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EXPEDITED REMOVAL AND DISCRIMINATION IN THE ASYLUM PROCESS: THE USE OF HUMANITARIAN AID AS A POLITICAL TOOL

In 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹ Through this act, Congress attempted to combat illegal immigration, while revamping the asylum process in the United States.² Some of the harshest new measures were instituted under the "expedited removal" system.³ This system allows the Immigration and Naturalization Service (INS) to summarily exclude any alien who arrives at a border without proper documents or with false travel documents.⁴ The decision to exclude such an alien is not subject to review, thus allowing low-level INS agents to make final decisions about the admission of certain aliens.⁵

The IIRIRA was implemented as an attempt to stem the tide of illegal immigration. Unfortunately, the law also harms true asylum-seekers. Aliens without documents or with false documents may be attempting to hide something from immigration officials, but they may also have legitimate reasons for their lack of valid documentation.⁶ The absence of any effective review by the courts

1. 8 U.S.C. § 1225 (2000).

2. Katherine L. Vaughns, *Retooling the "Refugee" Definition: The New Immigration Reform Law's Impact on United States Domestic Asylum Policy*, 1 RUTGERS RACE & L. REV. 41, 44-45 (1998).

3. See 8 U.S.C. § 1225.

4. *Id.* § 1225(c)(1)(A).

5. Daniel C. Horne, *Summary Exclusion/Expedited Removal*, in INTRODUCING THE 1996 IMMIGRATION REFORM ACT 30, 31 (R. Patrick Murphy ed., 1996).

6. Many asylum-seekers flee from past or potential persecution and may have their documents destroyed as a result of that persecution, or they may have falsified their documents to prevent the rulers of their own country from discovering their intent to leave. See, e.g., Cathleen Caron, *News From the International War Crimes Tribunals: Asylum in the United States: Expedited Removal Process Threatens to Violate International Norms*, 6 HUM. RTS. BRIEF 9, 27 (1999); Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum-seekers*, 12 HARV. HUM. RTS. J. 197, 200 n.13 (1999). In fact, "the very essence of being a refugee means fleeing for safety in

could easily lead to a violation of international law's principle of nonrefoulement,⁷ as well as other international law principles.

In addition to possible violations of international law, IIRIRA gives too much power to immigration officials. The nature of immigration law strictly limits judicial review of immigration decisions.⁸ The expedited removal system allows both INS officials individually and the INS as a whole to grant or withhold asylum on a discriminatory basis with no real checks on this power. Proponents of this system argue that the majority of aliens subject to the expedited removal system are not seeking asylum.⁹ They also assert that safeguards built into the system prevent accidental return of true asylum-seekers.¹⁰ These explanations fail to take into account the danger of a systematic refusal of all asylum-seekers from a single country. This danger has increased since the events of September 11, 2001, but has been present throughout the history of United States refugee law. Such a danger does not stem from the mistakes of low level immigration officials, but from the United States' decision to use asylum as a political tool rather than for its intended use: the protection of individuals from persecution.

a world where borders are sealed and where documents, however obtained, are a lifeline." AMNESTY INTERNATIONAL USA, *LOST IN THE LABYRINTH: DETENTION OF ASYLUM [sic] SEEKERS IN THE USA* [hereinafter AMNESTY: LOST], available at <http://www.amnestyusa.org/rightsforall/asylum/ins/ins-03.html> (last visited Mar. 16, 2002).

7. Nonrefoulement is the international law principle that says that a state may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 150, 176. See generally James E. Crowe, Note, *Running Afoul of the Principle of Non-Refoulement: Expedited Removal Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 18 ST. LOUIS U. PUB. L. REV. 291 (1999) (arguing that expedited removal does violate the principle of nonrefoulement); Amy Langenfeld, Note, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1055-56 (1999) (discussing IIRIRA's possible violation of the principal of nonrefoulement and INS attempts to correct any violation).

8. See *infra* notes 38-41 and accompanying text.

9. See, e.g., David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 680-82 (2000) (citing statistics to show that a small percentage of aliens subject to expedited removal even ask for asylum hearings).

10. *Id.* at 681-82 (explaining that the regulations require review and approval of each file by a high-level supervisor to prevent an asylum-seeker from going undetected).

This Note addresses the special problems that asylum-seekers face under the expedited removal system, particularly with respect to discrimination. The first section reviews the history of the IIRIRA and expedited removal. This history demonstrates that the IIRIRA, and particularly the expedited removal system, was a product of reactionary politics and pandering to general fears of illegal immigration, rather than a well-reasoned response to the problems facing immigration officials.¹¹

The next section discusses the removal of any judicial review of certain immigration decisions under the IIRIRA. In addition, this section addresses the historic foundations for the general deference afforded immigration decisions since the 1800s. Finally, this section examines the availability of constitutional protections to non-admitted aliens.

Section three discusses discrimination in United States immigration law. This section first deals with historical discrimination in general immigration law and in the asylum process. It then examines the potential for discrimination in asylum law under the expedited removal system and addresses the international law implications of allowing discrimination in the asylum process. The section concludes with a critique of the implementation of the expedited removal system.

Finally, discussion turns to possible solutions to these problems recently considered by Congress. Various efforts attempting to reform the problems of the IIRIRA were introduced in the last session of Congress. These reforms dealt with the problems of expedited removal as applied to the asylum process. None of the legislation introduced, however, went far enough. As this Note ultimately concludes, in order to prevent the possibility of discriminatory practices in asylum decisions, expedited removal must not apply to potential asylum-seekers.

11. See *infra* notes 12-20 and accompanying text.

THE EXPEDITED REMOVAL SYSTEM

In the years leading up to the passage of the IIRIRA, several events led to a backlog of asylum requests.¹² Upheaval in Haiti and Central and South America led to an influx of refugees seeking escape from human rights violations and civil war. The location of these countries made it easier for refugees to get to the United States compared to refugees from the Soviet Bloc, Africa, and Southeast Asia.¹³ The Refugee Act of 1980 compounded the increased influx by loosening the requirements for those seeking refugee status and increasing the numerical caps on yearly grants of asylum.¹⁴

In an effort to control illegal immigration, the Immigration Reform and Control Act of 1986¹⁵ added a requirement that immigrants have work permits.¹⁶ Asylum applicants were granted work permits while waiting for their cases to be heard.¹⁷ The INS reasoned that this would allow an asylum applicant to begin to establish a life in the United States rather than live in limbo while awaiting judgment.¹⁸ As a result, many illegal immigrants who sought to receive a work permit filed an affirmative application for asylum.¹⁹ Neither the INS nor any of the administrations in power took steps to increase the number of asylum officers.²⁰ This lack of personnel translated into an ever-increasing backlog of asylum cases and resulted in a longer time period for review of asylum

12. PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR* 32-39 (2000).

13. *See id.* at 30.

14. *Id.* at 27-28. The 1980 Act adopted the United Nations definition of refugee in an attempt to end discriminatory practices in refugee policies. Before the Act, asylum applicants had to be from communist countries, totalitarian regimes, or certain countries in the Middle East. Vaughns, *supra* note 2, at 59.

15. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

16. SCHRAG, *supra* note 12, at 31.

17. §§ 302-303, 100 Stat. 3359.

