1993) (portraying the discontent some have over current asylum statutes).

Top Ten Nationalities Applying for Asylum in FY 1993

<table>
<thead>
<tr>
<th>Country</th>
<th>FY 1993 (All)</th>
<th>% of Total FY 1992 Filings (All)</th>
<th>FY 1992 Filings (All)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>150,386</td>
<td>100%</td>
<td>103,641</td>
</tr>
<tr>
<td>Total (Top 10)</td>
<td>104,673</td>
<td>70%</td>
<td>73,507</td>
</tr>
<tr>
<td>Guatemala</td>
<td>34,681</td>
<td>23%</td>
<td>43,834</td>
</tr>
<tr>
<td>El Salvador</td>
<td>15,362</td>
<td>10%</td>
<td>6,730</td>
</tr>
<tr>
<td>China</td>
<td>14,354</td>
<td>9.5%</td>
<td>3,440</td>
</tr>
<tr>
<td>Haiti</td>
<td>11,377</td>
<td>7.6%</td>
<td>5,291</td>
</tr>
<tr>
<td>Mexico</td>
<td>6,192</td>
<td>4.1%</td>
<td>611</td>
</tr>
<tr>
<td>India</td>
<td>5,902</td>
<td>3.9%</td>
<td>3,160</td>
</tr>
<tr>
<td>Pakistan</td>
<td>4,653</td>
<td>3.1%</td>
<td>3,323</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>4,286</td>
<td>2.9%</td>
<td>2,065</td>
</tr>
<tr>
<td>Philippines</td>
<td>4,107</td>
<td>2.7%</td>
<td>4,012</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>3,759</td>
<td>2.5%</td>
<td>1,041</td>
</tr>
</tbody>
</table>

One proposed solution to the dilemma of simultaneously offering compassion while maintaining control is to make all refugees wait overseas until selected, or not selected, for resettlement in the United States rather than letting them come directly here. Supporters of this proposed solution prefer the greater control it would provide over the current system. To this group, the current system allows people arriving in the United States to claim asylum quickly and then to jump the queue of refugees waiting for resettlement. By processing refugee applicants overseas, denying those ineligible and not selecting those who do not fit into U.S. processing priorities and numerical limitations, the

103. INS Asylum Division, Washington, D.C.; see also supra notes 8-9 and accompanying text (noting immigration statistics for fiscal years 1980-94).
104. See INA, supra note 84, § 207 (suggesting that the establishment of annual numerical limits might help to solve the dilemma of control).
105. See Deborah E. Anker, First Asylum Issues Under United States Law, in ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS 125, 136 (Geoffrey Coll & Jaqueline Bhabha eds., 1992) (quoting a comment of INS District Director David Ilchert reported in the San Francisco Chronicle). Ilchert stated that "these [U.S. airport arrivals claiming asylum] are people who thumb their nose at the law by not applying for refugee status overseas." Id.
United States avoids deporting those ineligible for asylum and limits the possibility that undeserving and "unwanted" applicants may evade U.S. immigration controls.

On the other side of the issue are those who see such a plan falling short on compassion.\textsuperscript{106} They argue that the United States could live up to the spirit of the refugee regime and adequately control its borders merely by spending more money to administer current programs to determine asylum and deter abuse in a timely manner.\textsuperscript{107} They argue that existing statutes are adequate, if properly enforced, and that Congress should give the 1990 asylum system a chance to work before replacing it with another system.

Regardless of perspectives, almost everyone finds the current system and level of funding, even as reformed in 1990, inadequate. It meets neither the traditional U.S. goal of compassion toward those seeking refuge nor the need of governments to control illegal immigration and prevent abuse of asylum processing.

\section*{III. OPPORTUNITY: FINDING A SYSTEM WHICH CAN WORK AND ATTRACT BROAD SUPPORT}

In developing its asylum reform proposals,\textsuperscript{108} the U.S. Department of Justice and the Clinton Administration considered four main options.\textsuperscript{109}

\subsection*{A. SOLE ASYLUM ADJUDICATION BY THE INS ASYLUM OFFICER CORPS}

This option would have built on the improvements of the 1990 asylum reforms by making INS asylum officers the sole asylum adjudicators in the United States. They would interview asylum applicants,

\begin{footnotes}
\footnote{108. See generally id. at 1338-44 (noting that the Department of Justice working group hired Martin, a professor at the University of Virginia School of Law, and a long-time observer and writer on asylum and asylum reform, as a consultant to assist the working group in identifying key issues and options for reform).}
\footnote{109. See \textit{INS Prepares Asylum Reform Package}}, 70 INTERPRETER RELEASES 1193 (Sept. 13, 1993) (delineating the reform proposals and related issues).}

whether “affirmative” or “defensive,” in a nonadversarial exchange and render written decisions appealable only to the Board of Immigration Appeals (BIA).

