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Report to the

**ADMINISTRATIVE CONFERENCE
OF THE
UNITED STATES**

REFORMING ASYLUM ADJUDICATION

by

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May 1989

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**REFORMING ASYLUM ADJUDICATION:
ON NAVIGATING THE COAST OF BOHEMIA**

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Reforming Asylum Adjudication:
On Navigating the Coast of Bohemia

David A. Martin

Executive Summary

The practice of granting political asylum has come under increased strain in Western countries over the last decade, owing primarily to sharp increases in the number of asylum seekers. This study draws on the experience of other selected countries to develop recommendations for substantial changes in American asylum adjudication procedures.

The substantive legal framework. The central standard for determining whether an applicant will be granted asylum derives from the definition of "refugee" contained in a UN treaty, the 1951 Convention relating to the Status of Refugees, amended by its 1967 Protocol. Under Immigration and Nationality Act (INA) § 208, the Attorney General may, in his discretion, provide asylum to applicants who meet the definition, i.e., who show that they have a "well-founded fear of persecution" in the home country, based on race, religion, nationality, membership in a particular social group, or political opinion. Furthermore, INA § 243(h) provides a mandatory country-specific protection, often referred to as nonrefoulement. That section provides that the government may not return an alien to a country where his "life or freedom would be threatened" on any of the same five grounds. Although Supreme Court cases make a distinction in the qualifying standards for the two provisions, recent administrative practice has limited the significance of that distinction by curtailing discretionary denials of asylum. In most cases, therefore, the "well-founded fear" standard is the most important test, because people granted asylum are necessarily shielded

against removal from the United States. In any event, both the standard for asylum under § 208 and that for nonrefoulement under § 243(h) require virtually identical factual inquiries, to determine the level of risk faced by asylum applicants in their home countries.

The policy context. Affording asylum to the persecuted is a vital and treasured part of American tradition; it deserves reaffirmation and renewed commitment, even in times of increased influx. At the same time, in an era of greatly improved transcontinental travel and communications, asylum can also become a misused loophole in the laws that control immigration. Western publics tend to value both asylum and control, but these ends are inescapably in tension. The tension becomes acute when numbers increase.

Although it should be possible in principle to distinguish deserving from undeserving asylum applicants and thereby both honor the asylum tradition and close the loophole, several factors hinder the achievement of that outcome. First, the "well-founded fear" standard is far from self-defining. Partisans in debates on asylum policy can reach widely variant understandings of the operative definition. Second, judgments about the relative risks faced by asylum seekers in their home countries are invariably affected by the "pictures in our heads" of conditions in those distant countries -- our internal maps, which will inevitably be incomplete and sometimes can be quite misleading. In a phrase borrowed from Walter Lippmann, this perceptual difficulty is referred to here as the "coast of Bohemia" problem. Compounding the problem is a frequent assumption that refugees and economic migrants are sharply distinguished categories. At least under present conditions, this assumption does not hold. Asylum seekers represent a spectrum of risks and motivations; most now here, including those who deserve to be recognized as bona fide refugees, probably left home because of a mix of political and economic reasons. Adjudication must still make appropriate distinctions by drawing a careful line at the right point on the risk spectrum.

Third, the facts upon which adjudications must rest are also uniquely elusive, because they relate to conditions in a distant country. Three separate factual elements should be distinguished in asylum adjudication: (1) retrospective factfinding about events specific to the claimant (adjudicative facts); (2) broader determinations about country conditions (legislative facts); and (3) an informed prediction about the degree and type of danger the applicant would face upon return. These are not sequential inquiries; close prior acquaintance with country conditions can contribute importantly to effective inquiry into adjudicative facts. In asylum adjudications, a great deal also depends on the credibility of the applicant, who is the only available witness in the vast majority of cases. But credibility determinations are rendered difficult by the challenges of cross-cultural communication.

Because applicants enjoy important benefits (usually including work authorization and freedom of movement within the haven country) throughout the period while the claim is pending, delays greatly increase the attraction for marginal claimants. Other deterrents could be used to minimize this magnet effect, such as detention or limitations on work authorization, but all carry substantial disadvantages. Primarily, they are indiscriminate in their effects, and may have the most severe impact on genuine refugees who in the past have experienced torture or witnessed the killing of family or friends. These measures can also be quite costly, especially when asylum claims remain pending for lengthy periods. The only discriminate and humane deterrent derives from expeditious conclusion of asylum procedures, including all stages of review, followed by swift return of undeserving applicants to their home countries. Speedy conclusion of adjudication, leading either to a grant of asylum or to a final and enforceable removal order, is therefore crucial to any healthy asylum adjudication system; this aim demands some tradeoff against other measures that might otherwise serve the ends of accuracy and fairness.

The experiences of other Western countries. The paper describes the systems used in Germany, Switzerland, France, and Canada.

The American adjudication system. Historically, the United States has employed a mix of adversarial and nonadversarial procedures for deciding on asylum claims (the term is used here to include claims for nonrefoulement or withholding under INA § 243(h)). At present, "walk-in" claims are adjudicated by examiners in the district offices of the Immigration and Naturalization Service (INS) after an essentially nonadversarial interview, typically lasting about 20 minutes. The examiner goes over the application form (I-589) and supporting information filed by the applicant and writes in any supplementary information gathered in this process, then sends the information to the State Department for its advisory views. The examiner also uses the interview time to issue work authorization papers, provided that the claim is adjudged "nonfrivolous." Until recently the State Department prepared an advisory letter in every case, but now in a majority of cases it simply affixes a "sticker" stating that it has nothing to add to the information already publicly available in the Department's annual human rights country reports. If the State response is negative, the applicant will receive 15 days to rebut the response or supplement the record. An examiner, not necessarily the one who conducted the interview, will then review the whole file and issue a decision. The whole process often requires eight months or more. Informal review of district office decisions is provided by the Asylum Policy and Review Unit (APRU), a small office in the Department of Justice created in 1987.

Denials in the district office are not appealable, but unsuccessful claimants may renew the application in exclusion or deportation proceedings before an immigration judge, who will consider the matter de novo. (Aliens who do not file for asylum until such proceedings have started have no access to the district office; they will be heard only by an immigration judge.) After the State

Department's response is received, the matter is heard in the forum of the deportation or exclusion hearing, which conforms to an adversarial model. INS trial attorneys rely primarily on cross-examination of the applicant to test or challenge the application.

The immigration judge's ruling on asylum is appealable to the Board of Immigration Appeals (BIA), which is administratively located, like the immigration judges, in the Department of Justice's Executive Office of Immigration Review (EOIR). EOIR is wholly separate from INS, and its officers carry no direct enforcement responsibilities. Appeals can easily consume a year or more, largely because of delays in receiving transcripts of immigration court hearings. Judicial review of individual asylum denials almost always occurs as part of the review of exclusion and deportation orders under INA § 106.

Only a surprisingly small percentage of unsuccessful asylum applicants is actually deported, owing primarily to enforcement priorities within INS.

The Office of the UN High Commissioner for Refugees (UNHCR), which reviewed all claims by Haitian asylum seekers in the late 1970s and provided its views to the State Department, now plays a much more limited role.

Evaluation. Almost no one regards the current asylum adjudication system as an effective and efficient scheme for administering these sensitive provisions of our immigration laws. Delay is a major problem. It derives from backlogs affecting both administrative and judicial review, but more importantly from the provision of two separate rounds of de novo consideration of asylum claims -- "two bites at the apple." Unification of initial decisions was proposed in August 1987, but met with a substantial outcry from the immigration bar and nongovernmental organizations, and the proposal (still pending) was greatly modified. The original proposal would have removed immigration judges from asylum adjudication, giving all initial adjudication responsibility to

examiners in INS, responsible to the Central Office rather than the district directors. The proposal drew such a negative reaction primarily because it failed to include sufficient further guarantees of quality, professionalism, and independence from enforcement aims on the part of the adjudicators. Unification itself should not be dismissed based on this experience, however, provided those other safeguards are built into a reformed system.

Delay also derives from the qualified rights to counsel provided by current statutes and regulations. Although the statute precludes government funding of applicants' counsel, delays often result from the need to accommodate the schedules of the limited cadre of attorneys who are willing to take the cases on a pro bono basis. Some courts have recently imposed stiffer requirements for such accommodation and remanded cases that had already been through several stages of decision and review -- thus compounding the delay problem. A healthy system must be able to schedule speedy hearings, even if pro bono counsel are not available in large numbers. Fairness must therefore be sought through measures other than assurance of counsel, or else the statutes should be changed to allow government-funded counsel, perhaps following a public defender model.

The objective of accuracy also is not well-served by the current system. In part, this deficiency derives from the diffusion of responsibility between State and Justice Department officials, making it possible for each set to believe that the other is performing the crucial part of the evaluation. In any event, the system's results reflect a degree of political bias. Critics often blame that distortion on the State Department, but it is not clear that removal of State from the process would bring major changes in outcomes, because of the "coast of Bohemia" problem. Whatever the source of the partiality in results, it would be advisable to remove the State Department from a direct role in adjudication. But other steps must also be taken to minimize

any lingering perceptual distortions, primarily by regular provision to the adjudicators of the most accurate information possible, thus dislodging preconceptions and encouraging the redrawing of the "internal maps" of world conditions. That is, systematic expertise should be encouraged and deliberately fostered -- something that does not officially happen within the confines of the passive-judge adversarial model that now governs.

Consistency of outcomes is reasonably well-served under the current system through BIA review. But cases granted in the district office (roughly 30 percent of applications received there) escape this quality-control mechanism. One might argue that overly generous grants are not a problem. But they should attract some concern, both because they can enhance the magnet effect (drawing marginal applicants to the United States) and can undermine public confidence in the fairness of the overall system.

Proposed reforms. Reform should build upon one central change: assigning initial asylum adjudication to a corps of specialized, well-trained professional adjudicators, who would have no other function in the immigration system. This change should go far toward improving the system's accuracy, fairness, and speed, whatever other changes might be made. Assisted by an independent documentation center, these adjudicators should be expected to develop substantial cumulative expertise on country conditions, thus obviating the need for referral of cases to the State Department. They should be located administratively within EOIR, to afford reasonable assurances of independence, albeit under the general supervision of the Attorney General.

The basic procedure before the adjudicators should conform to a nonadversarial model, augmented by certain other guarantees. This model is selected primarily because it best suits the particular demands of this unique kind of litigation. Cross-examination and confrontation, often regarded as key components of due process, play little role in guaranteeing fairness to the applicant

in this setting, primarily because the applicant is usually the only witness. Nonadversarial procedures also allow better use of administrative expertise, not only for making the ultimate judgment, but primarily for posing truly useful, well-focused questions to develop the record, bringing out both positive and negative information. Many generalist lawyers would not be equipped to perform this function well; resources should be devoted instead to assuring that the one key participant, the adjudicator, has such expertise.

Because virtually all such expert knowledge would relate to "legislative facts," in Professor Davis's terminology, adjudicators should not be prevented by due process concerns from using that knowledge to rule on the claim. They should, however, honor established limits on "official notice." On occasion this may require giving notice of intent to deny based on certain information, and then affording the applicant a reasonable opportunity to rebut.

It is tempting to eliminate administrative review, as Canada has done, in order to achieve expeditious finality, but that temptation should be resisted. Administrative review is indispensable to assure consistency and quality control. Although the BIA might assume this function, an appellate Asylum Board within EOIR is recommended, because of the highly specialized character of the asylum function and its difference from most other immigration-law decisionmaking.

Present judicial review provisions should not be changed, at least until much greater experience is gained with the reformed administrative system. If some further streamlining then proves to be important, however, Congress might consider a "leave to appeal" system modeled roughly on Canada's arrangements.

Enforcement priorities should be changed to assure swift deportation of unsuccessful asylum applicants once the order is final.

Emergency responses to large-scale influxes. An expeditious, fair, and effective system as outlined above should eventually reduce the magnet effect that often leads to steeply rising numbers of asylum seekers. But any such effect is, at best, years away; immediate impact should not be expected.

Other proposals have been offered for emergency response to sudden influxes of the kind recently experienced in south Texas. Fast-track procedures for quick denial of "manifestly unfounded" applications may be useful in some circumstances, but are probably not cost-effective when a very high percentage of applicants come, as at present, from countries with serious human rights problems. Resources are probably better devoted to assuring speedy completion of the full merits procedures outlined above.

Disqualification for transiting through third countries where the applicants could have applied for asylum should not be employed. In the end it would impose substantial costs and damage relations with Mexico, and this country's treaty obligations would usually require full adjudication in any event, at least of nonrefoulement claims.

There is much interest in denying work authorization to asylum applicants, in order to reduce the magnet effect. This may be the most useful immediate measure if emergency responses are needed, but it must be accompanied by other arrangements for the shelter and feeding of applicants awaiting the outcome of their cases, lest it intolerably burden the rights of deserving applicants. This result probably points toward some sort of detention system, but it should not be seen as punitive detention. Families should be kept together, and camp conditions should be ameliorated as much as possible. Any use of detention should redouble the commitment to expeditious decisionmaking, to accomplish both swift return of the undeserving to their homelands and quicker release of those who merit asylum.



**REFORMING ASYLUM ADJUDICATION:
ON NAVIGATING THE COAST OF BOHEMIA***

A Report to the Administrative Conference of the United States

David A. Martin**

Over the last decade the venerable practice of political asylum has come under dramatically increased strain in Western democracies. In part, the new difficulties derive from the growing penetration of law into what once had been a largely discretionary practice; in part they result from improved global mobility and communications. Few of the challenged industrialized nations have responded well, and the search for effective reforms continues.

Western Europe received fewer than 20,000 applications for asylum in 1976, overwhelmingly from Eastern Europe. Today the annual intake exceeds 200,000, largely from developing nations. Allegations about "false refugees" have fueled bitter political controversy throughout the 1980s. Sometimes public unease over the issue has powered extremist right-wing parties to unprecedented electoral success, as happened most recently in Berlin in January 1989.¹ Newly restrictive government policies, adopted in response to the new flows, have brought denunciations from refugee advocacy groups who charge political manipulation or racism or simple heartlessness, and who complain that government practices violate legal obligations founded in statute and treaty.

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**Professor of Law, University of Virginia. This article draws, in part, upon my experience as Special Assistant in the Bureau of Human Rights and Humanitarian Affairs, U.S. Department of State, 1978-80. The individuals whose assistance made this work possible, particularly government officials, private lawyers, and scholars, in Europe, Canada, and the United States, who generously sacrificed large blocks of time for interviews for this study or for review of the manuscript, are too numerous to list here, but their help is deeply appreciated. I am also especially grateful to the German Marshall Fund and the Ford Foundation, whose financial support made possible the European research, principally during sabbatical leave from law school teaching in 1984-85. Special mention must also be made of the research assistance received from Rita Trigo Trindade of Geneva, whose multilingual talents were indispensable during that research year. And finally the research support, advice and feedback provided by the members and staff of the Administrative Conference have been of great assistance.

¹See Berlin: Ich Bin Ein Republikaner, *The Economist*, Feb. 4, 1989, at 44. See generally Martin, *The New Asylum Seekers*, in *The New Asylum Seekers: Refugee Law in the 1980s*, at 1 (1988) (the book is hereinafter cited as "The New Asylum Seekers").

In the United States the picture is similar, although the timing differs and the tones have been somewhat more muted. Sharp controversy over asylum erupted in 1980, but receded once the boatlift of Cubans from the port of Mariel was contained.² In late 1988 it began again in earnest. This country received about 2000 asylum applicants a year in the 1970s. In fiscal year 1988 the intake reached 60,000 on a steeply ascending trend line. By December 1988 the Immigration and Naturalization Service (INS) was receiving 2000 applicants per week in Texas alone, nearly all of them from Central America. As political controversy heated up, understandably INS sought ways to deter new arrivals. Despite lawsuits and temporary restraining orders,³ INS eventually managed to implement a policy providing for initial asylum decisions within one day of application, coupled with detention of all unsuccessful applicants in South Texas.⁴ Although this policy has reduced the influx there, costs are mounting⁵ and controversy over INS response remains intense. Another destructive cycle of litigation and questionable government reaction, like those that have beset asylum policy for many years, may be in the offing.⁶

²See Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 *Notre Dame Lawyer* 618, 620-23 (1981).

³See, e.g., Applebome, *Suit Attacks Policy of Keeping Aliens in Texas*, *New York Times*, Jan. 7, 1989, at 1; Judge Halts Rule Stranding Aliens in Rio Grande Valley, *id.*, Jan. 10, 1989.

⁴See *South Texas Asylum Applicants Face Detention Under New INS Policy*, 66 *Interp. Rel.* 217 (1989); Frelick, *South Texas Detention Plan Goes Forward*, *Refugee Reports*, Feb. 28, 1989, at 1.

⁵Costs for care and feeding of those detained in South Texas alone may rise as high as \$5 million a month. Kantor, *INS to Seek Extra Funds for S. Texas Operations*, *Austin American-Statesman*, March 19, 1989, at A1.

⁶Class-action suits over Haitian asylum seekers presented the first major challenges to the government's procedures for asylum adjudication and ultimately resulted in years of litigation, blocking return of nearly all affected persons. The first round, begun in 1975, focused on procedures for considering asylum claims lodged by excludable aliens. The litigation history, including citations to the several reported decisions that resulted, is summarized in *Sannon v. United States*, 631 F.2d 1247 (5th Cir. 1980). The second round derived from a 1977-78 INS campaign to hasten removals of Haitian asylum applicants. Ultimately this "Haitian Program" was declared unlawful, and the court ordered INS to reprocess all class members' asylum claims. *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). Moreover, the plaintiffs received a major attorneys' fee award under the Equal Access to Justice Act. *Haitian Refugee Center v. Meese*, 791 F.2d 1489 (11th Cir. 1986), vacated in part on other grounds, 804 F.2d 1573 (11th Cir. 1988). In 1981 the Administration embarked on a new detention policy meant largely to deter asylum applications. See T. Aleinikoff & D. Martin, *Immigration: Process and Policy* 722-24 (1985). Litigation challenging the detention policy went all the way to the Supreme Court, *Jean v. Nelson*, 472 U.S. 846 (1985). See also *Jean v. Nelson*, 854 F.2d 405 (11th Cir. 1988) (on remand). Although the government won some important victories on legal doctrine, the plaintiffs prevailed sufficiently on their statutory and regulatory claims to delay asylum processing for lengthy periods, see, e.g., *Louis v. Meissner*, 532 F. Supp. 2 (S.D.Fla. 1982); *Louis v. Nelson*, 544 F. Supp. 973

There is a way to escape this downward spiral, but it will require patient and steadfast attention to long-term objectives for our asylum adjudication system, even as immediate problems cry out for short-term solutions (and make short-cut solutions seem most tempting). A well-functioning adjudication process provides the indispensable key to alleviating the many ills now attributed to system. And this is so even though the various participants now offer widely variant diagnoses of what are the most serious ailments.

Present adjudication systems were cobbled together in an era that permitted leisurely consideration of modest caseloads. They have adapted poorly to an era when claims are numerous and subject to sudden escalation. Moreover, because most Western adjudication systems were built on the rough assumption (a product of the Cold War) that few claimants would be rejected, they avoided difficult questions about techniques for effective information-gathering and evaluation. Today's dilemmas require instead a sustained and sophisticated capacity to screen out unqualified applicants; hence the latent questions have become inescapable. If one is to say no to large numbers -- as virtually all Western countries are now doing -- one must either be callous to the risk of returning true refugees, or else demand assurance that the adjudication system is precise and reliable.

This study explores the inadequacies of the current American asylum adjudication process and ultimately proposes changes, some of them quite ambitious. To lay a foundation for the recommendations, it provides along the way an overview of our current, tangled adjudication procedures and a brief history of past procedures, explaining how we came to this pass. It also surveys systems of other selected Western countries, countries which face very similar problems and apply essentially the same standards, derived from a UN Convention, in their adjudications. None of these countries can claim to have mastered the ongoing policy and legal problems, but American reformers can learn much from the variety of different measures those countries have employed, with varying degrees of success, to ameliorate the difficulties. It behooves us, however, to start first with a more general look at the basic legal standards and then at the highly charged context in which all such decisions are currently made.

(S.D. Fla. 1982); *id.*, 544 F. Supp. 1004 (S.D. Fla. 1982), and ultimately to gain a sizable attorneys' fee award. *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988). Similar challenges to INS handling of Salvadoran and Guatemalan claims have likewise won initial successes. See, e.g., *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488 (C.D.Cal 1988); *Nunez v. Bolden*, 537 F.Supp. 578 (S.D.Tex.), appeal dismissed, 692 F.2d 655 (5th Cir. 1982).

I. The Substantive Legal Framework

A. International Provisions

Classically, the right of asylum under international law belonged to states and not to individuals.⁷ Sovereigns were considered to have the right or prerogative to grant protection against return to those they chose to shelter. This framework shamed itself in the world's woefully inadequate response in the 1930s and 1940s to those who were fleeing Nazi persecution. From the ashes of World War II arose an international structure that signalled a determination, measured but genuine, to do more for refugees.

Most enduring of the post-war measures were two instruments adopted under United Nations auspices. The first, accepted in late 1950, created a new post of UN High Commissioner for Refugees (UNHCR). Initially expected to be temporary, by now the Office of the UNHCR, staffed with approximately 2300 employees, has become a permanent fixture on the international scene.⁸ Under its original Statute and subsequent General Assembly resolutions, the office bears responsibility for providing protection and material assistance to refugees throughout the world.⁹ In connection with its protection function, UNHCR monitors asylum adjudication systems worldwide, and occasionally plays a direct role in individual determinations.

The second legal instrument, the 1951 Convention Relating to the Status of Refugees,¹⁰ remains of surpassing importance, for it incorporated a definition that has become the centerpiece of most Western asylum adjudication systems, including that of the United States. Under that definition, as improved by the Convention's 1967 Protocol,¹¹ a refugee is a person outside his home country, unwilling or unable to return or otherwise claim that country's protection because

⁷See Melander, *Refugees and International Cooperation*, 15 *Int'l Migration Rev.* 35 (1981); 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 6 (1972); G. Goodwin-Gill, *The Refugee in International Law* 101-02 (1983).

⁸See *Overview of UNHCR Activities: Report for 1987-88*, U.N. Doc. A/AC.96/709 (1988) at 87 (Table IX).

⁹See *Statute of the Office of the UNHCR*, G.A. Res. 428 Annex, 5 U.N. GAOR Supp. (No. 20), U.N. Doc. A/1775 (1950). Later changes in the scope of UNHCR responsibility are traced in Sadruddin Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 1976(I) *Recueil des Cours* 287, 301-09.

¹⁰Done at Geneva, July 28, 1951, 189 U.N.T.S. 137.

¹¹Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223, T.I.A.S. No. 6577. The 1951 definition covered only those persons who feared persecution "[a]s a result of events occurring before 1 January 1951." The main function of the Protocol was to remove this dateline. The United States became a party to the Protocol in 1968, thereby becoming derivatively bound by all the significant operative provisions of the Convention. See Protocol, *supra*, art. I.

of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."¹²

The Convention, a cautious and more limited treaty than is often appreciated, provides relatively few actual guarantees to refugees illegally present in the country of haven (as most asylum seekers now are).¹³ In particular, it does not guarantee asylum, in the sense of a durable lawful residence status, even for those duly adjudged to be refugees under its provisions. Thus even today there is no individual right of asylum under international law.¹⁴ What the Convention does require, however, even for refugees illegally present, is nonrefoulement -- a technical term for protection, deriving from Article 33 of the Convention, against return to a country "where [the refugee's] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁵ Article 33 affords a limited and country-specific protection, and the receiving nation technically remains free to send a refugee on to other countries, rather than granting asylum on its soil.¹⁶

¹²Convention, supra note 10, art. 1(A)(2). The definition also contains "cessation" and "exclusion" clauses that remove certain persons, such as those guilty of war crimes, or those who have taken on a new nationality, from the Convention's coverage. *Id.*, art. I(C)-(F).

¹³The Convention does provide a host of impressively detailed guarantees for refugees lawfully present, but a decision that the person is a Convention refugee does not ipso facto result in lawful presence. See Report of the Ad Hoc Comm. on Statelessness and Related Problems, U.N. Doc. E/1618/Corr.1; E/AC.32/5/Corr.1 (1950), at 47. See generally Weis, *The International Protection of Refugees*, 48 *Am. J. Int'l L.* 193 (1954). The major purpose of the Convention, as the name suggests, was to clarify questions of status for the World War II refugees already in place. As Prof. Goodwin-Gill has explained:

The 1951 Convention was originally intended to establish, confirm or clarify the legal status of a known population of the displaced. This met the needs of the time, and most provisions focus on assimilation, or are premised on lawful residence or tolerated presence. There is nothing on asylum, on admission, or on resettlement.

Goodwin-Gill, *The Future of International Refugee Law*, *Refugees Magazine*, Oct. 1988, at 28.

¹⁴An abortive effort was made in the 1970s to draft a convention that would go further toward international legal guarantees of political asylum for refugees. But this effort was abandoned when a 1977 conference of government representatives appeared likely to weaken even those minimal guarantees derived from the 1951 Convention and Protocol. See Weis, *The Draft United Nations Convention on Territorial Asylum*, 50 *Brit. Y.B. Int'l L.* 151 (1979).

¹⁵Convention, supra note 10, art. 33(1). Paragraph (2) of this article authorizes narrow exceptions to the nonreturn obligation, essentially for spies and dangerous criminals.

¹⁶See Melander, supra note 7, at 36.

The country is also free, of course, to grant asylum to others it deems worthy, even if they do not satisfy the Convention definition. Western European countries have done this more extensively than the United States, through so-called "B-status" refugee provisions or the acceptance

Nevertheless, since 1951 most Western countries, to their credit, have set up asylum claims systems that essentially combine the two decisions: refugee status determinations in accordance with the Convention definition, and the discretionary act of providing durable status, or asylum. An affirmative refugee status determination thus routinely leads not only to the limited protection against return contemplated by Article 33, but also to the full range of protections embraced within the notion of asylum.¹⁷ In this sense, we have come close to a system that guarantees an individual right of asylum to those who somehow establish physical presence on the soil of such Western countries and also prove that they satisfy the Convention definition.

That these admirable features of the system go beyond the strict requirements of international law, however, should remind us of their fragility. They cannot be taken as inevitable constants. Instead, it must be an ever-present concern of wise policy to shape asylum measures, including adjudication systems, so as to maximize continued domestic support. The systems' inability to cope effectively with growing numbers of asylum seekers over the last decade now threatens that foundation.¹⁸

of "de facto refugees." See generally D. Gallagher, S. Martin, P. Fagen, *Temporary Safe Haven: The Need for North American-European Responses* (Refugee Policy Group, Sept. 1987). This country occasionally provides such protection, without a determination of refugee status, through the use of "extended voluntary departure" (EVD). See generally T. Aleinikoff & D. Martin, *Immigration: Process and Policy* 726-43 (1985 & Supp. 1987); Note, *Temporary Safe Haven for De Facto Refugees from War, Violence, and Disasters*, 28 Va. J. Int'l L. 509 (1988). Under current law, EVD is provided as a matter of grace by the political branches, according to ad hoc criteria that are essentially beyond the reach of judicial review. See *Hotel and Restaurant Employees Union, Local 25, v. Smith*, 594 F.Supp. 502 (D.D.C. 1984), *aff'd* by an equally divided court, 846 F.2d 1499 (D.C.Cir. 1988). See also Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 902, 101 Stat. 1331 (1987) (establishing limited procedure for eventual permanent resident status for certain beneficiaries of EVD from 1982-1987).

Although I believe that this country should extend such protection on carefully chosen occasions to potential victims of civil strife or human rights violations, I do not address here either the standards or procedures for such decisions. This study focuses instead on what are supposed to be nonpolitical procedures for implementing binding, neutral criteria adopted to shield those most seriously jeopardized by granting them full asylum or, at a minimum, nonrefoulement.

¹⁷See Hofmann, *Asylum and Refugee Law*, in *The Legal Position of Aliens in National and International Law* 2045, 2058-59 (J. Frowein & T. Stein eds. 1987). In fact Western nations (with a few exceptions, like Austria, traditionally viewed as transit countries) rarely find third countries willing to take refugees off their hands. Given that the refugees are present and cannot be sent, in accordance with article 33, to the only country obligated to take them (the country of nationality), it is clearly better that they early attain a secure new status that allows them to rebuild a normal life. See Martin, *supra* note 1, at 18-19, n.26.

¹⁸A recent book by a former UN Deputy High Commissioner for Refugees underscores these risks. Richard Smyser writes:

B. American Legal Provisions

The American legal framework follows the same general outlines, but the details require some additional attention. Although the United States played a significant role in the conferences that led to UN promulgation of the 1951 Convention, this country never became a party to that treaty. During that era, bitter battles over the Genocide Convention and the Bricker Amendment had resulted in ill-considered executive promises against sending any human rights treaties to the Senate for ratification.¹⁹ Nevertheless, the United States regarded itself as a leading player in finding solutions to refugee problems. From the end of World War II, it had generously resettled hundreds of thousands of the displaced persons uprooted by that conflict, under a variety of statutory and administrative schemes.²⁰ That experience imprinted on American policy debates a distinctive perspective that predominated until quite recently: responding to refugees meant resettling displaced persons from refugee camps overseas, rather than dealing with populations already on national territory.²¹

Even during this period, however, some provision was made for the handful of individuals who somehow made it to American territory on their own and then asked not to be returned to face persecution. Congress enacted the first express statutory provision²² in 1950, directing the Attorney General not to deport aliens to countries where they "would be subjected to physical persecution."²³ In a more explicitly discretionary form, this provision was incorporated as section 243(h) of the newly codified Immigration and Nationality Act (INA) in 1952. It granted the Attorney General the discretion to "withhold deportation" of persons who would be subject to

The structure of refugee law and care, which has been generously assembled since the dawn of our culture and particularly in the twentieth century, cannot remain in place if it is abandoned by political and popular opinion. If the people of the world decide that they no longer wish to receive and help refugees, all the international conventions and organizations will be rendered useless and will prove unequal to the task of saving even a single life. That is a danger that must be averted.

W.R. Smyser, *Refugees: Extended Exile 2* (1987). See also Martin, *supra* note 1, at 11-15.

¹⁹See generally Kaufman & Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 *Human Rights Q.* 309 (1988).

²⁰A comprehensive account appears in Congressional Research Service, *Review of U.S. Refugee Resettlement Programs and Policies*, 96th Cong., 2d Sess. (1980) (Sen. Comm. Print).

²¹See Meissner, *Reflections on the Refugee Act of 1980*, in *The New Asylum Seekers*, *supra* note 1, at 57, 60. Sharply different policy constraints operate in the two settings, despite similarities in the governing threshold standards. See note 35 *infra*.

²²Related provisions had appeared, however, since 1875. They provided an exception to exclusion based on pre-entry conviction of a criminal offense, if the crime constituted a political offense. See Aleinikoff & Martin, *supra* note 6, at 638.

²³Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010.

physical persecution upon return.²⁴ In 1958, the Supreme Court ruled that this statutory provision applied only to deportation and was not available to aliens in exclusion proceedings,²⁵ but INS made equivalent protections available to excludable aliens through the use of the parole power, likewise an expressly discretionary remedy.²⁶

By 1968, the earlier resistance to human rights treaties had softened sufficiently for the Johnson Administration to send the 1967 UN Protocol to the Senate, where it secured speedy ratification. Because the Protocol incorporates by reference all the important operative provisions of the 1951 Convention (while making one important modification in the definition of "refugee"²⁷), ratification was tantamount to acceding to the earlier instrument. But this somewhat circuitous route toward accepting the 1951 obligations apparently helped avoid reopening any of the previous decade's treaty-power battles.

The Administration had promoted the Protocol primarily as a way of signalling U.S. leadership on worldwide refugee issues and encouraging other nations, regarded as less supportive of refugees, to improve protections. For that reason, political asylum issues drew little attention during the Senate's brief deliberations on the treaty.²⁸ The proceedings were permeated by the assumption that U.S. practices conformed fully to the Convention's requirements, and executive spokespersons assured the Senate that the Protocol could be implemented without changes in the statutes. Although this was true, the record suggests that the Senate probably did not fully appreciate the significance of the treaty with respect to the withholding of deportation. After accession to the Protocol, the United States came under a firm legal obligation to implement § 243(h), a discretionary provision, so as not to conflict with the mandatory requirements of Article 33 of the Convention, the nonrefoulement provision. In any event, the treaty deliberations clearly did not provoke consideration of any difficult issues concerning the substantive legal provisions or the adjudication procedures that would be used to implement them. No changes were made at the time in the substantive statutory requirements affecting political asylum.

²⁴Immigration and Nationality Act, ch. 477, § 243(h), 66 Stat. 163, 262 (1952) (codified at 8 U.S.C. § 1253(h)). In 1965 Congress deleted the reference to "physical persecution," replacing it with "persecution on account of race, religion, or political opinion." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11f, 79 Stat. 911, 918. See Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 *Int'l Lawyer* 204, 220 (1969). The Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 107, gave the section its present shape, more closely tracking the language of Art. 33 of the Convention.

²⁵*Leng May Ma v. Barber*, 357 U.S. 185 (1958).

²⁶See, e.g., 8 C.F.R. §§ 236.3(e), 253.1(f) (1978) (referring to parole, in limited circumstances, of refugee aliens otherwise excludable).

²⁷See note 11 *supra*.

²⁸See S. Exec. K., 90th Cong., 2d Sess. (1968) (transmittal materials from executive branch); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. (1968) (Committee report on the Protocol, including a transcript of the hearings).

There matters stood until Congress considered the bills that became the Refugee Act of 1980. The political branches took up refugee issues at that time primarily because of the difficulties encountered in coping with the massive refugee outflows from Indochina -- classic overseas refugee issues.²⁹ Even though asylum applications were increasing throughout the period of legislative deliberation, and a significant political and judicial controversy was brewing in Florida regarding Haitian asylum seekers, asylum was again largely a legislative afterthought. Nevertheless, Congress made some important improvements in the asylum realm, urged on by UNHCR and by activists who were becoming more vocal about domestic asylum issues. First -- a matter of particular UNHCR concern -- Congress changed INA §243(h) to mandatory form, to leave no doubt about the obligatory character of the nonrefoulement provisions in domestic law, and to specify that the provision applies to both exclusion and deportation.³⁰ Second, Congress finally added an express "asylum" provision to the INA, in the form of a new § 208.³¹ It serves to replace earlier haphazard administrative practice with a new, express, and clarified immigration status for those recognized as refugees after applications filed in this country.

Section 208 states that the Attorney General has discretion to grant asylum to aliens who meet the definition of refugee provided in the new §101(a)(42)(A).³² That section, in turn, tracks the Convention definition; the central qualification is a "well-founded fear of persecution" on account of the same five factors listed in the Convention. The new immigration status, called "asylee" in the regulations, clarifies the alien's entitlements to certain benefits in this country. It also enables him, after a minimum of one year as an asylee, to obtain full lawful permanent

²⁹See Martin, *The Refugee Act of 1980: Its Past and Future*, in *Transnational Legal Problems of Refugees*, 1982 Mich. Y.B. Int'l L. Stud. 91; Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981).

³⁰It now provides:

"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."

8 U.S.C. § 1253(h)(1) (1988).

³¹8 U.S.C. § 1158 (1988).

³²8 U.S.C. § 1101(a)(42) (1988).

resident status through a statutorily authorized adjustment procedure.³³ No such regular adjustment procedure for asylees existed theretofore.³⁴

Again Congress paid little attention to details of adjudication procedures or substantive standards.³⁵ But one theme is clear from the legislative history. Congress intended the refugee

³³8 C.F.R. Parts 208, 209. See INA § 209(b), 8 U.S.C. 1159(b) (1988). The statute imposes an annual ceiling of 5000 on adjustments of asylees to permanent resident status. This is a ceiling on adjustments only; it does not limit the number of people who may receive asylum in a given year. See generally Martin, *supra* note 29. Because asylum grants have run considerably above 5000 for the last several years, a backlog has developed and asylees must now wait much longer than one year before adjusting and thus receiving a "green card."

³⁴This statement must be qualified in one minor respect. The principal provision expressly meant for refugees from 1965 to 1980 was INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976). It allowed the use of six percent of the "preference" admission spaces each year for people who fled persecution in Communist countries or the general area of the Middle East. The overwhelming majority of these refugee spaces (a total of 17,400 in the late 1970s) were used for overseas refugee programs, principally for the admission of Eastern Europeans selected in Western Europe, and in the late 1970s for Indochinese processed in Southeast Asia.

A statutory proviso to § 203(a)(7), however, permitted use of a portion of these admission spaces to grant permanent resident status to aliens who met the basic requirements but had been physically present in the United States for at least two years before applying for such adjustment of status. See 8 C.F.R. § 245.4 (1971). For example, a Polish national who overstayed a nonimmigrant visa could receive this status through a petitioning process carried out entirely in this country, if she proved the requisite two years' presence and her flight from persecution. In a sense, she thus could be considered an asylee who graduated to full immigrant status under a permanent legislative provision. But the term "asylum" was never formally applied to the status of those who benefited from this proviso, and successful applicants moved directly to permanent resident status, usually from some sort of irregular status. Moreover, the qualifying standards departed somewhat from the provisions of the UN Convention (most graphically in the geographic limitations).

³⁵Congress also applied the UN refugee definition to overseas refugee programs under INA § 207, 8 U.S.C. § 1157 (1988), which usually operate by way of INS interviews and screening in refugee camps in third countries, such as Thailand or Austria. Because of this similarity in qualifying standards, one might assume that the system proposed here for asylum adjudications should therefore be applied to "refugee" adjudications in the overseas program. I would argue against such a conclusion. The widely different functional constraints operative in the overseas program counsel against identical determination systems.

First, simply because of physical location, the United States is able to apply numerous other screening criteria, as well as numerical ceilings, before deciding which refugees will be offered resettlement in the United States as part of the overseas programs. Historically, screening and selection there have typically been based most importantly on these other criteria, such as family or other ties in the United States, rather than on satisfaction of the refugee definition. Pouring extensive resources into the adjudication of the latter issue therefore is often not advisable.

standards to be applied neutrally and without ideological bias, in contrast to certain repealed refugee provisions that at one time made special provision for persons fleeing Communist countries.³⁶ Although occasional arguments have appeared, particularly during the Reagan administration, for a more overtly political selection system,³⁷ neutral application represents by far the fairer and wiser policy. In the long run, unfair favoring of some groups in the asylum process only increases the political costs of returning other individuals even when their claims are accurately rejected under an appropriately demanding application of the governing standards. Full consideration of this complicated debate is beyond the scope of this study. Nevertheless, it is premised on

Second, in most such overseas circumstances, a decision to exclude certain applicants from the U.S. refugee program, on whatever grounds, does not necessarily mean their return to the home country. Typically such persons remain the responsibility of the first-asylum country, who may be able to find still other resettlement opportunities for them.

The procedures suggested here are crafted for the sharper choices faced in U.S. asylum processing, wherein the government has essentially only two options once a person is adjudged a refugee, owing to the person's presence on U.S. territory and the unwillingness of third countries to contribute resettlement spaces: grant asylum (or at a minimum nonrefoulement) and allow indefinite stay here, or deny protection and return the applicant to the home country. In that setting, greater assurance of accuracy and professionalism in applying the refugee definition is essential. I have elaborated on these distinctions in Martin, *supra* note 29, at 111-14.

³⁶See Anker & Posner, *supra* note 29, at 12, 14-18, 41-43, 60, 64. Most of the congressional statements criticizing the earlier "discriminatory" provisions specifically addressed the overseas refugee program, because asylum provisions received little attention. There is no reason to doubt, however, that Congress expected the same neutral application in asylum processing, where the case for strict but evenhanded application of the refugee definition is probably far stronger. See, e.g., Martin, *supra* note 29, at 113-14.

³⁷In 1986, the Justice Department under Attorney General Meese was reportedly drafting new asylum regulations that would have established a presumption in favor of those fleeing "totalitarian" countries -- apparently including all Communist countries. See Pear, U.S. Studies Plan to Ease Access to Asylum for Poles and Others, *New York Times*, March 30, 1986, at 1. No such regulations ever appeared. In 1987, however, Mr. Meese did announce a set of steps relating to Nicaraguans. Although he was under pressure from some conservative circles hostile to the Sandinista government to grant blanket permission to stay ("extended voluntary departure") to all Nicaraguans, his announcement nominally only restated established standards for ordinary asylum determinations. In practice, however, that statement encouraged more Nicaraguans to come forward and apply, and it has led to a far higher grant rate for Nicaraguans applying for asylum in INS district offices. Special review by the central office in Washington is also required before any Nicaraguan is deported. As a result, such deportations are now extremely rare, even when asylum is denied. See Refugee Reports, July 10, 1987, at 7-8; *id.*, Aug. 14, 1987, at 8-10.

For broader consideration of the merits of a more expressly political refugee program (arguments that carry more weight with respect to an overseas refugee program rather than an asylum system), see M. Walzer, *Spheres of Justice* 49-50 (1983); Suhrke, *Global Refugee Movements and Strategies of Response*, in *U.S. Immigration and Refugee Policy: Global and Domestic Issues* 157-62 (M. Kritz ed. 1983).

the assumption that Congress's 1980 approach is to be continued. It concentrates on finding effective ways to implement a neutral system meant to protect those most seriously at risk of persecution, whatever the political orientation of the home-country government.

In the early years of asylum adjudication under the Refugee Act, immigration authorities and refugee advocates alike assumed that the threshold standard for applying the two sections, 208 and 243(h), was identical.³⁸ But the Act revived litigation over the precise understanding of that standard. The Board of Immigration Appeals (BIA) had traditionally required the applicant to show "a clear probability of persecution" in order to gain withholding of deportation under the pre-1980 version of § 243(h), whereas refugee advocates had consistently urged the adoption of some more generous standard.³⁹ When the Board declined to change its "clear probability" formula after enactment of the Refugee Act, numerous applicants challenged the rulings in the appellate courts.⁴⁰ The circuits divided on the question, and the issue reached the Supreme Court in 1984 in INS v. Stevic.⁴¹ That Supreme Court ruling unexpectedly split the qualifying standards. It ruled that the Board's traditional "clear probability" test still governs in order to claim the mandatory protection of § 243(h), while hinting, without expressly ruling, that some easier standard might apply under § 208. Stevic, however, did provide a softening gloss on the Board's "clear probability" test, reading it to require a showing only that persecution is "more likely than not."⁴²

Three years later, in INS v. Cardoza-Fonseca,⁴³ the Court finally ruled squarely on the threshold standard determining eligibility for a discretionary grant of asylum under § 208. The majority overruled the BIA's continued assertion that the two standards remained identical, and forcefully stated that the § 208 test is more generous than the standard for § 243(h). The Court declined, however, "to set forth a detailed description of how the well-founded fear test should be applied," leaving that term to acquire "concrete meaning through a process of case-by-case adjudication."⁴⁴ The § 208 test that has come to govern in the wake of Cardoza-Fonseca is most helpfully phrased as requiring "a reasonable possibility of persecution," or a showing of a "good

³⁸See, e.g., Helton, INS v. Cardoza-Fonseca: The Decision and its Implications, 16 N.Y.U. Rev. L. & Soc. Change 35, 39 n.31 (1987-88); Scanlan, *supra* note 2, at 625.

³⁹See, e.g., Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied 390 U.S. 1003 (1968); Rosa v. INS, 440 F.2d 100 (1st Cir. 1971); Matter of Dunar, 14 I&N Dec. 310 (1973).

⁴⁰See Matter of McMullen, 17 I&N Dec. 542, 544 (BIA 1980).

⁴¹467 U.S. 407 (1984).

⁴²*Id.* at 429-30.

⁴³107 S.Ct. 1207 (1987).

⁴⁴*Id.* at 1221-22.

reason to fear persecution" -- but even these standards leave much leeway for application to the evidence presented in a particular case.⁴⁵

These two Supreme Court cases bring curious results, to say the least. To my knowledge, no other country draws this sort of distinction between the substantive standards for determining refugee status, on the one hand, and nonrefoulement on the other.⁴⁶ Where there are distinctions, they run in the opposite direction: toward shielding more people against return, even if they do not strictly meet the refugee definition and will not be granted the full range of benefits that come with formal asylum.⁴⁷ Moreover, the bifurcation is subject to substantial objection on policy grounds. It would permit American immigration authorities to deny asylum, perhaps quite frequently, in the exercise of discretion. Indeed, the Supreme Court went out of its way to emphasize the Attorney General's discretion over these matters, and it plainly considered that the holding would increase his "flexibility" in responding to refugee crises.⁴⁸ Ostensibly this means that the Justice Department could even deport to the home country persons already judged to be "refugees" under the Cardoza-Fonseca standard, if they fall short of the showing required to claim the mandatory nonrefoulement protection, as interpreted in Stevic.⁴⁹

⁴⁵In Matter of Mogharrabi, Interim Dec. No. 3028 (BIA 1987), the Board implemented the Cardoza-Fonseca ruling and spelled out new guidelines for asylum cases. Unfortunately, however, it followed the lead of a Fifth Circuit case, Guevara-Flores v. INS, 786 F.2d 1242 (5th Cir. 1986), and restated the standard as follows: "an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." Slip op. at 9.

This formulation is misleading and unhelpful. If there is any significant level of persecution in a country, a reasonable person would fear becoming its victim, simply because of residence in that society, even if the abuses, to date, have never been directed at him or persons like him. He may recognize that the chances of his actually being persecuted are very slim, but we surely would not count him out of the realm of reasonable persons if he harbors a fear of persecution. In short, a "reasonable person" would fear persecution well before the time that we would consider that the persecution has become a "reasonable possibility."