18. *Id.*

19. SCHRAG, *supra* note 12, at 31-36. Immigrants who sought to avoid deportation at airports or borders could file a defensive asylum application. If an immigrant successfully avoided detection upon entry, the affirmative application for asylum granted them a work permit for the duration of the asylum adjudication. After the 1986 Act, work permits were increasingly more difficult to obtain; the sole exception to this general rule was the affirmative asylum application. *Id.*

20. *Id.*

applications.²¹ The increase in time allowed individuals with false asylum applications to work for a longer period of time before the application could be reviewed and rejected, making it more and more attractive for illegal immigrants to misuse the asylum system.²²

In addition to the backlog at the INS, several incidents led the public to call for reform in the asylum system.²³ For example, in January 1993, two people were shot and killed near CIA headquarters; the killer was an asylum applicant.²⁴ In February the World Trade Center was bombed. Several of the aliens charged with committing that crime were asylum applicants.²⁵ Finally, in March, *Sixty Minutes* aired a report on asylum that described the ease with which any alien with a passport could slip into the country and disappear by claiming political asylum.²⁶ The recession and unemployment rates at the time made people suspicious of immigrants coming to the United States and taking the jobs of Americans, and these incidents heightened that suspicion.²⁷ Calls for reform led to the Antiterrorism and Effective Death Penalty Act²⁸ in 1996, followed closely by the IIRIRA the same year.

Under the IIRIRA, an alien who arrives on U.S. soil, either at a land crossing or at an international airport, must pass through a primary inspection.²⁹ If the inspecting officer finds discrepancies in the documents or has any questions or suspicions unresolvable in the brief time allotted for the primary inspection, he must refer the alien to a secondary inspection.³⁰ The secondary inspection requires a careful interview, during which the alien has an opportunity to

21. *Id.*

22. *Id.* The earlier loosening of the rules and influx of refugees created a backlog at the INS. *Id.* The backlog meant that adjudication of the affirmative asylum claim could take a significant amount of time, during which the illegal immigrant had a work permit and could establish himself in the United States. *Id.*

23. *Id.*

24. Caron, *supra* note 6, at 28.

25. *Id.*

26. AMNESTY: LOST, *supra* note 6, at 17-18.

27. SCHRAG, *supra* note 12, at 53.

28. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

29. See 8 U.S.C. § 1225(a)(3) (2000).

30. Minnesota Advocates for Human Rights, *Refugee and Immigrant Program: Expedited Removal and Credible Fear Determinations* (2000) (on file with author).

respond to charges of false or missing documents.³¹ The second immigration officer must also inform the alien of the possibility of asylum and encourage the alien to speak up about any fear of persecution.³²

Aliens who (1) fail to possess valid travel and/or visa documents, or (2) possess false travel and/or visa documents are placed into the expedited removal system.³³ In order to prevent immediate deportation, such an alien must either indicate an intent to file for asylum or express a fear of persecution.³⁴ If the alien indicates an intention to apply for asylum, the alien must be referred to an asylum officer for further review.³⁵

The asylum officer conducts an interview to determine whether the alien has a credible fear of persecution.³⁶ In order to prove a credible fear, the alien must show a significant possibility that the he would be able to win asylum.³⁷ If the officer determines that there is no credible fear, the alien is removed "without further hearing or review,"³⁸ unless he requests further review within a specified amount of time.³⁹ The review is limited in scope and must take place within seven days of the officer's negative determination of credible fear.⁴⁰ At the hearing, the asylum-seeker cannot be represented by counsel, although legal counsel may be present.⁴¹

31. Martin, *supra* note 9, at 681.

32. *Id.*

33. *Id.*

34. 8 U.S.C. § 1225(b)(1)(A)(i).

35. *Id.* § 1225(b)(1)(A)(ii).

36. *Id.* § 1225(b)(1)(B). A credible fear interview involves ensuring that the alien understands the process and "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum . . ." *Id.* § 1225(b)(1)(B)(v).

37. *Id.*

38. *Id.* § 1225(b)(1)(B)(iii).

39. *Id.* § 1225(b)(1)(B)(iii)(III).

40. *Id.* Some commentators have expressed concern that this limited review could lead to lawful residents being excluded from the United States accidentally. Horne, *supra* note 5, at 30.

41. Michele R. Pistone, *Assessing the Proposed Refugee Protection Act: One Step in the Right Direction*, 14 GEO. IMMIGR. L.J. 815, 821 (2000).

JUDICIAL REVIEW UNDER IIRIRA

One of the most criticized aspects of IIRIRA has been that it severely limits any review of INS decisions.⁴² In the case of expedited removal, IIRIRA effectively removes most forms of judicial review for immigration decisions.⁴³ Administrative review of any decision is limited to an alien who declares, under oath, that he "ha[s] been lawfully admitted for permanent residence,"⁴⁴ "ha[s] been admitted as a refugee under section 1157,"⁴⁵ or he "ha[s] been granted asylum under section 1158."⁴⁶ Finally, the Act removes jurisdiction for collateral attacks based on the validity of any order under the expedited removal system.⁴⁷

As an administrative agency, INS decisions and policies are granted a great deal of deference.⁴⁸ Immigration law has also been afforded extraordinary deference by the Supreme Court under the plenary powers doctrine⁴⁹ and the public rights

42. See, e.g., Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1615 (2000) (discussing the pros and cons of judicial review in immigration decisions and concluding that judicial review is a necessary and important part of the system); Langenfeld, *supra* note 7, at 1061-63 (discussing the lack of judicial review under IIRIRA with regard to the mandatory detention provisions of the Act). But see Paul S. Jones, Note, *Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process*, 21 NOVA L. REV. 915, 915 (1997) (arguing that lack of judicial review does not violate due process).

43. 8 U.S.C. § 1225(b)(1)(B)(iii), (b)(1)(C), (b)(1)(D).

44. *Id.* § 1225(b)(1)(C).

45. *Id.*

46. *Id.*

47. See *id.* § 1225(b)(1)(D).

48. When a court reviews an agency's construction of the statute it administers, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the intent of Congress is not clear, however, and Congress has explicitly left a gap for the agency to fill, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-44. Unless the agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute," *id.* at 844, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*

49. In *The Chinese Exclusion Case*, 130 U.S. 581 (1889), the Court held that, even though the Constitution did not explicitly vest in Congress the power to regulate immigration, the power was inherent in Congress as "an incident of sovereignty." *Id.* The holding meant that Congress had the power to control immigration and exclude immigrants as it saw fit. The plenary powers doctrine is generally disliked among immigration law scholars. See, e.g.,

doctrine.⁵⁰ Such deference, coupled with the statute's explicit denial of most forms of judicial review, indicates that Congress intended to give the INS complete authority in determining whether an applicant had a credible fear. The lack of judicial review could allow an official or the agency as a whole to engage in discriminatory treatment without any check by another branch.⁵¹

The lack of independent judicial review means that the only recourse for an individual wishing to challenge a negative credible fear determination is the agency review established in the INS code.⁵² If the INS as an agency decides to engage in discriminatory practices, the review procedures established under the IIRIRA will not prevent it.