This system would have closely resembled that which the Attorney General proposed on August 28, 1987 but quickly abandoned when attacked by asylum advocates. Some in the legal and refugee advocacy communities still oppose this kind of system. They argue that an adversarial process with presentations from opposing lawyers, like the system used by the immigration courts and immigration judges, is necessary to get at the truth. This procedure, they say, must precede all asylum decisions, especially denials. Other critics say the current Asylum Officer Corps, while “improved,” still “cannot be the sole forum for adjudicating asylum claims” because “[i]t is critical to preserve the right to full and formal adjudication, based on a record that can be independently reviewed.”

During discussions of the four reform options, the INS asked nongovernmental organizations and others what would make asylum officers acceptable as the sole and final adjudicators of asylum claims. Most suggestions would have turned the current asylum officers into “Asylum Judges,” similar to existing immigration judges who would work in a quasi-adversarial setting but remain located within the INS. Because this option did not offer significant reform, Administration officials rejected it.

B. SOLE ASYLUM ADJUDICATION BY THE IMMIGRATION JUDGES

This option is still viewed by many as the primary alternative to the comprehensive reform proposal that the Administration finally adopted. Some members of the Department of Justice’s working group felt that to be successful, this option should mandate the creation of a new category of immigration judges (to be called “Asylum Hearing Officers” or AHOs). These AHOs would possess greater responsibility to take an active role in eliciting information directly from applicants based on


111. See Establishing the Asylum Corps, supra note 12, at 463-65 (noting the strong opposition to removal of immigration judges from the asylum process).

112. Two Reports Recommend Changes in U.S. Asylum Process, 70 INTERPRETER RELEASES 1364 (Oct. 18, 1993) (citing Harvard law lecturer and asylum project research director Deborah Anker).
their own intimate knowledge of asylum law and conditions prevailing in the country. Asylum reformers felt that the greatest need for more active AHOs arose when adjudicating asylum claims of applicants not represented by counsel. Therefore, adopting this proposal would imply a need to provide additional training, especially in the areas of international asylum law, the precepts of refugee protection, and the status of respect for human rights throughout the world.

Opponents of the proposal argued that the Immigration Court system is slower, especially when using INS Trial Attorneys at all asylum hearings, and therefore, probably more expensive than utilizing the INS Asylum Officer Corps. Others felt the adversarial process did not always elicit enough information or sufficient detail. This option would also take longer to implement than the other three options because of the time needed to expand the number and locations of immigration judges, and to give them new, specialized training.

C. ASYLUM ADJUDICATION THROUGH AN INTEGRATED SYSTEM

This option, which was adopted by the Department of Justice, was thought to combine the best features of the current system while adding safeguards against abuse. Under this plan, the INS asylum officers must either approve asylum claims punctually or promptly refer them to an immigration judge for a final decision in the course of deportation hearings. If applicants fail to establish statutory eligibility for asylum, the INS will deport them.

This system retains the nonadversarial interview before an INS asylum officer formalized in the 1990 regulations, and includes the asylum officer's responsibility to elicit information directly from the applicant on the basis of the officer's knowledge of the relevant law and current country conditions. This system, however, also gives an applicant the right to the more formal adjudication with opposing counsels before an immigration judge prior to any asylum denial. Referral to immigration courts, now discretionary, would become mandatory and automatic for those applicants who entered the United States illegally, or were otherwise out of status.

Asylum reformers hope that this system will ensure applicants full consideration while discouraging spurious claims. Additionally, reformers

113. Reform Announcement, supra note 74.
114. Proposed Asylum Rule, supra note 38, at 14,779.
115. Id.
believe that under this system it will be easier to deport applicants found ineligible to remain legally in the United States.\textsuperscript{116}

The proposal also incorporates procedural changes designed to keep known terrorists (or those who would change their identity during the asylum process) from abusing the asylum system. The INS will electronically check names of all asylum applicants against security lookouts, while electronically and permanently registering their unique and unchangeable identity.\textsuperscript{117}

D. \textsc{Leave Things Alone, Merely Add ``Sufficient'' Resources}

Under this option, the current system would have remained, but with additional funding and staff allocated to it. Although this option had some support, almost everyone agreed that the system needed structural changes to cope with the current situation and to prevent abuses. As the current affirmative asylum system seems to have lost the confidence of key members of the Clinton Administration, Congress, and the public, asylum reformers have abandoned the idea of maintaining the system with additional resources in favor of one of the other three proposals.