The Board continues to invoke the "reasonable person" standard but appears in practice to look for a "reasonable possibility of persecution" -- a more objective inquiry -- before granting asylum. It would promote greater candor in adjudication to revert to exclusive use of the "reasonable possibility" formulation, which is, after all, the precise wording used by the Supreme Court in dictum in Stevic and Cardoza-Fonseca.

⁴⁶See Helton, INS v. Cardoza-Fonseca: The Decision and its Implications, 16 N.Y.U. Rev. L. & Soc. Change 35, 39, 53 (1987-88).

⁴⁷See, e.g., Goodwin-Gill, Non-refoulement and the New Asylum Seekers, 26 Va. J. Int'l L. 897, 901-02 (1986).

⁴⁸107 S.Ct. at 1220, 1222.

⁴⁹These points are developed at greater length in Aleinikoff and Martin, *supra* note 6, at 664-67; *id.* at 79-80 (Supp. 1987).

To their great credit, the immigration authorities have avoided, to date, any such draconian use of the flexible discretion the Supreme Court ratified for them in Cardoza-Fonseca. The BIA has even moved, quite wisely, to limit discretionary denials of asylum and thus provide the more complete protection of asylee status for nearly all who meet the lower § 208 threshold.⁵⁰ As a result of this administrative practice, the only important test, in the vast majority of today's asylum cases, is the more generous § 208 standard, the "well-founded fear of persecution" test. If the alien meets the threshold qualification, and is also found worthy of the relief as a matter of discretion (as now usually happens), then there is no reason to consider the issues under § 243(h). Asylum status, by definition, carries with it protection against deportation or exclusion.⁵¹

But even if the bifurcation in standards someday becomes more important in the administrative scheme, it will have no significant bearing on the issues of procedural design considered in this study. As the Board has recognized, "the core of evidence and testimony presented in support of the asylum and withholding applications will in almost every case be virtually the same."⁵² In consequence, the basic process of information gathering and evaluation will not differ whatever the final calibration of the substantive legal standard. In principle, adjudicators must in either case first reach a judgment about the level of danger faced by the applicant in the home country. Only after making that combined factual and predictive assessment need they apply the respective legal tests in order to determine whether to say yes or no to the application for the precise protection at issue. In what follows, therefore, reference to "asylum" determinations should be taken to encompass the adjudication process necessary to apply the nonrefoulement standards as well.

II. The Policy Context

A. Angles of Vision

1. The asylum tradition

The commitment to affording asylum to the persecuted is deeply rooted in American experience and tradition. The Statue of Liberty is a treasured icon, perhaps the purest single symbol, in a richly diverse nation, of our national self-identity. Furthermore, awareness of the grave consequences that may await a refugee wrongfully returned to the home country plainly deepens this commitment. No successful policy can ignore the instinctively favorable reaction that

⁵⁰Matter of Pula, Interim Dec. No. 3033 (BIA 1987), overruling Matter of Salim, 18 I & N Dec. 311 (BIA 1982). For a comprehensive review of these issues, urging that discretionary denials of asylum be used rarely if the individual is found to be a refugee (an approach quite similar to that ultimately adopted in Pula), see Anker, Discretionary Asylum: A Protection Remedy for Refugees under the Refugee Act of 1980, 28 Va. J. Int'l L. 1 (1987). See also Helton, The Proper Role of Discretion in Political Asylum Determinations, 22 San Diego L. Rv. 999 (1985).

⁵¹See Matter of Mogharrabi, Interim Dec. No. 3028, at 3 (BIA 1987).

⁵²Id. at 12.

refugees evoke from the American public -- and politicians and even (or especially) judges. Refugee advocacy groups know that they have a ready hold on public imagination, provided only that they can persuade their listeners that the objects of their advocacy are indeed refugees. This is as it should be. It is a proud tradition, one that should be preserved and strengthened.

But the very vigor of the tradition carries the seeds of difficulty once it is translated into administrative operation. As will be seen, accurate asylum determinations require the careful application of expertise to a body of information about the individual asylum seeker that is, at best, difficult to marshal. But few Americans think of this as a job for experts. Few are disposed to defer to the judgments of the agency primarily responsible for these decisions,⁵³ if the outcomes conflict with their own sense of obligation to America's heritage. This attitude accounts, perhaps, for the ambitious interventionist stance sometimes taken by judges,⁵⁴ and for the impulse toward sudden swings in policy that can come when a new set of executive branch officials becomes involved in the process.⁵⁵ It also means that debates on asylum issues often become bitterly polarized, for those who oppose deportation of certain unsuccessful asylum applicants often see the matter as a life-or-death issue.

These attitudes have an important operative significance for asylum adjudication reform. Any reforms seen as substantially more restrictive will face a heavy burden of proof in the public, the media, and Congress. Numerous earlier reform efforts have become bogged down because of the resistance rallied in those forums, skillfully drawing on the Statue-of-Liberty tradition. If stalemate or retrenchment is to be avoided, reforms cannot be done on the cheap. They must include ample measures designed to win the support of relevant domestic audiences (including judges) because they assure that any new restrictions will not fall unjustly on deserving asylum seekers.

2. The need for control; asylum as a loophole

There is another important angle of vision on the promise of asylum, however, and with some domestic constituencies, this outlook prevails. It derives from the singular trumping power of a successful asylum claim. Such a claim overcomes virtually all the other qualifying requirements

⁵³This reaction is no doubt fortified by the low esteem that immigration agencies usually hold within the bureaucratic hierarchy. See M. Morris, *Immigration -- The Beleaguered Bureaucracy* 87-94 (1985). Sometimes this attitude bursts forth in startling fashion. See, e.g., Justice Blackmun's concurring opinion in *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1222 (1987), which levels harsh criticism (at the wrong agency! -- INS rather than the BIA) that takes little account of the complexity of the issues at stake.

⁵⁴See, e.g., *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442, 455, 509 (S.D.Fla. 1980), modified sub nom. *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

⁵⁵For example, in his early months as Attorney General, Edwin Meese reportedly sought ways to change asylum policy and make asylum more nearly automatic for those fleeing Communist countries, as distinguished from those fleeing "authoritarian" countries. See note 37 supra; N.L. Zucker & N.F. Zucker, *The Guarded Gate: The Reality of American Refugee Policy* 143 (1987).

for immigration to the United States. It also moves the applicant to the head of the line for early permanent residence rights in the United States, even if he first established his presence on the territory in knowing violation of the regular provisions of the immigration laws. Viewed in narrow compass, this too is as it should be. Those who have been victimized by persecution should indeed receive, early on, a secure new status that will allow them to rebuild a new life in a new homeland, without undue insistence on the bureaucratic niceties of ordinary immigration law.

There are millions of people around the world, however, who face no substantial threat of persecution but also would value such a chance at permanent residence in a stable and wealthy nation.⁵⁶ In an apt simile, Michael Walzer has compared the affluent Western democracies to "élite universities, besieged by applicants."⁵⁷ Lacking family ties or scarce job skills, most of these "applicants" have no real prospect of success through any ordinary legal channel. It should not be surprising, then, that those who learn about the power of a claim to refugee status might choose to try their luck with an asylum application. After all, the only clear requisites for such a filing are physical presence on the soil of a Western democracy and persistence in asserting the claim. The potential is so promising that it has called into being a new class of entrepreneur, "travel agents" who arrange for transportation and also instruct their clients on how to file for asylum once they encounter officials in the targeted Western country.⁵⁸ Seen in this light, asylum becomes a major

⁵⁶Lest this sentence be thought unduly ethnocentric or alarmist, one should add an important qualification. Cf. Rudge, Don't Blame the Victim, *World Link*, May 1988, at 68 (warning against "the apocalyptic scenario suggesting the whole world plans to seek asylum" in the West). For most such people, their first choice would surely be to enjoy stability and prosperity at home, in a political and cultural environment with which they are familiar. Indeed, such attachments to home will doubtless always hold most of the population there, even if Western countries suddenly became much more hospitable to asylum claims. Alarmist cries suggesting that asylum policy may cause whole countries to empty out into a migrant stream to the North are thus clearly exaggerated. But given that stability and prosperity are not realistic medium-term prospects in many developing nations, it is quite natural that a proportion of the population will begin looking elsewhere. And even if the proportion is low relative to total home-country population, the absolute numbers of migrants can become sufficiently high to pose a major political problem in the receiving state.

⁵⁷M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 32 (1983).

⁵⁸See, e.g., E. Ratushny, *A New Refugee Status Determination Process for Canada* 20 (report to the Minister of Employment and Transportation, 1984); Arbenz & Zürcher, *The Co-ordination of the Asylum Policies of the European States*, in *The Law of Asylum and Refugees: Present Tendencies and Future Perspectives* 126, 127 (Proceedings of the Sixteenth Colloquy on European Law, Lund, 15-17 September 1986; Council of Europe Publication 1987); Teitelbaum, *Political Asylum in Theory and Practice*, 76 *Pub. Int.* 74, 79 (1984); Canada: Welcome and Goodbye, *The Economist*, Jan. 7, 1989, at 35; Applebome, *Smugglers of U.S. Aliens Held More Sophisticated*, *N.Y. Times*, March 2, 1989, at A23. Most officials and a few private attorneys interviewed for this study also had tales about the schemes carried out by arrangers or organizers.

loophole that gravely threatens the overall structure of deliberate control over immigration -- control that is also highly valued by the public, and by politicians and judges.⁵⁹

Two public values, not terribly well articulated or conscious, but nonetheless strongly held, thus come into conflict in the asylum program.⁶⁰ On the one hand stands the promise of refuge to the persecuted; on the other the demand for reasonable assurance of national control over the entry of aliens. Only abandoning one goal or the other can eliminate the tension. And if events force utter confrontation and a stark choice between the two, it seems likely as a matter of practical politics that the control principle would win over the refuge principle.⁶¹ Refugee advocates should take this danger to heart. They too have a major stake in minimizing the tension between the two goals, by helping to structure a workable and reassuring asylum system. As a former UN Deputy High Commissioner, Richard Smyser, observed in a perceptive recent book: "The public will not allow governments to be generous if it believes they have lost control."⁶² Asylum will always be an inherently unruly component in an immigration system that usually works by tidy categories and elaborate advance screening. But its unruliness can be curbed, and public

⁵⁹See, e.g., Aleinikoff & Martin, *supra* note 6, at 723 (quoting Attorney General Smith); *Jean v. Nelson*, 727 F.2d 957, 975, (11th Cir. 1984) (en banc) (expressing concern that plaintiff's position "would ultimately result in our losing control over our borders"), modified, 472 U.S. 846 (1985); Public Opinion Poll Reveals Support for Border Security, *Imm. Pol. & L.*, April 20, 1989, at 5. See generally Reitz, *The Institutional Structure of Immigration as a Determinant of Inter-Racial Competition: A Comparison of Britain and Canada*, 22 *Int'l Migration Rev.* 117, 131 (1988) (on the importance of sustaining public perception of control over immigration).

⁶⁰See generally Pear, *New Restrictions on Immigration Gain Public Support, Poll Shows*, N.Y. Times, July 1, 1986, at A1 (polls found "that Americans have contradictory, ambivalent feelings about immigration"); E. Harwood, *In Liberty's Shadow: Illegal Aliens and Immigration Law Enforcement* 10-15 (1986) (similar poll findings reflecting ambivalence). Even more debilitating, each of the respective attitudes is likely to prevail at different points in the policy process: restrictionism in the early stages of a perceived massive influx can be replaced by doubt and generosity as the time nears for placing identifiable individuals on a plane home. This is a recipe for stalemate. See Martin, *supra* note 1, at 12-13.

⁶¹In 1986, for example, the Swiss Parliament modified its law on asylum in response to the substantial increases in asylum applications that country was experiencing. In addition to procedural changes, described in a later chapter, Parliament made it easier for the Federal Council to derogate from the ordinary statutory guarantees of asylum. Theretofore such derogation was permissible only in times of armed conflict; after the 1986 law, derogation is also authorized in peacetime when there is an "extraordinary" influx of asylum seekers. *Loi sur l'asile du 5 octobre 1979*, as amended by *loi sur l'asile, modification du 20 juin 1986*, art. 9(1), 1987 *Recueil officiel des lois fédérales* (R.O.) 1674 (R.S. 142.31).

⁶²Smyser, *supra* note 18, at 119.

support thereby increased, if we can create a system capable of saying no to the unqualified -- fairly, but firmly and expeditiously -- while promptly welcoming the meritorious applicant.⁶³

B. Factual issues

In principle, it should be possible to distinguish between genuine refugees and those who do not qualify, thereby both honoring the asylum tradition and closing the loophole to those whose claims are meritless. But that task is far more difficult than it might initially appear, for several important reasons.

1. Lack of clarity concerning the substantive legal standard

Although Americans (in common with the entire Western world) are virtually united in a commitment to protect refugees, they are far from united in a common conception of "refugee." Everyday parlance tends to treat anyone fleeing life-threatening conditions as a refugee, whether the source of the threat be natural disaster, foreign invasion, civil unrest, or deliberate persecution.⁶⁴ The legal framework of course employs a narrower concept than this journalistic usage, and the Convention definition might be thought to furnish the source of a unified common understanding, built around the phrase "well-founded fear of persecution." But this phrase too can also take on a variety of shapes, from highly expansive to narrowly crabbed, often depending, it seems, on whether the speaker wishes to include or exclude a particular group of claimants.⁶⁵

One common, but understandable, mistake -- made by both the left and the right -- is to assume that the existence of serious human rights problems in a country should translate into a finding that virtually all émigrés from that country are refugees.⁶⁶ The Convention's words, indeed, can be made to fit this situation: if persecution occurs in the home country, any expatriate's claimed fear of it upon return is well-founded. The fear is not fanciful; it is based in proven fact. And if the legal standards conformed to this conception, adjudication would be greatly simplified, for

⁶³The Select Commission on Immigration and Refugee Policy, *Immigration Policy and the National Interest: Final Report 165-68* (1981), reached similar conclusions.

⁶⁴See generally Shacknove, *Who is a Refugee?*, 95 *Ethics* 274 (1985).

⁶⁵See, e.g., C. Keely, *Global Refugee Policy: The Case for a Development-Oriented Strategy* 6-11 (1981).

⁶⁶Such a reading underlies oft-heard complaints that our asylum policy is "out of synch" with our human rights policy, or more broadly, with our foreign policy. See, e.g., Pear, *supra* note 37 (quoting unnamed Reagan Administration official stating that deporting Nicaraguans was inconsistent with the lobbying effort to win support for the *contras*: "We take tremendous heat from conservatives because our asylum policy is inconsistent with our foreign policy"); Dreifus, *No Refugees Need Apply*, *The Atlantic*, February 1987, at 32, 35 (quoting INS General Counsel Inman to the same effect); Hansen, *No Way to Treat Solidarity Refugees*, *N.Y. Times*, April 1, 1985, at A21 (arguing that INS denials of asylum to Poles undercut the credibility of our foreign policy).

it could then be based on sweeping categorical judgments that would be easy to pronounce and administer.

The case law makes clear, however, that the "well-founded fear" standard sets a higher threshold and ordinarily requires a far more individualized inquiry.⁶⁷ Partisans in the debate over legal doctrine usually accept this narrowing gloss,⁶⁸ even if it does not always penetrate into public debate on the issue. And if legal standards thus demand individualized scrutiny, obviously adjudication will require a more sophisticated and difficult factual inquiry. The inquiry must first strive to assure the marshalling of all the accessible information that might bear on the individual's circumstances and the conditions of the country. But just gathering that information is not sufficient, for in this highly charged sphere both governments and exiles may have significant reasons to distort the facts or manufacture them from whole cloth. Crucially, asylum adjudication must include the capacity authoritatively to evaluate the assembled information in order to decide which is trustworthy and which doubtful.

The legal standards thus require that applicants show something more than simply that human rights abuses occur in the home country.⁶⁹ That something more is usually understood as a showing that the applicant is likely to be targeted by the persecutors upon return. But there remains considerable room for dispute over just how much more of a showing this entails, and considerable play for interpretation remains even after the Supreme Court's Cardoza-Fonseca decision. Must the claimant show he would be "singled out" by the persecutors? How sharply focused must the threat be? What is relevant and probative evidence of such a threat? Must the

⁶⁷See, e.g., Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984); Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 107 S.Ct. 1207 (1987); Vilorio-Lopez v. INS, 852 F.2d 1137, 1140-41 (9th Cir. 1988); Matter of Mogharrabi, Interim Dec. No. 3028 (BIA 1987).

⁶⁸Some authors argue that protection of a wider range of endangered asylum seekers, such as those fleeing civil war, is now required as a matter of customary international law (under either the principle of nonrefoulement, as Goodwin-Gill argues, or a principle of "temporary refuge," as Perluss and Hartman urge). See, e.g., Goodwin-Gill, Non-refoulement and the New Asylum Seekers, 26 Va. J. Int'l L. 897 (1986); Perluss & Hartman, Temporary Refuge: Emergence of a Customary Norm, *id.* at 551. See also Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 20 June 1974, 691 U.N.T.S. 14 (this treaty's definition of "refugee" includes UN Convention definition and also those who flee "external aggression, occupation, foreign domination or events seriously disturbing public order"). But these authors generally do not dispute the conclusion stated in text about application of the UN Convention definition. See also Hailbronner, Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?, *id.* at 857, 880-87 (subject to a very limited exception, Prof. Hailbronner disagrees with the conclusion that protections against return are legally required for those who do not meet the Convention definition). For a brief discussion of American practice in this regard, using the device of "extended voluntary departure," see note 16 *supra*.

⁶⁹See, e.g., Martinez Romero v. INS, 692 F.2d 595 (9th Cir. 1982).

applicant's testimony be corroborated? And further, what exactly is persecution? Is sustained discrimination sufficient, or is something more like a threat to life or freedom required?⁷⁰

These disputes continue in the literature, in public debate, and in American and foreign case law. Although some progress has been made in refining the standards and achieving a more unified conception, large differences of view abide. Ideally, the Board of Immigration Appeals, the principal specialized custodian of legal doctrine in this field, would develop a body of doctrine that would refine and unify the understandings of the standard. But the Board has had difficulty playing this role, in part because it receives little deference from the reviewing courts in this field. Hence splits among the circuits develop and persist,⁷¹ and the Supreme Court is not in a position to resolve more than a handful of such disputes.

2. The coast of Bohemia

Compounding this substantive legal problem are the images we (both citizens and government officials) bring to judgments about asylum policy. The legal standard looks, in most cases, toward a finely calibrated individualized judgment of the risk of persecution the applicant would face in the homeland. The judgment must be based, to some extent, on general information about human rights conditions in the home country. But the primary reliance will fall, most of the time, on information specific to that individual.⁷²

Public debate on asylum policy, however, proceeds in cruder terms. Partisans are often ready to make sweeping judgments, by nationality, about the merit of large groups of asylum seekers. Two leading schools of thought have been prominent in the debate. The first, long dominant in affecting actual outcomes, assumes that virtually anyone from a Communist country would face persecution upon return. Holders of this view find it nearly unthinkable that the

⁷⁰For a thorough exploration of the case law on these issues, see Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 *San Diego L. Rev.* 327 (1986).

⁷¹Compare, e.g., *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir.), cert. denied, 108 S.Ct. 92 (1987), with *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (whether persecution is for private reasons or "on account of" political opinion); and compare *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988) with *Rodriguez-Rivera v. INS*, 848 F.2d 998 (9th Cir. 1988) (under what circumstances threats by guerrillas are sufficient to establish "well-founded fear").

⁷²This statement must be qualified when the asylum claim is based on group characteristics, e.g., flagrant persecution addressed at all members of a religious minority, or when political persecution is so indiscriminate that virtually all who manage to escape should be recognized as refugees.

government could contemplate deportation.⁷³ A second school makes similar assumptions about Central American countries, particularly El Salvador and Guatemala.⁷⁴

a. The essential problem. This kind of stereotyping or oversimplification is unfortunately commonplace -- and to a significant extent inevitable -- in public debate and policy decisions. In a classic work, Walter Lippmann explored comprehensively the influence on policy of these "pictures in our heads."⁷⁵ He wrote:

[T]he real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations. And although we have to act in that environment, we have to reconstruct it on a simpler model before we can manage with it. To traverse the world men must have maps of the world. Their persistent difficulty is to secure maps on which their own need, or someone else's need, has not sketched the coast of Bohemia.⁷⁶

The coast of Bohemia problem bedevils both public debate and adjudication in the asylum field. But perhaps the image for our purposes should be shifted from the littoral to the physiological. Few nations enjoy a political geography characterized by a reliably fertile plain of steady human rights observance. Outcroppings of abuses appear, sometimes intermittent hills, sometimes whole mountain ranges of severe persecution. The partisans in refugee debates -- as well as adjudicators and judges under the current system -- are too often inclined, in looking at nations to which they are favorably disposed, to mistake mountains for hills -- or plains. The same people, in looking at nations to which they are hostile or for whose exiles they have (understandably) developed sympathy, often picture mountains where they should see hills, and then rush to the conclusion that that nation's exiles are refugees. Whatever the actual geography, it is also easy to forget that many people in those distant nations continue to inhabit the valleys even when the mountains loom large and forbidding.

b. Boxes vs. spectrums. A related and persistent misunderstanding compounds the difficulties in achieving a sensible and widely supported asylum policy, and it also occasionally complicates adjudication. Much of the debate proceeds as though there are two sharply different categories of persons who find their way into the asylum adjudication system in this country: refugees, on the one hand, and economic migrants (or simply "illegal aliens") on the other. A recent book on U.S. refugee policy (in other respects quite thorough and insightful) reflects this attitude:

⁷³See, e.g., sources cited supra note 66.

⁷⁴See, e.g., *New Wave of Salvadoran Immigrants Revives Call for Refugee Status*, Wash. Post, Feb. 18, 1989, at B3.

⁷⁵W. Lippmann, *Public Opinion* 3 (1922; Free Press ed. 1965).

⁷⁶Id. at 11.

Refugees are neither immigrants nor illegal migrants, although, like immigrants, they have forsaken their homelands for new countries without permission. But a refugee is, in the end, unlike either. Both the immigrant and the illegal migrant are drawn to a country. The refugee is not drawn but driven; he seeks not to better his life but to rebuild it, to regain some part of what he has lost.⁷⁷

Even if this sharply dichotomous view might once have captured the realities of refugee flows, it does not offer a helpful way to approach today's asylum caseload. Today's dilemma is both tragic and surpassingly difficult precisely because, among current asylum applicants, refugees are so much like illegal immigrants. Only an indistinct and difficult line separates those who should succeed on their asylum applications and those who should not. That is, most of those applying in the United States today were both drawn and driven, and they chose to come in response to a complex mix of political and economic considerations. Asylum seekers are not so different from the rest of us; we act for a mix of motives, particularly when we make difficult, life-altering decisions.

Take the case of a hypothetical Haitian farmer. For years he has been anguished by the unbridled power that local officials, supported by the Tontons Macoutes, wield in the community. He knows of occasions where they have terrorized those who resist their decrees, by burning a hut or killing a farm animal. But he also realizes that most people who remain quiet, pay an occasional tribute, and raise no opposition will be left alone. He endures this situation for many years, although he is more vocal than most of his neighbors about the community's problems. One year, his meager corn crop fails owing to the worst drought of the decade. He worries how he will feed his children, already showing initial signs of malnutrition. Shortly thereafter he learns from friends about a boat that is about to depart for Miami, where, it is said, jobs are available and each day's pay exceeds a month's earnings in Haiti. They urge him to come along.

The choice is not an easy one. He consults with his family, and they talk about the crop failure and the political miseries of the region. They discuss the pain that would come from lengthy separation. They wonder whether the stories can be true about the jobs in Miami. Then they learn of a new episode of retribution visited on a farmer in a nearby valley, who apparently ran afoul of the local hierarchy and was left maimed by a nighttime attack. Some family members believe that this episode presages another serious outbreak of official violence; others think it is isolated and that things will quiet down as before. Pondering all these factors, at first he is sure he will stay. Then, after a child endures a week of persistent illness, he decides that he should leave, in an effort to earn enough to pay for medical care and food for his offspring. The family ultimately concurs, even though it means scraping together nearly all their savings to meet the boat captain's fee for the journey. No thought is given to moving the whole family; they could not possibly afford the captain's charge.

Once this person arrives in Miami, should he be seen as an "drawn" economic migrant or a "driven" refugee? He did not lack choice. Although many considerations strongly pointed toward leaving, he weighed a variety of difficult factors and chose at this time to travel to Miami. He could have stayed and remained subject to the same range of political and economic risks, uncer-

⁷⁷Zucker & Zucker, *supra* note 55, at xiv (emphasis added).

tainties, and privations. In fact, he was both drawn and driven, and the factors he considered were both economic and political.⁷⁸ Does the presence of economic considerations undercut his refugee claim? Or should we perhaps try to assess which was his primary or dominant motivation for leaving?⁷⁹ Or perhaps adjudication might center on the fact that the need to earn money for medical care -- an economic consideration -- was the immediately precipitating factor.

Each of these perspectives is misleading. We do not need to find that he was only driven, nor assess what his primary motivation was, nor the immediately precipitating event. The best way to understand asylum adjudication is to focus on the degree of risk he would face when he returns. If the risk is sufficiently substantial, his fear is well-founded, even if it was his need for funds to feed his children that sent him on the particular boat trip at the particular time. That he stayed home until economic considerations tipped the balance in his decision may be relevant -- but only for the light it casts on the separate question concerning the degree of risk he truly faces. His refugee claim is not forever tainted because he thought about jobs in Miami or the need for money to feed his family. Indeed, this would be abundantly clear if one could establish that shortly after his departure (which was precipitated, let us stipulate, by economic concerns) the local authorities expanded their violent suppression and actually began killing or jailing anyone who had ever publicly opposed the government or the local leaders.

The Convention definition best translates into workable adjudicative guidance only in this light. It does not ask how much economics played a role in the decision to leave; it asks about risk levels upon return. The economic migrant/political refugee distinction, however phrased, is misleading and unnecessary.⁸⁰

⁷⁸Further evidence of the mix of motives appears, e.g., in an extensive survey relating to Salvadorans in the United States. S. Montes Mozo & J. Garcia Vasquez, *Salvadoran Migration to the United States: An Exploratory Study 11-14* (Hemisphere Migration Project, Georgetown Univ. 1988) (28.5 percent of Salvadorans surveyed said they emigrated exclusively for political reasons; 20.6 percent claimed both political and economic reasons; apparently the rest spoke only of economic or other nonpolitical reasons).

⁷⁹See Anker & Posner, *supra* note 29, at 68 (suggesting -- erroneously, in my view -- that the applicant is a refugee only if his "primary motivation" was political).

⁸⁰The majority opinion in Cardoza-Fonseca states that the definition "makes the eligibility determination turn to some extent on the subjective mental state of the alien," and it later refers to "the obvious focus on the individual's subjective beliefs." 107 S.Ct. at 1212-13. Other commentary on the Convention also claims equal status for "subjective" factors. See, e.g., UNHCR Handbook, *supra*, at 11-12. But no asylum adjudication system visited in the course of this study devotes any significant resources to inquiries into the applicant's subjective state of mind; the fact of application for asylum is taken as sufficient indication that the applicant holds a subjective fear of return. Moreover, the central holding of Cardoza-Fonseca clearly contemplates primary inquiry into the probability of persecution -- an objective determination. See Gibney, A "Well-Founded Fear" of Persecution, 10 Human Rights Q. 109, 110 (1988). A British court's effort to import a greater role for subjective fears (even if they could be shown objectively to be exaggerated) was overruled by the House of Lords in *R. v. Secy of State, Home Dept, ex parte Sivakumaran*, [1988]

If all asylum applicants did fit neatly into one of two boxes -- refugee or economic migrant -- the adjudicative task would certainly be simplified. The job would simply be to unmask the impostors, those economic migrants who are base enough to pose as something they are not. Unfortunately some people with authority over asylum decisions in Western countries sometimes speak of adjudications as though they did present such a morality play. They hasten to label as abusive or frivolous or lawless those claims that simply fall short of the necessary showing.⁸¹

But the world is not that simple. Asylum adjudication, it must be recognized, is at best a crude and incomplete way to respond to the complex realities that the world throws its way.⁸² Our legal structure, for ultimately sound reasons, demands a simple yes or no answer to the asylum claim. But the dichotomous character of the results should not obscure the complexity onto which that yes-or-no grid is forced. Asylum seekers present a spectrum of situations, with only subtle shadings separating the risk levels they face.⁸³ Adjudication must draw a line at some point on that span. And it must do so with care, so that it protects those whose risks exceed the threshold, even if they happen to have joined a migration stream made up principally of those less severely threatened, who therefore lack, in this technical sense, a well-founded fear of persecution.

c. Lessons. These observations suggest two lessons with respect to asylum. The first focuses on the nature of public debate. Every effort should be made to avoid the use of dichotomous images and to break the ready links people rush to forge between human rights policy and asylum determinations. Obviously there is an important relationship between human rights abuses in the home country and the merits of asylum claims by that country's nationals. But it is hardly a one-to-one correspondence. Returning a high percentage of asylum seekers to a certain

1 All E.R. 193 (1987).

⁸¹For example, in a recent article, the Minister of the Interior for the Federal Republic of Germany noted that only 9.3% of asylum seekers in 1987 were recognized as refugees. He then commented: "This implies that 90.7% of all those seeking asylum in West Germany unlawfully claimed to be politically persecuted." Zimmermann, View From West Germany, World Link, May 1988, at 65 (emphasis added). See also 65 Interp. Rel. 1312 (1988) (comments by INS Commissioner Nelson suggesting that unsuccessful asylum claims are "frivolous"). A perceptive critique of such attitudes appears in Aleinikoff, Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States, 17 U. Mich. J.L. Reform 183, 191-93 (1984).

⁸²A pithy and revealing illustration of these complications, and of the effect of the pictures inside immigration judges' heads, appears in Neier, Closing Remarks, 16 N.Y.U. Rev. L. & Soc. Change 157 (1987-88) (recounting experiences of author, vice-chairman of Americas Watch, as an expert witness in asylum cases: similar home-country consequences lead to sharply different results as between Central America and Eastern Europe; they are seen as economic phenomena in the former setting and political in the latter).

⁸³The Zucker and Zucker book, quoted earlier in this section, ultimately recognizes this feature of much refugee immigration. See Zucker & Zucker, supra note 55, at 149.

country is not necessarily inconsistent with a vigorous human rights diplomacy. Return pronounces no blessing on the home government's overall practices; it simply indicates that these particular applicants did not make the requisite showing of the risk of persecution. Similarly, granting asylum is not inconsistent with a policy of alliance and support for a democratically elected government. Many such regimes, particularly when newly elected, are only beginning a difficult process of curbing human rights abuses committed by the military, the police, or nongovernmental factions. We can support their efforts while still shielding the truly jeopardized targets of those incompletely controlled elements. The highest level of leadership needs to carry out this process of public education.

Second, and more important for the immediate object of this study, the adjudication process must be shaped with attention to the "coast of Bohemia" problem. Asylum adjudicators are given an extremely difficult job, particularly in light of the inaccessibility of the facts they must develop, the potential consequences of their judgments, and the public ambivalence about their task. No wonder they may be tempted to retreat into categorical images about safety and danger in foreign countries that will make the sorting process easier.⁸⁴ Asylum reforms must therefore make allowance for this phenomenon and afford every opportunity, through initial training, continuous supply of reliable information, and well-crafted monitoring, for a redrawing of the pictures inside the adjudicators' heads to conform more closely to the reality of political life in the home countries.

3. Limited accessibility of the facts on which to base an adjudication.

Little has been done to analyze carefully the various elements that go into the difficult determination whether an asylum seeker has a well-founded fear of persecution, but such analysis is integral to designing an effective adjudication structure. In rough fashion, the determination may be broken down into three parts: (1) classical retrospective factfinding about past events specific to the claimant -- adjudicative facts, in Professor Davis's terminology⁸⁵; (2) broader determinations about the practices of the government or other alleged persecutors in the home country (often referred to here as "country conditions") -- legislative facts; and (3) finally, an informed prediction (not truly a finding) about the degree and type of danger the particular applicant is likely to face upon return, a prediction based on a combination of the first two elements. One must remember that these are not three separate steps performed sequentially. They are closely interwoven, and it will appear that acquaintance with the second element is most helpful in performing the first task

⁸⁴See W. Lippmann, *supra* note 75, at 75.

⁸⁵See 3 K. Davis, *Administrative Law Treatise*, ch. 15 (2d ed. 1980); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 *Harv. L. Rev.* 364 (1942). This framework has been criticized, particularly because in some circumstances it may be difficult to tell whether specific matters constitute adjudicative or legislative facts. See, e.g., Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Administrative Procedure Reform*, 118 *U. Pa. L. Rev.* 485, 536-37 (1970). Nevertheless, the distinction is sufficiently crisp to be quite illuminating in this setting. Judge Friendly used Davis's framework to make sense of the asylum adjudication process, and also to set forth limits on the appropriate use of State Department information, in *Zamora v. INS*, 534 F.2d 1055 (2d Cir. 1975).

effectively. Each step presents unique challenges, unlike those faced by other administrative adjudications. Indeed, of all such adjudications, asylum may rest on uniquely elusive factual foundations.

a. Adjudicative facts. To begin with, applicants typically base their claims on events in a distant land about which the U.S. government may have no independent information -- matters such as their own past political activities, or specific abuses or threats directed at them or their families and friends. Of course it is theoretically possible for the government to develop more information on an individual case, particularly once the applicant provides details, by assigning diplomatic personnel posted to that country to investigate. But sheer expense precludes such an effort except in a handful of cases, and the State Department freely admits that it now resorts to field checking rarely. Such checking makes sense only where the information is likely to be reasonably accessible: for example, when it involves a well-known figure or relates to a large-scale event, such as a claimed political demonstration in the capital city, which can be more readily confirmed or disproved. Moreover, even if the U.S. government would decide to dedicate greater resources to investigating more such cases, the investigations might yield little reliable information. If there truly is an ongoing threat of persecution, the persons interviewed in the home country can hardly be expected to speak with candor to an unknown foreigner about such sensitive and dangerous matters.

In short, even the straightforward retrospective factfinding involved in asylum determinations is difficult to achieve. Bona fide applicants are unlikely to have left their homelands with corroborating documentation or with eyewitnesses to critical events. On the other hand, fraudulent applicants can probably count on the government's inability to produce evidence disproving their stories.⁸⁶

Asylum determinations thus often depend critically on a determination of the credibility of the applicant, for he will usually be the only available witness to the critical adjudicative facts of the case.⁸⁷ Again and again in the course of the interviews carried out for this study, participants in the process, on all sides of the issue, emphasized this fact. This feature must therefore figure prominently in any serious effort at procedural and structural reform: in the vast majority of cases, the only useful detailed evidence respecting adjudicative facts comes from the mouth of the applicant. Because that person also has substantial incentives to lie or to embroider the truth

⁸⁶At one time, administrators and the courts tended to react to this problem by a dogmatic insistence on detailed corroboration of the applicant's claims. See, e.g., *Shoae v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983); *Kashani v. INS*, 547 F.2d 376, 379-80 (7th Cir. 1977); *Nasser v. INS*, 744 F.2d 542, 544 (6th Cir. 1984). Wisely, most U.S. authorities now recognize that the individual's own account may be all that is reasonably available regarding his own situation; it is to be accepted if reasonably detailed and consistent. See, e.g., *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 107 S.Ct. 1207 (1987); *Ananeh-Firempong v. INS*, 766 F.2d 621, 628 (1st Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984); *Matter of Acosta*, Interim Dec. No. 2986, at 10 (BIA 1985); *Matter of Mogharrabi*, Interim Dec. No. 3028, at 10 (BIA 1987).

⁸⁷See generally *Watkins, Credibility Findings in Deportation Proceedings: "Bear[ing] Witness Unto the Truth,"* 2 *Geo. Imm. L.J.* 231 (1987) (the author is an immigration judge in San Diego).

(and few disincentives⁸⁸), this makes for a system vulnerable to manipulation. I was struck, however, by the frequent comments from several participants, particularly government decisionmakers and trial attorneys, indicating that the asylum system is saved from complete collapse largely by the admirable honesty of most of the applicants.

b. Legislative facts. The second critical element of factfinding requires determinations about broader patterns of governmental behavior in the home country. For example, the asylum applicant may prove to the factfinder's satisfaction, through his own detailed testimony, that he was active as a union organizer for two years before leaving for the United States and that he heard stories of arrests of organizers in nearby towns before he left. But in order to assess the risk that the individual would face on return, the adjudicator must also learn from some source about relevant legislative facts. Does the government regard union organizers as opponents, subject to suppression? If so, what forms does the suppression take? Loss of a job or limitation of schooling options for organizers' children might not amount to persecution (even though it would constitute a human rights violation), but beatings, jailings, or killings in reprisal for peaceful union activity certainly would. If there have been some reports of such violence, how widespread are the abuses? Were they based on the victim's union affiliation or on some other characteristic? In other words, is the current applicant relevantly similar to other persecution victims? And has there been a material change in the country since those events, such as a complete revamping of the police forces responsible for the earlier abuses, including reliable disciplining of the violators?

Each of these questions will be difficult to answer, both because such patterns change over time, sometimes quite quickly, and particularly because persecutors do not spell out the range of characteristics they seek in their victims. If the available information shows any substantial level of persecution of union activists, then uncertainties should be resolved in the individual's favor. The claimant should thus receive the "benefit of the doubt" commonly prescribed in works on refugee law.⁸⁹ But the benefit of the doubt is hardly a magic formula, somehow dispensing with a need to reach a judgment about country conditions.⁹⁰

⁸⁸In principle those who falsify their applications are subject to criminal prosecution under statutes punishing false statements. But the same inaccessibility of the factual information obviously makes proof of knowing falsehood quite difficult, and prosecutions are rarely, if ever, brought. The only sanction, then, is expulsion from the country following denial of the asylum claim -- the same consequence faced if asylum had never been sought.

⁸⁹See Office of the UNHCR, Handbook of Procedures and Criteria for Determining Refugee Status 47-48 (1988).

⁹⁰The UNHCR Handbook, for example, at one point states that adjudicators "are not required to pass judgment on conditions in the applicant's country of origin," although it does suggest that some such knowledge may help assess the applicant's credibility. *Id.* at 12-13. Such knowledge is useful, to be sure, in the latter setting. But the adjudicator cannot avoid passing judgment more broadly on country conditions, as an indispensable part of the ultimate decision on the merits. In the example in text, the applicant's credibility may be relevant only in deciding whether in fact he engaged in the union organizing activities he claims. The adjudicator might then proceed to recognize him as a refugee because she credits, wholly apart from anything the applicant says,

The individual applicant will not necessarily be in a position to provide insight on these wider matters, although the process should certainly allow for whatever assistance he or his counsel can provide. Most Western countries therefore support their adjudicators with well-supplied documentation centers staffed by professionals in information science. Fortunately, the last 20 years have seen a welcome proliferation of human rights reporting, both by governments⁹¹ and private human rights organizations,⁹² as well as increasingly sophisticated efforts to systematize the information gathering process and facilitate sharing.⁹³ To minimize distortions in decisions about country conditions wrought by the needs of diplomacy, many countries assure clear separation of adjudicators from their foreign ministries, so that diplomats become only one source of input.⁹⁴ Of course, such systems presuppose that adjudicators are equipped to sort through competing accounts and reach their own judgments about country conditions.

Legislative facts should not be regarded, however, as simply something the adjudicator looks up or examines after he has completed the proceedings addressed to finding the adjudicative facts, even though much of his knowledge about country conditions will doubtless come from documentary sources rather than live testimony. Knowledge about political developments and patterns of persecution contributes not only toward making the final predictive judgment about risks faced if the individual returns home. Perhaps more importantly, such knowledge can also play a useful role in developing and assessing the adjudicative facts themselves.

numerous human rights reports describing a campaign of persecution directed against union leaders.

⁹¹The most comprehensive is the annual series of human rights country reports prepared by the U.S. State Department. See, e.g., Department of State, Country Reports on Human Rights Practices for 1988, S. Print 101-3, 101st Cong., 1st Sess. (Jt. Comm. Print 1989).

⁹²In addition to comprehensive annual volumes published by Amnesty International covering most countries of the world, see, e.g., Amnesty International, Amnesty International Report 1988, many organizations publish topical reports on conditions in a single country or region as the need arises. See, e.g., Lawyers Committee for Human Rights, El Salvador: Human Rights Dismissed (1986); Roth, Repression Disguised as Law: Human Rights in Poland (Lawyers Committee for Human Rights 1987); International League for Human Rights and International Human Rights Law Group, A Report on Human Rights in the Republic of Korea 1980-1985 (1985); Amnesty International, Burma: Extrajudicial Execution and Torture of Members of Ethnic Minorities (1988).

⁹³See, e.g., Thoolen, Refugees and Information Technology, Refugees Magazine, Oct. 1988, at 34. Nongovernmental organizations have taken the lead in this sharing process with the active cooperation of the UNHCR, which has recently become the focal point for an international network. See Int'l Refugee Documentation Network, Circular No. 3 (March 1989) (reporting, inter alia, on recent efforts to strengthen the network, including training courses for documentalists and an internship program of UNHCR's Centre for Documentation on Refugees (CDR) in Geneva).

⁹⁴See Aleinikoff, *supra* note 81, at 234.

This second use of knowledge about country conditions is often overlooked, but it remains crucial. An adjudicator thus equipped can better pick out what parts of the applicant's story are most relevant, and can ask pinpointed questions that will flesh out the testimony in the most helpful fashion.⁹⁵ Such expert questioning can also help expose inconsistencies and falsehoods more effectively. Since there are so few other checks on the asylum seeker's story (given that he is likely to be the only available witness to the key events), the system badly needs to make use of whatever other tools might be available for such assessment. But equipping adjudicators with such expertise is not just a device for spotting weaknesses or magnifying contradictions. Properly applied, it can also assist confused or inarticulate applicants present fully the particularized information that will cast positive light on their claim. All this argues for making sure, to the maximum extent possible, that the adjudicators are themselves highly knowledgeable about country conditions.

c. Predictive judgment. Finally, the information on the adjudicative and legislative facts must somehow be put together to reach a judgment on the likely threat to this particular individual. For most of the countries from which current applicants come, it will be clear that persecution does occur at the hands of the government or societal elements beyond fully effective control of the government. But what is the threat to this particular individual upon return? One must venture into the realm of prediction to decide. Cumulative expertise would also be of assistance here; such a judgment is not something that emerges routinely from the evidence placed on record in the case before a passive adjudicator.

But it is also clear that room for controversy will almost always remain. This is not a scientific prediction based on regular laws or formulas; it is an assessment based, as much as possible, on conscientious attention to country condition information and individual facts. As a result, the measure of an adjudication system's success cannot be the attainment of nearly universal acceptance of the rightness of the results, particularly negative results leading to deportation from the country. Success consists instead in achieving sufficient acceptance of the process, including respect for the judgment and fairness of the decisionmakers, so that final grants and denials are regarded as authoritative.

4. Difficulties of cross-cultural communication.

One final complication deserves emphasis. As is apparent, much of the adjudication process will turn on assessment of the credibility of the applicant. Ordinarily a decisionmaker judges credibility by probing the internal consistency of the testimony about past events, observing the demeanor of the witness, and comparing the testimony to that person's earlier accounts or to other evidence regarding the events described, if available. But because asylum applicants usually come from cultures sharply different from the United States, these ordinary guideposts to decision may not work well -- or at least they must be applied with considerable allowance for cross-cultural

⁹⁵See Martin, Comparative Policies on Political Asylum: Of Facts and Law, 9 In Defense of the Alien 105, 109-11 (1987); Martin, The End of De Facto Asylum: Toward a Humane and Realistic Response to Refugee Challenges, 18 Cal.W. Int'l L.J. 161, 167-69 (1987-88).

complications.⁹⁶ These complications have been ably catalogued and illustrated in a helpful article by Professor Kälin that should be read by all asylum adjudicators.⁹⁷ Persons interviewed for this study, particularly UNHCR personnel and attorneys for asylum applicants, frequently stressed that adjudicators must have the capacity for suspending immediate application of tests and expectations derived solely from the culture of the haven state.

Many asylum seekers come from societies where the population is inherently distrustful or fearful, perhaps for excellent reasons, of government officials (and often of lawyers). Nothing in their past experience prompts them to open up readily to strangers, particularly to speak of highly sensitive events. Thus it is not surprising that in their first hours or even weeks or months in the United States, they might fail to appreciate the new climate here that allows them to speak more freely and assertively. Many private attorneys interviewed for this study reported their own difficulties in winning trust and thus gaining candid accounts from their own clients. One experienced asylum attorney provided a graphic example. He reported that after spending nearly thirty hours with a reticent client, a Haitian asylum seeker, he believed he was prepared for a hearing. But the day before the hearing, some new information supplied by the client revealed that there was an entire new dimension to the story that he had earlier been afraid to reveal. Many more hours of patient interviewing were required to piece together the newly revealed true story, and concomitantly to bolster the client's trust in the attorney that would be needed for effective direct examination.

Beyond this, psychological studies indicate that some of the strongest candidates for asylum may be the ones with the greatest difficulties presenting their cases.⁹⁸ Those who have been tortured or have witnessed the brutal slaying of friends or loved ones may have great difficulty retelling the key elements of their accounts. At times, post-traumatic stress disorder may even block consistent memory of past events.⁹⁹

American decisionmakers unaware of these complications are likely to seize upon inconsistency and reticence (particularly about matters that most Americans would regard as of the

⁹⁶See generally Pfeiffer, *Credibility Findings in INS Asylum Adjudications: A Realistic Assessment*, 23 *Tex. Int'l L.J.* 139 (1988).

⁹⁷Kälin, *Troubled Communications: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 *Int'l Migration Rev.* 230 (1986).