The danger to true asylum-seekers does not lie only in bad faith discrimination. The determination of whether an individual has a credible fear of persecution is based on any facts the asylum officer deems to be relevant, in addition to what the alien tells him.⁵³ In part, this standard means information as to whether the United States considers the country to be one that engages in torture or other inhuman treatment, and the inspector's own knowledge of the

Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing that the plenary power doctrine is flawed because of the obvious racial bias of the cases and laws from which it was formulated); Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1089 (1998) (arguing that the plenary powers doctrine should be reformulated to recognize that the plenary powers exist under the Constitution, and as such, are constitutionally defined).

50. The public rights doctrine, first articulated in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (1 How.) 272 (1856), holds that Congress can "choose whether to assign certain disputes between individuals and the government to courts or to executive officials for resolution." Gerald R. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1027 (1998). During the late 1800s, the Supreme Court applied the public rights doctrine to immigration law in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). The Court held that the "decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 660. In other words, decisions of facts made by the INS or other duly appointed immigration officials are final.

51. Such discriminatory practices would qualify as arbitrary and capricious, and therefore, under *Chevron* would be open to judicial review. The nature of IIRIRA prevents this, because courts are denied jurisdiction for collateral attacks based on any single denial. 8 U.S.C. § 1225(b)(1)(D).

52. See *supra* notes 37-42 and accompanying text.

53. 8 C.F.R. § 208.30(e) (2001).

country's situation could govern the grant or denial of asylum.⁵⁴ Therefore, one danger of this system is that people with novel asylum claims and a real fear of persecution will not be able to meet the credible fear determination.⁵⁵ An additional danger arises when the United States decides not to acknowledge a country's human rights abuses, whether for economic or political reasons.⁵⁶ In either case, people facing a real threat of persecution in their homeland could be denied asylum simply because the decision makers are not well-informed and review procedures are too truncated to allow for a full development of the alien's case.

One commentator also argues that a lack of judicial review prevents any true independence in the process.⁵⁷ Professor

54. *Id.*

55. For example, until recently, women from certain African countries who had a real fear of female genital mutilation (or female circumcision), could be denied refugee status because their persecution was not "on account of race, religion, nationality, membership in a particular social group, or political opinion." Refugee Act of 1980, Pub. L. No. 96-212, § 201(a)(42), 94 Stat. 102, 102-03 (codified at 8 U.S.C. § 1101(a)(42) (2000)). The United States was hesitant to allow an asylum claim based on gender, despite indications that gender did fall under the membership in a "particular social group category." See, e.g., *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (holding that gender did constitute a social group in case of persecution); *In re Acosta*, 19 I. & N. Dec. 211 (1985) (interim decision 2986) (developing the immutable characteristics test to define the social group category). This reluctance stemmed, in part, from a fear that allowing gender persecution to become a category for refugee status and asylum would open the floodgates to an enormous number of new claims. But see Layli Miller Bashir, *Female Genital Mutilation In The United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & LAW 415, 451-54 (1996) (refuting the floodgates argument based on Canadian and French experience); John Linarelli, *Violence and Culture in the New International Order: Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 984-86 (1997) (refuting fears of opening the floodgates based on Canada's experience, the stringency of American asylum law, and the difficulties facing a woman attempting to flee the practice).

For a discussion of the history of using female genital mutilation as the basis for an asylum claim, see generally Gregory A. Kelson, *Female Circumcision in the Modern Age: Should Female Circumcision Now be Considered Grounds for Asylum in the United States?*, 4 BUFF. HUM. RTS. L. REV. 185, 209 (1998) (tracing the development of such claims in immigration case law beginning in 1994 and concluding that "the United States should take the lead in protecting women against gender based persecutions . . . worldwide"); Linda A. Malone & Gillian Wood, *International Decisions: In Re Kasinga*, 91 AM. J. INT'L L. 140, 146-47 (1997) (holding that this first Board of Immigration Appeals decision to use female genital mutilation as grounds for asylum was a success for women's rights advocates, but not an unqualified success, as many victims of this practice will still be barred from successfully asserting a claim for asylum).

56. See *infra* notes 84-123 and accompanying text.

57. Legomsky, *supra* note 42, at 1615.

Legomsky maintains that because the Board of Immigration Appeals (BIA) was created by the Attorney General, who also appoints Board members and can reverse any decision the Board makes, the judges of the BIA can never truly appear independent.⁵⁸ The appearance of independence is necessary to ensure that no indication of bias in important decisions exists.⁵⁹

Using an example of a lawfully admitted permanent resident who is being removed, Professor Legomsky further asserts that this independence is especially important in immigration cases because the stakes are so great.⁶⁰ Although this is a strong case, the case becomes stronger when considering the case of an alien seeking to receive asylum because of persecution. An added benefit of judicial review would be to inject a generalist's perspective into the process, thus overcoming some of the biases, either against asylum applicants in general or applicants from specific countries, that inevitably build up in asylum officers over time.⁶¹ Although asylum officers supposedly are trained to evaluate each claim objectively, such biases are often unconscious, and therefore difficult to overcome.

Constitutional Rights of Excludable Aliens

Because of the great deference afforded Congress and the INS, excludable aliens are often deemed to have few, if any, enforceable rights under the Constitution.⁶² The Supreme Court addressed the issue of due process rights for excludable aliens in *Knauff v.*

58. *Id.*

59. *Id.*

60. *Id.* at 1631.

61. *Id.* For an example of such bias, see Amnesty International, *Amnesty International Testimony on INS Detention: Before the U.S. Commission on Civil Rights* 8 (Dec. 8, 2000) (statement of Dr. William F. Schulz, Executive Director, Amnesty International USA) [hereinafter *Amnesty International Testimony*], available at <http://www.amnestyusa.org/refugee/testimony.pdf>. Dr. Schulz discusses an asylum officer who, upon hearing that an applicant's fear of persecution resulted from repeated beatings by Islamic extremists, responded to an asylum request by stating, "I'm Muslim. What's your problem with Muslims?" Although the applicant was ultimately granted asylum, he initially withdrew his application because he felt intimidated by the officer. *Id.*

62. See *Knauff v. Shagnessy*, 338 U.S. 537 (1950).

Shaugnessy.⁶³ In *Knauff*, the Court reiterated that decisions regarding the exclusion of aliens was a "fundamental act of sovereignty,"⁶⁴ and that the action of an executive officer is "final and conclusive."⁶⁵ The Court further held that, no matter what its authority to review a decision affecting an alien lawfully admitted to the country, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."⁶⁶ Finally, the Court explained, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁶⁷ In other words, Congress, not the Constitution, determines due process for excludable aliens.

The Court affirmed this holding in *Kwong Hai Chew v. Colding*.⁶⁸ *Kwong* concerned the question of whether an admitted alien and permanent resident of the United States, who left the country to work on an American ship, could be excluded from the country upon his return.⁶⁹ The Court declined to follow *Knauff*, because the petitioner was already a permanent resident of the country and was, therefore, entitled to due process under the Constitution.⁷⁰ The Court explained, however, that a Congressional authorization of a denial of hearings did not conflict with the Constitution if applied only to "excludable" aliens.⁷¹ Again, the Court was essentially giving Congress blanket authority over nonadmitted aliens.