\section*{IV. RECOMMENDATIONS}

\subsection*{A. Proposing a Comprehensive Package of Reforms of Asylum Processing}

On March 30, 1994, revised asylum regulations were published in the \textit{Federal Register} for a sixty day public comment period.\textsuperscript{118} INS officials had already publicly discussed the basic elements of the comprehensive asylum reform proposal in October 1993,\textsuperscript{119} and had submitted the proposal for additional public comment\textsuperscript{120} during the drafting of

\begin{itemize}
\item \textsuperscript{116} See Doris Meissner, \textit{Remarks of Commissioner . . . On Publication of Proposed Rule on Asylum Reform}, \textit{PRESS CONFERENCE AT INS HEADQUARTERS, Mar. 29, 1994} [hereinafter \textit{PRESS CONFERENCE}] (addressing the reform initiative and discussing the goals of the proposal). Commissioner Meissner stated that “asylum reform is needed because the existing system cannot keep pace with incoming applications and does not permit the expeditious removal of applicants whose claims are denied.” \textit{Id.}
\item \textsuperscript{117} Proposed Asylum Rule, \textit{supra} note 38, at 14,786 (to be codified at 8 C.F.R. § 208.9(b)-(c)).
\item \textsuperscript{118} \textit{Id.} at 14,779.
\item \textsuperscript{119} \textit{Reform Announcement, supra} note 74, at 1,361.
\item \textsuperscript{120} \textit{INS Drafts Asylum Reform Regulations, 71 INTERPRETER RELEASES 185, 187} (Jan. 31, 1994).
\end{itemize}
the proposed revised asylum rule. Nevertheless, the public and the media gave a somewhat skeptical reaction to the formal promulgation of the proposed reforms, while some editors generally offered support. Reformers designed this package, including the proposed revised regulations, to speed “compassion” and tighten “controls” by ensuring timely, yet fair, adjudication of all asylum applications as soon as the would-be asylees file them.

B. Key Elements of the Comprehensive Asylum Reform Proposal

1. Timeliness

The Administration’s reform proposal follows three strategies designed to ensure that asylum officers can interview all new asylum applicants in a timely fashion. This is accomplished by 1) increasing the produc-

121. See, e.g., Joe Davidson, Clinton’s Move to Speed Handling of Requests for Political Asylum Raises Critics’ Skepticism, WALL STREET J., Mar. 30, 1994, at A18 (expressing concern that the proposed reforms will not expedite the process effectively); Paul Anderson and Lizette Alvarez, Plan to Speed Refugee Cases Attacked, MIAMI HERALD, Mar. 30, 1994, at A8 (citing fears that the proposed reforms will create undue hardships on applicants without reducing the backlog); Roberto Suro, U.S. Tightens Rules for Political Asylum-Seekers, WASH. POST, Mar. 30, 1994, at A3 (discussing several criticisms of the proposed reforms); Paul Houston, Asylum: Administration Plan Seeks to Curb Growing Number of Bogus Claims, LA. TIMES, Mar. 30, 1994, at A1 (relaying the opinion that the proposed changes might increase the backlog).

122. See, e.g., Asylum Without Abuse, WASH. POST, Mar. 31, 1994, at A30 (suggesting that the present system needs significant revision and that “the new regulations should bring improvements without altering this country’s fundamental commitment to provide asylum to those who genuinely qualify”); Reform, Yes, But Don’t Nail the Doors Shut; Some INS Proposals Might Block Legitimate Asylum Seekers, L.A. TIMES, Apr. 1, 1994, at A10 (concluding that Commissioner Meissner created a worthwhile asylum reform package and that “the honorable tradition of giving asylum to genuine refugees is too important to jeopardize by allowing abuse of the system to continue”).