⁹⁸A UNHCR officer in Canada suggested that the most important quality to be sought in an adjudicator is empathy: "Can this person understand what real refugees go through?" He emphasized, however, that people with this quality "can still be firm in saying no" when that is warranted; failure to reject the unqualified, he stressed, also "screws up the system."

⁹⁹See, e.g., Pfeiffer, *supra* note 96, at 148-50; Allodi & Randall, et al., *Physical and Psychiatric Effects of Torture: Two Medical Studies*, in *The Breaking of Bodies and Minds: Torture, Psychiatric Abuse, and the Health Professions* 56, 65-72 (E. Stover & E. Nightingale, eds., 1985); Rovner, *The Torture of the Refugee: Why Judges Don't Believe*, *Wash. Post*, Sept. 2, 1986, Health Section, at 10.

greatest importance) as evidence of dissembling -- for reasons that usually hold good within our own cultural context. But these actions are not such ready signals of dissembling when the individuals involved come from sharply different cultural backgrounds. A reformed system must equip its decisionmakers to avoid snap judgments and make adequate allowance for cross-cultural difficulties. But it must also equip them to sort through such phenomena and still be able to spot false tales -- because sometimes inconsistency and reticence really will result from falsehood and not from more innocent explanations. The line to be walked is a fine one.

C. The Imperative of Speedy Final Decisions

The foregoing problems suggest genuine difficulties in applying the legal standards with precision and fidelity. And as long as these problems impair accurate decisionmaking, the system will have its own built-in magnet effect. When the process cannot reliably sort the qualified from the unqualified, asylum applicants drawn to the system will include not only those with a reasonable chance of qualifying, but also others whose claims are marginal or nonexistent. They will come hoping to take advantage of these very weaknesses to gain an undeserved benefit, namely, the award of asylum status and possibly eventual permanent residence.

Later sections of this study will propose measures to make the maximum use of the available information sources in service of the goal of accuracy. One might think that such an achievement would suffice to accomplish the fundamental objectives of our asylum program and also curb the magnet effect -- by providing asylum to the persecuted and saying "no" to those who seek to use asylum mainly as a loophole. And if accuracy were all we had to accomplish, we could embrace elaborate schemes that promise to serve that end well, even if they consume a fairly long time to reach final decisions and require a complicated administrative and judicial scheme with multiple layers as a check against error.

1. The scope of the magnet effect

Unfortunately, the magnet problem is more complex in ways that absolutely require preserving the capacity for speedy final and enforceable determinations. The magnet effect is not solely the product of perceived chances to gain full asylum despite a weak case. It also results importantly from the benefits applicants can expect to enjoy before a final ruling is issued in the case -- a period that now can stretch for months, and usually lasts years.

Of course, to some extent both accuracy and speed are goals of any administrative adjudication system. But the need for expeditious finality is more intense here. In other adjudication processes, such as disability or welfare or licensing, the applicant ordinarily does not enjoy the benefit sought until there has been a determination on the merits that he fully qualifies. Nothing in the application and waiting process itself tempts the unqualified to clog the system. In political asylum, in contrast, the simple act of applying for asylum has usually brought important benefits that magnify the attractions, whatever the ultimate determination on the merits. With a few recent exceptions, the very act of applying for asylum has resulted, after a brief delay, in the issuance of preliminary papers that both authorize employment and permit free movement within

U.S. territory. These two features comprise the bulk of the main benefits expected from asylum itself, particularly for those who know they have at best weak claims.¹⁰⁰

The longer the period of enjoyment that comes simply from the act of applying for asylum, obviously the greater the attraction in filing a marginal claim. And as word gets back to the home countries of those who initially benefit from such arrangements during the asylum-application stage, more and more people with marginal or nonexistent claims are likely to come, hoping to achieve at least the benefits of years of productive working life in a wealthy country whatever the ultimate outcome.¹⁰¹ A successful asylum system must thus place a high priority on speed in adjudications (including all stages of review), in order to avoid these incentives for marginal asylum seekers.

2. The alternative of deterrent measures

Of course, speedier final decisions are not the only way to eliminate the artificial attractions of the asylum-seeker stage. One could simply end instead the provision of free movement and work authorization during this period. Many Western countries have been moving in this direction, imposing a variety of restrictions and deterrents that have provoked the concern of UNHCR and harsh condemnation from the nongovernmental organizations (NGOs) that support asylum seekers and advocate refugee causes. These restrictive practices include denials of work authorization, enforced housing in austere communal facilities, other limits on freedom of movement, and sometimes full-scale detention in jail-like facilities.¹⁰²

Considerable misunderstanding has arisen regarding the use of deterrent measures and restrictive practices. NGOs sometimes act as though any deterrent steps are illegitimate -- sheer vindictiveness visited upon innocents, many of whom may prove to be bona fide refugees. But

¹⁰⁰To be sure, some important features are left out. The uncertainty about the duration of such benefits is of course a disadvantage. But it is a disadvantage that is doubtless felt more acutely by the true refugee for whom there are genuinely grave risks if he is returned. Those who know they face relatively little risk at home harbor fewer concerns about what will transpire once the asylum-seeker stage ends. In the meantime, they have relatively full access to the job market and the other features of life in a stable, wealthy, and free society.

¹⁰¹Canada, for example, experienced an exponential growth in asylum claims filed by nationals of Trinidad and Tobago throughout 1987-88 (reaching 2739 such applications in 1988). Once its new system was implemented on January 1, 1989, promising swift rejection of manifestly unfounded claims, applications from Trinidad dropped to 15 in the first quarter of the year. 63 Documentation-Réfugiés 1, 6 (15 Jan.-3 Feb. 1989); Refugee Determination in Canada: First Quarter Review 9 (mimeo, 25 April 1989).

¹⁰²See generally Martin, *supra* note 1. The United States has also employed Coast Guard interdiction of vessels coming from Haiti. Although the interdiction process is supposed to include screening to permit persons with valid refugee claims to come to the United States, interdiction has evoked severe criticism. See Aleinikoff & Martin, *supra* note 6, at 724-26; Helton, Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise, 17 U.Mich.J.L.Ref. 243, 255-56 (1984).

some perspective is needed. Designing policy to discourage the unqualified from even applying for a benefit is a perfectly legitimate policy objective, particularly when existing statistics demonstrate that a high percentage of applications lack merit.¹⁰³ To the extent that current measures are meant to encourage self-selection, so that only those with strong cases bother to leave their home countries and clog the application system, they address an unimpeachable administrative aim. Seen in their best light, these restrictive practices are meant to send a "general deterrence" message to persons still in the home country.

The problem is that the deterrent measures currently practiced can also be seen (or abusively diverted) to serve other aims. That is, they can be seen as penalties visited on persons for the mere act of filing an asylum claim, or as measures meant to coerce even bona fide applicants with strong cases to withdraw their asylum applications and return home. And when judges come to see them as coercion aimed at current applicants, rather than deterrents aimed at those still in the home country but not substantially threatened, who might be thinking about a trip to the States, courts are likely to declare the deterrents invalid for conflicting with the statutory right to apply for asylum.¹⁰⁴

The basic problem is this. These deterrent measures and restrictive practices are indiscriminate in their impact. By their very nature they fall equally, during the asylum applicant stage, on deserving refugees and the most flagrant abusers. A case could even be made that they fall with more debilitating impact on the true refugee, because lengthy uncertainty over their ultimate fate, coupled with enforced idleness and perhaps prison-like detention, will carry the most severe impact psychologically on those who know with substantial assurance that persecution awaits them at home. (It may be even more devastating for those who have already been tortured or severely mistreated.) For these reasons, such deterrents plainly should be avoided if workable alternatives are available.¹⁰⁵ At best these measures are crude tools, meant to send a message to marginal applicants discouraging them from leaving the home country -- but capable of implementation only by imposing harshness on true refugees as well, those who will ultimately be found to merit asylum here.

¹⁰³Naturally, a major part of the NGO criticism stems from a belief that existing grant rates are woefully inadequate. But unless the grant rate should approach 100 percent, encouraging self-selection remains a legitimate aim.

¹⁰⁴See, e.g., *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988); *Nunez v. Boldin*, 537 F. Supp. 578 (S.D. Tex.), appeal dismissed, 692 F.2d 755 (5th Cir. 1982). Other courts, however, have been more willing to sustain detention schemes, including their use for explicitly deterrent purposes. See, e.g., *Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987); *Singh v. Nelson*, 623 F.Supp. 545, 556-61 (S.D.N.Y. 1985). See generally Schmidt, *Detention of Aliens*, 24 San Diego L. Rev. 305, 329-33 (1987); Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. Rev. L. & Soc. Change 353 (1986).

¹⁰⁵I have elaborated on these points in Martin, *supra* note 1.

3. Toward a better-targeted deterrent

We need instead a discriminate deterrent, more precisely focused on the marginal cases, and one that takes away the artificial attractions of the asylum applicant stage of the proceedings. Such a deterrent is available, given certain changes in the adjudication system: the prompt reappearance in the home village of applicants whose cases were at best marginal. Such an event makes apparent to others similarly situated that such a trip is not worthwhile; they will not be able to work long enough even to repay the "travel agent's" fee.¹⁰⁶ Speedy finality is the essential precondition to achieving this deterrent. The message is lost if two or three years pass between departure and return, particularly if the applicant has been working while the application was pending.

How much speed is necessary? We lack empirical data to calculate the outside limits with any kind of accuracy (and anyway the calculations would vary by country and by travel agent). But if all but the most complicated cases could reach finality within six to nine months, including all the stages of consideration and review, little in the application process would any longer add artificially to the attractions of the asylum system.

NGOs that strongly oppose indiscriminate deterrent practices -- for good and worthy reasons -- should remember that the best way to help avoid them, or reduce their harmful impact, is to cooperate with the government in fashioning a speedy and accurate system that can accomplish discriminate deterrence. This point cannot be overemphasized. In the absence of the capacity to make final decisions quickly, officials have no way to respond to legitimate public concerns over massive influxes, unless they turn to the deterrent measures and restrictive devices that NGOs and UNHCR condemn. To defeat prudent streamlining of the adjudication process is to invite reliance on cruder measures of deterrence. Mere nominal acceptance of the need for expeditious proceedings is not enough. Refugee advocates will have to join in making difficult decisions about the trimming of certain procedures (which will undeniably carry some costs to the goal of accuracy) in order to achieve truly speedy determinations.

¹⁰⁶Much recent social science literature criticizes simplistic "push-pull" models of migration, and emphasizes the role of social networks in encouraging and sustaining migration. That is, if the first emigrants from a particular community succeed in establishing themselves in a new country, their experience, communicated homeward (often along with significant remittances), encourages others from the same locale to make the trip. Moreover, their presence in the target city or town within the new country helps those others during the difficult early months. See, e.g., Massey, *Understanding Mexican Migration to the United States*, 92 *Am. J. Sociology* 1372 (1987); Portes & Borocz, *Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation*, 23 *Int'l Migration Rev.* (forthcoming 1989); Boyd, *Family and Personal Networks: Bringing Women In*, *id.*

Although such studies generally do not focus on asylum-seeker networks, there is no reason to believe that this phenomenon would fail to operate in that context. Much anecdotal evidence about the role of asylum "travel agents" and similar entrepreneurs fits readily with the findings in social science studies based on "guest workers" and similar economic migration. Swift deportation of unsuccessful asylum seekers would seek to break the chain effect of such networks and would be designed to send a very different message back to the source communities.

A second point about restrictive measures and deterrents may be more immediately relevant. From the government's standpoint, most of these other restrictions do not eliminate the priority for speed; they simply create other reasons for embracing it as a vital goal. For reasons elaborated in Part VI.F., the U.S. government probably cannot simply deny work authorizations (now seen as a major contributor to an artificial magnet effect) to asylum applicants without establishing some other scheme to provide for the subsistence needs of the idled asylum seekers until they are either recognized as refugees or removed from the country. Whether such provision is made in communal facilities or in actual detention centers, it will still require a substantial commitment of public resources. Every day of added delay therefore compounds the expense imposed on the public treasury.¹⁰⁷

There is a final reason for embracing speedy procedures, derived from the perspective of the legitimate and meritorious claimant (for whose benefit, after all, asylum protections were initially adopted). Initial decisions in many district offices now require a matter of six to eight months, largely because of backlogs created by the overload of asylum applications. Bona fide applicants with qualifying cases should not have to wait so long to have the burden of uncertainty lifted from their shoulders. As indicated, their primary need is to find the calm and security that will enable them to rebuild some semblance of a normal life. They are much more likely to make a successful transition (including recovering from past episodes of torture or other traumatic mistreatment) if security comes quickly after arrival.

Speedy finality is, in short, imperative. It must not be achieved, of course, at the complete expense of either accuracy in outcomes or fairness in the process. But some tradeoffs will be necessary. Speed here is not simply the kind of virtue it may be in some other administrative settings -- desirable but optional, a pleasing accomplishment if achievable, but not gravely damaging if other aims preclude its attainment. Speedy denials of unworthy asylum applications, followed by prompt deportation, are indispensable if we are to implement the only really humane deterrent available to the system. In time of large-scale influx, at least, the inability to deport the unworthy in fairly short order will force governmental resort to other costly and troublesome deterrents which indiscriminately burden genuine refugees.

¹⁰⁷In fact, truly expeditious and accurate procedures might further validate the use of detention or enforced housing arrangements and denial of work authorization during the asylum-seeker stage. The main objection to these measures has been their baleful impact on bona fide claimants. But if most bona fide claimants can be recognized in the first-round proceeding and thus need wait only a short period (say two to three months) in such a setting, much of the unintended coercive impact disappears. The Select Commission on Immigration and Refugee Policy in fact recommended just such arrangements, focusing on accommodation in "federal asylum processing centers," in its recommendations for coping with "asylum emergencies." But these recommendations appear to have presupposed speedy determinations. Select Commission, *supra* note 63, at 165-68.

III. The Experiences of Other Western Countries

All Western industrialized countries employ the same fundamental legal standards, derived from the 1951 Convention, in their asylum adjudication systems. Nearly all have seen marked increases in applications through the 1980s, sometimes with stunning speed. Several European countries, as well as Canada, face a rate of intake four to six times as high as that of the United States, on a per capita basis. Because all these countries operate within the same basic policy constraints described in the preceding section, none have found asylum adjudication an easy task. None have succeeded in implementing systems that are so reliable as to still criticism of the quality of decisionmaking, and none have lengthy track records of expeditious final and enforceable decisions in a high percentage of cases. As a result, asylum policy has become a bitterly contentious political issue.¹⁰⁸ Nevertheless, because of the similarities in legal standards and policy constraints, the efforts of these other countries to master the challenges of asylum adjudication may prove instructive in considering American reforms. Four systems are examined here.¹⁰⁹

A. The Federal Republic of Germany

In West Germany the right of asylum is enshrined in the 1949 constitution, not merely as an aspirational goal but as a judicially enforceable right.¹¹⁰ The standards as they have developed, however, conform in large measure to the 1951 Convention, to which the Federal Republic (FRG) adhered in 1952. For at least two decades thereafter, asylum application rates were modest, averaging about 5000 per year, with most of the applicants coming from Eastern Europe.¹¹¹ In the

¹⁰⁸See generally, e.g., Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights*, 29 Va. J. Int'l L. 35 (1988).

¹⁰⁹The information in this section is based on available documentation as well as an extensive series of interviews with government officials, practicing attorneys, staffers of refugee support organizations, UNHCR officers, academics, and asylum seekers themselves. In the course of these visits, I was able to attend asylum proceedings, either initial round or appellate or both, in France, Germany and Switzerland. The European visits and interviews were carried out in 1984 and 1985, supplemented by further interviews in the summer of 1988. Canadian interviews were held in Ottawa in December 1988, supplemented by further conversations in May 1989.

¹¹⁰Art. 16(2), Grundgesetz (Basic Law): "Persons persecuted on political grounds shall enjoy the right to asylum." The Basic Law was adopted in 1949, and the right of asylum was considered "a sacred legacy which grew from the evils of the Nazi empire." Hailbronner, *Refugees and Asylum: The West German Case*, 1985 Wash. Q. 183, 193 (1985).

¹¹¹Because the West German polity is built on a fundamental assumption that the division of Germany is not permanent, persons who manage to make their way into the Federal Republic from the German Democratic Republic -- East Germany -- are counted as citizens. Although outsiders may call them "refugees," within the Federal Republic they have never been treated as such, and their permission to stay does not derive from the political asylum provisions of the law and

mid-1970s (coinciding with the time when Germany's extensive guest-worker program was ended) the numbers began to rise, reaching the level of 107,818 in 1980. The vast majority of these newer asylum seekers came from outside Eastern Europe, including especially Turkey, Pakistan, India, and Lebanon, later joined by substantial contingents from Sri Lanka, Ghana, and other developing countries.

In absolute numbers of registered asylum seekers, Germany's intake has far exceeded that of any other European country throughout the 1980s. Part of the explanation derives from the unique status of Berlin. To manifest disapproval of the city's division, Western governments have never imposed immigration controls on those travelling westbound across the city's internal boundary. East bloc airlines (and apparently several rings of organizers) exploited this fact to make money bringing asylum seekers to Schoenefeld airport in East Berlin, where they would receive a 24-hour transit visa that afforded ample time to take the subway to West Berlin. Negotiations with the German Democratic Republic (GDR), reportedly facilitated by the FRG's extension of millions of dollars in additional trade credits, finally induced the GDR to curtail the practice.¹¹²

The increasing numbers of applicants over the last decade have compounded adjudication delays, raised tensions, and made political asylum a highly contentious political issue.¹¹³ They also greatly increased the costs incurred by the federal government and the eleven Länder, the constituent states of the Federal Republic, which bear primary responsibility for actual implementation of federal asylum and aliens policy. From 1978 on, in response, the German Parliament adopted a series of statutes meant to streamline the administrative and judicial process.¹¹⁴ Those statutes also curtailed the benefits that asylum seekers might enjoy while their

constitution. Similarly, West Germany extends an unlimited offer for the resettlement in its territory of persons of German ethnic background, known as Aussiedler, even if their families have lived for generations in other countries. There are special programs for their reception and acculturation, but they too are not counted as refugees, nor do they have to prove a risk of persecution in order to claim these rights. The numbers of arriving Aussiedler have soared in recent years, topping 200,000 in 1988. The attendant burdens have caused some to question the open-door policy for ethnic Germans or to challenge the laxness of the standards used to judge those who claim to be in this category. See Breslau, *Old Volk's Home*, *The New Republic*, May 1, 1989, at 16; *West Germany: Fear of Foreigners*, *The Economist*, Feb. 18, 1989; McCartney, *Thousands from East Bloc Drawn by Westward Hopes*, *Wash. Post*, Mar. 31, 1989, at A1, A30. (One interviewee told me, only half-facetiously, that Poles or Russians claiming this status would be counted as "German" on the basis that their grandfathers once owned a German Shepherd.)

¹¹²See Fullerton, *supra* note 108, at 68-69.

¹¹³See generally O'Brien, *Continuity and Change in Germany's Treatment of Non-Germans*, 22/3 *Int'l Migration Rev.* 109 (1987).

¹¹⁴The most important is the Asylum Procedure Law of 1982, *Gesetz über das Asylverfahren vom 16 Juli 1982 (Asylverfahrensgesetz - AsylVfG)*, 1982 *Bundesgesetzblatt [BGBl] I 946*, which was further modified by *Gesetz vom 11 Juli 1984, 1984 BGBl I 874*, and *Gesetz zur Änderung asylverfahrensrechtlicher, arbeitserlaubnisrechtlicher und ausländerrechtlicher Vorschriften vom*

applications were pending. Two such restrictive measures predominated. First, the former practice of granting work authorization was ended, but the exact extent of the limitations has varied over the years. At present, East bloc applicants may not work for one year following application, while other applicants must wait five years.¹¹⁵ Of course, if they are granted asylum during that period, they then receive full work authorization and a variety of other benefits.

Second, all must live during the adjudication process in communal housing facilities to which they are assigned in accordance with an allocation scheme meant to balance out the burdens among the Länder and further among their constituent districts. These facilities vary considerably in quality. Refugee advocates denounce the waste that five years of enforced idleness represents, and accounts are plentiful of serious psychological impact on asylum seekers awaiting decisions. Moreover, the cost to the government of caring and feeding for such large numbers is high.

6. Januar 1987, 1987 BGBl I 89. The full Asylum Procedure Law, as amended, is reprinted in Baumüller, et al., *Gemeinschaftskommentar zum Asylverfahrensgesetz I-1* (looseleaf, 1988 revision). Earlier legislation in 1978 and 1980 had streamlined the former procedures, authorizing initial administrative decisions by a single deciding officer rather than a panel of three, eliminating an administrative appeal, and decentralizing appeals to administrative courts. Highly useful accounts in English of German asylum procedure, with more detailed statutory citations, appear in Fullerton, *supra* note 108, at 64-74; and Aleinikoff, *supra* note 81. See also Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19 *Stan. J. Int'l L.* 235 (1983); European Consultation on Refugees and Exiles, *Asylum in Europe: A Handbook for Agencies Assisting Refugees* 152-75 (3d ed. 1983). The range of material in German is overwhelming, but I have found especially useful Baumüller, *supra*; G. Köfner & P. Nicolaus, *Grundlagen des Asylrechts in der Bundesrepublik Deutschland* (1986); K. Hailbronner, *Ausländerrecht: Ein Handbuch* 751-1042 (2d ed. 1989).

¹¹⁵This differentiation reflects an underlying policy distinction. In 1966, the Interior Ministers of the Länder, joined by the Federal Interior Minister, agreed not to return nationals of the Warsaw Pact countries, even if they were not granted asylum. Such persons (as well as a few other categories or individuals who will not be deported) are given "toleration" permits (Duldung) that afford permission to stay and to work, although employment rights are more limited than those enjoyed by German citizens and recognized refugees. (The approach is similar in many respects to "extended voluntary departure" sometimes granted in the United States.)

This policy has come under serious question in the 1980s, and some curtailments have been adopted. For example, since 1985 East bloc asylum seekers have been able to take advantage of the 1966 policy only after formally applying for asylum and therefore being assigned, in most cases, to a communal housing facility for the year during which they lack work authorization. This is thought to be a modest deterrent or a "proof of earnestness," even though ultimate receipt of permission to stay is virtually automatic. Interview with Dr. Eckart Schiffer, Ministerialdirektor, Federal Ministry of the Interior, Bonn, July 9, 1985. Also, in 1987, the Interior Ministers agreed to take Poland and Hungary off the list of countries whose nationals would benefit from the 1966 policy. See *Ausländerrechtliche Behandlung von Ostblockstaatsangehörigen*, 34/1987 *Staatsanzeiger für das Land Hessen* 1784. But by and large the aliens authorities in the Länder, who must actually carry out deportations, have failed or refused to remove Poles and Hungarians. Neither of these changes therefore has really displaced the blanket availability of safe haven, at least for East bloc asylum seekers who will wait a year for work permission and clarification of status.

Nevertheless, these housing facilities are not closed detention camps. The residents may come and go, although the identity documents they are given usually allow travel only within the district in which the housing is located (roughly equivalent to a U.S. county). Moreover, some local administrators seek out ways to minimize the negative impact, such as permitting the residents to do their own cooking in their own living units, and endeavoring to keep close family members together. Asylum seekers are also given a small amount of pocket money each month in addition to the basic provision of food and clothing.

Each time Germany has amended its law to speed the procedure or add to its deterrent or restrictive measures, its action has had an impact in reducing the numbers of applicants, but the effect seems to wear off. From the 1980 peak, applications dipped below 20,000 in 1983 (following adoption of a major new Asylum Procedure Law in 1982), before climbing again to 99,650 in 1986. The amendments adopted in 1986 were followed by a reduction in applications below 58,000 for 1987, but applications climbed again in 1988, reaching 103,076.¹¹⁶

1. Adjudication procedures

The central administrative body for considering asylum claims is the Bundesamt für die Anerkennung ausländischer Flüchtlinge (Federal Office for the Recognition of Foreign Refugees). It is headquartered in Zirndorf, near Nuremberg, but has satellite offices in several other cities. It has a staff of approximately 630, including 180 "deciding officers."¹¹⁷ Zirndorf also maintains its own extensive documentation center, which includes information from the Foreign Ministry, but also from a wide spectrum of other sources, including human rights organizations. The current annual budget of the Bundesamt is approximately \$32 million.¹¹⁸

Each deciding officer is responsible for a particular country or set of countries, and is administratively part of a group of officers with similar geographic responsibilities. Although the groups on occasion discuss issues arising in their adjudications (for example, in trying to assess the impact of important political developments in the country of origin) and the group leaders may advise on such matters, each officer is fully independent in deciding a case. This same geographic

¹¹⁶See von Pollern, Die Entwicklung der Asylbewerberzahlen im Jahre 1988, 1989 ZAR 23 (statistics for 1983 through 1988); Aleinikoff, supra note 81, at 197 (figures from 1973 through 1982). These figures indicate numbers of persons, not numbers of applications; an application may include more than one person. (The American statistics in Tables I-V take the opposite approach, indicating the number of applications.)

¹¹⁷Letter from Bundesamt Deputy Director Weickhardt, 31 Jan. 1989.

¹¹⁸Id. Moreover, as will become apparent, the German administrative courts fulfill several functions that would be performed by administrative agencies in this country. A full picture of the resources Germany devotes to asylum adjudication should therefore include the costs incurred by the asylum panels of the first-instance administrative courts. Beyond this, the Länder and local communities spent an additional \$1.3 billion on asylum applicants, mostly for subsistence support, in 1988. Asylbewerber im Jahr 1988: Erklärung des Bundesministers des Innern, Bulletin, 14 Jan. 1989, at 26, 27.

specialization is also replicated in the satellite offices. For example, one office may have only specialists on Iran and Turkey, owing to the high concentration of applicants from those nationalities in its city. An applicant in that city who comes from another country, therefore, would have to travel to Zirndorf (or perhaps another satellite office, appropriately staffed) for her interview.

Applicants initially contact the local Aliens Authority to claim asylum. Except in certain narrow circumstances permitting the claim to be disregarded ("unbeachtlich"), the local officials must refer the claim to the Bundesamt, in addition to arranging for assignment to a housing facility -- locally or elsewhere, depending on allocation quotas. The Bundesamt will schedule an interview. In earlier years all such interviews were performed by the deciding officers, but the pressure of numbers, coupled with a desire to assure that deciding officers are all university graduates, preferably with legal training, brought about changes. Other officials, without such qualifications (but still with training and specialization by country or region), now often perform the interview and compile a record for later decision.

The interviews are recorded through a "protocol" procedure, widely used in Europe -- and perhaps worthy of some consideration in this country to overcome delays caused by the need for full transcription of asylum proceedings. The interviewer pursues questioning on a particular factual issue -- for example, the applicant's first encounter with the police in his home country. After satisfactorily sorting out the facts regarding this matter as the applicant presents them, the interviewer then pauses to dictate a brief summary, usually just a few sentences, into a recorder. He then proceeds to the next factual matter -- say, the next run-in with police at home -- and pauses again after a few minutes to dictate the next part of the protocol. The protocol is meant to be a brief descriptive summary; it does not contain the interviewer's evaluation (even when the interview is conducted by the deciding officer). At the end, the dictated tape can be transcribed quickly to produce, in the ordinary case, a five-to-ten page document. Because the applicants are present while the dictation proceeds, they have a chance to correct mistakes as they occur. NGOs pointed out, however, that the applicants' reticence in the presence of officials may prevent them from objecting even when they believe mistakes were made. Applicants are also usually permitted to review the typed protocol and offer corrections.

A majority of cases result in a decision by the Bundesamt officer that the claim is "unfounded," accompanied by a statement of reasons. The applicant then has a right to appeal to the first-instance administrative court from the denial of asylum.¹¹⁹ But if the Bundesamt rejects the asylum application as "manifestly unfounded" (offensichtlich unbegrundet), the applicant is notified that he is to leave Germany immediately. Such a ruling is appealable to the administrative court in a special summary procedure which has no suspensive effect (i.e., there is no automatic stay). Therefore, the applicant must file a separate court action requesting a stay, and unless he quickly persuades the court of error in the decision, he is likely to be deported swiftly. If he

¹¹⁹Unsuccessful asylum seekers not allowed to remain on humanitarian grounds will be served with an order to leave the country, issued by the local aliens authorities, along with the Bundesamt's order denying asylum. Both must then be challenged together in a unified procedure in the administrative court, thus assuring that the alien will be subject to a final, enforceable order if the appeal fails. See Fullerton, *supra* note 108, at 66-67 n. 160.

succeeds in the summary procedure, however, he can then receive full consideration in the first-instance administrative court, as described below.

A grant of asylum by the Bundesamt also is not necessarily final. A Federal Commissioner for Asylum Affairs (Bundesbeauftragter für Asylangelegenheiten), based in Zirndorf, reviews all decisions and is entitled to appeal to the administrative courts. Theoretically he may appeal from positive or negative rulings on the asylum application, but in practice his appeals are used overwhelmingly against the former. Some persons interviewed explained his role as necessary, however, to help assure consistency in a system whose deciding officers are independent and which, since 1978, lacks any appellate mechanism within the administrative agency.¹²⁰

German courts are far more highly specialized than American courts. Administrative courts are just one of five separate court systems, and they do not handle all business Americans would consider administrative; there are separate social security and labor courts. Moreover, particular business within a court's jurisdiction is assigned to designated panels, according to a highly detailed allocation decided in advance and adjusted annually as caseload changes require. One panel of a particular Land's administrative court might thus consider exclusively asylum claims from Sri Lanka, for example, and another those from West Africa. Perhaps two panels might be assigned to Turkey (because of the volume of claims), while still others would consider only zoning appeals and other non-asylum matters.

This specialization permits the judges of the panel to develop considerable expertise regarding the countries of origin for which they are responsible. This is particularly useful, because German law asks more of judges in this setting than does American law. That is, relatively deferential judicial review based on an administrative record, as Americans know it, is not permissible, owing to the constitutional stature of the right asserted. The court must instead make its own de novo factual inquiry and its own full substantive determination on the merits of the asylum claim. In consequence, administrative courts have their own comprehensive documentation centers (the one in Wiesbaden is well-known for its thoroughness), and some individual judges even develop their own card files referring comprehensively to information, including experts' studies, court decisions, human rights reports, and the like, on the countries whose nationals they will hear.

¹²⁰In 1985, the Bundesamt was regularly granting asylum to Sri Lankans, following what it regarded as controlling judicial authority. The Bundesbeauftragter appealed all such cases (several hundred) because he expected that holding to be overturned by a higher court. This had a severe effect on the applicants, who by then had been administratively identified as genuine refugees, because at the time such an appeal kept the alien subject to the restrictions imposed on all asylum seekers awaiting a final ruling (prohibition on employment, requirement to live in the communal housing facilities). The 1987 amendments to the Asylverfahrensgesetz alleviated this situation somewhat, by providing that such individuals were to enjoy the benefits of recognized asylees pending conclusion of any appeal by the Bundesbeauftragter -- one of a few modest ameliorative changes made by the 1987 legislation. See Fullerton, *supra* note 108, at 70 n. 178; ZAR Aktuell, Jan. 2, 1987, at 1.

The courts also make frequent use of court-appointed experts, usually from a university or research institute, to provide authoritative information on particular developments in countries of origin.¹²¹

The first-instance administrative courts sit in panels of five, consisting of three professional judges and two lay judges temporarily serving on the court. The president of the court typically takes the lead in questioning the applicant, recording the proceedings by means of a dictated "protocol" similar to the procedure followed at the Bundesamt. Other judges may also engage in questioning. Applicants' attorneys thus play a subsidiary role in developing the record, although they may pose further questions at the end and submit additional evidence on behalf of their clients. (A highly professional documentation center in Bonn, Zentrale Dokumentationsstelle der Freien Wohlfahrtspflege für Flüchtlinge, or ZDWF, partially funded by the German government, maintains an impressive collection of country-condition information, treatises, and German case law, primarily to provide informational support to attorneys and refugee organizations.)

Decisions are issued in writing, with a full statement of reasons. If the court rules that the application is "manifestly unfounded," all further appeals are blocked. Other decisions, either positive or negative, may be appealed to the administrative appellate court, but only with leave granted by that court or the first-instance court on grounds specified in the statute.¹²² Further appeals are possible to the Federal Administrative Court in Berlin, and if important constitutional issues are presented, those may be considered by the Federal Constitutional Court in Karlsruhe. Only a tiny proportion of cases are presented to the latter two courts, particularly to the Constitutional Court. Strict court rules, policed by fines imposed on attorneys, help assure that insubstantial cases go no further. Even so, the full procedure, administrative and judicial, regularly requires three to five years to reach finality.

2. Evaluation

This delay remains the Achilles heel of the German system. It imposes a substantial psychological toll on applicants, who are occupationless throughout the duration of the procedure, causes enormous expenditures for their care and maintenance, and negates much of any deterrent effect the other restrictive measures might well have. Germany also finds it quite difficult to return people at the end of such a lengthy procedure. Perhaps 70 percent of persons denied asylum are ultimately permitted to stay, usually on a Duldung or toleration permit.¹²³ These procedural

¹²¹For a general discussion of the distinctive features of German civil procedure, many of which obtain in administrative courts as well, see Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985).

¹²²AsylVfG, *supra* note 114, § 32. In essence, the case must raise "fundamental" questions, assert that the decision conflicts with the decisions of a higher court, or claim a substantial procedural defect. See *Asylum in Europe*, *supra* note 114, at 158; Fullerton, *supra* note 108, at 66-67 n. 160.

¹²³See *Asylrecht: Gegen die Flut*, *Der Spiegel*, 30 June 1986, at 28. A Duldung brings entitlement to certain social assistance and employment authorization, but on a more limited basis than that enjoyed by German citizens and recognized refugees. The government also estimates that

weaknesses, and the resulting sense of frustration and loss of control, may also have contributed toward some narrowing of the substantive doctrine, widely complained of by refugee advocates.

Although the German system is sometimes honored for the thoroughness of consideration it can provide, its development of detailed and well-considered legal doctrine through the court system, and its commitment to the rule of law, asylum will almost surely remain a bitter political issue, sometimes exploited by extremist parties, until speedier decisions can be assured. Considerable effort and statutory creativity have already been devoted toward eliminating any steps that may legally be regarded as superfluous under German administrative and constitutional doctrine. It is hard to see what other procedural trimming could be done, unless the Constitution is changed to permit greater reliance on administrative determinations. Even though a respected former president of the Constitutional Court, the late Professor Wolfgang Zeidler, has called for such a change, the idea understandably remains highly controversial.

B. France

In France the right of asylum is mentioned in the Constitution, a legacy of the French Revolution.¹²⁴ Although this provision, unlike the German constitutional guarantee, is not directly enforceable in the courts, it nonetheless is often invoked in debates on asylum policy, as an indicator of the proud heritage of France as a "terre d'asile." The notion that their country might be a country of immigration is more widely accepted in France than in Germany, but opinion is divided, and immigration has become a sensitive political issue in the 1980s. Jean-Marie Le Pen, extremist leader of the right-wing National Front party, has ridden the issue to surprising electoral successes, particularly in elections for the European Parliament in 1984. General immigration rules, made more protective for aliens in 1981, early in the presidency of François Mitterand, were selectively tightened in response to these political developments, particularly after Jacques Chirac became Prime Minister in 1986. Since Mitterand's reelection in 1988 and the Socialist recapture of the prime ministry, there is talk of some easing of these requirements, but the changes are expected to be modest.¹²⁵

300,000 persons, not meeting the 1951 Convention definition of refugee, are now resident in Germany on the basis of permission extended on these generalized humanitarian grounds. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant [on Civil and Political Rights], Addendum: Federal Republic of Germany, para. 98, U.N. Doc. CCPR/C/52/Add.3 (1989).

¹²⁴Article 120 of the Constitution of 1793 stated: "[Le peuple Français] donne asile aux étrangers bannis de leur patrie pour la cause de la liberté. -- Il le refuse aux tyrans." The preamble to the 1946 Constitution, which is incorporated by reference into the preamble of the 1958 Constitution, reaffirms this principle: "Tout homme persécuté en raison de son action en faveur de la liberté a droit d'asile sur les territoires de la République." Constitutions et Documents Politiques 39, 138, 154 (M. Duverger ed. 1966).

¹²⁵See Guendelsberger, The Right to Family Unification in French and United States Immigration Law, 21 Cornell Int'l L.J. 1, 25-35 (1988); Wihtol de Wenden, France's Policy on

Recent battles over immigration policy, however, have tended to focus on issues other than asylum -- naturalization rules, for example, or the "struggle" against clandestine migration -- and in the 1980s France has tinkered less than most other European countries with its asylum adjudication procedures or the general arrangements for asylum seekers. Numbers have risen steadily since the mid-1970s (see Table A), and the population of asylum seekers, once overwhelmingly European, is now dominated by applicants from Africa and Asia, notably Pakistan and Sri Lanka.¹²⁶ Although the increase in asylum applications has been considerable, with the total nearing 30,000 in 1988, one might well have expected even higher numbers, particularly because some features of the French system are so strikingly out of step with her European neighbors.¹²⁷ Above all, France is one of the few European countries still readily granting work authorization once an asylum claim has been filed, and it also provides some services and financial assistance for asylum seekers.¹²⁸

Migration From May 1981 till March 1986, 25 *Int'l Migration* 211 (1987); France: Mighty Modest, *The Economist*, May 6 1989, at 46, 47; Johnson, Pig Le Pen, *The New Republic*, May 23, 1988, at 18; Miller, A Delicate Campaign Issue in the South of France, *N.Y. Times*, March 13, 1986, at A3; Dobbs, Immigration Emerges as a French Election Issue, *Wash. Post*, March 8, 1986, at A20.

¹²⁶*Le cri d'alarme* de Gilles Rosset, *L'Evènement*, 10-16 Nov. 1988 (interview with the Secretary-General of OFPRA).

¹²⁷No one I interviewed had an entirely convincing explanation for why France has escaped the sudden surges of asylum seekers experienced by other European countries, and why its application rate is so far below Germany's despite its greater liberality. Several suggested, however, that it may have to do with rough practices in the prefectures or at the airports and train stations, where asylum seekers would first appear. Police officers there may simply manage not to "hear" an asylum request, arranging instead for speedy removal of the individual -- although usually to another Western European country, rather than back to the homeland. A few cases of this type have been reported, see, e.g., Avery, *supra* note 114, at 297, and some believe that they are only the tip of the iceberg. If so, these rough practices may send a deterrent message that outweighs the attractions French liberality would otherwise hold. This explanation remains largely speculative. In any event, the numbers of applicants are still on the rise, and overworked French officials find little comfort in comparing their totals with their neighbors.

¹²⁸See Ngo Quang Hien, *Rapport sur Les Principes et la Pratique de l'Asile en France, en République Fédérale d'Allemagne et au Royaume-Uni* 39 (mimeo 1987); Costa-Lascoux, *L'insertion sociale des réfugiés et demandeurs d'asile en Europe*, 3 *Revue Européenne des Migrations Internationales* 151, 151-55 (1987).

1. Adjudicative bodies

France became a party to the UN Convention in 1952 and promptly implemented its treaty obligations by statute and executive decree.¹²⁹ The key institutions in asylum adjudication, largely unchanged since the 1950s, are known as OFPRA and the Commission des Recours (Appeals Commission).

OFPRA is the Office Français de Protection des Réfugiés et Apatrides, or French Office for the Protection of Refugees and Stateless Persons. Technically part of the Ministry of Foreign Affairs, it enjoys considerable independence in actual operation. Its head is a director who must be a senior diplomat, appointed for a three-year term. Administrative continuity is provided by a permanent secretary general; the incumbent has served in OFPRA for over 33 years. OFPRA's operations are overseen by a council composed of representatives of six ministries, plus a public member representing established NGOs. The statute specifically provides that UNHCR may attend meetings of the council and provide its observations and recommendations.

OFPRA has exclusive responsibility for initial adjudication of claims to refugee status,¹³⁰ but it also shoulders other time-consuming duties. Principally, OFPRA is responsible for issuing documents relating to civil status (such as birth and marriage certificates) for all recognized refugees in France. As of 1988, there were 181,679 refugees on OFPRA's rolls, and OFPRA delivers over 40,000 such documents yearly.¹³¹ This leaves only a startlingly small percentage of OFPRA's employees to decide claims to refugee status; a leading treatise reports only 29 deciding

¹²⁹Loi No. 52-803 du 25 juillet 1952 portant creation d'un office français de protection des réfugiés et apatrides, Décret No. 53-377 du 2 mai 1953 relatif à l'office français de protection des réfugiés et apatrides. These instruments and later decrees making minor additions or changes to the 1953 decree, along with a compiled version of the 1953 decree, as amended through 1987, appear in F. Tiberghien, *La Protection des Réfugiés en France* 544-61 (2d ed. 1988).

¹³⁰The statute incorporates the standards of the UN Convention, Loi No. 52-803, § 2, and a grant of asylum is virtually automatic once OFPRA has decided that the applicant is a refugee.

¹³¹70 *Documentation-Réfugiés* 10 (5/14 April 1989); Solé, *Réfugiés en liste d'attente*, *Le Monde*, 28 June 1988. OFPRA also reported 2,267 stateless persons under its responsibility at that time. In addition, OFPRA formally makes a refugee status determination in the case of quota refugees brought as part of an organized program after selection in Southeast Asia (over 98,000 were on the rolls in 1988), but this is pro forma, serving primarily to bring such persons within OFPRA's civil status responsibilities after their arrival. Similar arrangements also apply for a small number of quota refugees selected elsewhere and arriving in France with a "visa de long séjour."

officers among 153 employees in 1986.¹³² The Office had grown to 175 employees in 1988,¹³³ but without any significant change in the percentage of officers assigned to the initial adjudication.

The Commission des Recours is a "jurisdiction," a high-ranking form of specialized administrative tribunal under French administrative law.¹³⁴ In the early years, it had only three members, who sat as a single collegial body to hear all cases. The governing decree was amended in 1980, however, to authorize an expansion in membership and the creation of multiple panels of three members each. (This change was resisted for fear of hindering the development of unified doctrine, but the pressure of a mushrooming docket ultimately forced the division.) Each panel consists of a member of the Conseil d'Etat,¹³⁵ who presides, a representative of OFPRA's council, and a representative of the UNHCR. The UNHCR officer serves as a full voting member of the Commission -- a unique feature that has won for the French system considerable praise among commentators.¹³⁶

2. Procedure

An asylum seeker is initially directed to the local prefecture, where he is to receive the necessary forms to apply for recognition as a refugee.¹³⁷ He also receives provisional documents authorizing a one-month stay, considered sufficient time to travel to Paris and present his application to OFPRA. (For several years, proposals for the opening of branch offices of OFPRA

¹³²Tiberghien, *supra* note 129, at 38.

¹³³Solé, *supra* note 131. OFPRA's 1988 budget came to 42.8 million francs, approximately \$7 million. 59 *Documentations-Réfugiés* 9 (16/25 Dec. 1988) (reprinting government statement to the French Senate).

¹³⁴See generally L. Brown & J. Garner, *French Administrative Law* 35-38, 152 (3d ed. 1983).

¹³⁵For a thorough description of the unique role of the French Conseil d'Etat, an elite and prestigious governmental organ that advises on legislation, serves as France's highest administrative court, and also lends members to help staff ministries, special tribunals, and other agencies, see *id.* at 27-53. See also Ducamin, *The Role of the Conseil d'Etat in Drafting Legislation*, 30 *Int'l & Comp. L.Q.* 882 (1981).

¹³⁶See, e.g., Aleinikoff, *supra* note 81, at 221; Avery, *supra* note 114, at 235, 294-96, 353-55 (1983).

¹³⁷There is a limited exception for asylum seekers at the border. Under a 1982 decree they may be refused entry into France, but only on the personal decision of a high official in the Interior Ministry, after consultation with the Foreign Ministry. The Interior Minister has explained that refusal is meant to be used when the asylum seeker is coming from a third country where he would be safe and could apply for asylum in accordance with the 1951 Convention. See 64 *Documentation-Réfugiés* 12 (4/13 Feb. 1989) (reprinting Minister's answer to a Parliamentary question).

elsewhere in France have been discussed, but to date its sole location remains in a Paris suburb.¹³⁸ Within that month, he is supposed to return to the prefecture, armed with a certificate from OFPRA proving that he has filed his application. At that point he officially applies to the prefecture for a resident card, and receives in return a formal receipt showing that he has applied for asylum. This receipt, which serves as a fully effective residence and work permit, is valid for a period of three months, but the applicant has an absolute right to renewal until such time as his application is definitively resolved, by OFPRA or the Commission des Recours.¹³⁹ If he is recognized as a refugee, he receives a refugee card from OFPRA, and then returns to the prefecture to receive a ten-year residence and work card, giving unrestricted access to the labor market and a variety of other benefits.¹⁴⁰

OFPRA officers are organized into geographic sections and are thus able, in theory, to develop specialized expertise about the countries of origin of the applicants whose cases they will consider. OFPRA affords only minimal documentary support, however, and the officers' heavy workload leaves little time, in any event, for keeping current on information sources other than what is received in the dossiers. Each officer must decide about 20 cases per week -- widely considered to be too many, but a pace needed to keep up with applications. Officers are usually hired on short-term contracts rather than enjoying tenure protections. Although their positions are in practice reasonably secure, this feature, coupled with the high volume of business they must handle, has led to considerable demoralization. In June 1988, the OFPRA director resigned suddenly as a protest meant to "sound the alarm" against the inadequate resources provided to his agency.¹⁴¹

Although OFPRA officers who were interviewed in 1985 affirmed the great value of a personal interview in deciding the merits of the applications, such a procedure is possible less than half the time.¹⁴² Clear grants and clear denials are dispatched based only on the written application and any supporting documents filed by the applicant; closer cases are called in for

¹³⁸See Tiberghien, *supra* note 129, at 37. The United States bears some unwitting responsibility for OFPRA's removal from a fashionable location in downtown Paris to its current location in a grim modern building in the working-class suburb of Aubervilliers. OFPRA was housed with the rest of the Foreign Ministry at the Quai d'Orsay until it was forced to move to make room for the U.S.-Vietnam peace talks that began in Paris in 1973. The talks ended, but the real estate proved impossible to reclaim. Interview with Gilles Rosset, OFPRA Secretary General, March 7, 1985.