A more recent case, *Jean v. Nelson*,⁷² calls this holding into question. In an action brought by and on behalf of Haitian refugees who were being kept in detention while their cases were pending, the petitioners asserted a Fifth Amendment claim, charging that

63. *Id.*

64. *Id.* at 542.

65. *Id.* at 543.

66. *Id.*

67. *Id.* at 544.

68. 344 U.S. 590 (1950).

69. *Id.* at 592-95.

70. *Id.* at 596-98.

71. *Id.* at 600; *id.* at 596 n.5 ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.") (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)).

72. 472 U.S. 846 (1985).

parole had been denied based on race or national origin.⁷³ The Eleventh Circuit held that such discrimination would not violate the Fifth Amendment, based on the government's plenary powers to control the nation's borders.⁷⁴ Despite pressure from both sides to reach the issue of whether the Fifth Amendment applies to excludable aliens, the Supreme Court declined, holding that it was sufficient to look to the nondiscrimination provisions in the INS's own regulations.⁷⁵ The dissent disagreed, holding that the constitutional question should have been reached and decided for the petitioners.⁷⁶ Such a holding would have meant that the Constitution does apply to excludable aliens, but because Marshall's opinion is a dissent it holds no more weight than dicta.

Regardless of whether constitutional protections apply to excludable aliens, a deeper problem arises in cases of aliens who have been excluded despite a genuine claim for asylum. In such cases, the alien is sent back to his country of origin.⁷⁷ In theory, the alien could appeal from home, but in cases of genuine persecution, such a possibility is extremely unlikely. In addition, lack of money on the alien's part could preclude, or at least limit, the scope of any appeal.

Finally, in *American Immigration Lawyers Ass'n v. Reno*,⁷⁸ the D.C. Circuit held that immigration and human rights groups within the United States lacked the standing to appeal an immigration

73. *Id.* at 848.

74. *Id.*

75. *Id.* at 853-57.

76. *Id.* at 858 (Marshall, J. dissenting). Marshall argued that the holding in *Knauff* applied only to aliens excludable for national security reasons. *Id.* at 872. Marshall further explained that the statement in *Kwong Hai Chew* that "excludable" aliens . . . are not within the protection of the Fifth Amendment" was merely dicta, and thus "entitled to no more deference than logic and principle would accord it." *Id.* at 872-73 (citing *Kwong Hai Chew*, 344 U.S. at 600 (1953)). Marshall then concluded that, even with regard to entry decisions, excludable aliens do enjoy certain constitutional protections, and that "[t]he proper constitutional inquiry must concern the scope of the equal protection and due process rights at stake, and not whether the Due Process Clause can be invoked at all." *Id.* at 876-77. Because Marshall's opinion is a dissent, it holds no more weight than he ascribes to the dicta in *Kwong Hai Chew*; however, combined with the refusal of the majority to reach the issue, it does leave the question of whether the constitution is applicable to excludable aliens still somewhat unsettled.

77. See 8 U.S.C. § 1225 (2000).

78. 18 F. Supp. 2d 38 (D.D.C. 1998).

decision for an excluded alien.⁷⁹ This leaves excluded aliens with a genuine asylum claim no recourse and harms the very people the United States should be protecting.

DISCRIMINATION IN IMMIGRATION LAW

The lack of any review in immigration decisions is especially problematic considering the history of discriminatory exclusionary policies of the United States. The Chinese Exclusion Act⁸⁰ was the first example of the United States government using discriminatory principles to define immigration patterns. Although much of the discrimination was initially aimed at Asian immigrants, the acts were also used to prevent a huge influx of Jewish refugees from Europe during Hitler's reign.⁸¹ Immigration law would continue to follow this new pattern⁸² until 1965, when national quotas were abolished in the immigration system.⁸³

79. *Id.*

80. Act of May 6, 1882, ch. 126, 6, 22 Stat. 58, 60 (as amended by the Act of July 5, 1884, ch. 220, 23 Stat. 115) (repealed 1943) (allowing exclusion and deportation of immigrants from China despite existing treaties).

81. In the eleven years between 1933 and 1944, the United States admitted about 250,000 European refugees, most of them Jewish, an average of 22,000 per year. SCHRAG, *supra* note 12, at 22. That number amounted to about forty percent of the German quota, and resulted from a combination of restrictionist policies, economic concerns due to the Great Depression, and Anti-Semitism on the part of the American public and members of the United States government. *See id.* at 21-22.

82. *See, e.g.*, Immigration Act of 1917, ch. 29, 39 Stat. 874, 876 (repealed 1952) (banning virtually all immigration from Asia); Immigration Act of May 19, 1921, ch. 8, 42 Stat. 5 (amended by Act of May 11, 1922, ch. 187, 42 Stat. 540 (1922)) (repealed 1943) (limiting the number of immigrants to a percentage of the current number of legal residents in the United States of that nationality, perpetuating the previous discrimination of the immigration system); National Origins Act of 1924, ch. 190, 43 Stat. 153, 154 (banning the admittance of all aliens ineligible for citizenship). For a more detailed accounting of discriminatory practices in general immigration law, see LUCY E. SAYLER, *LAWS HARSH AS TIGERS* (1995) (describing discriminatory practices toward Chinese immigrants); SCHRAG, *supra* note 12, at 17-36 (describing discriminatory practices in immigration law in general); William L. Pham, Note, *Section 633 of IIRIRA: Immunizing Discrimination in Immigrant Visa Processing*, 45 UCLA L. REV. 1461, 1468-72 (1998) (describing discriminatory practices towards Asians in the immigration process throughout history).

83. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 201(e), 79 Stat. 911 (ending the quota system in immigration as of June 30, 1968). The Immigration and Nationality Act of 1952 codified all immigration laws into one Act, but retained the discriminatory quota system. *See* Immigration and Nationality Act, 1952, 66 Stat. 163, 169 (current version at 8 U.S.C. §§ 1101-1503 (2000)). The Immigration and Nationality Act Amendments of 1965 abolished

Refugee and Asylum Law: A History of Using Asylum as a Political Rather Than Humanitarian Tool

As a unique subset of immigration law, refugee law has developed along a separate path, but it has retained the discriminatory leanings that were present in eighteenth and nineteenth century immigration law.⁸⁴ Furthermore, asylum and refugee status have been used consistently as a method of embarrassing the ideological enemies of the United States.⁸⁵ Laws governing admittance of refugees generally were enacted in response to an emergency or crisis and not meant to be used as a precedent or viewed as a commitment to helping refugees.⁸⁶ Congress made exceptions to the restrictive immigration laws only in order to "discharge responsibilities towards persons uprooted by the war, or as a gesture to the anti-communist preoccupation of the Cold War Era."⁸⁷

The Refugee Relief Act of 1953⁸⁸ allowed admission of refugees escaping natural disaster as well as those from Communist Europe and the Middle East.⁸⁹ The Act expired in 1956—the same year that the Soviet Union invaded Hungary in order to end reform taking place in that country.⁹⁰ President Eisenhower decided that a statement had to be made, and offered asylum to 21,500 Hungarian

the quota system and created a more equitable system of immigration, based both on a per country limit and a preference system based on the immigrant's own ties to the United States. See Act of Oct. 3, 1965, Pub. L. No. 89-236, § 201(e), 79 Stat. 911.