123. See INS Prepares Comprehensive Asylum Reforms, 71 INTERPRETER RELEASES, 245, 245-46 (Feb. 14, 1994) (Commissioner Meissner setting the four guiding principles of the goals of the proposed reforms as “(1) conducting fair and timely adjudications of the claims of bona fide refugees; (2) keeping up with current receipts; (3) ensuring that asylum adjudicators receive specialized training and are aware of current country conditions around the world; and (4) ensuring swift deportation for those who are denied asylum”); see also, President’s Report on Immigration, supra note 69, at 57 (stating that the administration’s asylum proposals can be realized “without changing the purpose and scope of US and international law”).
tivity of each asylum officer by automating and streamlining current asylum processing procedures under the 1990 Final Asylum Rule; 2) doubling the number of asylum officers to more than 300 before the end of 1994; and 3) reducing the number of spurious applications. 124

Under the proposal, the INS hoped to phase in the reformed system in 1994, make it fully operational by early 1995, and run the new system at maximum capacity by April 1, 1995. Planners anticipate that there will be no new applicants added to the backlog after that date. This increase in efficiency would greatly improve the system because asylum officers and immigration judges would be able to hear and decide within 180 days from the date of filing, and only then decide whether or not an applicant should be authorized to work. 125

2. Unified Processing System with Mandatory Referral to Immigration Judges

Under the proposed asylum rule, asylum officers from the INS Asylum Officer Corps (AOC) and immigration judges from the Executive Office for Immigration Review (EOIR) will become part of a unified asylum adjudications process that will incorporate the best aspects from each unit. For asylum applicants with illegal status in the United States, asylum officers will either grant the claim or refer it to an immigration judge to complete the denial. 126 This consolidation should shorten total asylum processing time considerably by eliminating one of the two separate *de novo* asylum hearings to which applicants are now entitled. Reformers are studying other layers of administrative and judicial review, but they have not yet adopted any specific reform proposals for further streamlining these reviews.

The proposed regulation would require asylum seekers to file complete applications, signed by the applicant and any preparer under penalty of perjury. 127 In addition, asylum seekers and officials will use the same application throughout the entire INS/EOIR proceeding. 128 With these and other measures of the proposed asylum rule, the unified system should also remove bottlenecks that in the past caused long delays, allowed applicants to “get lost” in or “drop out” of the system, or to

124. See infra part IV.B.4 (discussing efforts to reduce spurious applications).
125. Id.
126. Proposed Asylum Rule, supra note 38, at 14,786-87 (to be codified at 8 C.F.R. § 208.14(b)).
127. Id. at 14,785 (to be codified at 8 C.F.R. § 208.3(c)(4)).
128. Id. at 14,784 (to be codified at 8 C.F.R. § 208.2(b)).
change their stories as they moved from one level to the next in the asylum adjudication process.

Under the new process, an applicant first presents his or her case to an asylum officer in a non-adversarial hearing. If not immediately approved, the claim of an applicant otherwise in this country illegally, will automatically go to an immigration judge after issuance of a charging document by the asylum officer. There, the applicant receives a formal asylum hearing, generally with the participation of opposing counsel. If the applicant loses at this level and has no other legal grounds for staying in the United States, the judge issues a final order of deportation.

The new system would also expedite the asylum process by revising the advisory role of the Department of State. Currently, the INS must refer all asylum cases to the State Department’s Bureau for Human Rights and Humanitarian Affairs and wait sixty days for a response. The new plan eliminates this sixty day delay. The INS will still refer all new cases to the State Department, which may, at its own initiative, comment on individual asylum applications. Either asylum officers, immigration judges, or both, may also be able to request case specific information from the State Department. Most of the time, however, the State Department will issue generic advisory opinions and publicly available “Country Profiles.” The INS Resource Information Center will convey electronically the State Department reports and other relevant human rights information to asylum officers and immigration judges.

3. Decoupling Employment Permission from Asylum

As previously discussed, many people file spurious asylum claims as a quick and easy way to obtain work authorization in the United States. No other developed country makes it so easy for asylum seekers to work pending the completion of their asylum processing. The INS

129. Id. at 14,785 (to be codified at 8 C.F.R. § 208.11).
130. Id. at 14,787 (to be codified at 8 C.F.R. § 208.18(b)).
131. Id. at 14,786 (to be codified at 8 C.F.R. § 208.11).
132. 8 C.F.R. § 208.11 (1993).
133. Proposed Asylum Rule, supra note 38, at 14,787 (to be codified at 8 C.F.R. § 208.11).
134. Id.
135. Martin, Reforming Asylum, supra note 107, at 1378, n. 326 (stating that most other developed nations, unlike the United States, provide indigent asylum-seekers the same social welfare benefits offered other non-citizens).
even now encourages asylum applicants to file requests for employment authorization at the same time as their asylum request. The INS must then issue the official Employment Authorization Document within ninety days of receiving a “non-frivolous” asylum application.