¹³⁹These procedures are spelled out in a circular issued by the prime minister in 1985. *Circulaire du 17 mai 1985 relative aux demandeurs d'asile*, § I.A., [1985] J.O. 5775. A thorough description of the procedures followed in 1983, only slightly modified by the 1985 circular, appears in Aleinikoff, *supra* note 81, at 215-23.

¹⁴⁰See Costa-Lascoux, *supra* note 128; F. Tiberghien, *supra* note 129, at 24-30.

¹⁴¹Solé, *supra* note 131. See also *Le cri d'alarme*, *supra* note 126.

¹⁴²See 43 *Documentation-Réfugiés* 1 (9/18 Jul. 1988).

interviews, which typically last 30 minutes to an hour. Despite this practice, OFPRA's consideration typically requires many months and sometimes lasts a year or more. Interpreters are provided for the interviews; lawyers are rarely involved in the case at this stage.

The increase in applications over the last decade has been met by a marked decline in the rate of acceptance by OFPRA.¹⁴³ This has meant substantial growth in the caseload of the Commission des Recours, because roughly 85 percent of all OFPRA denials are appealed.¹⁴⁴ The worst backlogs in the French asylum system have therefore cropped up at the Commission; delays there averaged two and a half years in 1987.¹⁴⁵

An applicant who is not recognized as a refugee by OFPRA has one month to appeal the decision to the Commission, in a filing setting forth his arguments for reversal.¹⁴⁶ At that point, the case is usually referred to OFPRA for a more complete written explanation of its rejection (initial rejection notices tend to be very brief). Because this referral became another potential bottleneck adding to the delays, the governing decree was amended in 1985 and 1986 to give greater authority to the President of the Commission to decide clear cases without transmission to OFPRA, and to arrange for speedy dismissal of appeals that are manifestly baseless.¹⁴⁷ A separate section within OFPRA, rather than the original adjudicator, is responsible for providing the agency's response in cases referred to it by the Commission. In a significant but declining

¹⁴³See Table A.

¹⁴⁴F. Tiberghien, *supra* note 129, at 18. The Commission now has the largest caseload of any French jurisdiction. *Id.* at 39.

¹⁴⁵*Id.* at 32. In July 1988, backlogs amounted to 14,000 dossiers at OFPRA and 25,000 at the Commission. 43 *Documentation-Réfugiés* 1 (9/18 Jul. 1988). The Commission was able to dispose of 15,000 cases in 1988, but the government concedes that it needs the capacity to handle 20,000. 68 *id.* 12 (16/25 Mar. 1989). In 1985, the President of the Commission described his predicament to me in these words: "I am rich in dossiers, poor in money." Interview with Pierre Riviere, Paris, Feb. 12, 1985.

¹⁴⁶If OFPRA has not decided within four months of application, the applicant may treat this lapse as an "implicit" rejection, and then appeal within one month from the expiration of that period. Few applicants appeal at that stage, however, preferring to wait for an explicit decision in their cases. See Aleinikoff, *supra* note 81, at 218; Julien-Laferrière, *Un délai de recours court-il contre les décisions implicites par lesquelles l'OFPRA refuse de reconnaître la qualité de réfugié?*, 43 *Documentation-Réfugiés* 11 (9/18 Jul. 1988).

¹⁴⁷Décret no. 85-81 du 23 janvier 1985 modifiant et complétant le décret no. 53-377 du 2 mai 1953 relatif à l'office français de protection des réfugiés et apatrides; Décret no. 86-992 du 27 août 1986 modifiant et complétant le décret no. 53-377 du 2 mai 1953 relatif à l'office français de protection des réfugiés et apatrides (both reprinted in F. Tiberghien, *supra* note 129, at 553-55).

proportion of cases, OFPRA may decide at this point to reverse its earlier decision and recognize the refugee, thereby obviating further consideration by the Commission.¹⁴⁸

Sometime after the OFPRA response is received, the case is examined by a rapporteur for the Commission, who may, on infrequent occasions, undertake additional research. The actual hearing on the case commences with the rapporteur's presentation of a summary of the file and, usually, a recommended disposition of the appeal. Applicants, if present, may offer an additional statement, and they will usually then be questioned by the three members of the panel. Applicants are also generally represented by an attorney at this stage. The attorneys both help with the drafting of the appeal documents and assist their clients during their hearing (where they appear in their formal white-cravatted gowns before the commissioners, who appear quite ordinary in comparison, clad in regular business attire.) The pressure of numbers has forced reduction in the time available for each hearing, down to an average of 17 minutes in mid-1988.¹⁴⁹ The proceedings are not recorded.

Surprisingly, the Commission does not provide interpreters for the applicants -- a symptom of the minimal resources available. Applicants thus must find their own interpreters, often bringing along a friend for this purpose, or using their attorneys to fulfill this role. In one procedure I witnessed, the applicant, a Tamil from Sri Lanka, spoke in his mother tongue, which was then translated into English by a Tamil friend, which was in turn rendered into French by a French friend. The process, which had to be replicated in reverse when the panel asked its questions, proved so frustrating that the UNHCR representative on the panel began posing his questions in English -- a practice ordinarily frowned on, to say the least, in a French tribunal -- so as to eliminate one layer of translation.

The Commission has authority to consider arguments and factual material that were not presented to OFPRA, particularly developments in the (often lengthy) period since OFPRA issued its decision.¹⁵⁰ But in recent years it has affirmed the original denial in well over 90 percent of the cases. Written decisions typically issue a month or two after the hearing.

It is possible at that point for an unsuccessful applicant to seek further review before France's highest administrative court, the Conseil d'Etat, but review is limited to legal or procedural error ("cassation"), and the pendency of such a proceeding has no suspensive effect. This avenue

¹⁴⁸This happened in approximately 13 percent of the cases in 1982, Aleinikoff, supra note 81, at 220, but reduced to about 3 percent in 1986. Tiberghien, supra note 129, at 20.

¹⁴⁹See 43 Documentation-Réfugiés 1 (9/18 Jul. 1988).

¹⁵⁰This results from the appeal's character as a "recours de plein contentieux," established by the decision of the Conseil d'Etat in Aldana Barreña, 8 Jan. 1982, [1982] Recueil Lebon 9; 1982 L'Actualité Juridique: Droit Administratif 662 (with a helpful explanatory note by F. Julien-Laferrière).

of appeal is used more frequently now than in earlier years, but it remains a fairly rare event. Only 175 such cases were decided by the Conseil d'Etat in 1986.¹⁵¹

At the close of the appeal before the Commission, unsuccessful applicants are sent a notice to leave the territory, and their work and residence documents expire. A 1983 study found that such people were virtually never deported, and that the government at the time made no real attempt to carry out removals.¹⁵² Persons interviewed for this study in 1985 confirmed the rarity of deportations, but speculated that failed asylum seekers would find it difficult to continue in France without documents. Many probably therefore did leave, perhaps to try applying for asylum elsewhere in Europe. Since that time, the government has placed a higher priority on actual deportation,¹⁵³ and some celebrated removals have taken place. But deportation apparently remains the exception rather than the rule, and it appears likely to remain so as long as the asylum procedure is so prolonged.¹⁵⁴

3. Evaluation

France's asylum procedure is often held up as a model for the world.¹⁵⁵ To be sure, several of its features deserve commendation, particularly its generous provision of work authorization throughout the pendency of the application and appeal, its fairly high rate of acceptance (compared to other European countries), and the extra guarantees of independent decisionmaking afforded by the "juridiction" status of the Commission and the role therein of the UNHCR representative.

¹⁵¹Tiberghien, *supra* note 129, at 21.

¹⁵²Aleinikoff, *supra* note 81, at 222.

¹⁵³Circulaire du 17 mai 1985, *supra* note 139, at § II.B. The same section authorizes the prefectures to recommend a prolonged period of stay for persons who show that their particular circumstances would result in "grave risks" upon return, even though their refugee claims were definitively rejected by OFPRA or the Commission. This permission, which would roughly correspond to "extended voluntary departure" in American practice, may be granted only if approved by the Ministry of the Interior.

¹⁵⁴I was struck by how often the persons I interviewed in France, both in government and without, repeated a particular phrase when asked about deportations. Removal is "humainement impossible," they told me, if the individual has been living in France for a lengthy period awaiting a decision in her case -- and nearly everyone placed that period at a mere one year.

¹⁵⁵See, e.g., Avery, *supra* note 114, at 353 (chart citing France most frequently of ten countries studied as having "generally commendable practices" in the various categories listed); Sexton, Political Refugees, Nonrefoulement and State Practice: A Comparative Study, 18 Vand. J. Transnat'l L. 731, 771-76, 793-95, 804 (1985); McAndrew, The Dictator Dilemma: A Comparison of United States and French Asylum Procedures, 19 Int'l L. & Politics 1087 (1986). The latter two articles are extravagant in their praise of the French system -- in my view, going far beyond what is merited by the reality of French practices.

But the French system is still beset by serious problems. Few people interviewed expressed confidence in the quality of the decisions at the first stage before OFPRA. The lack of an interview in over half the cases stands as a major impediment to reliable decisionmaking. Insufficient training, burdensome output requirements, inadequate opportunity to draw upon documentary resources, and minimal explanation of reasons for rejection of claims further undercut its mission, despite genuine dedication to the task on the part of its (often demoralized) officers.

Interviews frequently left me with the feeling, however, that OFPRA's problems were not regarded as terribly significant by other observers of the system, because a more ample procedure always remains available before the Commission. The Commission's "procédure contradictoire" in fact often draws considerable praise.¹⁵⁶ But its merits too are often undermined by the absence of a government-supplied interpreter, the fact that many such appeals proceed without an in-person appearance by the applicant, and the limited time available for each hearing. The profound inadequacy of personal interviews, possibly at both stages of the procedure, should be counted as a serious failure. Even if these defects were to be cured, the split of resources between two inadequately supported decisionmaking bodies, both of which may serve as *de novo* fact finders, may be unnecessarily wasteful.

Nevertheless, there appears to be wide acceptance in France of the basic soundness of the decisionmaking structure, coupled with wide verbal agreement that greater resources must be provided to both OFPRA and the Commission. Many commentators also rally around a guideline that would call for full completion of all stages of the procedure within six months to a year from the time of filing¹⁵⁷ -- a timetable that should be possible if adequate resources are forthcoming. The trick remains translating this nominal agreement into effective supplementation of resources. Governments have promised such measures for years, and indeed have provided some modest growth¹⁵⁸ -- but never enough to catch up with the backlog.

¹⁵⁶See, e.g., Tiberghien, *supra* note 129, at 25. In this respect, the French system displays a few striking parallels to the current American system, described below, wherein serious deficiencies in the first stage of adjudication before INS district offices are sometimes considered tolerable because of the availability of a second *de novo* round in an adversarial hearing before an immigration judge.

¹⁵⁷See, e.g., Tiberghien, *supra* note 129, at 38; 57 *Documentation-Réfugiés* 12 (26 Nov./5 Dec. 1988) (Foreign Ministry response to a Parliamentary question); 43 *id.* 1 (9/18 Jul. 1988) (views of former OFPRA director Brouste, who resigned in protest against inadequate resources).

¹⁵⁸See, e.g., Tiberghien, *supra* note 129, at 37-39; 68 *Documentation-Réfugiés* 12 (16/25 Mar. 1989); 67 *id.* 14 (6/15 Mar. 1989); 57 *id.* 12 (26 Nov./5 Dec. 1988) (each of the latter three sources reporting responses of the Foreign Ministry to Parliamentary questions, which discuss additional resources provided to OFPRA and the Commission).

C. Switzerland

Although the Swiss Constitution, unlike the French and German, mentions no right of asylum, the confederation claims a proud history as a leading country of refuge. In the sixteenth century, for example, various cantons sheltered John Calvin and other Reformation leaders. In the late seventeenth century Switzerland became the principal haven for the Huguenots fleeing France after Louis XIV revoked the Edict of Nantes.¹⁵⁹ In World War II, Switzerland stood as an island of democracy completely surrounded by a fascist sea, providing refuge to many who fled Nazi persecution. Whether it rescued as many, particularly Jews, as it could have during the war remains a matter of controversy -- although other countries then in less precarious circumstances are hardly in a position to throw stones. A metaphor used by a member of the Federal Council in 1942, as Switzerland debated its asylum policy in those dark years, often reappears in today's debates, sometimes uttered with conviction, sometimes with sarcasm: "the lifeboat is full."¹⁶⁰

Switzerland became a party to the UN Convention in 1955 and began granting asylum in accordance with the treaty at that time. But it did not codify its obligations and procedures in statutory law until 1979. The substantive standard announced in that statute appears considerably more generous than that of the Convention. It speaks not of persecution but of "serious harms" or "serious disadvantages" because of race, religion, etc. Specifically included as a form of such harm is "unbearable psychological pressure," along with threats to life, liberty, and bodily integrity.¹⁶¹ Apparently this specification was meant to codify the approach Switzerland was already taking toward the Eastern European refugees who dominated the caseload in the 1970s, and who readily received asylum in overwhelming proportions.

Ironically, the law took effect in 1980, just when the old patterns were beginning to change, largely because of major increases in arrivals from Asia, Africa, and the Middle East. Perhaps for that reason, it has turned out that the distinctive wording of the Swiss statute makes little real difference in practice. The operative standards in Swiss asylum determinations today, both government officials and refugee advocates told me, are essentially the same as those of the Convention.

¹⁵⁹In 1985, observances throughout the country marked the 300th anniversary of these events. See Guinard, Huguenots in Switzerland: The First Refugees, *Int'l Herald Tribune*, Sept. 14-15, 1985, at 6; Billard, Switzerland: Of Huguenot Descent and Proud of It, *Refugees Magazine*, Sept. 1985, at 19.

¹⁶⁰See A. Häsler, *The Lifeboat is Full: Switzerland and the Refugees, 1933-1945*, at 116 and *passim* (1969).

¹⁶¹Loi sur l'asile du 5 octobre 1979, § 3, *Recueil Officiel des Lois Fédérales [RO]* 1980, at 1717, 1718. This law was amended in 1983, *Modification du 16 décembre 1983*, RO 1984, at 1, and amended more drastically in 1986 (taking effect Jan. 1, 1988), *Modification du 20 juin 1986*, RO 1987, at 1674. Unless otherwise indicated, future citations to the Loi sur l'asile refer by section to the amended act currently effective. The codified version appears in *Recueil Systématique du Droit Fédéral [RS]* 142.31.

Asylum applications averaged about 1200 annually during the 1970s, and Switzerland granted asylum in 85 percent or more of the cases throughout those years.¹⁶² But in 1979 and 1980 a steady increase in applications began, until Switzerland received over 16,000 in 1988 (see Table B). On a per capita basis, the latter figure is equivalent to the arrival of over 600,000 asylum seekers in one year in the United States. The vast majority are asylum seekers from developing countries, with over 50 percent in recent years from Turkey alone.

As a result, the generous impulses underlying the "psychological pressure" provision of 1979 have been sorely tested throughout the 1980s; indeed, some would argue that they have virtually disappeared. The approval rate has now fallen below 10 percent. There appears wide agreement that two factors have contributed to this decline: the government applies the asylum standards more strictly than it did a decade ago, and meritless applications have increased. But whether the "right" approval rate has been achieved is bitterly disputed. Refugee advocates charge that the government is overly narrow and that adjudicators look for reasons -- such as minor differences in the applicant's statements at various times -- to deny asylum. Officials dispute this charge and maintain that they faithfully apply Convention standards in the face of a massive increase in marginal or abusive claims. But all agree that backlogs and delays in adjudication have been a significant problem.

Unlike France, today the most intense controversy over aliens in Switzerland (where "Überfremdung" has been an issue in national referenda for some time) focuses squarely on asylum. In 1985 a right-wing extremist party in Geneva, never before successful in these elections, garnered 20 percent of the vote for the local parliament, in the very canton of John Calvin, on the strength of its campaign against "false refugees."¹⁶³ The party's candidates portrayed asylum seekers as both unfair competitors for employment and lazy idlers living at public expense in local hotels.

Political developments of this sort forced Parliament to return to the asylum issue in 1986 (having made minor changes to speed the asylum procedures in 1983), even though refugee support organizations and most administrators with responsibility for refugee matters, perhaps surprisingly in accord, were opposed to significant procedural changes. The system instead merely needed more adequate resources, they believed, to assure timely decisions and eliminate the huge backlogs that had been allowed to accumulate. But the political climate demanded something more dramatic and visible, and a more sweeping set of changes was adopted, described below. Opponents gathered the 50,000 signatures needed to take the law to a public referendum, but the changes were ratified by nearly two-thirds of the voters in April 1987. The revisions took effect on January 1, 1988, but have not had the expected effect. Applications took another huge jump in 1988, and little progress has been made against the backlogs.¹⁶⁴

¹⁶²See *Domaine Publique*, 25 Oct. 1984.

¹⁶³See, e.g., *Wash. Post*, Oct. 16, 1985, at A18; *Libération*, 22 Oct. 1985. The party's slogan was "Ras l'bol," which translates roughly as "we're fed up." It was no mystery that the slogan referred to asylum seekers.

¹⁶⁴See generally Schmid, *Neues im Schweizerischen Asylrecht -- Von Grenztoren, Empfangsstellen und Tamilen*, 1988 *Zeitschrift für Ausländerrecht und Ausländerpolitik* [ZAR] 79;

1. Administrative bodies

In Switzerland asylum adjudications are exclusively an administrative procedure under the responsibility of the Federal Department of Justice and Police; the courts have no role.¹⁶⁵ Within the Department, the key official is the Delegate for Refugee Affairs, a new position created in late 1985 to focus full-time on the multitude of issues, both foreign and domestic, affecting the refugee situation. The Delegate's office has over 200 employees. About 100 of them (as of summer 1988) are asylum adjudicators with exclusive responsibility to decide on asylum claims in the first instance. The rest provide support services of various kinds to the adjudicators, manage federal reception centers for asylum seekers, or else oversee the activities of the cantons in such matters as providing assistance to asylum seekers and recognized refugees or arranging for the removal of unsuccessful applicants. In 1988 the Office spent about \$130 million on refugees and asylum seekers, some \$100 million of that for assistance and \$30 million for administration, including adjudication.¹⁶⁶

Only a small percentage of the adjudicators are lawyers, the rest being university graduates with diverse training, often having considerable background (in anthropology or history, for example) regarding the particular region of the world for which they will bear responsibility as an adjudicator. Most are hired on short-term contracts, in part because of the temporary and uncertain funding Parliament has recently provided the agency. But in fact they hold long-term jobs if they perform competently and wish to stay, and there are possibilities to move up into tenured positions. Newly hired adjudicators go through an intensive two-week training program and then serve out a kind of apprenticeship, lasting three months, under the guidance of a senior officer, to learn how to handle interviews properly. For the first two months they will do no interviewing themselves, but instead will attend the hearing while the senior officer does so. Gradually they take on more of the responsibility, such as writing a first draft of the "protocol" (or interview summary) and later a draft decision. In the third month they do the interviewing, in the presence of the senior officer.¹⁶⁷

The second office of importance is the "service de recours," or appeals section. It is separate from the office of the Delegate, but is also within the Federal Department of Justice and Police. This close affiliation has occasioned much criticism, particularly in light of the unavailability of any form of judicial review. Critics have recently launched a sustained effort to

Frey, *Swiss Asylum Law: Recent Changes*, 2 *Geo. Imm. L.J.* 439 (1987); Table B.

¹⁶⁵See *Loi sur l'asile*, as amended, *supra* note 161, art. 11; Bolz, *Der Ausschluss der Verwaltungsgerichtsbeschwerde im Asylrecht*, 1988/3 *Asyl* [Schweizerische Zeitschrift für Asylrechtspraktiker] 3. The courts may, however, review a decision to withdraw refugee status, but this is a rare event.

¹⁶⁶Interview with Urs Hadorn, Deputy Delegate for Refugee Affairs, Berne, July 19, 1988.

¹⁶⁷*Id.*

create an appeals authority that would be wholly independent of the Department.¹⁶⁸ About 70 attorneys staff the appeals section, but turnover is a problem, moreso than among the first-instance adjudicators. Employment is tight in Switzerland, and the "tough guy" image of the Department on these issues apparently complicates recruitment of law graduates.¹⁶⁹

2. Asylum procedures

Asylum seekers usually apply to the aliens authority in the cantons, and are then promptly sent to one of four federal reception centers where preliminary identity checks are performed. Under the 1986 Act, initiation of the procedure was not supposed to happen this way. Parliament adopted the so-called "Bonny Amendment" during floor debate on the bill (the measure thus escaped prior vetting through the Federal Council -- a rare development in Switzerland). The amendment provides that asylum applications are to be presented, with very limited exceptions, at designated "border gates" on the frontiers of the country.¹⁷⁰ The idea was to deny entry or permit quick removal of those who lack other entry documents and cannot show that they would be in danger of either persecution or deportation in the neighboring country from which they had just come.¹⁷¹ And it was hoped that this requirement might have a major impact in reducing asylum applications. Twenty-five border posts and three airports were designated to serve this function. But in fact very few refugees apply there, and it has proven impracticable to enforce the Bonny requirement more strictly.¹⁷²

In any event, those few who do apply at the border, if not returned to the neighboring country, are admitted to the procedure and sent on, like applicants in the interior, to the appropriate federal reception center. They are then transferred within a few days to one of the

¹⁶⁸See Saladin, *Staatsrechtliche und Völkerrechtliche Gründe für eine unabhängige Beschwerdeinstanz, 1988/3 Asyl* [Schweizerische Zeitschrift für Asylrechtspraktiker] 7; see generally Bolz, *supra* note 165. The issue has also been taken to the European Commission for Human Rights.

¹⁶⁹See generally *Rapport de la Commission de gestion au Conseil sur l'inspection concernant l'application du droit sur l'asile du 19 mai 1987*, reprinted in *Documentation: Politique d'asile* 43, 45 (24 feb. 1988) (publication of the Service de documentation de l'Assemblée fédérale).

¹⁷⁰See *Loi sur l'asile*, as amended, *supra* note 161, art. 13(1).

¹⁷¹*Id.* arts. 6, 13(2), 19. These provisions reflect Switzerland's strict understanding of the so-called "principle of the country of first asylum." See Vierdag, *The Country of "First Asylum": Some European Aspects*, *in* *The New Asylum Seekers*, *supra* note 1, at 73, 76-77.

¹⁷²Interview with Walter Schmid and Walter Stöckli of the Swiss Central Office for Aid to Refugees (the umbrella organization for NGOs active on refugee issues in Switzerland), Zurich, July 15, 1988. All in all, only about 2% of applicants can be quickly returned to neighboring countries. Interview with Urs Hadorn, *supra* note 166. And the Delegate for Refugee Affairs, Peter Arbenz, has acknowledged that the "border gate" system does not work; less than 10 percent of all applications are received there. 49 *Documentation-Réfugiés* 1 (7/16 Sept. 1988).

cantons, not necessarily the one where they first appeared, which will be responsible for the next stages of the procedure, and for their settlement, housing, and maintenance pending its outcome.¹⁷³ Applicants deposit their documents with the local authorities and in return receive an attestation, with photo attached, showing their status as asylum applicants.

Earlier in this decade some cantons began delaying the issuance of work authorization to asylum seekers, apparently in the hope that this would deter further arrivals. The 1986 amendments curtail this practice, permitting a delay of no more than three months before authorization issues.¹⁷⁴ Most of the cantons still limit the permission to certain sectors of the employment market, but these appear to include the jobs most likely to be sought by this population anyway. Applicants who cannot find work are entitled to public assistance, but at a rate slightly below that provided for Swiss citizens. Many of the cantons also have created centralized housing facilities for the asylum seekers, at least as a transitional arrangement.

Before the implementation of the 1986 law, virtually all asylum seekers were preliminarily interviewed in the cantons but then travelled to Berne, several weeks or months later, for the central portion of the decisionmaking procedure. There they would be interviewed as part of a relatively formal proceeding lasting about one or two hours and carried out by the federal adjudicator who would decide the case. Adjudicators specialized by region of origin and were able to develop cumulative expertise on conditions in the source countries. I witnessed one such procedure in 1985 and found it quite impressive, particularly for the ways in which the adjudicator drew on his substantial knowledge of Turkey to ask questions that no generalist lawyer could have mustered based only on a reading of the dossier.¹⁷⁵

Most applicants were not represented by a lawyer at the first-instance interview, but the law specifically provided for the presence of a representative of a refugee aid organization at the interview, at the confederation's expense. The staffing of this role was and still is coordinated by the Swiss Central Office for Aid to Refugees, an umbrella organization representing all the refugee service organizations. These volunteers attended the interviews as observers and a kind of guarantor of the fairness of the process rather than as a counsel-substitute. Most would not have occasion to meet with the applicant either before or after the procedure. But they usually had the opportunity to pose questions during or at the close of the interview, to clarify matters left unclear or to pursue lines of inquiry they believed important. They were also allowed to remain quiet if they wished, an option most likely used if they found the case meritless.

¹⁷³The 1986 amendments authorized agreement among the cantons on quotas allocating the asylum seekers, and empowered the federal authorities to adopt such a scheme if agreement was not achieved. *Loi sur l'asile*, as amended, *supra* note 161, art. 14a. The resulting distribution scheme was published in the governing ordinance. *Ordonnance sur l'asile du 25 novembre 1987*, art. 11, RO 1987, at 1680.

¹⁷⁴*Loi sur l'asile*, as amended, *supra* note 161, art. 21.

¹⁷⁵For a more complete account of that interview, see Martin, *Comparative Policies on Political Asylum: Of Facts and Law*, 9 *In Defense of the Alien* 105, 109-11 (1987).

Unfortunately, this thoroughgoing centralization of the procedure, with its potential for high quality decisions, was a partial casualty of the 1986 amendments. In an effort to speed the process, strong momentum developed among politicians for some sort of "cantonalization" -- that is, transferring decisionmaking responsibility to cantonal aliens authorities. Refugee aid organizations resisted this proposal, and a compromise was struck. The statute now provides for a more thorough interview carried out by officials in the cantons, but the adjudicators in the office of the Delegate retain responsibility for the actual decisions.¹⁷⁶ The cantonal interviews are to be memorialized in a "protocol" (similar to the German protocol described above), signed by the applicant and transmitted with the rest of the dossier to Berne. The statute also specifically provides now for the presence of the volunteers at the cantonal interviews.¹⁷⁷ This change necessitated a major new recruiting effort by the voluntary agencies, but they now have 600 volunteers available for these duties throughout Switzerland. The volunteers receive SF 25 (about \$15) for each hour of duty in this role; SF 5 of this is considered to cover expenses. The agencies are reimbursed by the federal government for these costs.

The drafters of the new statute envisioned that most of the interviewing would occur exclusively in the cantons. In practice things have not worked out quite that way. Although some of the cantons have full-time interviewers who have become reasonably good at the process, others rely on part-time personnel. The statute permits a full federal interview "as needed," and the DAR

¹⁷⁶A 1983 statutory amendment had used a variation of this model in an earlier effort to speed the procedure. It authorized decision by the federal adjudicators based solely on the preliminary cantonal interview in cases adjudged "manifestly unfounded." See Modification du 16 décembre 1983, supra note 161, art. 16(5)-(6). The ordonnance promulgated by the government under that law was drafted with some care to avoid overuse of this provision; it listed a limited number of situations which were to be considered to fall within that category. As a result, only a small percentage of cases were dispatched under this provision without the interview in Berne. This provision was deleted from the statute in 1986, because it was expected that the vast majority of all cases, whether or not designated as "manifestly unfounded," would be decided expeditiously based solely on the cantonal interview.

Ironically, because that expectation has not been borne out in practice, in October 1988 the federal authorities developed still another new pattern, known as "Procedure '88" and implemented by ordinance, meant to assure faster dispatch of manifestly unfounded claims. It reduces reliance on cantonal officials, restores a larger role for federal officers, and allows for denial of work authorization in a far larger number of cases. Under this procedure, asylum applicants who have entered the country illegally (they comprise the vast majority of current claimants) will be interviewed promptly by federal rather than cantonal officers. If the claim appears manifestly unfounded, the applicant is transferred to a federal camp, where a more complete interview will be held, but on a speedier timetable. See Stöckli, *Änderung der Asylverordnung, 1988/4 Asyl 12*; Obrecht, *Procedure '88, Refugees Magazine*, Feb. 1988, at 14; 51 *Documentation-Réfugiés* 2 (27 Sept./6 Oct. 1988). Whether these changes will have any significant impact on the high influx remains to be seen.

¹⁷⁷Loi sur l'asile, as amended, supra note 161, art. 15(4).

has found such a procedure necessary in a high percentage of cases.¹⁷⁸ In those cases, the federal interview essentially proceeds as it did under the pre-1986 procedure, with thorough questioning by the federal officer who will be responsible for the decision. Today, as before, the federal adjudicators are organized by geographical region of responsibility. There are nine such sections overall, five of which cover Turkey and the Middle East. Developments in the region are often discussed among officers in a section, to assure consistent results in similar cases, and draft decisions must be approved by section heads before issuance.

Federal adjudicators are supported by a respected documentation center, which carries full sets of reports by Amnesty International and other nongovernmental human rights organizations. They also have occasion to draw upon inquiries carried out in the home countries by Swiss diplomats. Perhaps most importantly, unlike the situation with the heavily burdened French adjudicators, Swiss adjudicators are specifically charged with responsibility for keeping current on documentation available respecting the region of origin. Time charts specifically state that 10 percent of the adjudicator's week is to be used for this purpose. The result is that Swiss adjudicators' output is lower than that in most other countries; they are expected to decide three cases per week.

If the federal adjudicator issues a negative decision (with or without an interview in Berne), he is supposed to include in his written opinion a ruling on the deportability of the individual -- so that removal can be promptly effected.¹⁷⁹ Although few applicants have other possible defenses, some benefit from a decision at this final stage to allow them to remain, either because of developments in the home country that pose a danger upon return or sometimes because of ties that have developed in Switzerland in the meantime. A variety of statuses have been available to reflect this special permission to remain, but the 1986 law consolidated practices somewhat. If the individual is now to be given permission that includes full freedom of movement and work authorization, he receives "provisional admission." Those who will be placed under some form of greater or lesser confinement are given "internment."¹⁸⁰

¹⁷⁸Loi sur l'asile, as amended, supra note 161, art. 16. Exactly how many cases result in interviews in the capital was in some dispute when I carried out my research in Berne in July 1988. Refugee aid organization officials placed the number between 40 and 50 percent; a DAR representative placed the figure at 70 percent. In either case, this is far higher than the level evidently expected by the parliamentary drafters. Ironically, therefore, cantonalization probably delays more than it hastens the overall process, because it usually requires two rounds of fairly thorough interviewing rather than the single intensive round in Berne previously experienced.

¹⁷⁹See Loi sur l'asile, as amended, supra note 161, art. 21a. Before the 1983 amendments, asylum and deportability were separate and sequential procedures, and this bifurcation often caused additional delay.

¹⁸⁰See Loi fédérale sur le séjour et l'établissement des étrangers, RS 142.20, as amended by Modification due 20 juin 1986, RO 1987, at 1665, arts. 14-14c, 15.

The Delegate for Refugee Affairs has also started a program that permits a substantial number of "old cases" to receive a permit on humanitarian grounds, if they have family ties in Switzerland. This is seen by that office as an adequate alternative to the "global solution" that

If asylum is denied, the individual has 30 days to appeal to the service de recours. A lawyer for the applicant is more likely to become involved at this stage, although not at the expense of the confederation. UNHCR provides some funding for legal services, and refugee aid organizations also raise funds for these purposes. Many attorneys question potential clients closely before taking on their appeals, to assure that they concentrate their efforts on cases likely to be meritorious.¹⁸¹ Appeals are usually handled entirely in writing, without oral argument or further appearance of witnesses.¹⁸²

3. Evaluation

The Swiss system I witnessed in 1985, before the groundswell that led to the 1986 amendments, seemed to hold considerable promise. Applicants were interviewed face-to-face by the officer who would decide their individual cases and could therefore present directly whatever they wanted that official to consider. Moreover, the adjudicators specialized by region of origin and applied their often considerable expertise to the questioning process. They were reasonably well-supported by a catholic documentation system, and their schedules specifically allowed for them to keep their expertise current. All this seemed a solid foundation for high-quality decisions. And because the Swiss system clearly entailed only two stages of procedure (unlike the American, which often involves three or four), the potential existed for relatively expeditious completion of the procedure, provided only that adequate resources were available.

To be sure, there were genuine problems. Many of the adjudicators were fairly young and new to the task. Refugee aid groups felt many lacked the judgment that would have come with greater experience in the world. The lack of any consideration of the cases outside the Federal Department of Justice and Police gives pause. And finally, a relatively unhurried schedule for the adjudicators inevitably meant a reduced capacity for output, even as it allowed for higher

several advocacy organizations and many politicians have been advocating for several years, which would give a kind of blanket amnesty to all who have been in the procedure for a stated length of time. The idea of the global solution is to recognize their effective ties to Switzerland after all these years, and to eliminate a major part of the demoralizing backlog now accumulated at both stages of the procedure. (In any event, both those stages now use a "last in, first out" priority system to assure faster turnover of new cases, reaching the older cases only as time permits.)

Moreover, even after the 1986 law took effect, there remain other exotic statuses not entirely sanctioned by the statute. Tamils, for example, are given a notice to leave the territory, and receive no official status, but the government has announced that it will not for the time being send them home in view of the civil strife in Sri Lanka, and it issues work authorization. Interview with Schmid and Stöckli, *supra* note 172.

¹⁸¹One attorney told me that an asylum seeker complained to him after their initial interview that "you're tougher than the federal authorities."

¹⁸²Before the 1983 amendments, a further appeal was possible to the Federal Council, the seven-member body that constitutes the highest executive authority in Switzerland.

quality decisions. Extensive delays resulted, perhaps increasing the magnet effect. The consequent frustrations, exacerbated by rising numbers of asylum seekers, embittered the political atmosphere.

The 1986 amendments were the consequence, but subsequent experience reveals most of those changes as ineffective political expedients. Cantonalization took the interviewing task away from people who were often quite good at it and gave it to less experienced cantonal officers who would not be the ones actually making the decisions. Both cantonalization and border gates were false solutions that wound up complicating the process. Federal administrators are now using the discretion still left to them under the amendments to undo much of the harm those gimmicks portended, by arranging for a majority of cases to be decided, after all, only following federal interviews.

If this evolution continues, however, one hopes that Parliament will provide the resources needed to master the caseload and to be more resolute in assuring removal of denied applicants. Perhaps such mastery will require a somewhat higher weekly output per officer (although not up to the level of France or Germany). Although it took some missteps in 1986, Switzerland has not entirely lost the opportunity to couple high-quality decisions with sufficient speed to keep the political tensions at an acceptable level.

D. Canada

Canada's situation probably affords the closest parallels to that experienced in this country. Canada too is a traditional country of immigration. Like the United States, it has responded to worldwide refugee problems primarily by making resettlement spaces available through a generous, but selective, overseas refugee program, and its officials resist the notion that Canada is a country of first-asylum "to which refugees in need of protection could come spontaneously."¹⁸³

Canada became a party to the Convention and Protocol in 1969 (shortly after the United States), and developed a complex and cumbersome system to implement its refugee obligations. That system too received little sustained attention until the 1980s when growing backlogs and court litigation sharply revealed its inadequacies. Canada's crisis became acute in 1986, however, about two years before an equivalent asylum crisis in the United States, placing it somewhat ahead of this country in the effort to reform legislation, regulations, and administrative structure. Therefore, Canada was able to begin implementing its new system in January 1989. A brief description of the old adjudication system will set the stage for understanding the current arrangements and appreciating the major commitment of new resources which they represent.

¹⁸³Bissett, *Canada's Refugee Determination System and the Effect of U.S. Immigration Law*, 10 *In Defense of the Alien* 57, 58 (1988) (Mr. Bissett is the Executive Director, Immigration Canada, Employment and Immigration Commission). For general descriptions of Canadian refugee law and practice, see Refugee Affairs Division, *Refugee Perspectives 1986-87* (Employment and Immigration Canada, 1986) (including statistics on overall immigration and overseas refugee resettlement since 1980); Hathaway, *Selective Concern: An Overview of Refugee Law in Canada*, 33 *McGill L.J.* 676 (1988).

1. Former system

In 1976 the Canadian Parliament passed a comprehensive Immigration Act that provided a new legal framework for all immigration to Canada, including overseas refugee programs and political asylum claims made by persons already in Canada (usually referred to as "claims to refugee status").¹⁸⁴ Explicitly incorporating the basic UN Convention definition as the legal standard for judging asylum applications, that Act provided that claims were to be filed during the course of an "inquiry" conducted by an adjudicator -- essentially the same as a deportation proceeding in the United States. Upon such a filing, the adjudicator adjourned the inquiry to permit an examination under oath by a senior immigration officer. The claimant's counsel was allowed to be present at the examination and to take part. Over time, counsel came to do most of the questioning to develop the record, in the majority of cases. The examination was recorded verbatim, and a transcript was then forwarded to the Refugee Status Advisory Committee (RSAC).

With the assistance of staff, the RSAC, usually acting in panels of three, would consider the case based on the transcript and then provide its recommendation to the Minister of Employment and Immigration, who officially made the final decision.¹⁸⁵ In practice, review of the RSAC recommendation was delegated to senior government officials within the Ministry. In unusually difficult cases, or in cases where that official disagreed with a positive RSAC recommendation, the Minister would personally pass upon the case.

If the Minister's decision was positive, the initial inquiry resumed to consider whether the person was to be "landed" -- the equivalent of our grant of permanent residence status -- or else refused landing, notwithstanding the positive decision on refugee status. Refusal might be based, for example, on a serious criminal record or other security risk. Refusals of landing to recognized refugees were infrequent.¹⁸⁶

When the Minister decided negatively on the refugee status claim, however, the case proceeded to a Special Review Committee of senior departmental officials. This informal procedure, not based in statute, allowed for a decision whether the person might be allowed to remain in Canada anyway, based on specific guidelines for considering "compassionate or humanitarian factors."

If that Committee also declined favorable treatment, applicants could ask for "redetermination" of the refugee status ruling by the Immigration Appeal Board (IAB). Claimants would submit the transcript of the initial interview and an additional declaration setting forth the

¹⁸⁴Immigration Act, 1976, ch. 52, 1976-77 Can Stat. 1193.

¹⁸⁵Representatives from the Office of the UNHCR usually reviewed negative draft recommendations from RSAC before they were forwarded to the minister. If UNHCR disagreed, it sent a memorandum explaining its reasons, and often RSAC would reopen its consideration.

¹⁸⁶Similar arrangements for separate consideration of landing, after a person is recognized as a Convention refugee, are preserved under the new system. Immigration Act, 1976, as amended 1988, §§ 46.04-.05.

facts upon which they relied and the information they intended to offer at a redetermination hearing. The IAB was charged with a two-stage decision. First, it simply reviewed the papers on file. If it decided there were no "reasonable grounds to believe that a claim could, upon the hearing of the application, be established," it would terminate the proceedings at that point, stating its reasons for concluding that the person was not a Convention refugee. But if it found "reasonable grounds," the IAB would schedule the matter for a full hearing under the ordinary rules governing quasi-judicial hearings by such bodies under Canadian administrative law. Final denials, at whatever stage, were subject to judicial review in the Federal Court of Canada.¹⁸⁷

In 1977, the system received about 500 applications. By the early 1980s the annual intake exceeded 2500, and a number of voices were calling for reform. Complaints focused on two main features: the inordinate delay caused in part by the complex structure of the system, and the lack of an oral hearing in the presence of the actual decisionmaker (save in the minority of cases accepted for full review by the IAB). In response to complaints of this sort, the Minister of Employment and Immigration established a Task Force in 1980 to study the problem and recommend changes. That body provided several recommendations, centering on a proposal that oral hearings be provided in every case -- ideally through statutory amendment that might create a single "central tribunal" to hear and determine refugee claims, without the need for "redetermination."¹⁸⁸ After reviewing these suggestions, the Ministry established, in 1983, a pilot project in Montreal and Toronto to gain experience with oral hearings of the type recommended. Initial hearings there were held in the presence of at least one RSAC member, but the pilot project required somewhat convoluted arrangements to ensure that the process still conformed to the language of the 1976 Immigration Act.¹⁸⁹

These pilot projects provided useful experience, and a new Minister asked one member of the earlier Task Force, Professor Ed Ratushny, to carry out another study in 1984 to recommend specific legislative and administrative changes. That study provided a penetrating look at the system's deficiencies and surveyed a variety of models for reform, finally recommending the creation of a system based on a new "highly specialized body," whose members would be expected to develop "special expertise and sensitivity."¹⁹⁰ Under the Ratushny proposal, a single, expert member would conduct the initial inquiry, including an oral hearing, on a nonadversarial basis, and would

¹⁸⁷This description draws upon E. Ratushny, *A New Refugee Status Determination Process for Canada* (Employment and Immigration Canada, 1984) (a report on reforms prepared by a special advisor to the Minister) and *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 445-55 (1985) (opinion of Wilson, J.). The latter contains abundant citations to the relevant regulations and statutory sections that governed the former system.

¹⁸⁸Task Force on Immigration Practices and Procedures, *The Refugee Status Determination Process 100* (1980) (report to the Minister of Employment and Immigration).

¹⁸⁹See E. Ratushny, *supra* note 187, at 10-11.

¹⁹⁰*Id.* at 51, 56.

make a binding determination at the end, with a full statement of reasons. This ruling might then be subject to administrative appeal and ultimately to judicial review.¹⁹¹

Before action was taken on the Ratushny study, a major decision by the Supreme Court of Canada in April 1985 provided a further stimulus to action. In Re Singh and the Minister of Employment and Immigration, a unanimous Court ruled that the existing refugee status determination system was invalid because of its failure to guarantee an oral hearing.¹⁹² The Court found this failure particularly serious because refugee status cases usually present "a serious issue of credibility."¹⁹³

In response to Singh, a third study was chartered (by yet another new Minister). Its author, Rabbi Gunther Plaut, presented a highly detailed plan for a new system that would provide for oral hearings and make a variety of other changes.¹⁹⁴ In May 1986, the government announced a package of proposed legislative amendments based in large measure on the Plaut study.¹⁹⁵ At the same time, it began immediate implementation of a "backlog clearance" program -- a kind of case-by-case amnesty that ultimately gave permanent residence to most persons with refugee claims pending in May 1986.¹⁹⁶

¹⁹¹Id. at 51-59.

¹⁹²[1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422. Three Justices based their ruling on the Canadian Bill of Rights and three on the recently implemented Canadian Charter of Rights and Freedoms. But all were clearly agreed that the procedures were not in accord with "fundamental justice" -- the general equivalent of "procedural due process" doctrine in the United States. A useful discussion of the Singh case and its implications may be found in D. Lemieux & M. Normand, *Les Principes Directeurs du Régime Juridique des Immigrants et Réfugiés au Canada* 27-33 (1987).

¹⁹³17 D.L.R. (4th) at 465 (opinion of Wilson, J.).

¹⁹⁴W.G. Plaut, *Refugee Determination in Canada* (1985) (report by Special Policy Advisor to the Minister of Employment and Immigration). Meantime, the IAB implemented Singh by granting an oral hearing in every redetermination case. Blum & Laurence, *Cold Winds from the North: An Analysis of Recent Shifts in North American Refugee Policy*, 16 N.Y.U. Rev. L. & Soc. Change 55, 80 (1987-88).

¹⁹⁵See *Refugee Perspectives*, supra note 183, at 43-51 (reprinting statement to House of Commons May 21, 1986, and description of new system, including backlog clearance).

¹⁹⁶Approximately 22,000 people received the benefits of this clearance process. But implementing such backlog clearance before a new streamlined system was in place now appears to have been a serious mistake, for it apparently helped stimulate additional new flows of asylum seekers, some 27,000 in 1987 and 45,000 in 1988. The Ministry of Employment and Immigration reports a new backlog, in January 1989, of 85,000 persons (apparently including most of those who had claims pending in 1986 but did not qualify for that limited amnesty). See Kaihla, *Clearing the Logjam: A New Plan to Resolve the Refugee Crisis*, *Maclean's*, Jan. 9, 1989, at 16.

Before those legislative proposals could be acted upon, however, other events sharpened the political controversy. Not only were the numbers of asylum applicants rising more steeply than expected (perhaps stimulated, in part, by the implementation of the Immigration Reform and Control Act of 1986 in the United States), but two vivid incidents also claimed wide public attention. In August 1986, 154 Tamils from Sri Lanka appeared in lifeboats off the Newfoundland coast, and another boatload of 174 Sikhs from India arrived in Nova Scotia in 1987. It later became apparent that both groups had spent considerable time in Europe before arranging with boat captains to come to Canada because of its reputation as a more liberal haven.