84. See *supra* notes 72-74 and accompanying text.

85. Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 BERKELEY J. INT'L L. 38, 42-46 (1997) (citing as examples of discriminatory treatment in U.S. refugee history the different treatments of refugees from Cuba, El Salvador, Guatemala, and Haiti).

86. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 1, 12-13 (1981).

87. *Id.* at 13. For example, the Displaced Persons Act of 1948 gave sanctuary only to displaced forced laborers from States conquered by Nazi Germany and certain refugees who qualified under the United Nations standards for refugees. The Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009. The allowance for those refugees who met the UN standard for refugees was typically limited to those refugees who had fled Nazi or Fascist persecution or who were fleeing Communist persecution. Anker & Posner, *supra* note 86, at 13.

88. Pub. L. No. 203, 67 Stat. 400.

89. Anker & Posner, *supra* note 86, at 14.

90. *Id.* at 14-15.

decision for an excluded alien.⁷⁹ This leaves excluded aliens with a genuine asylum claim no recourse and harms the very people the United States should be protecting.

DISCRIMINATION IN IMMIGRATION LAW

The lack of any review in immigration decisions is especially problematic considering the history of discriminatory exclusionary policies of the United States. The Chinese Exclusion Act⁸⁰ was the first example of the United States government using discriminatory principles to define immigration patterns. Although much of the discrimination was initially aimed at Asian immigrants, the acts were also used to prevent a huge influx of Jewish refugees from Europe during Hitler's reign.⁸¹ Immigration law would continue to follow this new pattern⁸² until 1965, when national quotas were abolished in the immigration system.⁸³

79. *Id.*

80. Act of May 6, 1882, ch. 126, 6, 22 Stat. 58, 60 (as amended by the Act of July 5, 1884, ch. 220, 23 Stat. 115) (repealed 1943) (allowing exclusion and deportation of immigrants from China despite existing treaties).

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90. *Id.* at 14-15.

In addition to expanding the definition of refugee, the Act also set out specific provisions for refugees who reached America's shores, bringing American law in line with the United Nations Protocol of 1967.¹⁰⁷ Under the Act, "withholding of deportation" for refugees was mandatory.¹⁰⁸ In other words, a refugee could not be returned to a country in which his life was in danger.¹⁰⁹ The Act also gave the Attorney General discretion to grant asylum to any refugee, allowing the refugee to move on with his life rather than to live in continual uncertainty about his status.¹¹⁰ Immigrants who arrived at borders or airports without documents, or with suspicious or fraudulent documents, were immediately placed in removal proceedings before an immigration judge.¹¹¹ At the hearing, the alien could raise asylum as an affirmative defense to deportation.¹¹²

With the election of Ronald Reagan and the beginning of the 1980s, American refugee and asylum law again began to be used to promote American foreign policy rather than for humanitarian goals.¹¹³ Applicants for asylum from the United States' cold war enemies were granted asylum as a matter of course.¹¹⁴ There was no better way to try to embarrass American enemies than by releasing statistics showing that a large number of the people needing asylum were from communist countries.¹¹⁵

On the other hand, refugees from countries such as Haiti and El Salvador did not fair as well.¹¹⁶ Despite widespread international

107. Cf. *id.*, with Protocol Relating to the Status of Refugees, Jan. 31, 1961, 606 U.N.T.S. 267.

108. SCHRAG, *supra* note 12, at 28.

109. *Id.* "The 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." § 203(e), 94 Stat. at 107 (current version at 8 U.S.C. § 1251 (2000)).

110. SCHRAG, *supra* note 12, at 28.

111. Michele R. Pistone, *Assessing the Proposed Refugee Protection Act: One Step in the Right Direction*, 14 GEO. IMMIGR. L.J. 815, 820 (2000).

112. *Id.*

113. See generally Ira J. Kurzban, *Restructuring the Asylum Process*, 19 SANDIEGO L. REV. 91, 94-95 (1981) (describing the changes that the Reagan administration proposed for the asylum and immigration process).

114. See SCHRAG, *supra* note 12, at 28-29.

115. *Id.*; see also Kurzban, *supra* note 113, at 102-03 (describing the use of asylum to pursue political ends prior to the 1980 Refugee Act).

116. For example, in fiscal year 1983, the INS granted asylum to seventy-eight percent of Russian applicants and forty-four percent of Romanian applicants. SCHRAG, *supra* note 12,

knowledge that these regimes engaged in torture and persecution, the United States supported these governments and had no wish to embarrass them.¹¹⁷ Refugees from these countries, therefore, were regularly denied asylum because the INS deemed them to be escaping economic hardship, not true persecution.¹¹⁸

Critics of United States refugee policy echoed this concern regarding the true nature of that policy in the 1990s, when public opinion began to turn against the blanket admission of Cuban refugees. In response to public concerns, the United States began to limit the number of Cubans admitted each year; the United States would issue a set number of visas, and any Cuban rafters picked up at sea would be taken to a refugee center at either Guantanamo Bay or in Panama City.¹¹⁹ This policy was enunciated in a joint statement issued by Cuba and the United States on May 2, 1995.¹²⁰ This approach earned the criticism that, again, the

at 29. In contrast, only two percent of Haitian applicants and three percent of Salvadoran applicants had their applications approved. *Id.*; see also Blum, *supra* note 85, at 42-45. The divergent treatment of Haitian and Cuban refugees serves as an example. The United States Coast Guard physically prevented Haitian refugee boats from reaching United States waters during the Junta regime of 1991-1994, without ever determining whether any of the passengers were bona fide refugees. See Blum, *supra* note 85, at 44-45. The Supreme Court held that this was not a violation of nonrefoulement, because the boats never reached American territory. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993). On the other hand, boatloads of Cubans were allowed to enter American territory and were granted special legal rights. See Blum, *supra* note 85, at 45.

117. In addition to not wishing to embarrass these nations, the United States did not wish to appear to be supporting repressive regimes. See generally McBride, *supra* note 100, at 4-6. Granting of asylum to individuals from these countries would be an indictment of their governments, and by extension, an indictment of the United States for supporting the governments in the first place. *Id.*

118. See Kurzban, *supra* note 113, at 95.

119. McBride, *supra* note 100, at 6.

120. Office of the Press Secretary of the White House, Joint Statement of the United States and the Republic of Cuba (May 2, 1995), available at <http://clinton6.nara.gov/1995/05/1995-05-02-joint-us-cuban-statement-on-migration.html>. This policy later became known as the "feet-wet, feet-dry" rule. See Karen De Young, *U.S., Cuba Discuss Immigration Pact: Washington and Havana at Odds on Smuggling, Return of Illegal Migrants*, WASH. POST, Dec. 13, 1999, at A19.