To address this problem, the reformed system will decouple employment authorization from asylum processing. Under the proposed plan, no one may ask for work authorization until 150 days after seeking asylum and the INS will not issue any employment cards for another thirty days from that date. As the reform plan aims to have asylum officers interview all applicants well within that 180 day time period, asylum officials hope to reduce opportunities for frivolous claimants to exploit the asylum system in order to gain work. Indeed, the reform plan envisions completing all INS/asylum officer and EOIR/immigration judges processing within this time. Once the applicant receives an EAD, the INS will automatically authorize employment for all derivative family members, and automatically reauthorize it until asylum processing is complete.

4. Crackdown on “Boilerplate” Preparers and Applicants

The INS has been receiving an increasing number of “boilerplate” applications—those either identical or virtually identical to hundreds of others. Some unsuspecting applicants pay preparers of such applications, often “notarios” or “immigration consultants,” substantial sums of money to help them obtain work permits. When interviewing these applicants, INS officers occasionally discover that the “asylum-seekers” have no idea they had applied for asylum or that they had signed the asylum application “on penalty of perjury.” Consequently, they come unprepared for an asylum interview.

Stopping these “boilerplate” preparers is an urgent priority of asylum reform, one which need not wait for promulgation of new asylum regulations. “Asylum Abuse Task Forces,” operating under INS head-

136. INS Form I-765.
137. “Instructions” on INS Form I-589.
138. Proposed Asylum Rule, supra note 38, at 14,780.
139. Id. at 14,785 (to be codified at 8 C.F.R. § 208.7(a)(1)).
140. PRESS CONFERENCE, supra note 116 (noting that during the transition to the new system, those put into the backlog will be issued a work permit after the 180th day).
141. Proposed Asylum Rule, supra note 38, at 14,787 (to be codified at 8 C.F.R. § 208.20).
142. INS Prepares Comprehensive Asylum Reform, 71 INTERPRETER RELEASES 246
quarters guidance, began operating in selected INS districts nationwide in December 1993. The Task Forces will investigate and identify boilerplate preparers, fining some while bringing others to trial.

The INS does not intend to ignore individuals filing "boilerplate" applications. Generally, the INS will allow applicants the benefit of the doubt regarding their "unintentional" complicity in filing misleading or fraudulent claims. However, the INS reserves the option to arrest, prosecute, or both, if the circumstances surrounding such filings are egregious breaches of immigration laws.

One aspect of the crackdown on applications may use the newly promulgated final rule concerning changes in processing procedures for applications of immigration benefits. Under this system, the INS will return applications that are incomplete or which "raise[] underlying questions regarding eligibility." A maximum of twelve weeks are allotted to the applicant to provide more detailed and individualized information about his or her claim. Until the applicant files this detailed application, the ninety day clock for obtaining authorization to work (increased to 180 days when the Clinton Administration's asylum reform plan is promulgated) is stopped, and then restarted at day one upon receipt of the information.

(Febr. 7, 1994).


144. See New Applications Rule at 1461 (noting that "an applicant or petitioner must establish eligibility for a requested immigration benefit" and that "an application or petition form must be completed as applicable and filed with an initial evidence required by regulation or by the instructions on the form." The summary discussion in the Federal Register which precedes the new final rule states that "initial evidence is the evidence necessary to establish a basis for filing and to allow the Service to process the average case through to completion the first time." Id. at 1456. The discussion further states that "the filing of an application or petition without the required initial evidence, nor asking that a case be rescheduled, effectively hampers our ability to make a definitive determination of eligibility." Id. at 1457.

145. Id. at 1462.

146. See id. at 1461 (emphasizing that "in such cases, the applicant or petitioner shall be given twelve weeks to respond to a request for evidence").