The government responded to the new developments by attempting to tighten administrative practices in February 1987 and then by introducing new and more restrictive legislative proposals in May and August.¹⁹⁷ Although the legislation was introduced as a set of emergency measures, a strong reaction from churches and other refugee support groups slowed its progress through Parliament. With some important modifications, however, it received final assent in July 1988, and took full effect on January 1, 1989.¹⁹⁸

2. The new system

The 1988 legislation replaced the old IAB with a new Immigration and Refugee Board (IRB), formally recognized as an "administrative tribunal" under Canadian law -- in fact the largest such tribunal in the country. Headed by a Chairman appointed for a seven-year term, it is placed for budgeting purposes under the stewardship of the Minister of Employment and Immigration, but in its decision functions is wholly independent.¹⁹⁹ Moreover, it has no connections to the agencies that carry out immigration enforcement functions. The Board's members are assigned to one of two separate divisions: a Convention Refugee Determination Division (CRDD) and an Immigration

¹⁹⁷See Martin, *supra* note 1, at 7; Bissett, *supra* note 183, at 60-64; Canada Approves Severe New Refugee Laws, 65 *Interp. Rel.* 785, 786 (1988). In recent years, moreover, approximately 70 percent of refugee claims were rejected after examination. Immigration and Refugee Board, *Refugee Determination: What It is and How It Works* 3 (1988). One of the major administrative changes in early 1987 was to eliminate the so-called Special Programs, under which nationals of countries experiencing "adverse domestic events" were given blanket protection against expulsion (roughly equivalent to "extended voluntary departure" under U.S. practice). The list of such countries operative until then included Sri Lanka, El Salvador, Guatemala, Iran, Iraq, Poland, and 12 others. See Blum & Laurence, *supra* note 194, at 82-85.

¹⁹⁸Acts of 21 July 1988, chs. 35-36, 1988 Can. Stat. 903 (based on bills C-55 and C-84, 33d Parl., 2d Sess.). The most important portions of these bills amended the Immigration Act of 1976, *supra* note 184. The new provisions will be referred to, in the rest of this article, using the section number of the Immigration Act, as amended in 1988. For more complete descriptions of the legislative proposals and changes made by Parliament, see Hathaway, *supra* note 183, at 704-08; Hathaway, *Postscript -- Selective Concern: An Overview of Refugee Law in Canada*, 34 *McGill L.J.* 354 (1989); Blum & Laurence, *supra* note 194, at 57-59, 86-89.

¹⁹⁹Interview with Gordon Fairweather, Chairman, and Peter Harder, Executive Director, IRB, Ottawa, Dec. 19, 1988.

Appeal Division (IAD).²⁰⁰ The latter handles non-refugee immigration appeals and is much smaller than the former.

Regular members of the CRDD (up to 65 are authorized by statute) are appointed by the Governor-in-Council for renewable five-year terms.²⁰¹ The Board is also engaging, in addition, 80 or more temporary (but full-time) members for the CRDD, as authorized by statute, serving for two- or three-year terms, and perhaps another 50 to help clear the initial backlog of 85,000 to 100,000 claims. Members, most of whom are not lawyers, are based in four regional offices. Because over 80 percent of asylum claims historically have been presented in Toronto or Montreal, those two centers are far more amply staffed than Vancouver or Winnipeg.²⁰² The IRB already has an extensive support staff under the supervision of its Executive Director, comprising 328 officers and employees. Figures 1-3 depict the administrative structure of the IRB, and indicate Canada's major commitment of resources to these functions.

The new statute establishes essentially a two-stage administrative procedure.²⁰³ The first stage is meant to provide a speedy process to screen out terribly weak or abusive claims and assure quick removal of such claimants. Formally, the decisionmakers at this first stage must make a favorable determination on "eligibility" and "credible basis," before passing the case on to the second stage, a full hearing on the merits.²⁰⁴ Claimants lack eligibility, for example, if they have been granted refugee status in another country or have previously been denied such status in Canada, are war criminals, or have been convicted of serious crimes.²⁰⁵ Only a tiny fraction of

²⁰⁰Immigration Act, as amended 1988, §§ 57, 59.

²⁰¹Id. §§ 59, 61.

²⁰²Interview with Jerry Robbins, Director General, Operational Policy and Planning, Ottawa, Dec. 19, 1988.

²⁰³In addition to the stages described in text, senior immigration officers are also supposed to screen claims immediately after filing to decide whether to grant permission to remain on "humanitarian and compassionate" grounds -- a review that used to occur at the end of the process. This consideration has been moved to the earliest opportunity in order to conserve the resources of the IRB, for a grant of such permission obviates the refugee claim.

²⁰⁴Immigration Act, as amended 1988, §§ 43-46.03.

²⁰⁵Id. at § 46.01. A highly controversial provision allows the refusal of claims at the initial stage if the asylum seeker can return to a "safe third country" -- apparently designed for swift removal of those who came to Canada after spending time in a first asylum country in Europe or in the United States. See Hathaway, Postscript, supra note 198. The legislation permits the Cabinet to compile a definitive list of safe countries. Such a listing was bound to be politically sensitive in any event, but the sensitivity was heightened because many Canadians regard the United States' treatment of Central American asylum seekers as unduly harsh. Apart from this diplomatic complication, many critics felt that judgments about safe return to other asylum countries should not be made on a country-wide basis, but should attend case-by-case to the specific treatment likely for the particular asylum seeker. To date, these difficulties have carried the day;

cases are rejected on this basis. The "credible basis" test provides a more important sieve; it is meant to set a fairly undemanding threshold to screen out quickly those applications that are manifestly unfounded.²⁰⁶

The work of the IRB is aided by a new documentation center, staffed by roughly 20 officers and employees. It provides information on country conditions and on Canadian refugee doctrine to the decisionmakers, to claimants and their counsel, and to the public at large. In addition to responding to specific requests from Board members (sometimes highly detailed), its staff also prepares regular country summaries for more general use by members and others. "Country overviews" are meant to be useful especially during the initial screening hearings, and the somewhat more complete "country profiles" are meant to provide information to members and others involved at the second stage. The initial versions of these summaries (drawn up for countries which have recently sent a high volume of claimants to Canada) reflect reliance on a wide range of governmental and nongovernmental sources. Those establishing the documentation center have also been in close touch with refugee information centers (private, governmental, and intergovernmental) in Geneva, Bonn, the Hague, and elsewhere, to lay the groundwork for maximum use of information available anywhere in the world.²⁰⁷

Claimants are heard at the initial stage by a two-person panel, consisting of a member of the CRDD and an official from Immigration Canada called an adjudicator. As a safeguard for claimants, an affirmative vote of only one of these officers will send the case to the second stage for full consideration on the merits by a panel of the CRDD. A "case presenting officer" acts on behalf of the Minister to present evidence and question witnesses at the initial stage -- and in a heavy majority of cases so far, this officer has simply agreed that the claimant should reach the second stage, obviating further inquiry by the two-person panel.²⁰⁸ The claimant may be

the Cabinet decided not to list any countries for such treatment. 63 Documentation-Réfugiés 1 (25 Jan. - 3 Feb. 1989). As a result, however, the initial stage hearing is likely to consume far more time than Parliament originally contemplated, as it will usually have to focus on "credible basis" and other more particularized determinations, rather than resting on an easy checking of a fixed list.

²⁰⁶In describing the types of claims meant to be screened out on this basis, officials interviewed in Ottawa pointed to a sudden influx of over 2739 Trinidadians in 1988, who apparently hoped to take advantage of the weakness and inherent delays of the old system before it expired, and to Portuguese nationals who claimed religious persecution as Jehovah's Witnesses. Some of the latter reportedly showed up for their hearings wearing crucifixes. In the first few weeks under the new system, no claims were received from Trinidad and only one from Portugal. See 63 Documentation-Réfugiés 1, 6 (25 Jan-3 Feb 1989).

²⁰⁷See generally Rudge & Kjaerum, *The Information Aspects of Refugee Work: Time for a Fullscale Information Strategy*, *Refugee Abstracts*, Dec. 1988, at 1.

²⁰⁸In essence, then, an applicant need only convince one of three officials (the CRDD member, the adjudicator, or the case presenting officer) that the case is sufficiently substantial for it to be passed on for the full second-stage hearing on the merits.

represented by counsel, but because the case is expected to proceed to the first-stage hearing within a few days from the initial request, few claimants are likely to be able to locate their own attorneys within this period. Most will therefore be represented by "duty counsel," a roster of lawyers in a kind of legal aid pool available on short notice, at government expense. Claimants denied at the initial stage are to be removed promptly, but expulsion is stayed for 72 hours to allow them to apply for "leave to appeal" to the federal courts.²⁰⁹

The second stage of the process consists of a full merits determination by a panel of two members of the CRDD.²¹⁰ An affirmative vote of only one is required for a positive outcome for the asylum seeker, so as to assure that the applicant receives the benefit of the doubt.²¹¹ The statute provides that these proceedings are to be as informal and expeditious as possible, and training materials repeatedly describe them as "nonadversarial."²¹² Nevertheless, they are conducted under unique arrangements, described below, meant to honor the requirements of Canadian administrative law. Applicants may be represented by counsel, at government expense if needed. The Minister ordinarily will not be represented, although the statute permits such an appearance when the Ministry deems it necessary.

The major responsibility for presenting evidence, performing much of the questioning, and eventually summarizing the facts and law to assist the members, is shouldered in each case by officials occupying a newly created position of Refugee Hearing Officer (RHO). RHOs, most of whom are not lawyers, are not equivalent to prosecutors. They are officers of the IRB, not representatives of the Minister. Training materials lay great stress on the impartiality of their role and their responsibility not only to test the claimant's case but also to ensure that all facts are made available. In this connection, RHOs are responsible for assuring that the full range of country condition information, much of it developed through the IRB's documentation center, is presented for the record. The RHO position has been created to make sure that the IRB members do not carry out the tasks of marshalling evidence and questioning witnesses, for these

²⁰⁹Immigration Act, as amended 1988, §§ 49(1)(b), 83.1. Denial of leave to appeal is not itself appealable. *Id.* § 83.2.

²¹⁰For planning purposes, the IRB expects that each panel can dispose of slightly over five second-stage proceedings each week, requiring each member to write two full opinions. (Roughly one case per week is expected to be a straightforward positive case not requiring a full opinion.) Initial stage hearings are expected to require approximately one-half day each; one member could therefore take part in ten for each week of assignment to initial-stage duty. Immigration and Refugee Board, Briefing Book for Members, Annex D, Chart 3 (1988) (not paginated).

²¹¹Immigration Act, as amended 1988, § 69.1. The statute also expressly permits the UNHCR to send a representative to all refugee status determination proceedings. *Id.* § 68(3).

²¹²*Id.* § 68(2).

functions are deemed likely to call into question both the reality and appearance of the members' impartiality.²¹³

CRDD decisions are not subject to administrative appeal. Draft opinions, however, are expected to be sent routinely for a "reasons review" service performed by one of the 16 attorneys who staff the General Counsel's office. This office may not dictate changes to the members nor fetter their discretion, but it may recommend changes and at least inform members along these lines: "You are bucking the trend; did you realize it?"²¹⁴

A denied applicant has 15 days to appeal a CRDD decision to the Federal Court of Appeal, but appeal is not of right. The applicant must secure leave of a single judge of that court.²¹⁵ Denials of leave are not themselves appealable.²¹⁶ The statute does not set forth standards for granting such leave, and observers have expressed concern about its operation, because such a procedure is unprecedented within Canadian practice.²¹⁷ Appeals themselves may be based on one of three grounds: failure to observe "natural justice," error of law, or "perverse or capricious" finding of fact.²¹⁸

²¹³Interview with Sam Laredo, official responsible for Refugee Hearing Officers, Ottawa, Dec. 19, 1988. A briefing manual of the IRB explains the RHO position as the product of the nonadversarial system, which results in the presence of only one party officially appearing before the decision-maker:

[A]lthough the decision-maker is no longer presented with competing interests, he is still faced with the challenge of testing the reliability of the claimant's evidence, without entering the adversarial arena and espousing, or appearing to have espoused, a predisposition as to the credibility of the claim -- two difficult things to achieve when cross-examining a claimant

....

The purpose behind the creation of the RHO position is thus to dispel the bias, or apprehension of bias, that may result when a decision-making body, which also has an investigative role, unwittingly looks for, or appears to look for, facts that will suit its conclusion instead of letting the facts dictate its conclusions; the RHO makes possible the separation of the investigative and decision-making functions of the tribunal to ensure the appearance of fairness, if not to safeguard natural justice itself.

Briefing Book, supra note 210, section B.1.(a) "IRB Administrative Support," (emphasis in original).

²¹⁴Interview with Mario Bouchard, General Counsel of the IRB, Ottawa, Dec. 20, 1988.

²¹⁵Immigration Act, as amended 1988, §§ 83.1, 83.3. The Minister may also appeal a CRDD decision, but such appeals are expected to be rare.

²¹⁶Id. § 83.2.

²¹⁷Hathaway, supra note 183, at 707. The Chief Justice of Canada is to promulgate rules governing leave to appeal, subject to the approval of the Governor in Council. Immigration Act, as amended 1988, § 84.3.

²¹⁸Id. § 83.3(1).

3. Evaluation

The refugee advocacy community in Canada has been harshly critical of the new arrangements, and major court challenges are underway. Some critics predicted extensive use of the first-stage procedures to remove as many as 90 percent of claimants without a full hearing on the merits,²¹⁹ but these fears seem wildly exaggerated in light of early experience. In the first quarter of its operation, 89 percent of the 2,037 cases concluded at the first stage were in fact referred for a full determination by the CRDD, whereas 6 percent were found to lack a credible basis and 5 percent were withdrawn or abandoned. At the second stage, 94 percent of the 651 cases so far decided have resulted in a grant of asylum. Overall, of the 885 cases entirely completed in the administrative proceedings, 69 percent have resulted in a grant of asylum, 20 percent in a denial, and 11 percent were withdrawn. It must be remembered, however, that these are early statistics, and the picture may change as the new system gets more completely into operation.²²⁰ Moreover, despite the highly favorable grant rates, the new system has had a notable impact in reducing the influx of asylum seekers into Canada, particularly from countries not regarded as significant refugee-producing nations. From a rate of 45,000 applicants in 1988, Canada's intake has now been reduced to an annualized rate of 14,000 - 16,000.²²¹

These early figures seem quite promising. Nonetheless three features of the system led to expressions of concern on the part of nongovernmental observers interviewed for this study. First, many objected to the selection process used to appoint members of the IRB. The government allegedly treated these as political patronage positions (the annual salary in the US \$60,000 range made them attractive), and it passed over some respected RSAC members while selecting several persons who have had little background in this field.²²² The success and fairness of any asylum adjudication system does depend importantly on the training, sensitivity, and orientation of its

²¹⁹65 Interp. Rel. 785, 787 (reporting prediction of refugee attorney Barbara Jackman).

²²⁰Refugee Determination in Canada: First Quarter Review (mimeo, Ottawa, 25 April 1989). Some government officials are now expressing concern about the surprisingly low rate of rejection at the first stage. Malarek, Phony Refugee Claimants are Getting the Message, Toronto Globe and Mail, Feb. 18, 1989, at D2.

²²¹Remarks by Peter Harder, IRB Executive Director, to American Immigration Judges' Conference, Miami, Florida, May 16, 1989.

²²²See 51 Documentation-Réfugiés 1 (27 Sept. - 6 Oct. 1988).

decisionmakers; this is clearly a valid concern.²²³ But it is too early to know whether the recruitment process has actually hampered implementation of a fair and careful scheme.

Second, many interviewees complained about the structure -- and indeed the very existence -- of the first stage of the procedure. For one thing, the adjudicator rather than the CRDD member presides over the proceedings. Adjudicators, although enjoying some guarantees of independence, are regarded as part of immigration enforcement and, in this view, are likely to be oriented toward finding reasons to deny claims. Beyond this, some persons interviewed regard the first stage as unwise and unnecessary; resources should be devoted instead toward expediting the full merits hearing, without undercutting its care and thoroughness. Claimants whose applications lack a credible basis could still be rejected fairly quickly under that alternative, it is argued, although rejection might then require two to three months rather than the two to three weeks hoped for under the current system, assuming that leave to appeal is denied.

Third, the appellate structure causes concerns. The absence of an administrative appeal presents the risk of inconsistent outcomes. Although the General Counsel's office can ameliorate this problem through its "reasons review" function, and the Chairman can monitor outcomes and urge consistency, these correctives are wholly advisory. Court appeals may be too fragmented to achieve this end reliably. In addition, the newly discretionary nature of the appeal, under the "leave to appeal" device, has likewise come in for substantial criticism.²²⁴

I would add a fourth concern. The procedures seem to present an odd mix of adversarial and nonadversarial features, even though they nominally conform to the latter model.²²⁵ It would appear difficult to avoid having the RHOs take an adversarial stance, although the IRB is devoting a major effort to do so. In any event, the whole structure seems designed to guarantee the silence

²²³Professor Ratushny's report in 1984 laid some emphasis on this factor. Although it recommended numerous procedural improvements, it noted that their effectiveness can be over-rated. An important factor, which is often overlooked, is the quality of the decisionmaker. Characteristics such as knowledge, intelligence, patience, sensitivity and plain common sense can often salvage a badly designed process. On the other hand, the highest of procedural standards may not be effective in avoiding injustice where the decision-maker is uninformed, ignorant, impatient, arrogant or foolish.

Where refugee claims are involved, special knowledge, experience, and sensitivity are extremely important. The decision-maker must have a keen interest in international developments in order to keep absolutely current with changing conditions throughout the world. The special trauma and reactions of the persecuted must be taken into account without losing sight of those who would abuse our system in order to gain entry to Canada for reasons other than refuge from persecution.

E. Ratushny, *supra* note 187, at 31, 35.

²²⁴See, e.g., Hathaway, *supra* note 183, at 707; Blum & Laurence, *supra* note 194, at 88-89, 94-95.

²²⁵See also *id.* at 94.

and passivity of the CRDD members. Officially they are to make their decisions only on the record, and they are discouraged from participating in the questioning. Although this method of operation may help assure the reality and appearance of the Members' neutrality, it seems to squander the cumulative expertise those members acquire over time. The RHO role may compensate for this inadequacy, but adding another player in this fashion obviously adds to the expense and complexity of the system. This rigid separation of functions may well be required by Canadian administrative law, but other nations' systems not burdened with such a requirement should question whether this is the most efficient way to apply limited resources.

Despite these potential problems, the new Canadian system represents a major commitment of resources to high-quality and expeditious asylum adjudication, and it has enlisted the efforts of many dedicated individuals. It has had some early successes in reducing the numbers of asylum claimants, apparently through the deterrent message sent by the prospect of speedy rejections at the first stage, and in reaching expeditious decisions at the second stage, both positive and negative. Although the administrative structure does not preclude overly restrictive application, neither does it require such an approach. If sensitively implemented, the new Canadian system promises genuine progress toward the goals of accuracy, fairness, and speedy resolution of claims.

IV. The American Adjudication System

A. Historical Background

The earliest American regulations establishing procedures for asylum and related adjudications appeared in 1953, implementing the 1952 version of § 243(h).²²⁶ They provided for "interrogation under oath by an immigration officer" to examine the claim that the alien would be subject to physical persecution if deported. The regulations permitted the presence of an attorney, at the alien's expense, but said nothing more about the attorney's role during the interrogation. Final decisions, presumably based on the record of the interview, were to be rendered by the Commissioner or Assistant Commissioner -- a cumbersome requirement changed a year later to vest that authority instead in INS regional commissioners.²²⁷

In 1962, new regulations took effect establishing different arrangements for persecution claims in deportation proceedings. They established specific procedures for the immigration judge (then still called a special inquiry officer) to designate an alternate country of deportation, in case the country the alien chose refused to accept him, and they required the judge then to advise of the possibility of withholding under § 243(h). If the alien chose to claim that protection, he received 10 days to file an application documenting his persecution claims, after which he would be examined under oath on these issues as in a deportation proceeding.²²⁸ Later amendments

²²⁶18 Fed. Reg. 4924 (Aug. 19, 1953) (adding a new 8 C.F.R. § 243.3(b)(2)).

²²⁷19 Fed. Reg. 9179 (Dec. 24, 1954).

²²⁸26 Fed. Reg. 12110 (Dec. 19, 1961). With a few modifications, this provision, 8 C.F.R. § 242.17, remains in the regulations and affords one avenue for consideration of withholding by the

made clear that an INS trial attorney could also introduce evidence bearing on the persecution claim.²²⁹

By 1962, then, the two basic patterns for asylum and related adjudications that our system has known had already emerged. On the one hand, INS made some determinations based on a nonadversarial interview or interrogation carried out by an immigration officer. In other settings, immigration judges decided whether to provide relief from deportation after more formalized trial-type proceedings. In succeeding years, INS refined the nonadversarial procedures, vesting the ultimate decisionmaking authority not in the regional commissioners or higher officials, but in the district directors, who of course relied heavily on the immigration officer who conducted the interview. And as INS discovered more and more settings (outside the deportation procedure) in which persecution claims might arise, it adopted a variety of new regulations and instructions specifying that district directors, rather than immigration judges, were to hear and determine those matters. For example, district directors received authority to make final decisions on persecution claims by alien crewmen,²³⁰ excludable aliens,²³¹ and applicants for the special benefits of INA § 203(a)(7) who were already in the United States.²³²

In 1970, a Lithuanian seaman named Simas Kudirka was forcibly returned to a Russian vessel a few hours after he had escaped to a U.S. Coast Guard cutter. Although INS had not been involved in this extraordinary incident, the ensuing outcry launched a complete review of

immigration court. Most applicants today, however, affirmatively apply for asylum much earlier in the immigration court proceedings, under other regulations.

²²⁹See, e.g., 39 Fed. Reg. 25642 (July 12, 1974).

²³⁰32 Fed. Reg. 4342 (March 22, 1967) (amending 8 C.F.R. 253.1(f)). This assignment of authority to the district directors, to the exclusion of special inquiry officers, was approved, over vigorous dissent, in *INS v. Stanisic*, 395 U.S. 62 (1969). Interestingly, this provision, which provides protections only to those fearing persecution in Communist countries, was not amended in the wake of the Refugee Act of 1980, which mandated neutral and apolitical standards in refugee matters. It survives as a kind of dinosaur in the Code of Federal Regulations. Crewmen from other countries may still claim asylum under other provisions.

²³¹This was initially established by Operations Instructions, and only enshrined in the regulations in 1974. See *Pierre v. United States*, 547 F.2d 1281, 1285 (5th Cir. 1977), vacated and remanded to consider mootness, 434 U.S. 962 (1977).

²³²30 Fed. Reg. 14778 (Nov. 30, 1965) (adding 8 C.F.R. § 245.4); amended, 34 Fed. Reg. 19799 (Dec. 18, 1969). That section of the statute was enacted primarily to authorize overseas refugee programs for the resettlement of persons who had "fled persecution" in Communist countries or countries "within the general area of the Middle East." 8 U.S.C. § 1153(a)(7) (1976). But a proviso allowed for adjustment of status to permanent resident, of those who had been physically present in the United States for two years and could prove that they qualified. See generally *Martin*, supra note 1, at 93; *Aleinikoff & Martin*, supra note 6, at 622-23.

asylum procedures used by all agencies.²³³ Eventually INS promulgated new asylum regulations, permitting both excludable and deportable aliens to apply to the district director for asylum on a new form, Form I-589. These 1974 regulations also made specific provision for a practice that had already taken root. They required the district director to seek the views of the Department of State on an asylum claim, while also giving the alien an opportunity to explain or rebut any State Department comments before a decision could be based thereon. Such comments were not binding on the adjudicator, but if the district director decided to deny an application despite a favorable State Department letter, he had to certify his ruling to the regional commissioner for final decision.²³⁴

Under the 1974 regulations, any deportable alien denied asylum in essence could renew the claim in deportation proceedings, by applying to the immigration judge for protection under § 243(h). For excludable aliens, however, the district office remained the only venue for an asylum claim. Within a few years, excludable Haitians challenged, on due process grounds, the regulations' failure to permit an "evidentiary hearing" (of the type provided in immigration court proceedings) when so much was potentially at stake.²³⁵ District courts split on the issue, but the Fifth Circuit eventually ruled for the government, approving the regulations.²³⁶ While the asylum seekers' certiorari petition was pending in the Supreme Court, however, the newly installed Carter Administration decided to accede to the plaintiff's demands, finding merit in the due process concerns and seeing no major costs if the change were made.²³⁷

In considering new regulations to implement that 1977 concession, INS attempted to take to heart the vigorous objections to district director adjudications that had been voiced throughout the earlier litigation -- assertions which made it sound as though such a setting could never provide justice in asylum cases.²³⁸ In consequence, the agency promulgated regulations in 1978 that would

²³³The State Department's resulting policy was announced in 1972 and remains in force today with slight changes. Public Notice 351, 37 Fed. Reg. 3447 (1972), modified, Public Notice 728, 45 Fed.Reg. 70,621 (1980).

²³⁴39 Fed. Reg. 41,832 (Dec. 3, 1974) (adding a new 8 C.F.R. Part 108), amended, 40 Fed. Reg. 3408 (Jan. 22, 1975).

²³⁵This had long been a matter in contention; it was the essential dispute between the majority and dissent in a Supreme Court case construing the regulations governing asylum claims filed by alien crewmen, *INS v. Stanisic*, 395 U.S. 62 (1969).

²³⁶*Pierre v. United States*, 547 F.2d 1281 (5th Cir.), vacated, 434 U.S. 962 (1977).

²³⁷See *Pierre v. United States*, No. 77-53, Memorandum Suggesting Mootness (filed by the Solicitor General).

²³⁸See, e.g., *Pierre v. United States*, No. 77-53, Petition for Certiorari at 18-22.

have made the immigration court the only forum for consideration of such asylum claims, with very limited exceptions, for either excludable or deportable aliens.²³⁹

To INS's legitimate surprise, refugee advocates then began to sing a different tune. They filed comments on the regulations, as well as briefs in litigation, that revealed a remarkable rediscovery of the virtues of nonadversarial proceedings before the district directors, exactly the officials whose decisions had been so heavily criticized in the course of the earlier litigation. Nonadversarial hearings in the district office, it was asserted, would be less frightening for the applicants, particularly those with meritorious cases who were probably the most easily intimidated. Such proceedings would also allow for swift grants when they were warranted.²⁴⁰ Feeling somewhat blindsided, the agency nonetheless largely acquiesced. The final rules retained for deportable aliens the same two-tier de novo consideration, although they did insist on channeling all claims by excludable aliens into the immigration courts.²⁴¹

Refugee advocates were not entirely satisfied. Because legislation that became the Refugee Act of 1980 was then proceeding through Congress, hearings on that bill provided a forum to continue the pressure for a more extensive role for the district directors in considering asylum claims. Eventually the lobbying secured a measure of congressional support for such changes.²⁴²

²³⁹43 Fed. Reg. 40,801 (Sept. 13, 1978) (amendments to 8 C.F.R. Parts 108 and 236, intended to take effect immediately), modified, *id.* at 48620 (October 19, 1978) (in response to litigation, INS stayed the September rules to allow public notice and comment). At the same time, INS promulgated proposed rules intended to work the same changes for deportable aliens; that is, to make the immigration court the only venue for asylum claims. 43 Fed. Reg. 40,879 (Sept. 13, 1978).

²⁴⁰See, e.g., 44 Fed. Reg. 21,253-54 (April 10, 1979) (summarizing comments received on 1978 proposed rules). See also 48 Fed. Reg. 5885 (Feb. 9, 1983) (summarizing comments on 1980 interim rules):

A number of commenters suggested that all applications for asylum, whether filed before or after the institution of exclusion or expulsion proceedings, should be decided by the district director. Proceedings before the district directors were viewed as less adversarial in nature and were providing the applicants with a freer atmosphere within which to present their claims. It was pointed out that many applicants have fled from countries where the judicial process is suspect and feared by them and, they would not feel free to present their claims with the same candor that they could in a proceeding before a district director.

²⁴¹44 Fed. Reg. 21,253 (April 10, 1979) (adopting final rules requiring that asylum claims by excludable aliens be heard exclusively by immigration judges, but permitting deportable aliens not yet in proceedings to file before the district director, without prejudice to later consideration of the claim by the immigration judge; if an order to show cause had already issued, however, asylum and related claims could be heard only by the immigration judge).

²⁴²See, e.g., The Refugee Act of 1979, Hearings before the Subcomm. on Int'l Operations, House Comm. on Foreign Affairs, 96th Cong., 1st Sess., at 89-93 (1979) (testimony of Mr. Swartz); S. Rep. No. 96-256, 96th Cong., 1st Sess., at 9 (committee report on the Refugee Act, stating

INS paid heed to these messages, and its interim rules implementing the asylum provisions of the Refugee Act therefore granted both excludable and deportable aliens an opportunity to be heard first in nonadversarial proceedings before the district director, provided no charging document had yet issued.²⁴³ If unsuccessful, the claimants retained the right to renew their asylum claims before the immigration judges in exclusion or deportation proceedings.²⁴⁴ With minor changes, these interim asylum rules were made final in 1983, retaining the opportunity for two rounds of de novo consideration.²⁴⁵

B. The Current System

Current regulations thus establish a complex system -- rendered even more intricate when all the layers of review, both mandatory and advisory, are factored in. The following description, which draws heavily upon the interviews and field observations conducted for this study,²⁴⁶ sketches the stages of consideration through which an asylum application can proceed.

1. District office

Spontaneous asylum claims, what INS officers often call "walk-ins," receive initial consideration in the district office. To start the process, the asylum seeker files the basic application form, Form I-589, along with any supporting documents. The four-page form asks numerous questions, including queries about past political activities, membership in organizations, current whereabouts and status of family members, and the applicant's reasons for fearing persecution. Officials sometimes complain that many completed forms provide only the scantiest information or

Senate Committee's preference for opportunity for hearing outside exclusion or deportation proceedings, provided no order to show cause has issued).

²⁴³45 Fed. Reg. 37,392 (June 2, 1980) (interim regulations adding, inter alia, a new 8 C.F.R. Part 208 governing asylum).

²⁴⁴8 C.F.R. § 208.9 (1988).

²⁴⁵48 Fed. Reg. 5885 (Feb. 9, 1983) (modifying the earlier regulations to make clear that jurisdiction vests in the immigration judge once a charging document is served, even if the asylum claim was already pending in the district office).

²⁴⁶Interviews were conducted with INS Central Office officials in September 1985 and July and August 1988; with EOIR personnel in Falls Church, Virginia in August 1988; and with immigration judges, INS district office officials, private attorneys and voluntary agency representatives, at the following locations: Miami, November 1985; San Diego, February 1987; Washington, October 1988; New York, November 1988. These visits were supplemented by telephone conversations at various times to clarify matters, by conversations at numerous immigration-law conferences, and by telephone conversations with officials and attorneys in other locations.

seem to follow formulaic patterns.²⁴⁷ But other applications, usually prepared with the assistance of counsel, are accompanied by stacks of documents, both affidavits and more generalized information such as news accounts and reports from human rights organizations. INS charges no fee for filing the I-589.

All district offices provide for an interview by an examiner, but they vary in the precise arrangements. INS places some emphasis on having the interviews conducted by experienced journeymen examiners (usually at the GS-11 grade or higher), who have received special training for this task.²⁴⁸ Offices with heavy walk-in traffic have several such examiners, who do nothing but asylum and related refugee work during their rotation into this assignment (lasting 12 months or more). Smaller offices, however, may of necessity assign these functions to an examiner who has not had the special training and who may devote as little as 25 percent of his or her time to asylum.

Some districts hold the interview at the time of the filing, but most offices with a high volume of asylum traffic schedule interviews some weeks or months after receiving the application. New York is typical of the latter. When visited for this study in November 1988, the New York office had one supervisor and four experienced examiners who had been doing this work for several years. A fifth examiner in the Refugee, Asylum and Parole section had less experience, and so was usually assigned to more routine functions, such as processing renewals of asylum status or adjustments to permanent residence of persons admitted through the overseas refugee program. The office had ordinarily been able to schedule asylum interviews within 60 days of filing (a date that has significance for work authorization purposes),²⁴⁹ but recent increases in applications have

²⁴⁷See Dietrich, *United States Asylum Policy*, in *The New Asylum Seekers*, supra note 1, at 67, 70; P. Weiss Fagen, *Applying for Political Asylum in New York: Law, Policy and Administrative Practice* 31 (Occasional Paper No. 41, New York Research Program in Inter-American Affairs 1984).

²⁴⁸The training program has recently been refined under the guidance of a new officer in the INS Central Office who formerly worked with the UNHCR. It now includes sessions on the legal provisions and country conditions, and usually permits trainees to conduct simulated interviews, followed by critique. These measures represent a considerable improvement over earlier practices, when asylum training was minimal and examiners had to rely on "on-the-job learning." *Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service* 33 (mimeo June 1982) (quasi-official internal INS study). This internal study recounts one almost touching vignette that indicates the inadequacies that have beset INS adjudications: "One officer said that when she was assigned to asylum work, she bought a subscription to Newsweek magazine to 'learn more about' countries overseas." *Id.* at n.*. The officer's initiative is to be applauded. But the fact that asylum adjudication might be assigned to someone who does not already keep up with international affairs at a level represented by weekly general circulation magazines is disheartening. That she had to pay for her own Newsweek is perhaps even more revealing.

²⁴⁹8 C.F.R. § 274a.13(d) (1988) requires adjudication of an application for employment authorization within 60 days; otherwise interim employment authorization, good for 120 days, is to

jeopardized that timing. In an effort to keep up with applications, the office now schedules 20 interviews per day per available examiner, although it is expected that not all the applicants will show up. The press of business eliminates any opportunity for examiners to specialize by region of origin of the applicants; when one interview is finished, the examiner simply proceeds to a central table and picks out the file of the person who has been waiting the longest. This caseload permits only about 20 minutes per interview, although examiners have discretion to take more time if the case requires it.

The interviews usually concentrate on filling in any gaps in the information presented on the I-589, primarily with a view toward transmitting it all to the State Department for its advisory opinion. Typically the examiner records right on the form in red pen any supplementary information developed, although some examiners also write out a few sentences of interview notes on a separate sheet as well. There is considerable variety in the conduct of the interview, depending on the style of the examiner, availability of interpreters, and related factors. INS of course assumes responsibility for making translation available, but the interpreter for a particular language may be tied up in immigration court when needed for an asylum interview in the district office. For that reason, INS occasionally relies on family members or friends of the applicant for these purposes. Interviews also vary considerably in thoroughness. One examination I attended in Miami in late 1985 (when caseloads were less demanding) lasted nearly an hour. The examiner spoke fluent Spanish, and was trying with some creativity to flesh out the full dimensions of the story told by the Nicaraguan applicant. But another examiner in the same office engaged in only perfunctory questioning and completed his sessions in about 15 minutes.

In Miami at that time few applicants appeared with counsel. In New York in 1988, however, the asylum supervisor estimated that perhaps 80 percent of applicants were represented, although asylum attorneys in New York thought that number a bit high. Attorneys usually play only a bystander's role, partly because examiners wish to hear directly from the applicant, and partly because, as one attorney explained it, not much happens: the interview is "an untaxing experience." Although relations with attorneys appear to be satisfactory much of the time, most attorneys interviewed have stories of episodes that angered them, when they felt they were thwarted from playing a needed role, or occasionally where they believe the examiner was abusive or hostile in dealings with the applicant.²⁵⁰

The regulations require issuance of work authorization to "nonfrivolous" asylum applicants, and they require that such authorization be provided during all stages of administrative and judicial review.²⁵¹ Many attorneys expressed frustration, however, that INS rarely issues such authorization

be granted.

²⁵⁰The American Immigration Lawyers Association (AILA) collected affidavits recounting some of these complaints and filed them as part of their opposition to the proposed regulations promulgated in August 1987, described below. AILA affidavits, on file with the author.

²⁵¹8 C.F.R. §§ 274a.12(c)(8), 274a.13(a) (1988).

at the time of filing, no matter how solid the case.²⁵² Instead, the applicant almost always has to wait until the interview, which may be 60 days away.²⁵³ A substantial portion of the interview time is therefore consumed with work authorization, including the rather cumbersome physical process required to replace the old I-94 form in the applicant's passport with a new one stamped "employment authorized." Obviously this preoccupation further impairs the opportunity to use the interview to examine in detail the particulars of the applicant's testimony -- one important reason why the interviews are often "untaxing."

Not infrequently applicants receive no ruling on their asylum applications by the time the original employment authorization period expires. They may then have considerable difficulty gaining extensions, for few district offices have clear channels for making such decisions. Under the prodding of the immigration bar, INS is now trying to improve arrangements for such extensions, and also to improve arrangements for new work authorization for denied applicants who wish to renew their applications in immigration court proceedings.²⁵⁴

The fruits of the interview -- annotated I-589 with attachments, plus any separate interview notes -- are collected for transmission to the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA), under a standard cover sheet containing blanks that would allow the examiner to provide some additional insights. For example, the examiner is asked to characterize the verbal testimony (convincing, unconvincing, specific, generalized, etc.) and to provide a preliminary assessment (grant, deny, non-committal). State Department officers said that examiners often fail to fill out these portions of the form.

After the State Department's views are received, the applicant receives some form of notice, depending on what the district office intends to do with the case. If it is decided to grant the application, the applicant receives a letter calling him in to complete the paperwork for asylee status. If denial is indicated, the applicant receives notice of intent to deny, along with a copy of

²⁵²A memo setting forth standards for deciding on "frivolity" appears in 64 Interp. Rel. 886 (1987). In December 1988, in an apparent attempt to curb the attraction of asylum filings, INS issued instructions stating that the I-589 was not to be taken per se as a work authorization request; a separate application would have to be filed. 66 Interp. Rel. 130 (1989). INS has also clarified the steps necessary to continue work authorizations if the alien wishes to renew the asylum claim in immigration court proceedings. 65 Interp. Rel. 718 (1988).

²⁵³Some offices fell much further behind in scheduling interviews and issuing work authorizations, prompting litigation seeking, among other things, to mandate compliance with the 60-day limit in the regulations. *Mendez v. Thornburgh*, No. 88-04995 JJH (C.D. Cal.), summarized in 66 Interp. Rel. 151 (1989).

²⁵⁴65 Interp. Rel. 718 (1988). See also *Alfaro-Orellana v. Ilchert*, No. C-88-4729-CAL (N.D. Cal. Dec. 14, 1988) (preliminary injunction issued, ordering that work authorization not terminate upon district office denial of asylum, in view of its mandatory renewal once immigration court proceedings begin), summarized in 66 Interp. Rel. 4 (1989).

the State Department letter. He then has 15 days to rebut or supply additional information.²⁵⁵ "Eager young lawyers," I was told by one examiner, sometimes treat this notice as an invitation to provide several pounds of additional material. On rare occasions the new information is returned to the State Department for further review. But most of the time the matter is simply scheduled for final review by an examiner after the rebuttal period has passed. In New York, this whole process can last seven or eight months from the time of the interview; it almost surely will require at least four months. For that reason, no effort is made to return the file to the original interviewer; he probably would have no independent recollection of the case in any event. Several examiners told me that the State Department views "count for a lot,"²⁵⁶ although all were aware that they were not bound by the Department's position.

Table I provides statistics on the rising caseloads of the district offices, and Table II shows approval rates by nationality for FY 1988 and cumulatively for the last five years. The statistics show the number of "cases." Because a case may represent applications for several members of a family, who will be treated together in accordance with INA § 208(c), actual numbers of asylum seekers are higher than what is shown in the Tables. Moreover, the tables do not include applicants who apply only before the immigration judges.

2. Immigration court

Claimants who were denied in the district office may renew their asylum applications before the immigration judges when deportation or exclusion proceedings begin. But if the alien applies for asylum only after those proceedings have been initiated, immigration court will provide the only available forum.²⁵⁷ In either case, the process is virtually identical. It is initiated by filing with the docket clerk the Form I-589 along with any accompanying documents.²⁵⁸ The clerk then forwards

²⁵⁵Under a recently implemented procedure described below, if State responds with a preprinted sticker indicating simply that it has nothing to add, the district office may proceed to a negative decision without issuing a notice of intent to deny. See 66 Interp. Rel. 351 (1989).

²⁵⁶An internal study of INS asylum procedures also confirms the great weight carried by State Department letters. Asylum Adjudications, supra note 248, at 57-64. A GAO study based on 1984 advisory opinions found that the Justice Department's final decision agreed with the State advice in 96 percent of the cases worldwide. General Accounting Office, Uniform Application of Standards Uncertain -- Few Denied Applicants Deported 22, 42 (GAO/GGD-87-33 BR, Jan. 1987).

²⁵⁷Many first express a wish to apply for asylum when the case comes up on master calendar a short while after the proceedings have begun. In this setting the alien pleads to the order to show cause and makes known any defenses or applications for relief from deportation he may wish to raise. The overwhelming majority of asylum applicants admit deportability; asylum is the only issue in the deportation proceeding.

²⁵⁸Technically, an applicant in the immigration court is seeking the benefits of both asylum under INA § 208 and withholding under § 243(h), whereas examiners in the district office can award only asylum under § 208. This makes virtually no practical difference, and the Form I-589 is identical in both settings.

a copy to the State Department. Although the regulations seem to preclude State Department referral if the district office earlier received an advisory letter (with limited exceptions),²⁵⁹ docket clerks now routinely transfer the files without checking for earlier letters. Not only is this arrangement less cumbersome for the clerk, but it also fits better with the desire of EOIR to assure the independence of the present proceedings from earlier INS consideration. State Department officers reported that they received less complete files from the immigration courts, perhaps because some docket clerks resist mailing lengthy documentary attachments. In any event, State clearly receives nothing equivalent to the district office examiner's notes. Some judges even provide a cover sheet pointedly stating that no assessment of credibility or other review has been performed before transmission to the State Department.

After the file comes back from State with its views, the case can be calendared for a hearing. The timing varies depending on caseload, but delays of a year are not unknown. Asylum cases receive no priority in calendaring, unless the applicant is detained, in which case the judges place a high priority on prompt adjudication. Detention is more likely in exclusion cases than in deportation.²⁶⁰ The immigration court in New York has worked out arrangements with attorneys to permit time for interviews with clients when they are brought in to the court facility in Brooklyn, thus obviating frequent trips out to the more remote detention facility.²⁶¹

It is also possible, as well, that an asylum claim will be lodged later in the process. For example, the regulations still provide for express advice of rights to apply for withholding at the time when the immigration judge designates a country of deportation. 8 C.F.R. § 242.17(c) (1988). The alien then can receive 10 days to fill out the I-589 and thereby initiate consideration of a persecution claim. An alien can also apply for asylum after the issuance of a deportation order by filing a motion to reopen, *id.* § 208.11, but he then carries the additional burden of explaining why he failed to apply earlier. This can be a substantial burden. See *INS v. Abudu*, 108 S.Ct. 904 (1988). If reopening is granted, however, the matter will return to the immigration judge for consideration.

²⁵⁹8 C.F.R. § 208.3(b), 208.7, 208.10(b) (1988).

²⁶⁰See 8 C.F.R. §§ 212.5, 235.3 (1988). The background of the detention policy is set forth in *Aleinikoff & Martin*, *supra* note 6, at 722-24. See also *Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987); *Singh v. Nelson*, 623 F.Supp. 545 (S.D.N.Y. 1985) (generally upholding detention of asylum seekers, in part as a deterrent measure). For critiques of detention of asylum seekers, see Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. Rev. L. & Soc. Change 353 (1986); Levy, *Detention in the Asylum Context*, 44 U.Pitt. L. Rev. 297 (1983).

²⁶¹Detention arrangements bring frequent complaints from applicant's attorneys, particularly when detention is carried out by private contractors such as those that manage the Westway Hotel facility in New York. I was told that "these are guys who usually guard construction sites," that they "know nothing" about American Correctional Association accreditation standards, and that they make life quite difficult for attorneys who are simply seeking access to their clients. INS should assure better treatment in such facilities. See General Accounting Office, *Criminal Aliens -- INS' Detention and Deportation Activities in the New York City Area* (GAO/GGD-887-19 BR, Dec. 1986).

Procedure in court conforms, by and large, to a standard adversarial model of a trial-type proceeding. Most asylum seekers, at least in the districts with high volume, are now represented in immigration court by counsel or accredited nonattorney representatives.²⁶² The burden of proof is on the alien. Counsel will usually elicit the key particulars of the story from his client on direct examination and will also offer available supporting materials, often derived from the reports of human-rights NGOs such as Amnesty International or the International Commission of Jurists.²⁶³ The INS trial attorney then cross-examines, but in busy districts trial attorneys have little time to prepare the cases. Sometimes they are able to review the file for the first time only while direct examination is proceeding. Moreover, trial attorneys are not really expected to develop extensive additional information or other sources of evidence.

This insufficiency in preparation time and resources carries several disadvantages, compounded by the failure to assign clear responsibility to develop other sources of information. To begin with, cross examination is impoverished under these circumstances. One trial attorney stated ruefully during his interview that he necessarily does what he was always taught in law school not to do: he asks questions when he has no idea where the answers might lead. Sometimes a useful line of inquiry develops. Often it does not. All he can do is probe apparent soft spots and inconsistencies in the story. Given so little to work with, his incentives are to magnify the weaknesses in the testimony even if there might be an innocent explanation.

Second, early file review might sometimes have revealed the need for additional and specific information on country conditions, but the day of the hearing will be too late to meet the need, even if the information would have been relatively accessible. An example may be helpful in illustrating this point. Suppose the applicant claims that he fled to avoid forced conscription into the army or a guerrilla unit. Cross-examination can do little to explore whether such dragooning really takes place at home; it can only probe the wellsprings of this particular alien's belief. If the State Department response said nothing about the issue (perhaps because the initial papers did not make sufficiently clear that this was the basis of the claim), the record may contain no useful general information on this crucial question. The applicant's assertions will therefore stand "uncontroverted," whatever may be the real state of facts in the home country. BIA member Michael Heilman expressed particular concern about this inadequacy, especially given the Board's

²⁶²8 C.F.R. § 292.2 (1988) provides for accreditation of such representatives. *Id.* Part 292a requires district directors to maintain a list of free legal services programs available in the area. These lists can be somewhat misleading, both because the list gets out of date, and some of the organizations listed have in recent years become more selective in accepting cases.