The policy was adopted in an attempt to end the "rafter crisis" of 1994, during which the coast of Florida experienced a huge influx of Cuban refugees. *The United States' Inconsistent and Confusing Immigration Policy Towards Cuba has a Little Boy Caught in an International Tug of War*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Dec. 19, 1999, at 1G. This policy put the United States Coast Guard in the position of enforcing Cuba's law that prohibits emigration without government approval. See *id.* More recently, however, Cuba has

United States was looking at domestic or foreign policy concerns in making refugee determinations, rather than at the underlying humanitarian concerns.¹²¹ The policy had another, unintended effect: The United States essentially contracted with Cuba to deny Cubans the right to leave their country.¹²² This action violated the United Nations Universal Declaration on Human Rights, which gives every person "the right to leave any country, including his own."¹²³

The granting of asylum throughout history has been based in part on foreign policy considerations and public prejudices. Expedited removal, because of the lack of review and corresponding lack of transparency in the system could easily be used to hide such facts from international monitors and the general public. The United States accepts the principle that "[e]veryone has the right to seek and enjoy asylum if they are forced to flee their country to escape persecution;"¹²⁴ the spirit of asylum and refugee standards are to protect those in danger of persecution, not promote a political ideology.

International Law Obligations Regarding Discrimination in the Granting of Asylum

In general, international law plays a very small role in American domestic law. The United States considers international law to govern states, not human beings.¹²⁵ As such, unless the United States has enacted implementing legislation for a treaty,¹²⁶

begun to criticize the policy as encouraging illegal immigration, especially after the recent, highly publicized Elian Gonzalez case. See DeYoung, *supra*; see also David Adams, *Desperate Cuban Rafters on the Rise*, THE PATRIOT LEDGER (Quincy, Mass.), Oct. 20, 1999, at 22.

121. McBride, *supra* note 100, at 6.

122. *Id.*

123. Universal Declaration on Human Rights, art. 13(2), U.N. G.A. Res. 217A, U.N. Doc. A/010 (1948).

124. Amnesty International Testimony, *supra* note 61, at 1.

125. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987). The exception to the rule of states as subjects of international law are areas such as human rights; individuals are increasingly recognized as the subject of these rights and may have individual causes of action. *Id.* § 703(3), cmt. c.

126. Under American interpretation, treaties are deemed to be non-self-executing and have no immediate effect upon ratification. *Id.* §§ 303 cmt. d, 312 cmt. j. In order to have an effect, Congress must consent to it. *Id.*

international law is not used as a basis for litigation or a standard for our own laws. This is not the case in immigration law. The United States explicitly adopted the definition of a refugee from the U.N. Convention in drafting the Refugee Act of 1980.¹²⁷ Moreover, immigration lawyers and judges consistently rely on international standards in these cases.

In the aftermath of World War II, the international community was faced with a massive refugee problem. In an attempt to deal with the problem, the United Nations ratified the Convention Relating to the Status of Refugees.¹²⁸ The United States was not originally a party to the treaty, but was a party to the later Protocol Relating to the Status of Refugees.¹²⁹ The Protocol adopted all of the substantive provisions of the Convention¹³⁰ but modified the definition of refugee to include all refugees, not just those who became refugees as a result of World War II.¹³¹ A refugee is defined as

any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country

....¹³²

Under the Protocol, the parties are obligated not to "expel or return ('refouler') a refugee ... to the frontiers of territories where his life or freedom would be threatened on account of his race,

127. See *supra* notes 108-13 and accompanying text.

128. July 28, 1951, 189 U.N.T.S. 150.

129. Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

130. See *id.* art. 1.

131. See *id.* art. 1(2). In the Convention refugee was defined in part as "any person who ... [a]s a result of events occurring before January 1, 1951 ... is outside the country of his nationality ... or who, not having a nationality and being outside the country of his former habitual residence as a result of such events ..." Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A), 189 U.N.T.S. 150. The Protocol dropped the "[a]s a result of events occurring before January 1, 1951" and "as a result of such events," from the definition. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 606 U.N.T.S. 267.

132. Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150.

religion, nationality, membership of a particular social group or political opinion.”¹³³ The use of expedited removal in cases of aliens claiming asylum could easily violate this provision, especially considering the lack of review afforded to any single claim.¹³⁴

The Convention Against Torture also prohibits the refouler of persons to states in which they may be subject to torture.¹³⁵ The Convention directs Contracting States to make determinations about whether there are “substantial grounds for believing”¹³⁶ that a person would be in such danger by “tak[ing] into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”¹³⁷ Under the expedited removal system, an INS agent could deem a fear of persecution to be noncredible if it is not well known that a country engages in torture, and in so doing, could be violating the Convention. The United States has ratified this treaty, but it has not yet passed implementing legislation. Because the United States deems international treaties to be non-self-executing, the United States may be under no legal obligation to follow it.¹³⁸

Two considerations, however, will keep the United States from consciously violating the treaty. First, prohibitions on torture are considered a *jus cogens* norm of international law.¹³⁹ This means that they are super-norms, and as such are applicable to all countries whether they are party to a treaty or not.¹⁴⁰ By extension, prohibitions on returning a refugee to face torture also becomes a *jus cogens* norm. Second, even if the return of a potential victim of torture would not violate a *jus cogens* norm, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not a treaty that the United States wants to be accused of violating. If nothing else, it is bad public relations.

133. *Id.* art. 33.

134. For more extensive treatment of this issue, see Crowe, *supra* note 7, at 291.

135. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., pt. 1, Supp. No. 51, at 197, U.N. Doc. A/39/46 (1984).

136. *Id.*

137. *Id.*

138. See *supra* notes 125-27 and accompanying text.

139. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) & cmt. n (1987).

140. *Id.* §§ 702 cmt. n, 102 cmt. k.

The Protocol Relating to the Status of Refugees also requires signatory States to apply the provisions of the Convention "without discrimination as to race, religion or country of origin."¹⁴¹ In theory, this means that the United States cannot discriminate on any grounds when deciding whether a person is a refugee and whether to admit that person, either through asylum or by simply withholding of expulsion.¹⁴² However, the initial denial of asylum in expedited removal proceedings is left to low-level INS officials and subject only to approval by supervisor.¹⁴³ Such an official may decide someone is not credible on subjective factors having nothing to do with an applicant's actual situation.

In addition to personal prejudices, national policy plays into the decision not to grant asylum. Asylum officers are informed of countries that are deemed to engage in torture, but that process itself depends on the United States' recognition of a country as one that engages in torture or other inhuman treatment.¹⁴⁴ If the United States, for trade reasons or reasons of foreign relations, fails to list a country as one that engages in such behavior, an asylum officer may find no credible fear even if one truly exists. This finding would result in the expedited removal system being used to promote political ends, rather than the protection of human rights, violating the spirit, if not the language of the protocol. The same holds true for current situations that might give rise to refugees and asylum-seekers.¹⁴⁵ Leaving the decision to admit or deny a potential refugee in the hands of a very small number of immigration officials, without any substantial review, leaves

141. Convention Relating to the Status of Refugees, July 28, 1957, art. 3, 189 U.N.T.S. 150.

142. *See id.*

143. *See* 8 U.S.C. § 1225(b)(1)(B) (2000).

144. *See supra* notes 117-18 and accompanying text; *see also* Susan Aschoff, *The Politics of Immigration*, FLORIDIAN, Dec. 21, 1997, at 1F.