147. See id. at 1462 (explaining that "if an application or petition is missing required initial evidence, or an applicant, petitioner, or beneficiary requests that an interview be rescheduled, any time period imposed on service processing will start over from the date of receipt of the required initial evidence or the date of the request for interview rescheduling").
5. Electronic Security Checks of All Asylum Applicants Before Processing Their Applications

To further reduce abuse of the system, the four INS Service Centers nationwide that receive and register asylum applications will conduct electronic security checks on all applicants seeking asylum. Currently, the INS primarily checks applicants already interviewed and recommended for approval. The INS does not run security checks on those interviewed but not recommended for approval or those already in or still being added to the backlog. Under the President Clinton's initiatives of July 27, 1993, the government will expand the "look-out" databanks which will be available for INS use.

6. Definitive Identification and Verification

Under the reform system, the new proposed regulation would require applicants to establish "full identifying information at the time of any interview,"\(^{148}\) and authorize asylum officers to register this identity electronically.\(^{149}\) The INS intends to create a definitive identification verification system for asylum applicants which would prevent them from changing their names and refileing or dropping out of the system in order to avoid deportation. The system, which will probably rely on automated fingerprinting, will be installed at selected air ports-of-entry and asylum offices on a pilot basis beginning in 1994 and later will be extended to immigration courts.

7. Ensured Proper Service of Orders to Show Cause

Currently, the INS has been unable to deport many people found ineligible for asylum because it cannot properly demonstrate that the applicant received the Orders to Show Cause (OSCs), a document issued to failed applicants to start the deportation process. Because the INS now mails the documents, immigration judges frequently rule that there is inadequate proof that the applicants received the document. Without proof of "proper service," immigration judges may place deportation on hold or close the case administratively. Under the proposed reform system, the INS will ensure proper service of OSCs by requiring asylum

148. Proposed Asylum Rule, supra note 38, at 14,782 (to be codified at 8 C.F.R. § 208.9 (b), (c)).
149. Id.
applicants to personally collect and sign for their decisions. In most instances, a judge will be able to issue enforceable final orders of deportation in absentia, even if the asylum seeker subsequently tries to "drop out" of the system or fails to show up at court hearings.

8. Significantly Enhanced Resources

The proposed reform system will require significantly enhanced resources, as previewed in the Clinton Administration's May 28, 1993 testimony before the Senate Subcommittee on Immigration and Refugee Policy. The Clinton Administration's plan recommends doubling both the INS Asylum Officer Corps and the number of immigration judges by the beginning of FY 1995 and FY 1996, respectively. This, along with new automated data processing equipment, electronic fingerprinting machines, and other administrative reforms will be costly. On the other hand, the new equipment and reform procedures should make the new asylum process more efficient and reduce the number of spurious asylum claims. The asylum and immigration judge staff will then have more time to whittle down the backlog.

9. Charging Fees for Asylum and Asylum-related Applications

The proposed asylum rule includes imposition of a $130 direct filing fee for all asylum applications, and where warranted, will also charge for initial requests for employment authorization. Those asylum-seekers unable to pay the fee may obtain a waiver. Presently, asylum processing is financed from surcharges on the fees charged to other immigrants for examinations not related to asylum. Reformers propose that the additional resources needed be funded by a trust fund to be established under the Crime Bill now being considered by Congress. Early on, the asylum reform community viewed this fee as one of the more controversial aspects of the proposed system.


151. Proposed Asylum Rule, supra note 38, at 14,781 (to be codified at 8 C.F.R. §§ 103.7(b)(1), 208.4(d)).

152. Proposed Asylum Rule, supra note 38, at 14,781 (to be codified at 8 C.F.R. §§ 208.4(d), 103.7(c)(1)).

153. Proposed Asylum Rules, supra note 38, at 14,781.

10. Implementing the Concept of “Safe Country of Asylum or Transit”

The Administration’s reform proposal also addresses the problem of
airport-hopping for asylum shopping: people traveling from one country
to another repeatedly seeking asylum. The proposal seeks regulatory
changes allowing the United States to return asylum seekers, based on
bilateral or multilateral agreements, to a country of “safe transit”\textsuperscript{155} for
a single and definitive asylum hearing.\textsuperscript{156} The idea is to give any one
applicant a chance for asylum in only one appropriate country among
those bound together through multilateral accords such as the Dublin\textsuperscript{157}
and Schengen Conventions,\textsuperscript{158} or other bilateral arrangements.