²⁶³The closest analogues in this country to the documentation centers used by European adjudicators are the private documentation centers put together by refugee advocacy organizations. Many specialize by region. See, e.g., 60 *Interp. Rel.* 975 (reporting on new center gathering information on El Salvador). At least one commercial organization has become involved; the Data Center in Oakland, Calif. recently mailed a brochure to members of the American Immigration Lawyers Association advertising its Political Asylum Documentation Service, available for \$50 per hour of search time, plus photocopying and postage.

strict adherence to the requirement that decisions be based on evidence of record in the particular proceeding.

Some trial attorneys also reflected thoughtfully on wider implications of applying the adversarial system to these matters. The government's real interest will not always be to oppose the claimant; some of the applicants deserve asylum. But the attorney may have little idea which type of case is before him until well into the proceedings. Moreover, as one told me, even when it appears to be a strong case, his instincts (and perhaps his inevitable role under this structure) lead him to react in a particular way: "When it's there in the courtroom, I'm 'agin' it."

There are currently 75 immigration judges. As Table III indicates, asylum cases have risen from 10 percent of immigration court caseload in 1985 to over 13 percent in 1988. Because asylum cases tend to present the most difficult and challenging issues, however, they occupy a much higher percentage of actual work time. In fiscal year 1988, immigration judges received 11,025 new cases and disposed of cases as follows: 1,647 cases were granted (representing 2,276 individuals), while 5,626 were denied, for an overall grant rate of 23 percent. A total of 4,364 cases were pending in immigration courts at year's end.²⁶⁴

3. State Department role

The State Department is required by statute to publish annual reports on human rights conditions in all foreign countries.²⁶⁵ This requirement derived from congressional efforts to strengthen human rights policy during the Kissinger era at the State Department, rather than any concern for asylum proceedings. But the reports in fact have proved extremely useful in asylum adjudications, both in the United States and around the world. Every district office asylum unit and every immigration judge receives a copy, and I have seen well-thumbed issues in the offices of asylum adjudicators in Western Europe and Canada -- and indeed in the offices of UNHCR and refugee advocacy organizations.

The controversial portion of the State Department's role, however, relates to its preparation of advice letters in individual asylum cases. The Bureau of Human Rights and Humanitarian Affairs (BHRHA) plays the central role in the asylum advice process. Its asylum unit, headed by a career foreign service officer, is largely staffed by retired foreign service officers, doing part-time work under contract. They are able, to a considerable extent, to specialize by region of origin. In summer 1988, for example, one officer assumed responsibility for claims from Eastern

²⁶⁴EOIR, Asylum Statistics [Immigration Judges] for Period 10/1/87 - 10/1/88. (The slight discrepancy between these numbers for cases received and those in Table III is unexplained.) Until very recently, EOIR published only limited statistics on asylum cases and did not reveal grant and denial rates by nationality. In the spring of 1989, however, it decided to compile such figures, id., and make them available to the public. They show, for example, a noticeably higher grant rate for Salvadorans (12 percent) and a lower one for Nicaraguans (38 percent) than the comparable rates in the INS district offices, which are shown in Table II.

²⁶⁵22 U.S.C. § 2151n(d) (1988).

Europe and some East Asian countries. Another concentrated on the Near East and South Asia. And three officers were responsible for Central and South America.

When files arrive from either district offices or immigration courts, they are logged in on a central bureau computer and assigned to the appropriate officer for review. Until early 1988, the Bureau returned an opinion letter in each case, many of them standard form letters, usually announcing whether the Department believed that the particular applicant had a well-founded fear of persecution.²⁶⁶ BHRHA officers initially drafted the letters, in almost all cases simply after reading through the file. Very few cases have stimulated further specific research. After drafting, the letter is cleared with the appropriate country desk in the regional bureaus of the State Department. Critics have sometimes targeted the regional bureaus as the source of political bias in the outcomes. But State Department officials deny that diplomatic commitments to other nations have ever entered into the advice-letter process.²⁶⁷ Moreover, as caseload has expanded, the regional bureau clearance process has become more and more routine. Apparently regional bureaus often now grant blanket clearances, relying on the BHRHA officer to bring to their attention any unusual cases requiring more thorough scrutiny.

In February 1988, State introduced a new system. INS and EOIR still send all files as before, but the Department no longer invariably returns an advice letter. Its response instead takes one of three forms. First and most common, a sticker is affixed to the returning papers simply stating that the Department has nothing to add and referring generally to the latest human rights country reports.²⁶⁸ Second, the officer might return the file without an individualized communication, but include a general update sheet. Those sheets will report, for example, on a change of government since the last country report was written, or sometimes provide more detailed information than the country report contains about specific issues, such as the treatment of a particular religious group or punishments for those who left the country without exit permission. And third, the Department still sometimes returns more detailed advisory letters in cases where it has something specific to add.²⁶⁹

²⁶⁶Form letters have often drawn criticism, but volume made such an approach virtually unavoidable. See generally, e.g., *Matter of Vigil*, Interim Dec. No. 3050 (BIA) 1988), slip op. at 12 (deportation respondent complains of form letter; BIA finds no error, because letter is not binding and immigration judge may determine weight it deserves).

²⁶⁷See Burke, *Compassion versus Self-Interest: Who Should Be Given Asylum in the United States?*, 8 *Fletcher Forum* 311, 320-22 (1984); Dietrich, *United States Asylum Policy*, in *The New Asylum Seekers*, supra note 1, at 67 (each article is written by a former Deputy Assistant Secretary of State who headed the asylum office).

²⁶⁸The text of the sticker is reprinted in 8 *AILA Monthly Mailing* 118 (1989) (reporting further on INS cable clarifying that no "notice of intent to deny" is necessary when the State Department responds with a sticker). Because examiners apparently tended to treat stickers as negative opinions, INS recently had to send further guidance to its offices emphasizing that stickers are not to be considered as "adverse evidence." 66 *Interp. Rel.* 351 (1989).

²⁶⁹See 53 *Fed. Reg.* 2893 (Feb. 2, 1988) (announcing new system).

The new sticker system receives mixed reviews. Several people interviewed, including William Robie, the Chief Immigration Judge, find the change a big improvement. The stickers make it clearer than the old form letters did that the Department has nothing to add. It is then more clearly left to the immigration judge to decide based on the record -- which can of course include the annual State Department country report and any generic update sheets that are available. Others, especially district office examiners, but also some immigration judges, regard the stickers as a kind of dereliction of duty; they want more guidance from State. One State Department officer (who also dislikes the sticker system) reported frequent receipt of files from district offices with a marking on the cover sheet: "No sticker."

Asylum applicants have frequently challenged the use and accuracy of State Department letters, or have sought access to their authors for cross-examination. Although some letters have drawn sharp judicial criticism,²⁷⁰ by and large the courts have approved the practice, even in the immigration court setting.²⁷¹ In dictum in one such case, Judge Friendly advised certain changes that would minimize any due process problems arising from introduction of the letters without making their authors available for cross-examination. In the future, he recommended, such letters should be confined to dealing with "legislative facts" such as the extent of persecution in the home country, and refrain from recommending an outcome in the specific case. If so modified, Judge Friendly suggested, they would deal with matters "on which the safeguards of confrontation and cross-examination are not required and on which the IJ needs all the help he can get."²⁷² For roughly 13 years after that admonition, the Department persisted in sending letters that commented on the specific case, i.e., on adjudicative facts. The new sticker system (ironically, adopted primarily for budgetary reasons) now brings practice more in line with the scheme the Judge envisioned.

4. Administrative review

a. The Board of Immigration Appeals. There is no appeal from the district office decision, although renewal in immigration court obviously provides an opportunity to secure relief if the original denial was unjustified. Decisions in immigration court, however, are appealable to the BIA, under the standard procedures allowing review of decisions in exclusion and deportation cases. Both the applicant and the INS can appeal, although appeals by the latter are far less frequent.

²⁷⁰See, e.g., *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968); *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975).

²⁷¹See, e.g., *McLeod v. INS*, 802 F.2d 89 (3d Cir. 1986); *Hotel and Restaurant Employees Union, Local 25 v. Smith*, 594 F.Supp. 502, 510-14 (D.D.C. 1984), *aff'd* by an equally divided court, 846 F.2d 1499 (D.C.Cir. 1988) (en banc). For BIA descriptions of the appropriate use of State Department advice, see, e.g., *Matter of Vigil*, Interim Dec. No. 3050 (BIA 1988); *Matter of Exilus*, 18 I&N Dec. 276 (BIA 1982).

²⁷²*Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir. 1976).

The Board, created by Justice Department regulations rather than by statute, consists of five members and does all its work at its headquarters in Falls Church, Virginia. It hears appeals in all exclusion and deportation cases, and also reviews a variety of other immigration-related decisions.²⁷³ Exact statistics are unavailable, but informed guesses place asylum at about one-quarter of the BIA's caseload. Owing to their greater complexity, however, asylum cases occupy about half its worktime. See Table IV.

To cope with rising workload, new regulations in 1988 authorized temporary assignments of immigration judges to sit with the Board, and for the first time allowed consideration of cases by three-member panels.²⁷⁴ Oral argument is possible with Board approval, but remains rare. Far more commonly the Board considers the matter on briefs alone. Each appeal is decided by opinion, but only a small fraction of those opinions are published as precedent decisions.²⁷⁵ The BIA appeal process can consume considerable amounts of time, although precise statistics are currently unavailable. The greatest delays derive from backlogs in typing the transcript of the hearing; periods of eight to twelve months are not uncommon. The Board then requires several additional weeks or months before issuing a decision.²⁷⁶ Cases involving an applicant in detention receive priority, however. The transcript can then be prepared in a matter of weeks, and the Board will also expedite its own decision process.

b. The Asylum Policy and Review Unit. The Asylum Policy and Review Unit (APRU) was established in the Office of Legal Policy of the Department of Justice in 1987, at least partly in response to the Medvid incident (the forcible return of a Ukrainian seaman to a Soviet ship docked in Louisiana).²⁷⁷ Its genesis also reflects the dissatisfaction of the Justice Department under Attorney General Meese with the tenor of State Department and INS handling of certain cases. An APRU official complained, for example, that State failed to stay sufficiently "up to date" on developments in some countries. Critics of APRU provide a harsher assessment of its origin.

²⁷³See Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1302-10 (1986).

²⁷⁴53 Fed. Reg. 15659 (May 3, 1988) (to be codified at 8 C.F.R. § 3.1(a)(1)).

²⁷⁵For a useful look at BIA practice, see Smith, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681 (1989).

²⁷⁶See Legomsky, *supra* note 273, at 1331 (reporting rough estimate of three months' mean for BIA disposition -- presumably from the time the BIA actually receives the case; *i.e.*, after the transcript and briefs are received). Transcript delays are so costly that the system should explore other means of presenting an adequate record on appeal. For an innovative suggestion of using videotapes for these purposes in asylum cases, see E. Ratushny, *supra* note 187, at 57-58.

²⁷⁷The regulation officially establishing the Unit appears at 52 Fed. Reg. 11,043 (April 7, 1987). See also 64 Interp. Rel. 439, 472-73 (1987).

They believe it exists to assure a higher grant rate for persons fleeing Eastern Europe or other Marxist countries -- apparently a matter of strong concern to the Department under Mr. Meese.²⁷⁸

APRU receives the whole file in every case denied in the district offices, and also a copy of the approval letter in granted cases -- almost always after the alien has been notified of the result. The office carefully keeps its distance from cases being considered in EOIR (by the immigration judges or the BIA), in order to honor the latter's quasi-judicial independence. But there apparently have been a handful of cases where an applicant rejected in EOIR has been given a new round of review in the district office as a result of APRU concern. APRU is not strictly an appellate body. Asylum applicants do not initiate its consideration, although knowledgeable lawyers are now becoming more aware of the office's role and of course cannot be prevented from writing with concerns about allegedly unjustified denials.

Most of APRU's review work is performed by three attorneys in the office. If they believe an application was improperly denied, or spot trends indicating undue restrictiveness with respect to certain groups, APRU makes its concerns known to the Central Office of INS. Sometimes this results in reopening and correction in the district office, but at the time of interviews (July 1988), the Deputy Director expressed concern whether messages communicated in this way adequately get through to the districts. He further described APRU's role as a "safety valve," assuring that persons at risk are not wrongfully sent home; the office's individual case review serves mainly to spot egregious cases. About 40 such cases had been pursued with vigor with the district offices.²⁷⁹ INS, however, believes that APRU's functions are duplicative, and Commissioner Nelson recently urged Attorney General Thornburgh to abolish the office, freeing its annual budget for use in other parts of the adjudication system.²⁸⁰

²⁷⁸See, e.g., Pear, *supra* note 37 (reporting on consideration of regulations that would provide a presumption favoring asylum for persons from "totalitarian" but not from "authoritarian" countries; the proposal later drew considerable criticism and was never officially made public).

²⁷⁹Interview with Robert Charles Hill, Deputy Director, APRU, July 28, 1988. As of April 5, 1989, the Director reported: "APRU has worked with INS to obtain the reversal on approximately 40 cases. In another approximately 40 cases, no agreement could be reached with INS, and APRU recommended, and the Deputy Attorney General approved, grants of asylum. In addition, approximately 50 cases are currently being discussed by APRU with INS." Letter from Henry L. Curry to the author, April 5, 1987.

²⁸⁰66 Interp. Rel. 3 (1989) (asserting that from April 1987 through December 1988, APRU cost the INS appropriation \$750,000).

5. Judicial review

Applicants ordinarily secure judicial review of asylum denials in accordance with the regular arrangements for review of exclusion or deportation orders under INA § 106.²⁸¹ Exclusion cases therefore proceed to district court on a habeas corpus petition; deportation cases are heard in the court of appeals based on a petition to review. This distinction makes little or no difference in the operative scope of review. Courts review denials of the mandatory protections of § 243(h) to check that the ruling was based on "substantial evidence."²⁸² Denials of asylum under § 208 are subject to a bifurcated standard of review. The "substantial evidence" test applies to factual determinations that underlie the judgment whether the person has a well-founded fear of persecution, but if asylum is denied in the exercise of discretion, that denial is reviewed only for "abuse of discretion" -- intended as a more deferential standard.²⁸³ Whatever the precise formula, the actual vigor of scrutiny covers a wide range, from highly deferential to highly demanding.²⁸⁴

Deportation is automatically stayed once a petition to review is served on the INS.²⁸⁵ Stays are not automatic in exclusion cases or while a motion to reopen is pending, but for understandable reasons district courts have been quite hospitable to the issuance of a stay, in light of the possible effects of an erroneous removal.²⁸⁶ Given federal court caseloads, pursuing judicial review can therefore considerably lengthen an applicant's stay in the United States. But to date only a small proportion of asylum applicants pursue direct review in court, as Table V indicates. The information in the Table is somewhat misleading, however, as class actions or other suits seeking broadly applicable injunctive relief, rather than direct review in single cases, have provided

²⁸¹8 U.S.C. § 1105a (1988). Some cases appear to hold open the possibility of judicial review in district court under the APA of denials in the district court, but the better view postpones court consideration until immigration court and BIA remedies have been exhausted. See, e.g., *Chen Chaun-Fa v. Kiley*, 459 F.Supp. 762, 765 (S.D.N.Y. 1978).

²⁸²See, e.g., *Chavarria v. Dept. of Justice*, 722 F.2d 666, 670 (11th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1316-17 (9th Cir. 1981). But see *Marroquin-Manriquez v. INS*, 699 F.2d 129, 133 (3d Cir. 1983), cert. denied, 467 U.S. 1259 (1984) (stating that "abuse of discretion" standard should be used, because of the "necessary application of expertise in the determination that a fear of persecution is well-founded").

²⁸³See, e.g., *Cruz-Lopez v. INS*, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986); *Vides-Vides v. INS*, 783 F.2d 1463, 1466 (9th Cir. 1986); *Carvajal-Munoz v. INS*, 743 F.2d 562, 567-68 (7th Cir. 1984).

²⁸⁴Compare, e.g., *Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987) and *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1977) (close review of immigration judge's credibility rulings) with *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986) and *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (prescribing great deference to agency's credibility determinations).

²⁸⁵INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3)(1988).

²⁸⁶See, e.g., *Bazrafshan v. Pomeroy*, 587 F. Supp. 498 (D.N.J. 1984).

the setting for some of the most important judicial rulings on asylum processing.²⁸⁷ Some of these cases have resulted in multi-year stays of removals and in orders necessitating reopening of hundreds of proceedings. The Director of the Justice Department's Office of Immigration Litigation reports that asylum issues "take a huge portion of our time."²⁸⁸

6. Actual deportations

It is difficult to obtain precise information on actual removals of unsuccessful asylum seekers, but by all accounts, the numbers are quite low. A 1984 GAO study found final deportation orders issued in only 3.5 percent of cases of persons initially denied asylum, and over half of those individuals apparently had not been removed. Another one percent had left on their own. Although a very high percentage of the sample of 21,032 aliens were in an uncertain status (and some might have left), these numbers are disturbing, particularly because actual deportations are essential to send any kind of deterrent message to persons in the home countries contemplating a journey to the United States to apply for asylum.²⁸⁹

Deportations falter at two stages. First, applicants denied asylum in the district office will receive orders to show cause (thus initiating deportation proceedings) only if the investigations section completes the paperwork. These sections are overburdened, and failed asylum applicants do not occupy a high enforcement priority. Second, when a deportation order becomes final, the respondents are usually promptly served with a notice to leave the country. But if they fail to do so, enforced deportation will occur only if INS takes the initiative to locate and apprehend the person. Again, failed asylum seekers occupy a low enforcement priority.²⁹⁰

There are exceptions to these patterns. If the individual is held in detention, a final deportation or exclusion order will almost always result in prompt removal. Moreover, several officers in district offices reported to me that voluntary surrender for deportation picks up just before holidays. Apparently the individuals are ready to go home, and present themselves to INS

²⁸⁷See cases cited supra note 6.

²⁸⁸Telephone interview of Robert Bombaugh, March 8, 1989.

²⁸⁹GAO study, supra note 256, at 25. See also Weiss Fagen, supra note 247, at 54-55. The problem is by no means confined to asylum cases. Other studies have noted the general inability of the INS system to secure actual deportations. See, e.g., E. Harwood, supra note 60, at 41-46 (1986). In 1986, INS also changed the regulations to eliminate the 72-hour advance notice to surrender for deportation given to aliens already subject to a final deportation order, in part because an INS study found that more than 76 percent of recipients absconded after receiving such letters (often known familiarly as "bag and baggage" letters or, even more familiarly, as "run letters"). See 51 Fed. Reg. 3471, 23041-42 (Jan. 28, June 25, 1986).

²⁹⁰See generally E. Harwood, supra note 60, at 30, 122-30, 184.

because the agency is likely then to pay the costs of transportation. It is not surprising that such behavior by unsuccessful asylum applicants evokes cynicism on the part of the officers.²⁹¹

7. The role of the UNHCR

In the late 1970s, the State Department made arrangements with UNHCR for its review of all Haitian asylum applications, then the most controversial portion of its caseload. If UNHCR disagreed with a draft State advice letter, it raised its concerns with BHRHA and a negotiating process ensued before the final letter was sent. Sometimes the Bureau persuaded UNHCR to change its views. In all other cases of initial disagreement, the State Department accepted the UNHCR position.²⁹²

Although there have been frequent calls for expanding this practice (in some form) to cover all asylum cases, during the 1980s the trend went in the opposite direction. The Reagan administration held to a more skeptical stance toward international organizations, and UNHCR's access declined.²⁹³ Although the Washington office retains some contact with State and INS to communicate its general views on, for example, proposed regulations, its role as systematic reviewer of individual cases has long since ended. It now performs three other functions: (1) helping asylum seekers, on occasion, to locate pro bono counsel; (2) filing amicus curiae briefs in cases (usually class actions) likely to have wide impact on asylum processing; and (3) sending a letter to applicant's counsel expressing UNHCR views on the particular application. UNHCR receives far more requests for the latter service than it can possibly meet. It tries to be selective and write such a letter only in strong cases, and only at the stage when the matter is already before an immigration judge. It is then up to counsel to introduce the letter in an appropriate manner into the immigration court proceedings.²⁹⁴

²⁹¹The Harwood study, *id.* at 41-46, uncovered the same phenomenon. It recounts the story of one alien who showed up two days before the date shown on his "bag and baggage" letter for deportation to El Salvador. The INS office made him wait. One officer explained: "What they have to realize is that deportation is a privilege, not a right."

²⁹²See U.S. Refugee Programs, Hearing before the Sen. Comm. on the Judiciary, 96th Cong., 2d Sess. 15 (April 17, 1980) (testimony of Cyrus Vance). Secretary Vance expressed satisfaction with this arrangement and stated: "this doublecheck which we have developed by working with the U.N. High Commissioner is a sensible and wise way of checking our standards and seeing that they are being fairly applied."

²⁹³See Burke, *supra* note 267, at 325 (Reagan Administration official argues against UNHCR participation in asylum adjudication, because determining who may stay "is a fundamental attribute to sovereignty").

²⁹⁴An example of such a letter may be found in *Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988).

8. The August 1987 proposed regulations

Throughout the 1980s, INS has been considering further reforms to the asylum process to make it more expeditious and effective. The most thorough effort at crafting reforms built upon an internal study carried out by retired district director Richard Spurlock in 1985. Because of the sensitivity of the issues, the potential costs, and the multiple agencies involved, each with its own particular angle of vision and bureaucratic turf to protect, however, the proposals did not result in formally promulgated draft regulations until August 1987.²⁹⁵

Those proposed rules ranged widely and contained some improvements widely supported. But the central change touched off a storm of controversy. The regulations proposed to establish a new corps of asylum adjudicators in INS, responsible to the Central Office's Office of Refugee Asylum and Parole, who would consider all asylum issues, no matter at what stage of the proceedings the asylum claim was filed.²⁹⁶ The immigration judges would have been removed from asylum issues altogether, thus ending the provision of two possible rounds of de novo consideration.

If the alien was already in deportation or exclusion proceedings at the time of the asylum claim, those proceedings were to be adjourned to permit consideration of the case by the new adjudicators. The State Department was to receive a copy of all asylum applications and retained the option of communicating its views to the adjudicators, but the proposal probably would have led to a reduced role for the Department. If asylum was denied, the matter would return to the immigration court for consideration of any other defenses, and for issuance of a final deportation or exclusion order. Under the proposed regulations, the immigration judge had no authority to reconsider the asylum claim. The alien could still appeal to the BIA, however, and the Board retained authority to review the adjudicator's asylum decision.

These regulations evoked a strong reaction from refugee advocates. Although some had earlier expressed openness to the idea of a single corps of expert adjudicators, all were deeply concerned about the adjudicators' lack of independence under the August draft. The asylum office was to remain in INS, instead of being moved to EOIR or a wholly new independent agency. Moreover, initial indications about staffing and training held little promise of significant upgrading in the quality of personnel or procedures over what was already experienced in the district offices.²⁹⁷

Although some comments filed in response to the rulemaking suggested measures that would address these concerns directly, while retaining the basic idea of a single round of adjudication before a specialized set of adjudicators, NGO opposition soon focused with vigor on one particular cure: reinstatement of the opportunity for de novo consideration by the immigration

²⁹⁵52 Fed. Reg. 32,552 (Aug. 28, 1987).

²⁹⁶Although the regulations did not so state, INS initially envisioned stationing these officers in seven or eight cities throughout the country, with some provision for "circuit riding" to hear claims lodged in more remote locations.

²⁹⁷See, e.g., Helton, *The Proposed Asylum Rules: An Analysis*, 64 *Interp. Rel.* 1070 (1987).

judges. The campaign was so intense that the matter moved directly to the desk of the Deputy Attorney General, who decided to accede to the NGO position. On the day the comment period closed, the Justice Department told the press that new regulations would issue reinstating the judges in the process.²⁹⁸ And finally in April 1988 new proposed regulations appeared, implementing this decision, but continuing with plans for a centralized corps of adjudicators to replace the district office examiners.²⁹⁹ Continuing internal disputes have prevented final promulgation.³⁰⁰

C. Evaluation

Almost no one regards the current asylum adjudication system as an effective and efficient scheme for administering these sensitive provisions of our immigration laws. If accuracy, speed, and fairness are the key objectives in asylum adjudications, the current system achieves them in only a small portion of cases.

1. Speed and fairness.

a. "Two bites at the apple." Despite nominal agreement on all sides that expeditious proceedings are needed, the current system rarely achieves prompt finality. The most obvious culprit is the wasteful provision of two venues for de novo rulings in asylum -- exactly the problem targeted in the August 1987 proposed rules.³⁰¹ Those rules, of course, met with such strong opposition that the Justice Department beat a hasty retreat and reinstated the role of the immigration judges in the April 1988 NPRM. But the nature of the objections, the NGOs' proposed remedy, and the Administration's ultimate response merit further inquiry.

Most of the opposition to the August 1987 proposed rules derived not from a belief that the immigration court provides the ideal setting for consideration of asylum claims. Indeed, the judges are often criticized in other venues, on a variety of grounds, by the same people who attacked the 1987 proposal. The opposition derived instead from concern about the quality of decisionmaking that could be expected under the precise form of unification that was proposed. The centralized corps of asylum adjudicators, who would have become the the sole arbiters, would not likely have been much different, in training, background, or outlook, from the current examiners who make the decisions in the district offices. Opponents of the new regulations were

²⁹⁸Arocha, Political Asylum Revision Dropped, Wash. Post., Oct. 30, 1987, at A23, col. 1. This was followed by a formal announcement to this effect in the Federal Register in December. 52 Fed. Reg. 46,776 (Dec. 10, 1987).

²⁹⁹53 Fed. Reg. 11300 (April 6, 1988). See Helton, Asylum Rules Revisited: An Analysis, 65 Interp. Rel. 367 (1988).

³⁰⁰See, e.g., 66 Interp. Rel. 3 (1989) (INS Commissioner suggests that asylum adjudication function should remain in the district offices as before).

³⁰¹See Kurzban, Restructuring the Asylum Process, 19 San Diego L. Rev. 91, 98, 111-12 (1981).

able to collect affidavits with numerous stories of brusqueness, mishandling, errors, and apparent bias on the part of some of those officials.³⁰²

Early internal versions of what became the 1987 proposed regulations had considered assigning the newly centralized adjudication function to a different set of officials -- attorneys at a higher civil service rank. But the Administration ultimately chose instead a version that would keep the position as one for journeyman immigration examiners, and OMB initially assigned a relatively low grade, GS-11, to the new positions (GS-12 for supervisors) -- relative, that is, to the magnitude and challenge of the adjudication required. The administration decided, in short, to attempt reform on the cheap, by shifting boxes on the organization charts rather than investing adequately in a new system and new personnel that might break through the established, and destructive, patterns of polarization and distrust that have paralyzed effective reform for years. The vigorous reaction from the NGO community should not have been a surprise, given that the adversarial forum was being replaced with such a stingy alternative.

Some old government hands in the immigration field, familiar with the shifting patterns of NGO advocacy over the last 15 years -- sometimes favoring nonadversarial procedures, sometimes treating the immigration judges as indispensable -- conclude that the NGOs' position is always and only a tactical one, meant to preserve "two bites at the apple" whatever the proposal on the table. But to be fair, there is no inherent inconsistency in the advocates' position. If speed were no concern, it might well be that the best possible system does involve two rounds of de novo consideration in different institutional settings: first a nonadversarial hearing to foster responses from hesitant or fearful applicants, followed by an adversarial, trial-type hearing that we traditionally identify as the best way to honor due process when the stakes for the individual are high.³⁰³ And Arthur Helton, a leading figure in the asylum debates, stated forcefully during his interview for this study that the fight over the 1987 regulations has left the NGO community deeply committed to "bifurcated proceedings," that is, to a system that allows two separate forums for initial, de novo consideration. NGOs will probably resist stoutly any departure from the victory they feel they justifiably won in October 1987.

But the rub is this. Speed is a concern, a vital concern. It must come to be seen as such by NGOs as well as government officials, including high level Justice Department officials who step in on immigration matters only when political controversy burns high. Without speedy denials, the system will either attract large numbers of marginal claimants or else force resort to other costly and troublesome deterrents which indiscriminately burden genuine refugees. Restoring the "two bites" system thus implicated greater costs than were appreciated in October 1987, by NGOs or the Justice Department.

b. Administrative and judicial review. Delay also derives from the clogged dockets of the immigration courts and from backlogs at the BIA. Shortening those delays requires additional

³⁰²See note 250 supra.

³⁰³See Verkuil, A Study of Immigration Procedures, 31 U.C.L.A. L. Rev. 1141, 1145 (1984) (identifying *Goldberg v. Kelly*, 397 U.S. 254 (1970), which imposed extensive requirements for trial-type hearing, as the "high watermark of procedural due process in the administrative setting").

resources, rather than major institutional redesign,³⁰⁴ and remains within the general control of the Justice Department. One particularly important element in the delay, however, derives from the lengthy period of time required to obtain transcripts of immigration court proceedings. That period can now run eight months or more, although cases involving detained aliens are given priority and can be processed within a matter of weeks. If expeditious final rulings are to be received, EOIR must either arrange for quicker turnaround of transcripts or else experiment with alternatives to full transcription of each hearing. (A Canadian study once recommended the use of videotapes, with briefs citing to the location on the tape where crucial matters appear.³⁰⁵)

Major delay also potentially derives from the provisions for judicial review, although this does not appear to affect a significant proportion of cases at present. Several refugee attorneys stressed during interviews that judicial review is sought only if the case appears particularly strong - in part because of the pro bono nature of the representation, and in part because such attorneys worry about developing bad law that would serve to undermine stronger cases later. This practice thus contrasts importantly with the use of other stages of the process, for immigration attorneys, I was told, consider renewal of asylum cases in immigration court and administrative appeals to the BIA to be routine steps in all but the most farfetched cases.

Changes to the judicial review provisions would therefore not appear to be warranted at this time. If these patterns change, and judicial review someday comes to cause delay in a far higher percentage of cases, then reform could be considered at that point. Statutory changes would then be needed. Other nations confronting the problem of judicial delay have tried two approaches: (1) by speedily identifying a class of applications adjudged "manifestly unfounded" and strictly limiting judicial review for that class; (2) more ambitiously, by limiting the scope of judicial review in virtually all asylum cases to a summary proceeding that is highly deferential to the administrative outcomes, but still affords some opportunity for judicial correction of gross error or abuse. These approaches will receive greater, albeit preliminary, attention below in connection with proposed reforms.

c. Is delay really a problem? Before doing so, however, one further set of objections to the above evaluation should be aired. Refugee advocates sometimes argue that the problems of administrative and judicial delay are exaggerated. They agree that the current system allows, theoretically, for six layers of consideration (three administrative and three judicial) in exclusion cases, and five in deportation. But they point to the absence of statistics showing that many asylum seekers actually avail themselves of all these opportunities.³⁰⁶

It is certainly true that the case for administrative simplification cannot be made convincingly on the basis of currently available statistics. EOIR maintains and releases only limited statistics on asylum caseloads; it is impossible to tell how many of its asylum cases represent

³⁰⁴The recent rules changes allowing the BIA to sit in panels of three should help cut that backlog. 8 C.F.R. § 3.1(a)(1).

³⁰⁵See Ratushny, *supra* note 187, at 57-58.

³⁰⁶See generally Kurzban, *supra* note 301, at 91, 96-97.

renewals of applications initially rejected in the district offices.³⁰⁷ The GAO study based on 1984 applications found that only seven percent of applicants denied in the district office renewed their claims before the immigration judges.³⁰⁸ But this statistic is suspiciously low, and may be attributable to the fact that time limitations on the study precluded GAO's tracking all the initially denied cases through to the applicants' actual removal from the country or other resolution of their status. It would be entirely possible that many aliens involved simply were not processed for deportation until after the study period, particularly because the study found a low INS priority on initiating such deportation cases.³⁰⁹ Everyone interviewed for the present study -- including immigration lawyers -- thought that the seven percent figure was too low, although most placed their rough guesses of actual renewals in the 20-30 percent range, still not terribly high. Similarly, judicial statistics (again limited) do not show massive court litigation over asylum.³¹⁰

These statistics, however, almost certainly tell a dated story. Before the full implementation of IRCA's employer sanctions, aliens denied asylum in the district office had little incentive to pursue matters further. Most could probably find work and enjoy the benefits of a "de facto asylum" that carried few risks, despite their undocumented status.³¹¹ They had no reason to rush further review, because they always retained the option of renewing the asylum application in immigration court if and when INS caught up with them and initiated deportation proceedings. Moreover, because of enforcement priorities, deportation has not been an imminent threat.

After IRCA, all of this has changed, although it is still too early for reliable statistics. The "walk-in" rate is up considerably in the district offices, and evidence suggests that many people choose to file affirmatively for asylum now, unlike earlier years, in order to receive work authorization.³¹² Once denied, they then have incentives to press INS to initiate deportation. In a striking role reversal, the immigration bar and refugee support groups have been urging INS to hasten arrangements for the issuance of orders to show cause in these circumstances, in order to assure an early forum for rearguing the asylum claim and, by no means incidentally, to renew work

³⁰⁷It may be that the more complete EOIR statistics being released as a result of a policy change in early 1989, see note 264 supra, will provide greater insight into these issues.

³⁰⁸General Accounting Office, *Asylum: Uniform Application of Standards Uncertain -- Few Denied Applicants Deported* 20 (Figure 1.3), 33 (GAO/GGD-87-33BR, 1987). At the time of the study, 77 percent of the claims had been filed only in district offices and 16 percent only in immigration court.

³⁰⁹Id. at 27-29 (describing methodology); 33 (showing that for 81 percent of the cases INS had taken no "deportation action" by the close of the study period).

³¹⁰See Table V.

³¹¹See generally Martin, *The End of De Facto Asylum: Toward a Humane and Realistic Response to Refugee Challenges*, 18 Cal. W. Int'l L.J. 161 (1987-88).

³¹²See, e.g., Frelick, *The Back of the Hand: Bias and Restrictionism Towards Central American Asylum Seekers in North America* 17 (U.S. Comm. for Refugees Issue Brief 1988).

authorizations.³¹³ Past statistics thus furnish no reliable guide to the magnitude of the delay problem under the present multilayered administrative system, given the changes brought by IRCA.

d. Rights to counsel. One further element of possible delay lurks in the current system, owing to a major feature meant to enhance fairness to the applicant. Statute and regulation provide a right to counsel at no expense to the government in the immigration court proceedings, and they also mandate the provision of a list of pro bono counsel available in the area.³¹⁴ When asylum claims rise numerically, the limited numbers of pro bono attorneys are easily swamped.³¹⁵ This places immigration authorities in a difficult position as they try to keep pace with rising intake -- a perfectly legitimate and praiseworthy bureaucratic objective. Inevitably they have incentives to press for waivers of counsel or else to deny repeated continuances requested because of free counsel's limited availability. Recent court decisions, however, are imposing increasingly demanding requirements to assure a knowing waiver of counsel rights. Concomitantly, courts are increasingly insistent that the immigration judges allow continuances until pro bono counsel becomes available.³¹⁶ Obviously, in times of major influx, or in areas where counsel is limited, this stance can cause backlogs to increase rapidly.

Court reversals for failure to honor these (qualified) counsel rights are particularly demoralizing to the system, for they inevitably come months or years after the initial proceedings and all later phases of administrative consideration, at a time when the deportation or exclusion order is administratively final. Moreover, such reversals plainly require complete rehearing in the immigration court, possibly followed again by administrative and judicial review.³¹⁷ If the system is to be prepared reliably for speedy determinations despite a fluctuating caseload, the problem of

³¹³See 64 Interp. Rel. 882, 886 (1987); 65 id. 718 (1988). Similar incentives may someday operate at the judicial review stage, at least as long as the work authorization regulation remains unchanged, but that appears a more remote prospect, given the reluctance most experienced asylum attorneys feel about taking a weak case to court. See text at note 305 supra.

³¹⁴INA §§ 242(b), 292, 8 U.S.C. §§ 1252(b), 1362 (1988); 8 C.F.R. Parts 292, 292a (1988).

³¹⁵For an example of these complications, see, e.g., *Maldonado-Perez v. INS*, 854 F.2d 328 (D.C. Cir. 1989).

³¹⁶See, e.g., *Baires v. INS*, 856 F.2d 89 (9th Cir. 1988); *Castro O'Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1988); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). Some cases are more tolerant of the agencies' efforts to process cases in this manner. See, e.g., *Vides-Vides v. INS*, 783 F.2d 1463, 1470 (9th Cir. 1986); *Committee of Central American Refugees v. INS*, 682 F. Supp. 1055 (N.D. Cal. 1988).

³¹⁷Class actions challenging broad features of asylum processing can likewise lead to this result. See note 6 supra.

counsel must be solved, either by wider provision of government-paid counsel³¹⁸ or by assuring fairness to the applicant even in the absence of counsel.

The reforms proposed below center on a nonadversarial model that could provide a full and fair opportunity to present an asylum claim, even if the individual is unrepresented. Although efforts would be made to accommodate counsel's schedule, the proposed system is designed to proceed with fairness on a fairly prompt timetable, even if the applicant expresses a desire for pro bono counsel but insufficient numbers of counsel are available to meet the demand. It must be acknowledged that such a proposal will be highly controversial. Due process, at least when the stakes are high, is often closely associated with adversarial trial-type proceedings, which usually require professional counsel.

If the nonadversarial model is not accepted as the way of providing fairness to unrepresented asylum applicants, some carefully crafted alternative is imperative to maintain the system's capacity for expeditious processing, and without the risk that a court will send the case back to square one months or years later. The best alternative is probably this: Congress should then amend the statutes to eliminate the ban on government-paid counsel -- not for all immigration matters but only for nonfrivolous asylum cases. Because of unpredictably fluctuating caseloads, it would probably be best to follow a public defender model, assigning the representation responsibility to a permanent staff of government-paid attorneys.³¹⁹ Such a staff would present other advantages as well, because of the expertise they could develop concerning country conditions over the course of litigating numerous cases. Naturally, applicants could still retain private counsel or engage unaffiliated pro bono attorneys when available, but the pace of proceedings would no longer be so dependent on private charity.³²⁰ Obviously the cost of such a system would be

³¹⁸At least one commentator regards EAJA as a possible solution to these problems. Note, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 *Yale L.J.* 1459 (1988). But EAJA is at best a half-measure that affords only marginal relief, because attorneys and agencies cannot know up front whether they will actually be compensated from the public treasury. It may be years before the fee question is settled. At best EAJA may attract a few more attorneys into initially pro bono representation, and groups currently providing assistance may be able to expand their staffs using EAJA awards from past cases. But unless the expansion far exceeds expectation, pro bono attorneys are still unlikely to be able to keep pace with new arrivals in times of large influx. Either delays will continue or many applicants will remain without representation -- again risking judicial remand many months hence.

³¹⁹Arrangements could be made for adequate insulation of these officers to assure an independent litigation posture, or perhaps the function could be performed under contract with a nongovernmental organization that would agree to maintain an adequate legal staff at the necessary locations, paid from government grants. Britain has arrangements of roughly this sort with the United Kingdom Immigrants Advisory Service (UKIAS), although not all of UKIAS's representatives are lawyers. See generally *European Consultation on Refugees and Exiles, Asylum in Europe: A Handbook for Agencies Assisting Refugees* 371 (3d ed. 1983).

³²⁰As an added benefit, NGOs might then find it easier to target their own scarce resources on cases they regard as most deserving or as critical for establishing an important factual or legal

substantial. But the current statutes (allowing counsel only "at no expense to the government") provide only illusory cost savings. Although no money goes directly to applicant's counsel, the government incurs substantial expenses from, e.g., detention lengthened by the period necessary to wait for pro bono counsel to come available. Other indirect costs are harder to quantify but probably more substantial -- for example the burdens on local services caused by massive influxes of asylum seekers. A speedy system is imperative if such influxes are to be reduced.

2. Accuracy

a. Diffusion of responsibility. The current system fails to focus responsibility for this difficult and challenging decisionmaking in one set of officials. It thus enhances the risk of improper denials of asylum, even if all officials act in good faith. Over the years, INS spokespersons have sometimes responded to complaints about asylum denials by pointing out that all cases are checked with the State Department, which has expertise on these matters, and that INS almost always follows State's lead.³²¹ At the same time, however, State Department officials have often felt that it was INS or the immigration judges who really performed the important part of asylum decisionmaking. State, after all, sees only the printed page. Much of the adjudication must turn on credibility judgments -- clearly a task principally for Department of Justice adjudicators, who see the applicants in person and can test the stories through direct questioning.³²² The system thus courts the risk that a negative State Department opinion will induce some relaxation in Justice Department care in examining individual cases. Yet that opinion may have been issued in recognition that a cold record is not fully revealing, and in anticipation that the alien will have another chance to bolster his case before an adjudicator he will see in person.

It is not an easy thing to send a person back to a land where he claims he faces persecution. Unsurprisingly, officials may therefore seek at times to minimize their own role in such results. But arrangements that unintentionally help to meet that psychological need may entail systemic costs. A system that provides undue comfort in going along with negative results may fail to create adequate incentives for the care needed to spot the truly meritorious case.³²³

The reduced role for the State Department under the new sticker system should ameliorate this problem. A more complete focusing of the decision in a single set of adjudicators would

precedent.

³²¹See generally Asylum Adjudications, supra note 248, at iii, 61-64. Similarly, a 1983 study of asylum processing in New York noted "a certain discomfort with asylum cases" among immigration judges that led to heavy reliance on State Department views and a certain disavowal of responsibility for applying their own judgment. P. Weiss Fagen, supra note 247, at 16.

³²²See Asylum Adjudications, supra note 248, at 61. I also encountered this attitude with some frequency during my own service in BHRHA (known simply as HA in State Department lingo) from 1978 to 1980.

³²³A similar point is made by Anker & Posner, supra note 29, at 76. See also Aleinikoff, supra note 81, at 193-94.

provide even greater assurance. It would also give applicants the opportunity to make their cases in person to the official who will be responsible for all phases of the decision.

b. Political bias. For decades the asylum adjudication system has been attacked for the bias of its results.³²⁴ No completely reliable scientific test of these claims is possible, and a GAO study chartered to discover whether asylum applications were given neutral consideration could only conclude that the matter was "uncertain."³²⁵ Nevertheless, even a quick glance at the statistics in Table II raises serious questions about the high grant rates for applicants from Communist countries (particularly Poland, where political activity has become much freer since the lifting of martial law in 1984), and the strikingly low rates for El Salvador and Guatemala. Moreover, testimony about bias comes in highly persuasive form from published accounts by INS insiders as well as from INS's critics.³²⁶

Much of the outsiders' criticism blames bias on the role of the State Department (recently modified) in providing advisory letters on every case considered in the district offices and immigration courts.³²⁷ Clearly that practice provides an opportunity for diplomatic considerations to intrude on what the statute ordains should be neutral, case-by-case decisionmaking.³²⁸ For this

³²⁴See, e.g., J. Scanlan & G. Loescher, *Calculated Kindness: Refugees and America's Half-Open Door, 1945-Present* 170-219 (1986); Zucker & Zucker, *supra* note 55, at 142-76; Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243 (1984); Kurzban, *A Critical Analysis of Refugee Law*, 36 U. Miami L. Rev. 865 (1982); Note, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, 7 N.Y.U. Rev. L. & Soc. Change 107 (1978).

³²⁵GAO, *supra* note 256.

³²⁶See *Asylum Adjudications*, *supra* note 248, at 59 n.*, Meissner, *supra* note 21, at 57, 63 (description of the pressures that skewed decisionmaking, with special attention to Poland and El Salvador; the author was Acting Commissioner of Immigration from 1981-83 and Executive Associate Commissioner from 1983-86). In unguarded moments, some Reagan Administration spokesmen also revealed that they regarded asylum adjudications as inherently political. For example, in arguing (unsuccessfully) for extradition reform legislation that would have transferred from the courts to the State Department the authority to decide whether a particular offense was "political" and hence non-extraditable, the Deputy Legal Adviser stated: "a decision on the 'political offense' exception is (as the name suggests) inescapably political in nature, and inextricably intertwined with the conduct of foreign relations. It is an issue best left to the Executive branch to decide -- much as the decision to offer political asylum is an executive decision." Extradition Reform Act of 1981, Hearings Before the Subcomm. on Crime, Sen. Comm. on the Judiciary, 97th Cong., 2d Sess., at 32 (prepared statement of Daniel McGovern) (emphasis added).

³²⁷See, e.g., Posner, *Comments and Recommendations on Proposed Reforms to United States Immigration Policy*, 36 U. Miami L. Rev. 883, 887 (1982).

³²⁸See, e.g., *Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir. 1976) ("some likelihood of the Department's tempering the wind in comments concerning the internal affairs of a foreign nation");

reason, it would be far better to remove the Department from any substantial role in the decisionmaking system.³²⁹ No matter how conscientious the State Department may be in performing this function, the aura of distortion is bound to linger. Moreover, the Department itself would benefit from such separation. When the home-country government is angered by an asylum grant, its ire can be more easily deflected by our diplomats if the Department can credibly state that it had no role in the decision.³³⁰

Removing the State Department from asylum processing has been advocated for years. But many critics fail to think through carefully the continuing risks of political bias even then, unless other important changes are made as well. For the "coast of Bohemia" problem would still be present.³³¹ Indeed, it would probably be aggravated. As Lippmann observed in his classic study, those who know less about the realities of an issue or a far-away land are more likely to rely on the "pictures in their heads" to cope with a challenging and complex mass of data.³³² And without State Department advice, nonexpert adjudicators will be confronted with just such a dilemma.