145. In the aftermath of the terrorist attacks of September 11, 2001, lawyers for Arab and Muslim applicants for Green Cards say that their clients have faced increased scrutiny. Eric Schmitt, *Backlog and Wait for Green Card Declines*, N.Y. TIMES, Jan. 19, 2002, at A12. No actual discriminatory practices have been alleged, but the increased questioning has been noticeable. *Id.* As one immigration lawyer put it, "It may be an unspoken type of thing, '.... The I.N.S. may have Sept. 11 in the back of their minds.'" *Id.* (quoting Ashraf Nubani, an immigration lawyer in Virginia). Despite any actual discrimination so far, such an unconscious bias could easily carry over to asylum applicants.

potential asylees open to discriminatory treatment without any recourse.

One commentator holds that expedited removal does not violate international standards towards refugees.¹⁴⁶ Professor Martin explains that the U.N. High Commissioner for Refugees (UNHCR) does not exclude, and in fact allows, summary proceedings in an asylum setting.¹⁴⁷ He states the UNHCR's views on the subject of summary exclusion as noting that "national procedures 'may usefully include special provision for dealing in an expeditious manner with applications which are considered to be *so obviously without foundation* as not to merit full examination at every level of procedure.'"¹⁴⁸

Upon examination, however, Professor Martin's analysis does not hold up. The UN statement allows a form of expedited removal when claims are manifestly unfounded.¹⁴⁹ In contrast, the expedited removal system's credible fear determination is a higher standard. To be removed from the expedited removal system, an alien must show that there is a substantial likelihood that he will be able to apply successfully for asylum.¹⁵⁰ Manifestly unfounded, the standard allowed by the U.N., indicates that the claim must be false on its face, not merely unlikely or difficult to prove.

Expedited Removal in Practice

The expedited removal system was an attempt by Congress to handle the backlog of asylum cases and to stem the flow of illegal immigration.¹⁵¹ According to the INS, between August 1, 1997 and September 30, 1998, 160,000 immigrants were subject to expedited removal.¹⁵² Of that number, half withdrew their applications for

146. Martin, *supra* note 9, at 692.

147. *Id.*

148. *Id.* (quoting UNCHR EXCOM Conclusion 30 (XXXIV), *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum* (1983) (emphasis added), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home>).

149. *See id.*

150. *See* 8 U.S.C. § 1225 (2000).

151. *See supra* notes 12-22 and accompanying text.

152. Immigration and Naturalization Service, *FY 1998 Update on Expedited Removals* (June 21, 1999), available at <http://www.ins.usdoj.gov/text/publicaffairs/factsheets/expedite.htm>.

admission, while approximately 3000 expressed some fear of returning home and were referred for a credible fear interview.¹⁵³ Eighty-six percent of those referred to credible fear interviews met the standard and were taken out of the expedited removal system.¹⁵⁴ In contrast, ninety-two percent of those removed through the expedited removal process were Mexican, lending credence to the idea that the system will stem the flow of illegal immigration from southern borders.¹⁵⁵

The problem with placing any possible asylees into the expedited removal system, however, is not solved simply because the numbers involved are small; in any given year the number of asylees is small. The problems stem from the true refugee's lack of reviewability after being rejected from the system, coupled with the inadequacy of the system to deal with new forms or sources of persecution. In addition, the United States is still a superpower; as such, other nations look to the United States as a gauge for their actions. If the United States limits the entrance of refugees, other nations may follow suit.¹⁵⁶ Finally, the consequences of error are too great. Not only would returning a true refugee to a country in which he will be subject to persecution be a violation of international law, the consequences for the individual could be torture or even death.¹⁵⁷

153. *Id.*

154. *Id.*

155. *Id.* Using expedited removal to remove illegal aliens not seeking asylum still raises questions about due process and constitutional guarantees. However, because of the Court's past treatment of aliens and questions of constitutional protections, expedited removal in this situation is not as problematic. *See supra* notes 35-74 and accompanying text. A full examination of the application of expedited review in nonasylum cases is outside the scope of this Note.

156. *See, e.g.*, Ralph Begleiter, *Massacre May Ultimately Speed Up Mideast Peace Process* (CNN television broadcast, Feb. 25, 1995), available at LEXIS, Allnews File ("The U.S. can't avoid it. It's the only remaining super power. . . . Everyone turns to the U.S. for an opinion, for mediation.").

157. "Deportees are not monitored by the U.S. Embassy or by human rights monitors. There is no adequate security protection for returnees to ensure that they are not beaten or worse when they return to their villages or towns." 139 Cong. Rec. H1151-52 (daily ed. Mar. 10, 1993) (statement of Rep. Meek) (discussing the plight of Haitian refugees who are deported).

POSSIBLE LEGISLATIVE SOLUTIONS

In response to concerns that legitimate applicants for asylum were being turned away, a bipartisan group of Senators introduced legislation during the 106th session of Congress. These bills attempted to limit the scope of the expedited removal procedure and to correct the problems inherent in its application.

The first of these bills, the Refugee Protection Act of 1999 (RPA),¹⁵⁸ would have limited the application of the expedited removal system to times during which the Attorney General determined that an extraordinary migration situation existed.¹⁵⁹ An extraordinary migration situation was defined as "the arrival or imminent arrival in the United States or its territorial waters of aliens who by their numbers or circumstances substantially exceed the capacity for inspection and examination of such aliens."¹⁶⁰

Even during a declared "extraordinary migration situation," expedited removal would not have applied to certain aliens.¹⁶¹ Aliens from countries that had been designated as engaging in various human rights abuses, including torture, arbitrary detention, and systematic persecution, as well as aliens from countries involved in an ongoing conflict, would be exempt.¹⁶² This exception would have covered situations like the conflict in the former Yugoslavia. In addition, aliens who were natives or citizens of a country with whom the United States did not have full diplomatic relations would have been exempt from expedited removal.¹⁶³ This exemption would have covered women escaping from gender apartheid that occurred under the former Taliban regime in Afghanistan. Finally, children unaccompanied by a parent or guardian would also have been exempt from the system.¹⁶⁴ This last exemption was in response to human rights

158. S. 1940, 106th Cong. (1999).

159. *Id.* §§ 3(a)(2), 235(b)(1)(A).

160. *Id.* §§ 3(a)(2), 235(b)(1)(A)(ii).

161. *Id.*

162. *Id.* §§ 3(c), 235(b)(1)(G)(i).

163. *Id.* §§ 3(c), 235(b)(1)(G)(ii).

164. *Id.* §§ 3(c), 235(b)(1)(G)(iii).

groups' criticisms of treatment of children in the immigration system.¹⁶⁵

Under the RPA, an extraordinary migration situation would have been valid for ninety days, which could be extended for additional ninety-day periods after consultation with the Senate and House Judiciary Committees.¹⁶⁶ One commentator noted, however, that the ambiguous nature of the statutory provision, coupled with the broad discretion given to the Attorney General, could have allowed an "extraordinary migration situation" to be declared for the southern border.¹⁶⁷ This situation would be outside of the drafters' intent, but would be in the INS's interest.¹⁶⁸ The INS is evaluated in large part by the number of people it removes from the United States each year;¹⁶⁹ it is therefore in the INS's interest to continue the policy if at all possible.¹⁷⁰ In addition, 1999 saw a decrease in asylum applications, due in part to the expedited removal system.¹⁷¹ Although the decrease will allow the INS to clear some of the backlog it is currently experiencing, the danger is that true refugees, who otherwise would have applied for asylum, are being denied asylum in the new process and returned home to face further persecution.