To assuage possible critics of this “safe country of asylum” concept,
the Clinton Administration plans to enter into such bilateral or multi-
lateral agreements with only those countries who guarantee the returned
applicants access to the country’s asylum procedures. Additionally, these
procedures must meet minimum international standards of fairness. The
UNHCR might be asked to help certify that the asylum procedures of
prospective countries of return meet those minimum standards.\textsuperscript{159}

11. Enhanced Ability to Remove Aliens Having Final Orders of
Deportation

To date, the United States rarely succeeds in deporting those persons
found ineligible for asylum or other immigration relief. This situation
undermines the integrity of immigration processing in general, and asy-
lum processing in particular. The Administration is currently reviewing
several methods to remedy this situation and expects to recommend new

\begin{footnotes}
\footnotetext{155}{Proposed Asylum Rule, supra note 38, at 14,781.}
\footnotetext{156}{Id.}
\footnotetext{157}{Convention Determining the State Responsible for Examining Applications for
Asylum Lodged in One of the Member States of the European Communities, Dublin,
June 15, 1990 \textit{translated in} 2 \textsc{Int’l J. of Refugee L.} 469-83 (1990).}
\footnotetext{158}{Convention Applying the Schengen Agreement of June 14, 1985 Between the
Governments of the States of the Benelux Economic Union, the Federal Republic of
Germany, and the French Republic, Schengen (Grand Duchy of Luxembourg), June
19, 1990; \textit{see, e.g.,} Elizabeth Whitaker, \textit{The Schengen Agreement and its Portent for
(discussing of this convention).}
\footnotetext{159}{See UNHCR ExCom Conclusions, No. 8 (XXVIII) (outlining the United Na-
tions minimum standards); UNHCR Handbook on Procedures and Criteria for Deter-
mining Refugee Status, Geneva, 189-94 at 45-46 (same).}
\end{footnotes}
strategies and additional resources, if needed, by the time the reformed asylum system becomes fully operational.

The primary controversy involved in ensuring removal of individuals with final orders of deportation focuses on detention, which the INS now uses primarily to detain criminal aliens. Due to the inadequate number of detention facilities and the high cost of their operation, the INS detains only a few of the total number of legally detainable aliens. Refugee advocates generally argue that the INS should hold asylum seekers sparingly and only according to certain standards and processing priorities because detention is costly and genuine asylum seekers generally pose little threat to the security of the United States. For this reason, they see little need to detain these people for a prolonged period of time. Others would like to see detention used more frequently, showing that the Service gives high priority to deterring illegal immigration and to facilitating deportation, especially of criminal aliens. The Administration is likely to recommend, at a minimum, detaining those who the INS had issued final orders of deportation, pending completion of removal processing.

12. Streamlining Asylum Processing

While awaiting the regulatory authority needed to begin many parts of the comprehensive asylum reform proposal, the INS has already made administrative changes which reflect the spirit of the upcoming reforms. Streamlining current affirmative asylum processing will increase the number of cases each asylum officer can complete before reforms are fully implemented. These administrative changes, begun in January 1994, do not affect the fairness or impartiality of adjudications.

Taken together and given sufficient financial resources, this package

160. See Lizette Alvarez & Lisa Getter, Detention: The Failed Deterrent, MIAMI HERALD, Dec. 16, 1993, at 1A (arguing that the INS does not have sufficient resources to locate and detain the millions of aliens who are subject to detention or who have been ordered deported).

161. To promulgate new asylum regulations, the INS has to draft them, get them cleared inside INS, then cleared by the Department of Justice, and then shared for inter-agency review and concurrence before being approved by the Office of Management and Budget and then published in the Federal Register. Almost all proposed regulations from now on have a 60 day public comment period. These comments are reviewed and the proposal modified accordingly if necessary, and then it is republished in the Federal Register. Effective dates are then 30 to 90 days away.
of comprehensive asylum reforms, including additional asylum officers and immigration judges, should be able to adjudicate 150,000 cases annually while maintaining the U.S. commitment to asylum for the persecuted. It should decide cases faster than ever before, approve more each year than in the previous ten years, deny cases only after fair procedures including appeal, and remove ineligible applicants in a timely manner. Such a system would merit the support of advocates of both “compassion” and “control,” and win back a measure of confidence from the American people that their generosity is not being abused.