A 1986 episode, widely reported in the newspapers, reflects the impact of such stereotyped thinking. The district director in Miami decided in April of that year to end all returns of aliens to Nicaragua from his district, because of concern that they might be persecuted by the Sandinista government. He was quoted as saying "I would personally -- not just as a Government official, but personally -- have trouble sending people from a Communist country back to that country."³³³ Although this position was at odds with State Department information (as reflected in the annual country reports and in the fact that numerous advisory letters for Nicaraguans were still negative), and contravenes Congress's explicit decision in 1980 to adopt a neutral standard to replace former provisions that expressly favored refugees from Communist countries, the Justice Department

Kasravi v. INS, 400 F.2d 675, 677 (9th Cir. 1968) ("A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations . . ."); Aleinikoff, *supra* note 81, at 194, 234-35.

³²⁹For an argument that State should retain its role, see Burke, *supra* note 267, at 325.

³³⁰Some system should still be worked out for regular notification to the State Department of cases received, to help prepare it for cases that will spark political controversy with the home government, to assure identification of any asylum seekers who may prove to be defectors with sensitive information, and perhaps to allow for the Department or the intelligence agencies to introduce confidential information bearing on the claim, pursuant to procedures permitting use of such information. See, e.g., 8 C.F.R. § 208.10(c), (d). Each eventuality is rare in asylum cases.

³³¹Even today, the State Department's advice is not always followed. But some impressionistic evidence suggests that the failure to follow the advice has its own bias that compounds the favoritism for those who flee Communist countries. See Aleinikoff & Martin, *supra* note 6, at 705.

³³²W. Lippmann, *supra* note 75, at 30-49.

³³³Pear, Key Federal Aide Refuses to Deport any Nicaraguans, *New York Times*, April 17, 1986, at A1.

apparently made no effort to discipline the district director or otherwise bring his actions back into line.³³⁴

The phenomenon is not confined to the district offices. Immigration judges also volunteered to me that they considered a certain country (usually a Communist country) too dangerous for return, although none offered very complete or convincing reasons for this judgment. Certainly they did not claim that it was based on State or Justice Department policy or on country guidelines or across-the-board authoritative findings. It was simply based on their views about current world conditions. In the context of the conversations, I would not regard these comments as deliberate bias; they were meant as sincere efforts to implement the statute's commands in light of that person's understanding of home-country conditions. But especially when matched up with competing stereotypes that may lead to great skepticism of claims from Central Americans other than Nicaraguans, the potential for inaccurate results and for unfairness is manifest.³³⁵

Most immigration judges, it should be stressed, strive conscientiously to apply the legal standards fairly based on the records before them. But the potential for improvement remains. Some better way should be found to correct as much as possible for the unintended bias that derives from the adjudicators' inevitable creation of internal maps, particularly if the State Department is to be removed from routine involvement. Systematic effort should be undertaken to replace stereotypes with detailed and accurate information, helpfully digested. The "coast of Bohemia" problem can never be eliminated, but it can be minimized.

c. Inadequate use of existing expertise. The immigration judges' role is firmly anchored in the adversarial model; by and large they are expected to remain as passive arbiters ruling on records developed by the parties.³³⁶ Initiative by the judges to learn more about country conditions is not officially encouraged. EOIR Chairman Milhollan has specifically rejected an AILA

³³⁴See *id.*; Dreifus, No Refugees Need Apply, *The Atlantic*, Feb. 1987, at 32, 35. It appears likely that this action, along with other Department leniency toward Nicaraguans over the last two years, became well-known back in Nicaragua and played a role in eventually encouraging large numbers of people there to think about migration to the United States. The fruits of that encouragement were reaped in the Harlingen district, at a rate of several thousand marginal applications for asylum each month during the winter of 1988-89.

³³⁵See P. Weiss Fagen, *supra* note 247, at 21 (study found that presumptions based on national origins distorted asylum adjudications).

³³⁶In this respect, of course, EOIR is simply trying conscientiously to move away from a problematic past, when immigration procedures were harshly criticized for their inquisitorial character and for the mixture of enforcement and adjudicative roles for the special inquiry officers. See Aleinikoff & Martin, *supra* note 6, at 87-91. This effort is praiseworthy in most immigration-law settings, but certain elements fit uneasily in the asylum proceeding. Most troublesome is the assumption that the judge is a kind of blank slate at the beginning of each new case. This specialized kind of adjudication, unlike most other matters within the immigration courts' jurisdiction, cannot be performed well unless the adjudicator brings to the case cumulative expertise on country conditions. See E. Ratushny, *supra* note 187, at 15-18, 51.

suggestion that judges should receive more training on country conditions, and reaffirmed the traditional adversarial model.³³⁷ His response stressed "that it was the attorney's responsibility to offer whatever evidence he or she deems appropriate to meet the alien's burden of proof in asylum cases."³³⁸

Officially, therefore, immigration judges and the Board of Immigration Appeals must decide asylum cases based only on the record created in the specific case.³³⁹ In reality, particularly when numerous cases are received from the country involved, the judges and the Board cannot help but remember and to some extent use information learned in other cases. Indeed, this is a praiseworthy practice that probably helps improve the quality of decisionmaking, even though it violates the formal requisites of the adversarial model.

One immigration judge I interviewed had in his office an impressive array of books, including biographies and recent nonfiction bestsellers, that reflected some of the political developments in foreign countries whose nationals were sometimes encountered in the courtroom. He said he tries to do a fair amount of such reading, in order to have a better "feel" for the cases that come before him. This extracurricular determination is admirable -- far preferable to the attitude encountered in some decisionmakers who rested content with whatever information the parties happened to add to the record. But such helpful approaches should not be left to the initiative and energy of individual adjudicators. We should instead devise a system that provides more systematically and honestly for such learning, and also gives assurance that adjudicators develop as balanced a picture as possible from their readings.

³³⁷New immigration judges are given specific training on asylum matters as part of their standard two-week training course, however, including presiding over a simulated deportation case wherein asylum is the chief issue. But this training can only be scheduled when there are enough new judges (about 8) to justify the session. Therefore some judges may hear numerous cases before attending the sessions. Moreover, annual conferences of the judges usually offer some program on asylum, at times including presentations by refugee advocacy groups and human rights organizations.

³³⁸65 Interp. Rel. 749 (reporting on AILA-EOIR meeting).

³³⁹See Matter of M____, 7 I.&N. Dec. 222, 225-26 (BIA 1956).

3. Consistency and quality control

An important component of fairness is consistency of outcomes among decisionmakers.³⁴⁰ If judged only by asylum decisions in the immigration courts, the consistency goal would appear to be well-served, primarily through the mechanism of BIA review. Even now when the Board ordinarily sits in two panels, it remains a sufficiently small and cohesive body that it can reasonably assure similar outcomes for similarly situated aliens. Moreover, because both INS and the applicant can appeal to the BIA, the Board is in a position to police against both false positives and false negatives.³⁴¹

A substantial body of asylum claims, however, escapes this checking process: the applications that are granted in the district office. These amounted to 39.1 percent of cases decided there in FY 1988, and 27.8 percent as a cumulative percentage for cases decided over the past five years.³⁴² Of course, anyone unfairly denied asylum in the district office may renew the application in immigration court, where consistent results are more likely. The problem thus is one of inconsistent positives -- a less disturbing result, perhaps, than inaccurate negatives resulting in return to the home country of a true refugee. One might possibly argue that false positives are not a genuine problem, that they reflect merely the system's commitment toward giving asylum seekers the benefit of the doubt.

Such a view should be resisted. False positives, in the long run, also harm the system, in two ways. First, the general patterns in asylum cases are communicated back to the home country. An excessive pattern of false positives can thus help stimulate a larger flow of marginal asylum applicants. Such a communication process appears to have played a role in the current drama of Nicaraguans in Texas.³⁴³ Second, when the false positives are systematically biased in favor of

³⁴⁰In a well-functioning system, consistency should also go far toward serving the goal of accuracy. The claim here is more modest, because of doubts about the validity of some of the BIA's doctrines, making it too hard for some nationalities to win asylum and too easy for others. Nevertheless, even within such a framework, the value of fairness would be served by assuring that Nicaraguans in Miami receive the same consideration as Nicaraguans in Nebraska, and that Salvadorans in Texas are treated no more harshly than Salvadorans in California.

³⁴¹This BIA capacity, however, is unfortunately undercut to a certain extent by APRU's role. Although APRU is scrupulously careful not to intervene in the quasi-judicial proceedings before the immigration judges and the Board, it does occasionally reopen discussion with INS on the merits of a case after a deportation order is administratively final. To the extent that this leads to a later grant despite the EOIR denial, it undermines some of the consistency the BIA attempts to obtain.

³⁴²See Table II.

³⁴³See Frelick, *INS Seeks Tougher Approach on Asylum, Work Authorization, But Faces Legal Challenge*, *Refugee Reports*, Jan 27, 1989, at 1, 2 (Associate Attorney General seeks to rescind earlier Meese policy that was quite generous to Nicaraguans, viewing it as "a contributing factor to the current situation" in South Texas).

certain groups, as appears to be the case at present, they undermine public confidence in the system and perhaps increase the chances that courts will be tempted to overturn accurate denials of other nationalities in an attempt to restore some rough parity. False positives, when systematically favoring certain groups, also violate the underlying premises of the system. Those premises require neutral adjudication, committed to providing asylum to those, and only those, sufficiently at risk of persecution in the home country.³⁴⁴

The 1980 regulations were crafted with some attention to the problem of false positives. Some advocates had urged that the regulations allow prompt grants of asylum by district directors in meritorious cases, without referral to the Department of State. The Justice Department decided against this approach, in part to assure greater consistency by checking overhasty grants by examiners.³⁴⁵ But this limited check never worked with great efficiency, because State had no way to follow up on cases granted by the examiner in spite of a negative advisory letter. In any event, this consistency check has virtually evaporated now, when the majority of referred cases come back with a sticker that simply indicates that State has nothing to add.

Finally, it could be that APRU was meant to bring greater consistency to this body of decisions. But because of its method of operation and its limited staffing, APRU places its greatest emphasis on cases denied in the district offices rather than on grants. In doing so, it unnecessarily duplicates the roles played by other units involved in the process. Indeed, the Asylum Policy and Review Unit is hard to justify under any vision of a sound asylum adjudication process. It adds a layer of procedure, and it seems likely only to confuse the guidance that INS examiners attempt to follow in adjudicating cases, heightening the risks of inconsistency. After all, those examiners already are mandated to consider the views of the State Department, and they are bound to follow the legal doctrine developed by the BIA.

Why was APRU created? If inadequacies in State Department information led to this step, obviously it would be more effective to address the specific deficiencies at State -- or else completely replace that Department with another method of providing up-to-date information. If instead direct review through the normal channels (involving the immigration judges and the BIA) was failing to assure proper outcomes, it would have been far better to address those deficiencies directly, rather than throwing another agency at the problem.

³⁴⁴See generally Kurzban, *supra* note 301, at 115. This careful insistence on neutrality and consistency in ruling on asylum applications under INA §§ 208 and 243(h) would not preclude the granting of temporary residence rights to specific groups chosen by the political branches, based on a combination of political and humanitarian factors, through EVD or special legislation, for example. But decisions of that sort, to shelter a wider category of necessitous individuals, should be clearly seen as such -- political decisions rather than quasi-entitlements. Such clarity both avoids distortion of asylum adjudication and focuses appropriate responsibility for such safe-haven decisions in the political branches.

³⁴⁵This theme was voiced frequently in internal meetings in which the author participated in 1980. See generally Mashaw, *The Management Side of Due Process*, 59 Cornell L. Rev. 772 (1974) (describing elaborate quality control systems, based on sampling and follow-up used by some social-welfare adjudication systems).

V. Proposed Reforms

A. Specialized Adjudicators

Any cure, short- or long-term, for the ills afflicting our present asylum adjudication system should build upon one central change. The United States should create a corps of specialized, well-trained professional adjudicators³⁴⁶ to preside at the asylum adjudication proceedings and to make the initial determinations in a single, unified procedure. They should have no other function in the immigration system, nor should they rotate to this post from other enforcement responsibilities. This change would greatly improve the system's accuracy, fairness, and speed, whatever other reforms might ultimately be adopted. It would better equip us both to welcome refugees promptly, as our tradition demands, and to deport unqualified applicants expeditiously. Nearly all other Western countries have a system built around such specialists. It is high time that the United States joined their ranks.

To attract high-quality professionals, the new office should set the grade and salary of the adjudicator's position at a level equivalent to that enjoyed by immigration judges.³⁴⁷ Asylum adjudicators make decisions every bit as complicated and challenging --and as important to the government and the litigants -- as other cases that fall within present EOIR caseload. This means that costs for the new system, at least for the first several years, will run considerably above the recent experience under the current system, particularly because several dozen adjudicators will be needed.

We must develop the capacity, however, to accept short-term expenditures in order to avoid larger long-term societal costs, costs that are unavoidable as long as we remain highly vulnerable to influxes by marginal asylum applicants. The new system, if effectively implemented, should finally unclog the many kinks that now prevent or greatly delay actual deportation of unsuccessful applicants. Once it becomes widely known that the system has that capacity, future influxes should decline significantly (barring major outbreaks of persecution in this hemisphere). Such results are doubtless years away. Expending enough now to do the job right, however, should be seen as an indispensable investment.

Canada's recent experience reveals the need for taking the long view of the expenses. Canada's new system was confronted with a backlog of 85,000 cases and an intake that ran to 45,000 in 1988. To deal with this task, the new Immigration and Refugee Board has hired not only the 65 permanent full-time members authorized by statute for its refugee division, but also an additional 80 or more members with two- or three-year terms. It also plans to add another 50 or so over the next year to help eliminate the backlog. All such officials are being hired at a high

³⁴⁶Similar suggestions have been made for many years. See, e.g., Anker & Posner, *supra* note 29, at 74; Select Commission, *supra* note 63, at 173-74.

³⁴⁷Early internal papers that ultimately led to the August 1987 proposed rules discussed an option of making the new adjudicators "attorney examiners" with the higher rank that classification carries. Unfortunately, INS chose the cheaper option, making the asylum adjudicator's position a journeyman-examiner position, at the GS 11 or 12 grade.

rank, with a salary in the range of \$50,000 to \$60,000. Canada expects to spend over \$70 million in 1989 on asylum adjudications, both to keep pace with new applications and to make sizable inroads into the backlog.³⁴⁸ This is a considerable outlay. The proposal offered here differs from the Canadian model in several important particulars, partly in order to develop a less costly system, but significant expense cannot be avoided.

Although an asylum adjudicator's function should be seen as equivalent in many respects to that of the immigration judge's, the adjudicators need not necessarily be attorneys. Most of their business will be based on a few rather straightforward statutory provisions; they will not need to know the full range of our intricate immigration laws. The research underlying their decisions will focus more on political and social facts rather than legal precedents. Although they should of course receive training on domestic and international law and on the procedures, most of their business will concentrate on sizing up the story told by the applicant and evaluating conditions in the home countries. They will be responsible for developing (mostly based on the testimony of the applicant) an adjudication record with adequate sensitivity to the cross-cultural complications detailed in an earlier section of this study.

The most important qualifications, therefore, to be sought in recruiting and selection, would be an interest in international affairs and demonstrated awareness of and sensitivity to life in other cultures. Although current adjudicators could of course apply for such positions, an effort should be made to assure a wide diversity of backgrounds among those hired, both to provide the necessary cross-cultural sensitivity and to signal that the new system marks a clean break from a problematic past.³⁴⁹

A demonstrable change from the past, fortified by a visible commitment of added resources to assure professionalism, would also serve other useful functions. First, it would maximize the chances of gaining the support, or at least the acquiescence, of the refugee advocacy groups. Indeed, a major effort should be undertaken to encourage NGO participation in shaping final details of any such plan. The August 1987 proposed regulations foundered in part because they did not signal such a new departure, nor did they reflect any real commitment of new resources.

Second, a major shift to an impressively professional group of adjudicators might also send an important message to the courts. It would show that the new system was not cobbled together

³⁴⁸Interview with Jerry Robbins, Ottawa, December 19, 1988. The figures are translated into US dollars. See also 66 *Interp. Rel.*

³⁴⁹A provision in an early Simpson-Mazzoli immigration reform bill would have created a separate unit of immigration judges to decide asylum cases after special training, but in an extraordinary measure apparently meant to demonstrate a thoroughgoing change from the past, it provided that no one who had served as an immigration judge before the date of enactment could hear asylum cases. S. 2222, 97th Cong., 2d Sess., § 124(a)(1) (proposed new INA § 208(a)(2)), 128 *Cong. Rec.* 21,675 (1982). The 1983 version of the bill eased this restriction, however, simply preventing such service until the judges received special training in international relations and international law. S.529, 98th Cong., 1st Sess. § 124 (1983), 129 *Cong. Rec.* S6975 (daily ed. May 18, 1983).

solely as a hasty reaction to the rise in the numbers of asylum seekers. It would demonstrate that reform also attended to the needs of those asylum seekers who are truly in danger of persecution at home. The history of dealings between agencies and courts in the asylum field suggests that a fresh start is well-advised.³⁵⁰ The object of these reforms is not to launch a system that will work only after years of paralysis resulting from test cases. The object is to create a system that can work fairly and efficiently after only a brief start-up period, and that can actually lead to swift grants and denials -- the latter leading to prompt deportation. This objective cannot be achieved unless the courts are prepared to defer to the agency in the vast majority of cases.³⁵¹

Many Western countries have developed adjudication staffs whose members specialize by region or even by country of origin. Such further specialization would be ideal, for it would improve still further the development of expert and detailed knowledge to be brought to bear in the cases.³⁵² Nevertheless, such a system is probably not fully attainable here, owing primarily to geography. In Switzerland, for example, the full adjudication staff can remain in Bern. Applicants simply come to the capital via an inexpensive train ride for their interviews with the appropriate country specialist. The United States is too vast for such a system. Nevertheless, there may be some chance for a limited specialization in various locations where particular nationalities have congregated (such as Poles in Chicago). In any event, most current asylum seekers come from Central America and the Caribbean. Recruitment efforts should therefore probably focus on persons already having familiarity with those cultures, and all adjudicators should receive training and ongoing information on country conditions in that region.

The new system should be expressly based on an understanding that these adjudicators will develop expertise about country conditions over time, and may apply their cumulative learning to each case they encounter. As developed above, such expertise will help serve several important objectives. It should facilitate adequate questioning at the hearing to cover all necessary details, it should help in assessing credibility, and it will undergird the ultimate evaluation of the risk the applicant would face if returned. Training must emphasize that the adjudicator's mission is as much to help substantiate meritorious claims as it is to issue prompt denials when the claimant is unqualified.

Other elements, some detailed in succeeding sections, would also serve to develop and preserve the needed expertise. Perhaps most important would be a well-staffed documentation

³⁵⁰See, e.g., cases cited supra note 6. In the Haitian Refugee Center litigation, the element most damaging to the government's case may have been the revealing fact that INS tally sheets for reports on the "Haitian program" contained room only for the number of denials; it had no line for reporting on grants of asylum. It is hardly surprising that the courts concluded that the effort was meant to clear caseload without attention to the merits of individual cases. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1031-32 (5th Cir. 1982).

³⁵¹See Mashaw, supra note 345, at 772, 806-07 (suggesting that an important factor determining whether reviewing court will take an interventionist or deferential stance is the court's "confidence or lack of confidence in the integrity of the underlying administrative process").

³⁵²See Kälin, supra note 97, at 239; Aleinikoff, supra note 81, at 234.

center, independent of the State Department. Its task would be to amass unclassified information on country conditions from a wide range of sources, including both the State Department and private human rights organizations, in order to make it available in as accessible a form as possible. Many other nations have devoted resources to official documentation centers of this type, and Canada in particular has pioneered several innovative and useful techniques, including frequently updated country profiles and background information on all significant source countries.³⁵³ In addition to assuring currency on developments in source countries, adjudicators should be able to use the center, with the help of its staff, to search for information about a particular legislative fact. For example, if the claimant asserts that he was involved in a major demonstration on in November 1983 in the capital city, and that the demonstration was violently suppressed by the police, an adjudicator could seek confirmation of such an event from the center. Or if the claimant asserts that government soldiers forcibly impress young men into the armed forces, the adjudicator could ask the documentation center staff to provide whatever information is available from its database on such matters. (Fairness constraints on the use of such information are discussed below.) The center's resources should also be open, of course, for use by asylum seekers and their counsel.³⁵⁴

Because this new system would develop its own capacity for obtaining and evaluating a wide range of country condition information, routine referral of cases to the State Department should be eliminated.³⁵⁵ Individual adjudicators might still refer a particular matter, when it appears likely that State Department information, not otherwise available through the documentation center, would be particularly helpful. But solicitation of State Department views should be the exception, not the rule.

There remains the "coast of Bohemia" problem. Indeed, when I described early versions of this proposal to them, some private attorneys expressed deep concern that experts of this sort might become overly dogmatic in their own distinctive views of conditions in the home country. And with the removal of any second-round reopening before the immigration judges, advocates would lose at least one important opportunity to correct for such bias.

No system can be designed that escapes this problem altogether. But it hardly seems prudent to retain multiple layers of de novo consideration on the chance that the pictures inside the head of the second adjudicator will cancel out those inside the head of the first. That is a

³⁵³See generally Thoolen, *Refugees and Information Technology*, *Refugees Magazine*, October 1988, at 34.

³⁵⁴Ideally, the new system would follow the Swiss model and specifically provide that 10 percent of each officer's work week be set aside for keeping current on the latest information received in the center regarding countries for which he has responsibility.

³⁵⁵Arrangements should still be made for referral of "urgent action cases," for example involving defectors and diplomats, to the State Department, so that they may handle the immediate diplomatic consequences. Or perhaps basic biographic data could be provided on each applicant, solely for the purposes of screening by national security agencies, rather than to generate State Department views on each application.

recipe for stalemate or confusion, even though it may actually result in fewer deportations while litigation drags on. A better approach, though hardly foolproof, is to craft a system candidly aware of the risk of such distortions and dedicated to avoiding them.

The best cure for dogmatic stereotypes must be steady provision of reliable information -- constantly forcing the participants to redraw the pictures inside their heads to conform more completely to the new, more detailed, and more accurate information.³⁵⁶ This kind of corrective is far more likely under the proposed system than the present system, if only because the adjudicators will be confronting such information full time, rather than considering asylum cases as a fraction of their workload. Other strategies can offer further assurances -- if pursued with sufficient determination by the agency -- such as weekly regional updates prepared by the documentation center staff, ongoing training procedures, and well-targeted monitoring.

B. Organizational Location

Who exactly would perform that monitoring and arrange for ongoing training? That is, where would this new office be located, and what would be its lines of accountability? Earlier studies have sometimes argued for a fully independent asylum adjudication office, headed, for example, by a multi-member board appointed by the president and removable only for cause.³⁵⁷ Independence would indeed carry perceptible advantages. It should ensure reasonably neutral decisionmaking insulated from foreign policy influence, and sheltered from dominance by an enforcement perspective.

But full independence of this sort might not provide adequate assurance to those who worry primarily about asylum as a loophole. And in any event it would not likely be politically acceptable. Traditionally, Congress has insisted on keeping a wide range of functions and authorities in the immigration field under the control of the Attorney General, whether they relate to enforcement or adjudication.

It remains possible, however, to achieve most of the objectives of independence while retaining general responsibility in the Attorney General. The obvious location for a new unit of this sort would be within the Executive Office of Immigration Review (EOIR). Created in 1983, that Office has evolved over the last several years into a major subunit of the Justice Department concerned exclusively with adjudication and review, and freed of entanglement with enforcement functions. Although EOIR reports to the Attorney General, it is sufficiently removed from foreign policy and enforcement responsibilities to afford adequate assurance of neutrality and independence in asylum adjudications.³⁵⁸ The August 1987 regulations might have been much more acceptable

³⁵⁶See W. Lippmann, *supra* note 75, at 233-42.

³⁵⁷See Aleinikoff, *supra* note 81, at 234-35; Zucker and Zucker, *supra* note 55, at 276-77.

³⁵⁸As a practical matter, the Attorney General exercises his authority over EOIR decisions only through use of his "referral" power under 8 C.F.R. § 3.1(h) -- for example, because it would set a wide-ranging precedent. Referrals are rare, and in any event they are publicly known and visible, thus minimizing the risk of improper invasion of adjudicative neutrality. See generally United

if they had placed their proposed new corps of asylum adjudicators within EOIR, rather than keeping the unit in INS.

Therefore the precise proposal could be framed in this way. Statute or regulation should create within EOIR a new Asylum Board, headed by a chairperson responsible directly to the Attorney General. The chair would supervise a staff of asylum adjudicators, hired as described above, who would probably be located in several offices distributed around the country as caseloads require. The chair would also be a member of any administrative appellate unit dealing with asylum (to be discussed below).

C. Nature of the Proceedings

Because the asylum adjudicators would lack jurisdiction over other immigration-law issues, under this proposal asylum determinations will obviously be separate from deportation or exclusion proceedings. Those who walk into a district office to apply affirmatively for asylum should receive the necessary forms, and be given a reasonable period to complete the form and gather any desired supporting information. Once the form is returned, their cases can be referred to the adjudicators. Denial by the adjudicator would foreclose future consideration of the issue in deportation proceedings. If the matter arises only when the alien is already in proceedings, the immigration judge could adjourn the hearing pending a decision on the asylum claim by the specialized adjudicator.³⁵⁹ Alternatively, special arrangements could be made, particularly when the party concedes deportability and suggests no other relief from deportation, for speedy entry of a conditional deportation order -- conditional on the outcome of the asylum adjudication. Careful thought should be given to streamlining these procedures, so that if the asylum claim is not accepted, a fully effective deportation order can take effect as soon as possible.

Other questions about the nature of the proceedings are more basic, for they go to the fundamentals of how evidence will be presented and tested, both in the interest of the applicant

States *ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1953) (limiting other opportunities for Attorney General control of BIA decisions). Similar procedures should likewise shield the determinations of the asylum unit.

Some commentators appear to assume that any adjudications still under the responsibility of the Attorney General will be inevitably tainted with an enforcement outlook. See Note, *Developments in the Law -- Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1363-66 (1983); U.S. Commission on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* 42-43 (1980). This approach is too mechanical. Functional independence and neutrality grow from and are nourished by a far wider range of ties and reinforcements; judgments about independence based solely on inspection of an organization chart or tenure protection provisions are likely to be misleading. See Aleinikoff & Martin, *supra* note 6, at 91, 451-53; J. Mashaw, *Bureaucratic Justice* 41-44 (1983).

³⁵⁹The August 1987 regulations spelled out detailed arrangements for such a procedure. They also provided possible procedural models for consideration of asylum claims that arise only after deportation proceedings have ended, and for limited opportunities for reopening of denied claims based on changed circumstances. 53 Fed. Reg. 32,552 (proposed §§ 208.3, 208.18) (Aug. 28, 1987).

and in the interest of the government. Recommended here is a nonadversarial model that assigns to the adjudicator the major responsibility for developing the record, including the marshaling of both positive and negative information -- with certain additional measures to assure fairness for the applicant and a complete opportunity to present his best case.

The choice of a nonadversarial model may seem surprising in light of constitutional due process considerations.³⁶⁰ Under a Matthews v. Eldridge analysis,³⁶¹ it is customary to consider that asylum seekers have a very high personal stake. And although the government's interests may also be weighty, particularly in light of the pressures caused by massive influx, it remains customary to think of adversarial trial-type proceedings as the best guarantees -- perhaps indispensable guarantees -- when individual stakes are high.³⁶²

But a closer look at the Supreme Court's procedural due process jurisprudence reveals that the Court does not prescribe adversarial procedures as a requirement in all settings where important interests are at stake.³⁶³ Due process requires, at its most fundamental, the opportunity to be heard "at a meaningful time and in a meaningful manner."³⁶⁴ What is meaningful should not be decided in the abstract, but only after careful attention to the specific adjudicative task at

³⁶⁰See generally, e.g., Scanlan, *Asylum Adjudication: Some Due Process Implications*, 44 U.Pitt. L. Rev. 261 (1983).

³⁶¹Eldridge, 424 U.S. 319, 335 (1976), established the Supreme Court's framework for considering what process is due when the government is depriving someone of life, liberty, or property. It requires courts to consider three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

This analysis has often been criticized as inadequate, primarily for focusing too much on accuracy and too little on the "dignitary" interests of the individuals involved. See, e.g., Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U.Chi. L. Rev. 28 (1976). Those critiques may have less weight in the immigration setting, but in any event Eldridge remains the governing court test.

³⁶²See Mashaw, *supra* note 345, at 772, 775 (describing and criticizing this view). See generally Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U.Pitt.L. Rev. 165 (1983).

³⁶³See, e.g., Richardson v. Perales, 402 U.S. 389, 410 (1971); Goss v. Lopez, 419 U.S. 565, 583 (1975); Parham v. J.R., 442 U.S. 584, 606-09 (1979); Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985).

³⁶⁴Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

hand.³⁶⁵ Eldridge is not to the contrary. In fact, the Eldridge analysis -- and particularly its middle factor -- asks us to move away from rigid reliance on the classical trial-type hearing model, to inquire instead into what makes the most sense for assuring fairness in the precise adjudication at issue. That middle factor invites us to undertake a careful comparative inquiry, weighing the relative merits of the adversarial and nonadversarial models in the asylum context. Viewed in this light, an adversarial asylum hearing, presided over by a passive judge who officially knows nothing about the relevant issues except what appears in the record, should be seen as a poor servant of either fairness or accuracy.

First, several of the basic assumptions that underlie our usual preference for trial-type procedure do not apply here. That preference derives from the view that usually rebuttal evidence, cross-examination, and confrontation provide "the best way to resolve controversies involving disputes over adjudicative facts."³⁶⁶ But cross-examination and confrontation are rarely among the tools used by an asylum seeker in an asylum proceeding, for a fundamental reason. The government offers its own witnesses only on rare occasions. In the overwhelming majority of asylum cases, the only live witness is the applicant himself (perhaps joined by family members). Therefore the only cross-examination that takes place, most of the time, is that of the trial attorney who endeavors to expose inconsistencies or weaknesses in the applicant's own account. It could hardly be thought unfair to the applicant to replace such interrogation (designedly adverse) with

³⁶⁵See *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979). Many other writers, including two eminent federal judges, have urged that American due process inquiry expand its horizons and acknowledge that fairness can often be well served by procedures other than trial-type hearings. See, e.g., Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263 (1978); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1287-91 (1975); Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1052-55 (1975). See also *Parham v. J.R.*, 442 U.S. 584, 606-09 & n. 16 (1979) (approving nonadversarial procedures in the context of parental commitment of children to state mental institution: "The judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise").

³⁶⁶Professor Davis amplifies on those reasons as follows:

The reason we use trial-type procedure, I think, is that we make the practical judgement, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.

K. Davis, 3 *Administrative Law Treatise* 144-45 (2d ed. 1980).

questioning done instead by an examiner who has been instructed that his role is to develop a full record and not to strive zealously for a negative outcome.

The other information in the record is usually documentary, such as newspaper accounts or human rights reports. Very little of it relates specifically to the individual; virtually all of it thus has to do with legislative facts.³⁶⁷ Reports concerning legislative facts may of course be rebutted, and occasionally it will be in the applicant's interest to attempt to do so -- for example, to challenge something asserted in the State Department's human rights country report. But again, the usual adversarial tools are not necessarily of great assistance here. Rebuttal customarily takes the form of supplying competing documentary evidence that tends to controvert the asserted fact. The nonadversarial model proposed here makes full allowance for such submissions, along with argument based thereon. Moreover, unlike the present system that makes regular allowance only for State Department input, the model here places responsibility on the adjudicator to consider not only State Department information, but also human rights reports from other reasonably available sources.

Secondly, an adversarial model functions well only when each of the three key roles (the judge plus the parties' representatives) is played by a professional well-equipped to deal with the subject matter and the techniques at hand. In asylum adjudication, this is not simply a matter of assuring the presence of lawyers, for the ordinary generalist lawyer's tools often are insufficient to carry out an adequate inquiry, even into the immediate adjudicative facts. Substantial country expertise, supplemented by sensitivity to cross-cultural difficulties, is necessary even to perform an effective direct examination of one's own client.³⁶⁸ Few INS trial attorneys have the time or resources to become expert on home-country conditions. Such expertise is more likely to reside on the other side of the table, because some asylum attorneys, particularly those on the staffs of refugee advocacy organizations, have indeed developed impressive knowledge on the groups whose interests they represent. But these staffs are too small to cover more than a small fraction of the caseload.

³⁶⁷The only likely exception may be an account of earlier statements the individual applicant gave to immigration officials, usually at the time of apprehension. For example, the account may say that he told the officers he came to find a job. If he disputes the accuracy of that account, it may be necessary to call the recording official to the hearing. But most often the applicant does not challenge the fact of the earlier statements; he challenges their significance or seeks to explain them because of his reluctance to touch on risky subjects in the presence of uniformed officers. Here too, the applicant's own testimony will be the relevant tool, not confrontation or cross-examination.

³⁶⁸One manual for volunteer attorneys in asylum cases illustrates the need for such expertise and cross-cultural sensitivity by telling the story of "one lawyer who, upon hearing that his client had been chased by armed men in civilian clothing in El Salvador asked, 'Well, why didn't you go to the police?'" Committee for Health Rights in Central America and the Father Moriarty Central American Refugee Program, *Political Asylum: A Handbook for Legal and Mental Health Volunteers* 44 (n.d.).

In short, the relevant expertise, detailed knowledge about conditions in source countries, is simply too scarce. One cannot expect three participants in the adversarial proceedings (two lawyers and one judge) to have it in any but unusual circumstances. Adopting a nonadversarial model would allow us to target resources on making sure that the one key participant, the adjudicator, is thus equipped -- equipped not only to make the final predictive judgment, but also to frame questions throughout the hearing that will promote accurate understanding of the adjudicative facts at issue.

The nonadversarial procedures in asylum cases should thus proceed roughly as follows: The applicant would have the opportunity, as at present, to provide whatever information he wished when filing the Form I-589. This could take the form of lengthy answers to the form's questions, supplementary affidavits or accounts, or general human rights information on country conditions. If the adjudicator is not already familiar with conditions in the source country, he will be responsible for establishing such acquaintance, with the aid of the documentation center, in advance of the proceedings. Such preparation would of course include review of the material supplied with the I-589.

At the actual hearing, applicants should first be invited to recount the important elements of their case and to add anything they wish. The adjudicator would then pose questions, meant both to flesh out the account as necessary, to test its consistency, and to home in on the issues that appear, under the facts of the particular case, to be crucial to the ultimate judgment about risks faced in the home country. No government counsel would appear. If it developed that further information had to be marshaled to enable effective examination, the adjudicator could adjourn the proceeding. But such postponements should be rare. The proceedings should be recorded verbatim, as occurs now in immigration court.³⁶⁹

If the asylum seeker has a lawyer (for example, through the efforts of an NGO), counsel could of course be present to advise and reassure the applicant throughout the proceeding. Beyond this, counsel's role should supplement that of the adjudicator, by posing further questions to expand or clarify or to put on other evidence, in those cases where such is available. Most of the time the case will focus only on the factual inquiry, but in those cases where substantial legal issues arise, counsel could of course offer argument on points of law.

The proposal is designed for reasonably full and certainly for fair development of the affirmative case, even for inarticulate asylum seekers who appear without counsel, or with counsel insufficiently familiar with asylum cases or home country conditions.³⁷⁰ It is therefore meant to

³⁶⁹Eventually, however, it may be possible to find more expeditious ways to preserve the record for appeal. See note 276 *supra* (proposals for use of videotapes) and text at note 119 (describing German "protocol" procedure).

³⁷⁰The setting would thus bear many similarities to social security disability proceedings, where the presiding administrative law judge is under an affirmative duty to develop both sides of the case. See Mashaw, *supra* note 345, at 779-84. Courts have found ways to police this requirement, particularly in instances where the applicant appears *pro se*. See, e.g., *Bluvband v. Heckler*, 730 F.2d 886, 892, 895 (1st Cir. 1984). Some 70 percent of the litigants are unrepresented. 3 K.

enable speedy but fair decisions in a heavily burdened system, without being entirely dependent upon the availability of pro bono efforts from the private bar.³⁷¹ If reasonably available, however, counsel's role should be welcomed, primarily for the way in which prehearing consultation can serve to sharpen the issues and encourage reticent applicants to tell the whole story. The less the case has been developed beforehand by counsel, the more time the adjudicator will probably have to devote in order to identify the crucial factual elements on which the affirmative case rests. But clearly no adjudicator will be able to spend the 30 hours or more that private attorneys report spending, on occasion, to develop the full trust necessary to coax out the whole story. This deficiency must be acknowledged. But the system simply cannot be expected to go that far, on governmental resources, to help bring forth facts that are that elusive. Claimants bear the burden of coming forth with the evidence. The system cannot be designed for the chance (although it is admittedly real) that in a small percentage of the cases such delay and coaxing will unearth a meritorious case.

D. Fairness and the Use of Legislative Facts

The expert knowledge developed by the adjudicators would be used primarily to ask detailed and focused questions, as described above, and to help evaluate the answers received and make the predictive judgment about future risks. Such usage of expertise should not present significant fairness difficulties; this is exactly the reason that specialized adjudication is customarily assigned to expert administrative bodies.³⁷² But if some of these facts as developed by the expert

Davis, *supra* note 366, at 86. See also Mashaw, *supra*, at 781-82. Nevertheless, the Supreme Court has specifically upheld this structure against due process challenge. *Richardson v. Perales*, 402 U.S. 389 (1971); *Richardson v. Wright*, 405 U.S. 208 (1972) (*per curiam*).

³⁷¹As a further measure of reassurance to unrepresented applicants, especially those from backgrounds that might make official proceedings intimidating, it might be possible to emulate one other feature of the Swiss system. As indicated above, the Swiss government pays a small stipend to volunteers, recruited by a local refugee advocacy umbrella organization, who have a right, by statute, to attend each asylum adjudication interview. They are there primarily as observers, and they clearly do not see their role as lawyer-substitutes for the applicant; they do not meet with the applicants beforehand. But their presence can serve as an additional guarantee of fairness, and they also are generally permitted to pose questions at the end of the procedure to clear up any confusion or ambiguities.

³⁷²See, e.g., W. Gellhorn, *Official Notice in Administrative Adjudication*, 20 *Tex. L. Rev.* 131, 136 (1941) ("The conventional process of proof presupposes, in the main, that each case is a separate entity, which the trier of fact approaches with a more or less blank mind. The hypothetical foundation for that conventional process is absent when the trier of fact is an experienced governmental agency."); E. Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 *Duke L. J.* 1, 43. Supreme Court precedents also support this notion. See, e.g., *Federal Communications Comm'n v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978) (because the determinations were "primarily of a judgmental or predictive nature," the agency could apply its expert knowledge, and "complete factual support in the record" for the agency's conclusions "is not possible or required"); *NLRB*

adjudicators become central to particularized determinations that are crucial to the ultimate ruling, fairness may require additional steps before relying on this outside information. An example will help clarify.

Suppose that the applicant claims he will be persecuted because he was a local organizer with the XYZ political party, a radical splinter group operative in a certain province of the home country. He offers evidence of a government crackdown on the organization, and indeed the country profile from the documentation center likewise reports on the crackdown. But after examination, the the adjudicator is prepared to rule as follows:

I find the asylum seeker not to be credible in his claim of involvement with the XYZ party. I reached this conclusion primarily on the basis of certain questions I posed to him. I asked him who A was and I asked him who B was, and he did not know. A and B are key leaders of the XYZ party in that region (citing the sources of this information). Anyone even minimally active with that party would have known that. Therefore, his testimony regarding involvement with that group is not worthy of belief. Because his claim rested solely on that ground, his application for asylum will be denied.

Because this information about A and B is not a fact concerning the immediate party, it is a legislative fact, in Professor Davis's conceptual scheme. Hence it need not necessarily be placed of record by means of live testimony subject to cross-examination; official notice is appropriate.³⁷³ But because it is being used here as the crucial basis for a credibility judgment, fairness may demand specific notification to the individual, with an opportunity to rebut. The Administrative Procedure Act makes provision for such situations in adjudications covered by its terms. It provides: "When an agency decision rests on official notice of a material fact not

v. Seven-Up Bottling Co., 344 U.S. 344, 348-49 (1953).

³⁷³See K. Davis, *supra* note 366, § 15.10. It must be acknowledged that some cases take a narrower view of official notice, apparently limiting it to the much smaller range of facts that may be judicially noticed -- i.e., facts that are common knowledge or cannot reasonably be disputed. See, e.g., *Sosna v. Celebrezze*, 234 F.Supp. 289 (E.D.Pa. 1964); *Glendening v. Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962). But the better authority is to the contrary, acknowledging that wider scope for official notice is the concomitant of agency expertise. See, e.g., *McLeod v. INS*, 802 F.2d 89 (3d Cir. 1986) (approving use of official notice in asylum cases and emphasizing that it is a broader concept than judicial notice). Some cases taking a restrictive approach to official notice base their concern on the fact that such a practice may effectively shift the burden of proof from the agency to the individual. See, e.g., *Dayco Corp. v. FTC*, 362 F.2d 180, 186 (6th Cir. 1966); cf. E. Gellhorn, *supra* note 372, at 45. But in asylum the individual clearly bears the burden of proof in any event. Cf. *Zamora v. United States*, 534 F.2d 1055, 1062 (2d Cir. 1975) (per Friendly, J.) (dictum approving use of State Department information in asylum cases, without making drafter of State letter available for cross-examination, so long as letter speaks only to legislative facts).

appearing in evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.³⁷⁴

A variant of a procedure now used in district offices, when the examiner is prepared to deny an asylum claim based on information received from the State Department, might be employed here to afford such an opportunity. The adjudicator under the reformed system could simply issue a "notice of intent to deny," giving the reasons as described above and citing the source for the information about A and B. The asylum seeker would then have a specified period of time (district offices now allow 15 days) to rebut the information, either by showing that the source was mistaken and that A and B were not involved with the XYZ party, or by providing other reasons why the asylum seeker could not be expected to know them. Such a procedure should be sufficient to satisfy due process requirements.³⁷⁵

It should be emphasized, however, that in most asylum adjudications this procedure will not be necessary. Most decisions will not "rest on" official notice of specific legislative facts of this character, instead simply employing the adjudicator's general knowledge in making the ultimate predictive judgment about the risks the applicant would face on return.

E. Administrative Review

The objective of expeditious proceedings demands that the system achieve final deportation orders quickly, mainly to serve as a deterrent against others in the home country with marginal cases who may be thinking of coming to the United States to file for asylum. Obviously any provision for administrative or judicial review will to some extent undercut that objective. Yet to leave the decision in the hands of one official, without even some form of review on the administrative record compiled at the initial stage, would be intolerable when so much is potentially at stake for the individual. Some sort of review is indispensable.

1. Administrative review or not?

Because of the habeas corpus clause in the constitution,³⁷⁶ judicial review in some form appears inescapable. (Appropriately channeled, it is also highly desirable, as an outside check on the administrative agency.) It is therefore tempting to consider eliminating administrative appellate review altogether, in the interest of speedy finality. After all, if judicial review must be available, then any administrative review simply adds a third layer of consideration.

³⁷⁴5 U.S.C. § 556(e) (emphasis added). See generally E. Gellhorn, *supra* note 372, at 42-49; K. Davis, *supra* note 366, § 15.10.

³⁷⁵It might be possible to justify the issuance of the hypothetical ruling in the text even without advance notice of intent to deny, so long as an administrative appeal system is available on terms that would permit the alien to file rebuttal information in that forum. In the analogous situation under the APA, § 556(e) only requires that the opportunity to rebut be made available "on timely request."

³⁷⁶U.S. Const., art. I, § 9, cl.2.

Canada yielded to this temptation. Its 1987 legislation eliminates any centralized administrative review by a body equivalent to our BIA. If the United States should choose to follow that model (it is not the one favored here), it should at least take the other steps Canada pursued to minimize the risk of inconsistency and error despite the absence of administrative review. Primarily, proceedings on the merits of an asylum claim in Canada are invariably heard by a panel of two members of the Immigration and Refugee Board. The asylum seeker needs to persuade only one of them that the case is meritorious in order to achieve a favorable result.

Nevertheless, several people interviewed in Canada acknowledged that the new system remains vulnerable to the vice of inconsistency. If it comes to the attention of the chairman of the Immigration and Refugee Board, for example, that a panel in Vancouver is granting asylum readily to members of a certain dissident group, but panels in Montreal are consistently denying asylum in such circumstances, he has available no direct measure for achieving unified Board policy on the issue. Informal controls, primarily through the use of legal opinions or other advice from the General Counsel's office, will probably ameliorate the inconsistency problem, but such measures are advisory only. Conceivably consistency could also be established in Canada through judicial review. But judicial review under these circumstances is also heard in different courts at various levels and in various locations, rather than before a single tribunal. Consistency via the judicial route may take a long time to achieve.

Centralized administrative review is also desirable because of the difficult nature of the decisions that asylum adjudicators must make. A hypothetical example will illustrate. Suppose that human rights reports reveal a gradually increasing pattern of government suppression of labor union activists in a central American country. The first reports mention isolated arrests of certain leaders. The next reports indicate that some of these detained leaders have been tortured. A few weeks later a wider circle of prominent union activists are arrested, although many still remain at large. At some point, the government's pattern of persecution crosses an important threshold, such that prominent union activists found in this country should be recognized as refugees based on that affiliation alone. Just when that line is crossed is a difficult judgment call. It would not be surprising for adjudicators initially to reach differing results in the midst of this evolving pattern. But consistency would be served if there is a centralized forum for making a definitive and binding decision as to when the line is crossed -- or at least to assure that union activist asylum applicants in Miami are treated the same as their counterparts in California.