The RPA also would have limited expedited removal to those aliens with no documents or facially invalid documents.¹⁷² This would have decreased the amount of leeway INS inspectors have in finding that facially valid documents were obtained through fraud. Although this limitation was sound, the RPA failed to take into account the fact that many genuine refugees may not have documents because the documents were destroyed by their persecutors or because they have had to obtain false documents in

165. See, e.g., Human Rights Watch, *Detained and Deprived of Rights*, at <http://www.hrw.org/hrw/reports98/ins2/berks98d.htm> (last visited Mar. 16, 2002).

166. See S. 1940, §§ 3(a)(2), 235(b)(1)(A)(iv).

167. Pistone, *supra* note 41, at 829.

168. *Id.*

169. *Id.*

170. *Id.* at 830.

171. Immigration and Naturalization Service, *Refugees, Asylees, Fiscal Year 1999*, at 8 (attributing an eighteen percent decline in applications to a decrease in filings by nationals of Guatemala, El Salvador, India, and Mexico), at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/99YrbkBEF/RA99list.htm> (last visited Mar. 16, 2002).

172. S. 1940, §§ 3(b), 235(b)(1)(B)(i).

order to flee the country safely.¹⁷³ The very people asylum was designed to protect still would have been subject to the expedited removal system.

The RPA also broadened the credible fear definition, requiring that the claim "is not clearly fraudulent and is related to the criteria for granting asylum"¹⁷⁴ rather than requiring a "significant possibility . . . [of] eligibility for asylum."¹⁷⁵ This would have allowed more genuine applicants for asylum to meet the criteria and present their case before an immigration judge. It also would have brought INS policy in line with the U.N. policy on the use of an expedited removal system.¹⁷⁶ Finally, the RPA would have reformed the review procedure, requiring the Attorney General to provide for prompt review by an immigration judge of a negative credible fear determination.¹⁷⁷ The review would have taken place in person and would have allowed the alien to be represented by counsel at the government's expense.¹⁷⁸

The RPA was based on an amendment offered and passed in the Senate during the original passage of the IIRIRA.¹⁷⁹ A later bill, the Immigrant Fairness Restoration Act of 2000,¹⁸⁰ would have limited the use of expedited removal to aliens seeking admission.¹⁸¹ These improvements would have been important, as they would have prevented the use of expedited removal in asylum situations in most instances, and prevented the use of expedited removal for immigrants already admitted to the United States. They never made it out of committee before the 106th session of Congress ended, however, and have not yet been reintroduced.

These bills would not have prevented the INS from enforcing an asylum agenda based on foreign politics rather than on true fear of

173. See, e.g., Jules Witcover, *America Lagging as Refugee Haven*, BALT. SUN., June 18, 2001, at 7A ("Refugees by the very nature of their flight often have no such papers, their departures having been entirely voluntary, if you can call threats to their lives as leaving voluntarily.").

174. S. 1940, §§ 3(e), 235(b)(1)(C)(v).

175. 8 U.S.C. § 1225(b) (1)(B)(v) (2000).

176. See *supra* notes 143-44 and accompanying text.

177. S. 1940, §§ 3(d), 235(b)(1)(C)(iii).

178. *Id.*

179. *Domestic Violence Cases in the Asylum Process*, 146 CONG. REC. S8752 (daily ed. Sept. 19, 2000) (statement of Sen. Leahy).

180. S. 3120, 106th Cong. (2000).

181. *Id.* § 3.

persecution. In addition, many true refugees may not know to ask for asylum or they may be too scared or embarrassed to discuss the fears they have and the dangers they may face.¹⁸² Even though INS officers are supposed to be trained to recognize all kinds of signals indicating fear, including body language,¹⁸³ officers may make mistakes. Judicial review would create an additional safeguard to ensure that the INS is not returning people to persecution. Until a full degree of judicial review is permitted for aliens who fail the credible fear determination, expedited removal must not be applied to aliens seeking asylum or refugee status.

Congress implemented the IIRIRA as a result of negative public opinion about illegal immigration and asylum, a backlog of asylum cases at the INS, world events that created severe influxes of refugees, and an effort by Congress to prevent illegal immigration from Mexico and other Central and Latin American Countries.¹⁸⁴ Rather than continue to use a plan that potentially violates international norms, however, the INS should try to correct the original problem.

The backlog of asylum applications occurred, in part, because of faulty legislation coupled with a shortage of asylum officers. Rather than implement more faulty legislation, the obvious solution would have been to hire and train more asylum officers.¹⁸⁵ Congress should now repeal the IIRIRA, or at least insert a provision completely exempting those seeking asylum from the system. This may lead to an initial backlog of asylum cases. The fact that, under IIRIRA, asylum applicants are detained in prisons until their cases are decided should prevent most false claims.¹⁸⁶

182. Pistone, *supra* note 41, at 824-25 (discussing difficulties asylum seekers face).

183. Martin, *supra* note 9, at 681-82 (describing the training and process used in evaluating asylum applicants).

184. See *supra* notes 12-23 and accompanying text.

185. In 2001, the backlog of applicants for Green Cards decreased for the first time since 1994, in part because the INS has hired 1200 more adjudicators in the last three years. Schmitt, *supra* note 145. If this trend continues and the decline increases, the necessity of applying expedited removal in any asylum situation will be eliminated.

186. See generally Pistone, *supra* note 6 (discussing the INS policy of detention of asylum applicants for the duration of the adjudication process). The initial backlog of asylum applicants stemmed, in part, from the INS policy of granting work visas to applicants while their cases were being reviewed, a process that took up to two years. See *supra* notes 15-20 and accompanying text. Mandatory detention of asylum applicants should prevent most false claims. Problems with this policy have been discussed at length by various commentators

In addition to changes in the legislation itself, the asylum process must be subject to judicial review. The best response to criticism about discriminatory treatment in any process is transparency; judicial review will lend that transparency to immigration law. The alien should have access to a translator, and representation by an attorney during any review. The asylum process must take into account the mental state of true refugees. Finally, asylum officers must be well-versed in the potential for persecution all over the world, not simply within countries deemed to be enemies of the United States.

CONCLUSION

Expedited removal does seem successful in preventing some of the illegal immigration that takes place through America's southern border. Denying judicial review to immigrants who do not wish to seek asylum is still problematic because of due process concerns. The difference, however, is in the result of the lack of review for asylum applicants. A potential immigrant who is seeking to improve his economic opportunity by coming to the United States will lose that opportunity if placed into the expedited removal system. The immigrant will also be prevented from reentering the United States for five years.¹⁸⁷ Despite America's beginnings as a nation of immigrants, however, public opinion and economic considerations have led to the implementation of immigration laws. These laws permit the denial of admittance to certain aliens, based on quotas or other considerations. The exception to these laws must be for those fleeing persecution, and each potential refugee must be given a fair chance to prove his or her credible fear. Anything less renders any asylum policy meaningless.

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and are beyond the scope of this Note. *See generally supra* notes 12-23 and accompanying text.

187. 8 U.S.C. § 1225 (2000).