CONCLUSION

Legitimate justification exists for some of the public and legislative concern over the “problem of immigration” and asylum processing in the United States, although certainly not enough to justify panic. The current immigration law and asylum procedures cannot simultaneously cope with the increasing numbers of legitimate immigrants and deter abuse of the U.S. traditional hospitality toward displaced and persecuted persons from other countries. As one writer recently noted, “[t]he INS’s mandate is a mixed one—to serve people who are authorized to enter the country while barring entrance to those who aren’t.” As then Carnegie Senior Associate Doris Meissner observed in 1992, “states have an obligation to control entry into their societies . . . [but] immigration control in democracies is highly imperfect.” Today as INS Commissioner, Ms. Meissner, herself the daughter of German immigrants to the United States, will discover exactly how difficult achieving the balance between “compassion” and “control” can be. The abuses of U.S. immigration laws highlighted in 1993 require urgent action. Yet we should not react to this situation for myopic or defensive reasons in ways that in the long run will damage our national traditions, our defining acceptance of diversity, or our hospitality towards newcomers.

162. See Dan Stein, Here’s An Idea: Hold Off Immigration, L.A. TIMES, Nov. 29, 1993, at B7 (arguing that without a pause on legal immigration and better management of illegal immigration, the nation risks revisiting past immigration related problems by the turn of the century).
165. Meissner Reviews Issues and Changes Facing INS, 70 INTERPRETER RELEASES 1,469-72 (Nov. 8, 1993).
166. 1990 CENSUS, supra note 16, at 3 (quoting Theodore H. White as saying
Regardless of the measures employed, people will continue to leave other countries for a variety of reasons, including persecution and a search for economic opportunity. Under U.S. law, some of these people should be granted access to enter this country as well as the opportunity to contribute to and become valuable members of our society. The others should be rejected, and if ineligible for other immigration relief, removed to their countries of origin. Most immigration decisions are life altering, involving actions such as acceptance into the United States, family reunification or deportation. Accordingly, procedures which are fair and timely, and administered with maximum compassion and respect for all individuals concerned, are necessary.

The challenges of reform require careful analysis and informed debate. Today's immigration and asylum systems need new ideas, not only from INS, but from the rest of the Administration, Congress, and the American people. The rhetorical heat of the past year should be America is more of an idea than a place). He goes on to say that it is an idea that has drawn together the most diverse population on Earth and one that is becoming more varied every day. Id. at 248-49. "If late twentieth-century trends continue, immigration will reshape the nation's racial composition." Id. at 257.

167. 1990 CENSUS, supra note 16, at 5 (noting the tremendous number of U.S. residents who were born abroad). "The surge in immigrants and the surprisingly high birthrate . . . will boost the nation's population by another 50% in about six decades—to about 400 million in 2050." Id. at 246.

168. See Doris Meissner, Making INS What It Can and Should Be, 16 COMMISSIONER'S COMMUNIQUE 1-3 (Nov.-Dec. 1993) (calling for an agency whose effectiveness helps to defuse the tensions that inherently surround immigration processes). Meissner explains that we live in a world where intense international migration pressures exist and that these pressures will become issues of significant global concern. Id. at 2. Meissner goes on to note that generous immigration policies will only be accepted by the public if asylum rules are administered firmly and fairly. Id. See also The President's Report on Immigration, supra note 69, at 8 (restating the need for compassion toward asylum-seekers but within the context of greater control of our borders).

169. See Roberto Suro, New Voice in Immigration Debate, WASH. POST, Apr. 13, 1994, at A15 (quoting Barbara C. Jordan, chair of the Commission on Immigration Reform established under the Immigration Act of 1990, as stating that "[a] lot of people are just tempted to throw up their hands and say immigration is an insolvable problem, but I say that cannot be because there is no such thing as a problem which cannot be resolved . . . "); see also, 1994 Executive Summary, U.S. Immigration Policy: Restoring Credibility, US Commission on Immigration Reform, Report to Congress, Sept. 1994 (presenting the Commission's perspectives on immigration and policy recommendations on reform).

170. See id. (quoting Jordan as stating that the debate she participated in was more of a "furor" than a "debate").
matched not only by the light of knowledge and insight, but also by the resources and concrete actions needed to address these concerns in a meaningful way.

The fundamental nature of the American experience should encourage us to keep open, although vigilantly guarded, the door to the American dream. Responding to the challenges of immigration and asylum, we have the opportunity to create a system that can meet the demands of increased migration; reconfirm our commitment to legally protect refugees; reassure the public that our immigration processing is fair, timely and implemented with discipline and consequences, while ensuring our sovereignty and guarding our national security. Creating such a system, ambitious as it may be, is essential to continuing the kind of immigration tradition which has populated and significantly enriched this country.