2. The recommended framework

A reformed U.S. asylum adjudication system therefore should retain an administrative appellate body, both to make such difficult judgment calls and also to monitor for consistent implementation of the standards throughout the country. Its basic role would be to consider appeals from denials by the initial adjudicators, based on the administrative record and briefs filed by the asylum seeker as appellant. A limited time, perhaps ten days, should be allowed for the filing of an appeal after an initial adjudication, and there should also be fairly strict limitations on the time for briefing. Even if the initial stage before the adjudicator is not adversarial, it may be worthwhile to treat appeals in a more adversarial manner, using INS appellate attorneys (as under the current system) to represent the government's interest when the matter reaches the administrative appellate body.

For reasons sketched earlier, it might also be advisable for the appellate authority to perform some monitoring role with respect to grants of asylum. Inaccurate grants of course provoke less concern than erroneous denials, but a broad pattern of undeserved grants can undercut public confidence in the system's fairness. For this reason, the staff of the appellate body might regularly receive and review decisions in all cases, appealed or not, to watch for aberrant patterns. (The staff at this level, being centralized in one location, could probably specialize by region or country.) In limited circumstances, the appellate body could then use the device of certification³⁷⁷ to bring an unappealed case, positive or negative, before it for further review. This sort of monitoring would provide a useful quality-control mechanism.

The appellate caseload would thus consist primarily of appeals initiated by denied claimants, supplemented by a handful of other cases brought before the body on its own initiative. Given adequate staffing, and assuming a solution to the transcript problem, this process of review strictly on the record created below should add only a few months to the overall delay, and even that only in cases accepted for full appellate consideration.

There remains the question of the composition of the appellate body. Clearly the current Board of Immigration Appeals could perform this function; approximately half of its time is already devoted to asylum cases. In the end, however, I recommend against assigning these functions to the BIA, although the question is close. Fairly or not, many NGOs identify the BIA as a significant source of the biased results they believe the system has achieved over the past several years. Creation of a new Asylum Board would help signal the reality of a fresh start, and thus may make the more restrictive elements of the new scheme more acceptable. Moreover, asylum is likely to furnish a substantial portion of contested cases under the immigration laws for the foreseeable future, thus justifying the creation of a new and permanent unit.

A separate administrative appellate body, an Asylum Board, focusing solely on asylum cases, will have a better opportunity to develop the necessary expertise in the function, particularly including detailed acquaintance with home country conditions on the part of both members and staff.³⁷⁸ Members should be attorneys, because difficult legal questions under the asylum provisions of the immigration laws will have to be settled in this forum.³⁷⁹ The Asylum Board should be located organizationally within EOIR, and as indicated earlier, the Chairperson of the Asylum

³⁷⁷See 8 C.F.R. §§ 3.1(c), 3.7. A similar procedural mechanism provides for "referral" of cases to the Attorney General. *Id.* § 3.1(h).

³⁷⁸In the press release announcing the creation of APRU, the Justice Department emphasized that asylum decisions are "distinct from the normal operation and administration of the immigration laws." 64 *Interp. Rel.* 473 (1987). A new Asylum Board would thus allow appropriate specialization on the part of the BIA.

³⁷⁹Recent cases have presented the BIA, for example, with difficult legal questions concerning the appropriate standards for asylum claims by conscientious objectors, see *Matter of A.G.*, *Interim Dec. No. 3040* (BIA 1987); cf. *M.A. v. INS*, 858 F.2d 210 (4th Cir. 1988), or by participants in a violent coup, see *Dwomoh v. Sava*, 696 F.Supp. 970 (S.D.N.Y. 1988).

Board should also have general oversight and administrative responsibility over the corps of adjudicators.³⁸⁰

3. Country guidelines

Some earlier reform proposals have suggested country guidelines or profiles as a device that would help streamline the process and simplify the adjudicative task.³⁸¹ For example, by 1981 it became clear that the regime in Iran had begun systematic persecution, often including summary execution, of adherents of the Baha'i faith. The State Department issued a policy statement announcing that Baha'is who escaped Iran should be considered refugees ipso facto.³⁸² A similar firm guideline might have been possible, for example, in 1978, declaring that anyone who escaped Pol Pot's Cambodia should be considered to have a well-founded fear of persecution on return, in view of the indiscriminately murderous policies of that government. With such a guideline in place the adjudicators would be freed of responsibility for the ultimate predictive judgment about threat levels and whether the threat is sufficient to cross the threshold and lead to the recognition of refugee status. They could instead focus on a much narrower and more easily ascertained issue: simply whether the individual claimant was truly an Iranian Baha'i or a Cambodian (and possibly whether he fell within one of the exclusion or cessation clauses of the definition).

With the removal of the State Department from any major role in refugee matters, responsibility for discerning such patterns and issuing appropriate guidelines to asylum adjudicators -- if guidelines are to be used at all -- would appropriately devolve on the Asylum Board. The Board would remain primarily an adjudicative body, but the guidelines could be seen as a natural outgrowth of the regular monitoring of country conditions the Board should be performing anyway to discharge its adjudicative responsibilities.

³⁸⁰The Asylum Board would also provide a logical centralized forum for receiving the views of the UNHCR (the rough equivalent of the State Department under the earlier ad hoc arrangements for UNCHR file review in Haitian cases in the late 1970s). UNHCR officials stated to me that their preferred point of access is at the administrative appellate stage (interview with Richard Stainsby, UNHCR Senior Legal Adviser, Washington, Oct. 1988), and several other countries have made arrangements for routine file review by UNHCR officials in this manner. Many NGOs place a high priority on a well-targeted UNCHR role, and its expertise could be of genuine assistance to the decisionmakers.

³⁸¹See, e.g., Select Commission, *supra* note 63, at 169-73; Verkuil, *supra* note 303, at 1141, 1172; Scanlan, *supra* note 2, at 637-38. The comparison is often made to overseas refugee programs, where country guidelines (more in the nature of group presumptions of refugee status) are sometimes employed. But such an approach is not workable in asylum. Rougher judgments on refugee status are tolerable in overseas processing, because other screening tools provide an enforceable cap on the number who will actually be admitted to the country, however many are initially adjudged to meet the refugee definition. See note 35 *supra*.

³⁸²See 62 Interp. Rel. 1000 (1985) (describing earlier policy announcements on Baha'is, as well as on Christians and Jews from Iran).

A large dose of realism, however, should curb any extensive expectations about the likely utility of country guidelines. First, appropriate occasions for their issuance are likely to be exceedingly rare, at least in view of the current caseload, which comes predominantly from Central America and the Caribbean. For the United States, clear patterns like the Baha'i or Cambodian examples are unlikely to manifest themselves very often.³⁸³ Guidelines are useful only when they can be based on particularized characteristics that sharply distinguish a certain group from the rest of the population. Most persecution in countries significantly represented in the current asylum caseload, however, does not follow such crisp patterns. If guidelines can only say that "prominent" union activists or "visible" governmental opponents are likely to be persecuted, the subsequent adjudicative process will have to cover almost all the same ground it would cover anyway in the absence of guidelines. That is, the adjudicator would still have to pursue in detail the applicant's own personal history, in order to judge prominence or visibility based on his past activities and any earlier threats made against him or his family or friends. Guidelines that must necessarily use such vague terms are probably worse than no guidelines at all, for they would impart an aura of misleading clarity, when the circumstances still require a highly individualized, contextual judgment.

Second, most guideline proposals envision the use only of affirmative guidelines -- that is, guidelines that lead to a grant of asylum if the individual matches the profile. Negative guidelines verge on denying individuals a right to show that their own personal threats are so great that they deserve recognition as Convention refugees, whatever may be the general state of human rights observance in the home country.³⁸⁴ This approach makes sense, but it obviously undercuts the utility of guidelines in streamlining adjudication. Moreover, the risk would persist that the absence of an affirmative guideline could be taken as an implicitly negative factor by an adjudicator.

There is a third limitation. Most proposals for the use of guidelines or profiles assume that they would be made public.³⁸⁵ But asylum officials in nearly every country visited expressed great skepticism about the idea of published guidelines. One Swiss official commented: "The next week half the applications would match the guidelines." Published country guidelines might wind up simplifying the ultimate predictive judgment about danger levels only at the cost of encouraging more sophisticated fraud, thus complicating adjudication over whether the applicant truly belongs to a class favored by the guidelines. Other profiles used for a variety of law enforcement and administrative purposes usually remain a closely guarded secret.³⁸⁶ If guidelines are to be useful at all, then, they probably should remain as internal aids to decision only, not a matter for public

³⁸³Some European officials reported that clear patterns appear in a larger proportion of their caseload than is the case in the United States. They mentioned situations like that in Turkey, where opposition groups are highly organized and government response correlates quite closely to the precise cell or splinter group to which the asylum seeker belonged.

³⁸⁴See Zucker & Zucker, *supra* note 55, at 272-73.

³⁸⁵See, e.g., Verkuil, *supra* note 303. Verkuil goes further and suggests that guidelines be adopted through a notice-and-comment rulemaking proceeding. Such a process, however, would appear to be too cumbersome to keep up with necessary changes as country conditions evolve.

³⁸⁶See J. Monahan & L. Walker, *Social Science and Law* 207-27 (1985).

dissemination. But if confidentiality is maintained in this fashion (except to the extent that the underlying information is manifest in written decisions explaining individual grants and denials), then the guidelines are subject to the charge that they amount to a kind of secret and unaccountable decisionmaking.³⁸⁷ Country guidelines may well cause more problems than they would help solve.

F. Judicial Review

Under current statutes, asylum determinations are fully reviewable in court, ordinarily in connection with review of a deportation or exclusion order under INA § 106 (in the court of appeals for deportation, in the district court for exclusion). Courts apply either a "substantial evidence" or "abuse of discretion" test, depending on the precise issue.

Given overloaded court dockets, these avenues for review create significant potential for delay. If most denied applicants were to petition for judicial review after exhausting administrative remedies, delays would mushroom, negating any effective deterrent message that might derive from prompt returns. Although this appears an unlikely prospect at present, complete assurance against debilitating delay might someday require some limitation or careful channeling of judicial review, which could only be done by statutory amendment.³⁸⁸ But any trimming will be highly controversial, both because courts have sometimes performed a genuinely valuable service by

³⁸⁷This objection was voiced vigorously by the American Bar Association's Coordinating Committee on Immigration Law in its comments on a preliminary version of this study. Letter from Charles C. Foster to the author, April 13, 1989.

³⁸⁸Some proposals have been offered that would eliminate judicial review of asylum decisions, although as part of a package of reforms grafting several additional safeguards onto the administrative process. See, e.g., Scanlan, Issue Summaries Submitted to the Select Commission on Immigration and Refugee Policies by the Center for Civil and Human Rights, *in* Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Appendix C to the Staff Report (Papers on Refugees) 43, 67 (1981).

Attempts to eliminate judicial review are inadvisable, at least short of emergency circumstances, for two reasons. First, carefully framed, such review plainly can serve a most useful checking function, assuring fulfillment of the protective purposes of our asylum laws. Second, complete denial of review may not be constitutional under the U.S. Const., Art. I, § 9, cl. 2, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." See generally Note, Developments in the Law -- Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1263-74 (1970). Aliens being removed from the country must necessarily be taken into custody, and it would not be difficult in many cases to allege colorable constitutional violations -- the foundation for issuance of the Great Writ. In any event, absolute preclusion statutes tend to spring leaks. See, e.g., *Johnson v. Robison*, 415 U.S. 361 (1974). A more productive course is to concentrate energies on channeling review into forms that will maximize effective judicial checks with minimum disruption. When substitute mechanisms are available for review in some form by Article III judges, restrictions on the availability of habeas corpus have been held valid. See, e.g., *Swain v. Pressley*, 430 U.S. 372 (1977); *Palmore v. United States*, 411 U.S. 389 (1973).

correcting significant bureaucratic error or abuse in asylum processing, and because of the general high regard Americans hold for courts as guarantors of rights. Such changes should therefore be considered a last resort, to be employed only if the effectiveness of the administrative changes proposed above is undercut by abusive use of judicial review for purposes of delay -- abuse that is now rare. The discussion that follows, therefore, should be taken only as a preliminary sketch of possible changes to judicial review, changes which, one hopes, would not be necessary.

Two primary aims, necessarily in tension, are generally accepted for judicial review in the asylum scheme. Judicial review should (1) play a limited but effective role in checking bureaucratic mistake or abuse, and (2) avoid imposing undue delay. With respect to the first goal, the court's checking function is necessarily "limited," because almost no one believes feasible a system where the courts make de novo determinations of asylum. With respect to the second, obviously no one favors undue delay. Although views may differ on what delay is excessive, Section II.C. above points out why expeditiousness is unusually important in the asylum setting. Delays tolerable in other administrative settings may become "undue" here.

Close attention to these two aims suggests a reformed scheme that might maximize each, should changes become necessary. Deterrence of unworthy asylum seekers requires speed, but obviously it does not require the swift return of everybody who files an I-589. It requires swift return only of those whose cases are at best thin or marginal. In all likelihood such cases constitute a substantial majority of the current caseload and of reasonably foreseeable caseloads in time of major influx.³⁸⁹ Obviously those with clearly meritorious claims must be permitted to stay, perhaps indefinitely. But presumably these are the cases the new corps of specialists will readily grant anyway, thus obviating judicial review.

This leaves a third category: difficult cases on the boundary, which may understandably require more thorough deliberation, research, and possible reconsideration. Provided they remain a fairly small percentage of the caseload, this category of cases could remain pending in the overall administrative-judicial system longer without much damage to the deterrent message.³⁹⁰ If this guess about proportions is roughly correct, the system could give some form of access to Article III courts to all asylum seekers, provided that the mechanisms permit speedy termination of review unless a truly substantial question is raised.³⁹¹

³⁸⁹This guess would of course be changed if a Central American Hitler or a Caribbean Pol Pot came to power. But we would be in a much stronger position to rally political support for massive acceptance of refugees in such desperate circumstances if the system has won public support through clear demonstration of the capacity to say an enforceable "no" when people do not qualify.

³⁹⁰This threefold division of cases (unqualified, difficult borderline, meritorious) is in principle a clear one. In practice, of course, actual location of the boundaries will be much tougher. If administrators differ greatly from the courts on where those boundaries lie, the latter are bound to intervene more, creating delays in more cases and undermining the hoped-for humane and targeted deterrent.

³⁹¹For other proposals to curtail judicial review while maintaining needed safeguards, see Aleinikoff, *supra* note 81, at 236-38.

Canada's new system provides a potentially useful procedural model. Its legislation disallows judicial review of denied refugee claims unless the applicant first obtains "leave to appeal" from a specified court. This is not a device that is familiar to U.S. lawyers. Our system ordinarily allows review liberally without prior screening, although of course meritless appeals may be disposed of summarily. Our nearest analogue may be the certiorari process in the Supreme Court, but this is plainly a screening mechanism that we reserve for the highest levels of appellate consideration.³⁹² Applying such a device at the very threshold of judicial review is unlikely to win easy acceptance. Proponents would carry a heavy burden of persuading the relevant audiences (including the Congress) that a unique device of this type is needed because of the special requirements of an asylum system challenged by steeply rising numbers of applicants.

Under the 1988 revisions to Canadian law, asylum applicants seeking court review on the merits (including review of assertions that natural justice has been violated -- the equivalent of our constitutional due process claims) must file for leave within 15 days of the administrative decision at issue. The court will ordinarily decide the application without a personal appearance. If leave is granted, the matter is scheduled for full hearing in the ordinary course. But if the judge is not persuaded that the case is worth considering, the matter goes no further; there is no appellate review of denial of leave. What makes a case worth hearing? Unfortunately the Canadian legislation does not specify clearly, leaving it to the courts to develop precise standards.³⁹³ Because the new Canadian scheme has been functioning for only a few months, it is too early to know what will become the operative threshold.

If this "leave to appeal" approach were to be adopted in the United States, it would be better for the statute to spell out the governing standard. The exact formulation needs further attention. But the basic idea, if both of the above goals are to be served, would be to preclude full-fledged court review, with complete briefing and argument, unless there is a substantial likelihood of reversal of the administrative action.³⁹⁴ This is essential. For such a change to effect

³⁹²Certificates of probable cause, needed under 28 U.S.C. § 2253 (1988) and Fed. R. App. P. 22(b) to appeal a district court's denial of habeas corpus to a state prisoner, bear some similarities to this scheme, but there are important differences as well. First, the threshold for issuance is lower than what is suggested here, see *Barefoot v. Estelle*, 463 U.S. 880 (1983). And second, denial of the certificate is itself open for reconsideration by a judge of the appellate court, whereas Canada has precluded further review of denial of leave to appeal.

³⁹³[Canadian] Immigration Act, as amended, *supra* note 198, §§ 83.1 - 84.3.

³⁹⁴This standard thus comes close to the test applied when a single Justice of the Supreme Court considers an application for a stay pending the full Court's ruling on the petition for certiorari. See, e.g., *John Doe Agency v. John Doe Corporation*, 109 S.Ct. 852, 853-54 (Marshall, J., in chambers) (granting stay, in part because there is a "fair prospect" that the full Court would find the decision below to be erroneous). This formulation makes general schematic sense, but it has hardly been framed in language suitable for a statute. I am not quite sure what precise formulation should be used to get the job done. What is meant to be communicated is more a mood or posture for the courts, than a precise schema. The standard should signal that most of

the desired results, Congress would have to signal clearly that it expects substantial deference on the part of the courts to administrative decisions, and hence expects leave to be granted only in a small fraction of overall cases. (Moreover, district court denials of leave to appeal should not themselves be appealable.) If the proportions do not work out as sketched above, however, and if most cases wind up being heard on the merits in the courts, then the "leave to appeal" arrangements, ironically, would actually serve to compound delays, by adding an additional round of paperwork. Full success depends on both an attitude of restraint by the courts and a dedication to high-quality professional adjudication by the agency, to reinforce the idea that judicial deference is fully merited.

If the scheme works as envisioned, all denied claimants would have access to an article III judge; no bureaucratic decision could block that access. This fact is vital, for it preserves many of the incentives for agency self-policing that exist in more thoroughgoing schemes of judicial review. The officials involved in adjudication would know that in some cases (exactly which ones cannot be known in advance), the independent third branch will be looking in on their work. But the initial access to the courts would be of a strictly limited character. Within perhaps 45 days, judicial review in a large majority of cases would be at an end and the underlying deportation or exclusion order would become fully enforceable.³⁹⁵

G. Deportation

Whenever the asylum claim is finally denied, the underlying deportation or exclusion order must be promptly executed, in order to assure the only effective form of deterrent that does not depend on indiscriminate harshness meted out to all asylum seekers whatever the strength of their claim.³⁹⁶ Surprisingly few of such deportations actually occur at present, however, unless the alien has remained in detention.³⁹⁷ The reason is simple. Asylum seekers occupy a low priority for use of scarce investigation and enforcement resources in the district offices. Those resources are targeted instead on criminal aliens and others apparently involved in major abuse of the immigration system.

the time the job of adjudication belongs to the agency, and the courts should not intrude too deeply into precise development of substantive standards or their implementation in the particular case. Court review is an outside check, an occasional chastener and reminder that accountability also runs to persons outside the bureaucracy.

³⁹⁵A possible complication might arise under the proposal offered here because deportability and asylum would be decided in different venues. But the Justice Department has gained experience through the legalization programs adopted in the Immigration Reform and Control Act of 1986 regarding how to work out the technical details in order to provide for unified judicial review despite an initial splitting of adjudication forums. See Martin, *Judicial Review of Legalization Denials*, 65 *Interp. Rel.* 757, 761 (1988).

³⁹⁶See Martin, *New Asylum Seekers*, *supra* note 1.

³⁹⁷See Section IV.B.6. *supra*.

If we were to look only at each individual category in isolation, this ranking of enforcement priorities makes sense. Criminal aliens do pose a greater threat to society than failed asylum applicants, who are largely harmless and law-abiding job-seekers. But enforcement priorities must be reoriented to take full account of systemic impacts and not just individual characteristics. The rest of this proposal painstakingly seeks every reasonable opportunity for streamlining at each stage in an inevitably complicated procedure. That effort is for naught -- any achievements are rendered illusory -- unless this last piece is resolutely inserted into the puzzle.

H. Emergency Responses to Large-Scale Influxes

This study was chartered at a time of relative stasis and calm within the asylum adjudication system. Applications in the INS district offices had remained for years at an annual level of 20,000 to 30,000. Although these figures ran some 10 times higher than annual statistics in the mid-1970s, the number appeared politically tolerable. There was no undue pressure for quick fixes or emergency solutions. It would have been an auspicious time to provide for a phase-in of the ambitious changes suggested here, allowing the opportunity for careful restructuring of offices and processes, the recruitment and training of new officers, and the inevitable adjustments and modifications that will appear advisable as actual implementation reveals new problems and opportunities.

But now, toward the conclusion of the project, the political situation has altered considerably, and any changes will have to be implemented in much less favorable circumstances. Large influxes of Central Americans to Florida and Texas during the winter of 1988-89 strained arrangements even for basic provision of shelter and food. "False refugees" claimed the front pages again, and the potential for political backlash reappeared. Radical solutions are being floated, sometimes reflecting little understanding of the international and domestic legal framework.³⁹⁸ And patience for long-term solutions of the kind sketched here may be in short supply. But whatever the long-term solution adopted, political leaders and the public may need some showing of more visible and immediate and effective action to stem the flow and dispatch pending cases quickly.

I will offer a few suggestions, plus a few words of caution about some quick fixes being tendered. But the requirement for prompt action of some sort must not divert attention from the need to start implementing the central reforms proposed here as soon as possible. Almost every conceivable (and certainly every reasonable) emergency response will be easier to implement, to sustain, and to render effective, if emergency measures are accompanied by the steady phase-in of a more reliable, high-quality, one-tier adjudication system staffed by a corps of true professionals, insulated from foreign policy concerns, sensitive to cross-cultural communication difficulties, and equipped to make effective use of the disparate array of information sources that must be employed.

³⁹⁸For example, an internal draft has been circulated within INS of a draconian proposed "Asylum Anti-Abuse Act of 1989." See 66 Interp. Rel. 478-79 (1989).

1. Quick denial of manifestly unfounded applications

Several countries have made use of fast-track denials of "manifestly unfounded" asylum claims (what I will call here "MU procedures"), and in time of large-scale influx, such possibilities become attractive. A well-designed MU procedure could conceivably help magnify the qualified deterrent message that the United States now is trying to send to those in Central America who may be contemplating a trip northward.³⁹⁹ But its contributions to this end would be modest, and its complications may outweigh its advantages at the present time.

The UNHCR Executive Committee (a body in which the United States is a key participant) adopted a formal Conclusion in 1983 on "the problem of manifestly unfounded or abusive applications" for asylum. It gave cautious endorsement to the creation of an expeditious procedure for dealing with such applications, but it warned against overuse of such measures, particularly in view of the "grave consequences" of an erroneous determination. It therefore emphasized that the interview should be conducted by a fully qualified official and that the decision should be made by the "authority normally competent to determine refugee status." The concern was primarily that such responsibilities would devolve on border police, who would be ill-equipped to carry out the role and might have incentives to use MU procedures to exclude asylum seekers without an adequate effort to find the facts.⁴⁰⁰

³⁹⁹Necessarily this proposal is founded on an assumption that a large majority of the recent Central American asylum seekers will not qualify under current legal standards. That assumption is debatable, on legal and factual grounds, but for reasons that cannot be elaborated here, I believe it to be wholly defensible.

⁴⁰⁰The Conclusion, No. 30(XXXIV), 38 U.N. GAOR Supp. (No. 12A) at 25, U.N. Doc. A/38/12/Add.1 (1983), states in relevant part that the UNHCR Executive Committee:

(c) Noted that applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria constitute a serious problem in a number of States parties to the 1951 Convention and the 1967 Protocol. Such applications are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees;

(d) Considered that national procedures for the determination of refugee status 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 the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum;

(e) Recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees and therefore recommended that:

(i) As in the case of all requests for the determination of refugee status or the granting of asylum, the applicant should be given a complete personal interview by a fully

With these cautions in mind, MU procedures for the United States might be built on the following framework. Those persons apprehended by INS or "walking in" to INS offices who apply for asylum or otherwise express fear of return to the home country should be given the application form and told to complete and file it within a limited time period. Upon receipt of the form, an asylum adjudicator would go over the form and any other information in the alien's file to perform a preliminary screening. If the case clearly seems to have substance, it should simply be set for the regular interview or hearing procedure. If it looks as though the claim might be manifestly unfounded, it should be set for an early MU screening interview, which should be recorded verbatim.

If during the interview the applicant now tenders a plausible basis for his asylum claim, the matter should be passed on for the next stage, the merits hearing, which would probably take place several weeks later. Access to the full merits hearing should be permitted even if his present account seems to contradict earlier statements given to the immigration officials. The individual may be pressed about the seeming contradiction, but unless the responses reveal clear fraud, he should make it to the next stage.⁴⁰¹ There are simply too many possible innocent explanations for inconsistent initial statements in these settings, owing to the manifest difficulties of cross-cultural communication and to the understandable reticence that truly persecuted people may feel upon their first encounter with uniformed American officials.

The MU procedure is not the forum for resolving such contradictions, for to do so adequately, it would have to expand until it became virtually indistinguishable from the merits

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- qualified official and, whenever possible, by an official of the authority competent to determine refugee status;
- (ii) The manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;
 - (iii) An unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, Governments should give favorable consideration to their establishment. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.

⁴⁰¹Apparently a high percentage of the current applicants say something about coming to the United States for a job during their first encounters with INS, and only later begin speaking of feared persecution. Because of cross-cultural differences, one cannot simply apply a presumption that the first statement is the more accurate or honest (even if such a presumption might make sense in dealing with American citizens in other contexts). It is entirely possible that the individual muttered a non-threatening response in the first encounter with uniformed officials only because his entire experience in his home country taught him to volunteer nothing to people in uniforms. The change of story, of course, should be explored fully in the merits hearing, but it cannot be treated as dispositive in the MU procedure.

procedures.⁴⁰² This fact unavoidably limits the utility of MU procedures. If the individuals come from countries with known human rights problems (and this includes the Nicaraguans, Salvadorans, and Guatemalans who make up the bulk of the current influx), MU procedures will probably screen out only a handful. These would be mainly persons so poorly advised by friends or "travel agents" -- or so honest -- that they speak during the MU interview only about crop failures at home and job attractions here. But a more restrictive approach carries too high a risk of quick return of true refugees.

If the application is found to be manifestly unfounded, the consequence would be some truncation of normal procedures. Again many variants are possible; the most effective would require statutory change. Possible limitation by regulation alone, however, might take the following shape: the MU determination should constitute a final negative ruling on the asylum and withholding claims, without the possibility of de novo consideration or further review in any administrative forum.⁴⁰³

If statutory changes are deemed advisable, the MU determination should also serve to limit judicial review, but with safeguards. Limited judicial review would be possible, through a summary procedure like that suggested above for deciding on "leave to appeal." There would be one difference. If the court found the MU determination unsupported, it would not schedule full-fledged court review. It would simply remand the case for a full merits hearing before the adjudicator. If instead it approved the MU finding, the deportation order would become final and immediately enforceable, without possibility for further judicial consideration.

Obviously the force given an MU determination cautions that MU procedures should not be used unless training and recruitment have proceeded to the stage that the Justice Department has substantial confidence in the officers doing the MU interviews. The ever-present temptation

⁴⁰²The Department of Justice actually drafted a kind of MU procedure, using different terminology, in asylum regulations proposed in 1978. Those regulations allowed for "summary judgment" on a shortened timetable, in cases that appeared straightforward -- i.e., there were no genuine issues of material fact. The 1978 proposal never made it into fully operative final regulations, however. The agency explained its abandonment of the idea as follows:

Critics cite as hardships [rendering the summary judgment procedure unfair] the circumstances of many newly arrived applicants for asylum who face a language barrier and suffer from a lack of education and limited financial resources. . . .

The objections to the summary judgment provisions have merit. Upon reconsideration, this type of motion appears to be rather sophisticated given the nature of the proceedings and situation of the individuals [Also, since] applications for asylum most frequently involve disputed facts a motion for summary judgment would rarely lie.

44 Fed. Reg. 21254 (April 10, 1979). These considerations have lost little force in intervening years and may still counsel against adopting such a procedure, under whatever name.

⁴⁰³An exception might be made for review solely on the initiative of the Chairperson of the Asylum Board, much as the Chief Administrative Hearing Officer may now arrange for review of certain administrative orders issued by Administrative Law Judges under 8 U.S.C. §§ 1324a, 1324b (1988) within thirty days of the order's issuance. See 28 C.F.R. § 68.52 (1988).

will be to overuse MU determinations. A report prepared by Professor A.M.J. Swart of the Netherlands for the Council of Europe found that exactly this sort of error was being committed. He reported that national authorities implementing MU procedures in several European countries "are inclined to want to judge the merits of a request fully in order to see whether it is abusive or unfounded [rather than 'clearly' abusive or 'manifestly' unfounded]. This means that criteria which have been developed to do no more than make a first, rough selection possible, become so important that the selection itself becomes the crucial moment in asylum procedure for all asylum seekers."⁴⁰⁴

The lack of adequately trained and equipped personnel at present may pose a substantial obstacle to effective implementation of MU procedures as an immediate response to the recent influxes. Such a procedure would be far more reliable once a staff of independent and professional asylum adjudicators is in place -- another reason to move quickly toward implementation of such a new administrative scheme. But even then, MU procedures should not be expected to carry a heavy load. Even in Germany, which has had several years to perfect its MU techniques, only about 25 percent of cases can be disposed of in this fashion, and Canada has eliminated only about 10 percent this way under its new system.⁴⁰⁵ It may be better, as the UNHCR's formal Conclusion on this issue ultimately suggests, to target resources instead on assuring speedy completion of full merits hearings and all review stages.⁴⁰⁶

⁴⁰⁴Swart, *The Problems Connected With the Admission of Asylum Seekers to the Territory of Member States*, in *The Law of Asylum and Refugees: Present Tendencies and Future Perspectives* 65, 80 (Proceedings of the Sixteenth Colloquy on European Law, Lund, 15-17 September 1986; Council of Europe Publication 1987).

⁴⁰⁵See von Pollern, *Die Entwicklung der Asylbewerberzahlen im Jahre 1988, 1989* *Zeitschrift für Ausländerrecht und Ausländerpolitik* (ZAR) 23, 26 (from 1982, when MU procedures were introduced in Germany, through 1988, 25.32 percent of cases were denied as "manifestly unfounded;" for 1988, the figure was 36.38 percent); *Refugee Determination in Canada: First Quarter Review* 10 (Ottawa, 25 April 1989). A UNHCR study estimated that manifestly unfounded or abusive claims represented 10 to 15 percent of "unscheduled arrivals" in industrialized countries in 1984. Jaeger, *Irregular Movements: The Concept and Possible Solutions*, in *The New Asylum Seekers*, supra note 1, at 23, 31.

⁴⁰⁶In Conclusion 30, supra note 400, at para. (f), the UNHCR Executive Committee:

(f) Recognized that while measures to deal with manifestly unfounded or abusive applications may not resolve the wider problem of large numbers of application for refugee status, both problems can be mitigated by overall arrangements for speeding up refugee status determination procedures, for example by:

- (i) Allocating sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously, and
- (ii) The introduction of measures that would reduce the time required by the completion of the appeals process.

2. Disqualification for transiting through third countries

Some interest has also been expressed in new rules that might disqualify persons from asylum or withholding of deportation if they transited through other countries where they could have applied for asylum. Because virtually all asylum seekers from Central America travel through Mexico, some regard this as a nifty device to deal with most of the current caseload.

This proposal, however, poses such serious legal and practical problems that it should be abandoned.⁴⁰⁷ Suppose a Salvadoran files for asylum and is told that his claim will not be heard on the merits because he should have applied in Mexico. What exactly will be done with him? Presumably he could be sent to Mexico, if Mexico would agree to receive him. But the odds of Mexico's accepting such a person, much less tens of thousands of needy Salvadorans, are nonexistent.⁴⁰⁸ The only country likely to accept him would be El Salvador, but this is where he claims he would be persecuted. His transit through Mexico to the United States by no means proves that he had no legitimate fears in El Salvador. Both Article 33 of the Refugee Convention and INA § 243(h) obligate the United States not to return him to El Salvador if his fears are well-founded.

In the end, therefore, a "transit" doctrine would not obviate a ruling on the merits, at least with respect to the nonrefoulement obligation. It would only delay such a ruling, in the meantime possibly complicating diplomatic relations with Mexico.

3. Ending work authorizations and making alternative arrangements for subsistence pending adjudication.

There may yet remain a need for some decisive step to deal with sudden influxes and replace the magnet effect with a deterrent. Many INS personnel interviewed for the study volunteered a ready solution along these lines: simply end the work authorizations that are now fairly automatic for asylum seekers during the pendency of their claims (both initially and on appeal).⁴⁰⁹ And there is additional evidence that the recent rise in filings is at least partially linked to the work authorization issue.⁴¹⁰

⁴⁰⁷Similar issues have been debated in Europe for years under the rubric of "country of first asylum" doctrine, and the debate there suggests the legal and political intricacies that can be implicated. See generally Vierdag, *The Country of "First Asylum": Some European Aspects*, in *The New Asylum Seekers*, supra note 1, at 73; Conclusion No. 15(XXX), *Refugees Without a Country of Asylum*, 34 U.N. GAOR Supp. (No. 12A) at 17, U.N. Doc. A/34/12/Add.1 (1979).

⁴⁰⁸See generally J. Friedland & J. Rodriguez y Rodriguez, *Seeking Safe Ground: The Legal Situation of Central American Refugees in Mexico* (1987); P. Weiss Fagen & S. Aguayo, *Central Americans in Mexico and the United States: Unilateral, Bilateral, and Regional Perspectives* (1988).

⁴⁰⁹8 C.F.R. §§ 274a.12(c)(8), 274a.13(d). The claim must be "nonfrivolous." An INS memorandum elaborates on the standards used in this screening. 64 Interp. Rel. 886-87 (1987).

⁴¹⁰See, e.g., Frelick, supra note 312, at 17.

But a simple end to work authorizations (or a raising of the threshold to qualify beyond the "nonfrivolous" standard now contained in the regulations⁴¹¹) will not fully solve the problem, nor is it likely to be sustained by the courts, unless other steps are also taken. Before the rules were amended in 1987 to make work authorization nearly automatic, district directors had considerable discretion in granting such permission. In Diaz v. INS, a district court issued a preliminary injunction against restrictive implementation, however, finding that a restrictive policy unduly burdened the alien's statutory right to apply for asylum and thereby frustrated the goals of the statute.⁴¹² The nondiscretionary 1987 regulations were issued at least in part to conform to Diaz.⁴¹³

Nothing has happened since then to undercut the court's reasoning. It is indeed quite plausible to read Congress's enactment of § 208 in 1980 as creating a right for persons physically present in the United States to have asylum claims heard on the merits. If work authorization is now to be denied, any lawyer for the Department of Justice is bound to be asked in court how the government expects asylum seekers to survive during the months (and possibly years) until a final ruling is obtained on the application. Unless the government takes further steps to provide for such people during the pendency of the claim, the lawyer has no respectable answer.⁴¹⁴ Courts might easily conclude the government was trying to starve people out of pursuing a congressionally mandated right. And they would surely point out that a no-work-authorization policy falls with equal weight on bona fide refugees and the abusers who are the ostensible targets.⁴¹⁵

At times of heavy influx, a policy of near-automatic work authorizations may well have to be ended. But the government must then provide alternative arrangements for feeding and housing the asylum seekers. Obviously this course will be expensive, but it would be adopted in

⁴¹¹See 66 Interp. Rel. 4 (1989).

⁴¹²Diaz v. INS, 648 F.Supp. 638, 651-53, 656 (E.D.Cal. 1986).

⁴¹³See 64 Interp. Rel. 882-86 (memorandum from attorneys involved in Diaz explaining significance of the 1987 regulations).

⁴¹⁴The problem is compounded because asylum seekers are not considered to be "permanently residing under color of law" (PRUCOL), a prerequisite to qualifying for most federally funded public benefit programs. See 20 C.F.R. §416.1618 (1988); Sudmir v. McMahon, 767 F.2d 1456 (9th Cir. 1985); Wheeler, Alien Eligibility for Public Benefits: Part I, 88-11 Immigration Briefings (1988); *id.*, Part II, 88-12 Immigration Briefings (1988); Stein & Zanowic, Permanent Resident Alien Under Color of Law: The Opening Door to Alien Entitlement Eligibility, 1 Geo. Imm. L.J. 231 (1986). These federal statutory restrictions sharply distinguish U.S. practices from those of most European countries, which routinely provide subsistence allowances and other benefits for asylum seekers within the general schemes they have for public assistance. This helps explain their more ready resort to denials of work authorization to asylum applicants (even though such denials clearly impose a larger burden on the taxpayers).

⁴¹⁵See Diaz v. INS, 648 F. Supp., at 652-56.

the hope that it would slow new arrivals and minimize overall long-term costs. These alternative arrangements could be done in two ways. The first would be to detain asylum seekers physically under the relevant portions of the immigration statutes. Current regulations already provide for a presumption of detention for excludable aliens who arrive without documents.⁴¹⁶ And the bonding provisions governing deportation probably allow sufficient discretion to the Attorney General, particularly in what could plausibly be argued are emergency conditions, to arrange for detention of those asylum seekers who have already made an entry into the United States.

The second framework would emphasize the voluntary nature of the communal shelter and feeding facilities, and it would be set up primarily to assure that no asylum seekers will go hungry while awaiting a ruling on their asylum claims. If they cannot provide for themselves through personal resources or the resources of friends and family, they could move into the governmental facilities. For those who choose this course, some kind of daily checking-in procedure might be used to verify identities and to maximize the chances that the people can be located when a deportation order becomes final. But they could presumably come and go at their discretion during the day. (West Germany uses such arrangements in the communal housing facilities it has established for asylum seekers.) This course would probably cost less in direct government payouts, because a fair number of asylum seekers would prefer to move in with family. But many of those not in the government facility might well attempt to work surreptitiously or with false documents. And this course would probably also increase the absconding rate once final deportation orders begin to issue.

Under either course, there will obviously be a need to locate considerable government facilities for housing, but there is a well-worn path of experience here, tracing back to the 1975 refugee emergency caused by the fall of Saigon, and the 1980 Mariel boatlift. The current population of asylum seekers should, of course, be considerably easier to deal with than the Mariel population, which included some inmates fresh from Cuban jails. As a result, steps should be taken to make the new facilities as comfortable as possible under the circumstances, and to minimize some of the pathologies that are generated when enforced idleness and close quarters continue for lengthy periods. For example, it would be advisable to keep families together, and to provide access, whenever possible, to cooking facilities, so that the individuals could prepare their own meals. The detainees are not felons, and the government might garner wider public support for the deterrence policy if it attempts to ameliorate camp conditions as much as possible.⁴¹⁷ Of course, it might be objected that any steps to ameliorate conditions limit the deterrent impact. That risk is worth taking. The main deterrents will remain denial of work authorization (which should be widely publicized through all available media in Central America) and new measures to hasten final decisions, thus enabling both return of the unqualified to their homelands and quicker release of those who merit asylum.

⁴¹⁶See 8 C.F.R. §§ 212.5, 235.3(b) (1988).

⁴¹⁷This would seem to be consistent with what the Select Commission on Immigration and Refugee Policy had in mind when it proposed creation of "asylum processing centers." Select Commission, *supra* note 63, at 166-68.

VI. Conclusion

Government officials reading through all the proposals offered here may be struck by the apparent cost of the system envisioned, compared to what we seem to have today. Up until now, asylum responsibilities have been assumed by a mere handful of harried examiners in district offices and by the surprisingly small corps of immigration judges who shoehorn asylum in among their many other responsibilities. But the true costs of the present system are much more vast. They include not only the costs to localities in Florida and Texas scrambling to meet the most elemental needs of asylum seekers now coming in much higher numbers, but also anticipated costs in the future as the magnet effect worsens.⁴¹⁸ We almost surely cannot escape an expensive detention or government accommodation scheme if the flow continues at a high level.

The costs required to implement the reformed system are worthwhile if the changes can break through the vicious cycle in which asylum policy now seems to be caught. Quicker, seemingly cheaper fixes are wholly illusory. They were tried in the Haitian Program of 1978, and the result was only years of litigation, preliminary injunctions, remands, and duplicative reconsideration, topped off by a major award of attorneys' fees to the asylum seekers' counsel.⁴¹⁹ The courts have shown again and again that they will intervene unless the asylum "problem" is attacked by a comprehensive program that demonstrates adequate seriousness about our Statue of Liberty tradition. Such seriousness inevitably costs money.

Refugee advocates encountering these proposals will probably be struck instead by the possible removal of several layers of comforting checks and appeals. Those checks have probably been effective in assuring that bona fide refugees are not sent home, particularly if a skilled advocate makes full use of all the avenues of attack. But the cost has been high; it has meant the creation of a system that has great difficulty actually sending anyone home. Now that this latter message has been received in Central America (and to some extent all over the globe), the flow will probably continue to rise, until political backlash imposes its own correctives -- possibly far more draconian. The effort here is to find ways to minimize the magnet effect without impairing the quality of the judgment on the merits of the asylum claim. Indeed, the steps proposed here, if properly implemented and carefully monitored, should significantly improve the accuracy and fairness of decisionmaking, despite the streamlining of the system and the trimming of layers of review.

This proposed system, centered on a nonadversarial model of adjudication, obviously places great reliance on the role of the single adjudicator. One refugee lawyer, apprised of an early

⁴¹⁸See generally General Accounting Office Letter to Sen. Bob Graham, Feb. 23, 1989 (GAO/GGD-89-54FS) (recounting financial effects of asylum applicants on Miami); Schmalz, Miami Students: Future's Hope, Today's Crisis, N.Y. Times, Mar. 21, 1989, at A1; In Miami, Rivalries of Minority Groups Fan Riot's Flames, Wall St. J., Jan. 20, 1989, at 1; Thompson, Black Anger at Refugees Fed Riots, Wash. Post, Jan. 20, 1989, at A3; Applebome, South Texas Fears Big Buildup of Aliens, N.Y. Times, Dec. 16, 1988, at A22.

⁴¹⁹See note 6 supra.

version of these proposals, marveled: "you would really have to have trust" in the officials running the procedure. Exactly. Asylum adjudications have been conducted for years in such an atmosphere of profound and mutual mistrust that we may have great difficulty even conceptualizing such a system. But if we are to show true fidelity to the best of our asylum tradition, we have to find a way to create a system that merits our confidence. Other systems are too cumbersome to work effectively -- at least when the asylum applicant intake reaches 100,000 per year.

Asylum determinations should be made by specialists who carry focused responsibility for fulfilling our legal obligations and for implementing consistent, coherent, and accurate policy. And courts must develop a more deferential stance toward that expertise. It is time to create a system that would, at long last, merit such deference and trust, even on issues that will remain hotly controversial and about which we, as Americans, rightly care deeply.

Table A

Applications^a Received and Decided, OFPRA (France)

<u>Year</u>	<u>Received</u>	<u>Accepted</u>	<u>Rejected</u>	<u>Total Decisions</u>	<u>Percent Accepted</u>
1982	12,556	6,051	5,540	11,591	52.2
1983	14,347	5,801	6,252	12,053	48.1
1984	14,258	5,634	7,614	13,248	42.5
1985	22,114	5,159	15,123	20,282	25.4
1986	20,716	4,777	16,629	21,406	22.3
1987	23,346	4,542	17,924	22,466	20.2
1988	29,790	5,157	16,631	21,788	23.7

^aThese figures exclude persons from Southeast Asia (ranging from 9,915 arriving in 1982, to a low of 4,222 in 1987), because those applicants arrive as part of a quota refugee program, with documents that assure OFPRA's recognition of their refugee status. The figures here thus illustrate the trends relating to "spontaneous" asylum applications filed in France, although they do not fully represent OFPRA's total workload.

Source: Office Français de Protection des Réfugiés et Apatrides (OFPRA), as reprinted in 71 Documentation-Réfugiés 16 (15/24 Apr. 1989).



Table B**Asylum Applications Received and Decided, Switzerland**

<u>Year</u>	<u>Received</u>	<u>Accepted</u>	<u>Rejected</u>	<u>Total Decisions</u>	<u>Percent Accepted</u>
1980	3,020				60
1981	4,226				90
1982	7,735				48
1983	7,886				24
1984	7,435	640	1,982	2,622	24.4
1985	9,703	939	5,658	6,597	14.2
1986	8,546	820	5,781	6,601	12.4
1987	10,913	829	8,292	9,121	9.1
1988	16,726	680	8,844	9,524	7.1

Source: (1980-83) Federal Office of Police, as reported in *Domaine Publique*, 25 Oct. 1984; (1984-88) Delegate for Refugee Affairs, as reported in *ECRE Country Report Switzerland*, 3/20/88; 64 *Documentation-Réfugiés* 2 (4/13 Feb. 1989); and 67 *id.* 16 (6/15 Mar. 1989).



Table I
Asylum Cases* Filed in INS District Offices

<u>Fiscal year</u>	<u>Total received</u>
1984	24,291
1985	16,622
1986	18,889
1987	26,107
1988	60,736

*These statistics show number of cases, but a case may include more than one individual (when family members file together).

Source: Immigration and Naturalization Service.



Table II
Grants and Denials by Nationality
Asylum Applications Filed in INS District Offices

Country	June 1983 - September 1988 Cumulative ^a			Fiscal year 1988			
	Approval Rate for			Approval Rate for			
	Cases Decided	Cases Granted	Cases Denied	Cases Decided	Cases Granted	Cases Denied	Cases Pending
TOTAL ^b	27.8%	28,416	73,753	39.1%	5,531	8,582	73,109
Iran	61.7%	12,459	7,727	75.0%	764	254	1,373
Romania	61.4%	895	562	82.9%	345	71	341
Czechoslovakia	44.7%	123	152	44.8%	13	16	72
Syria	39.4%	186	285	65.7%	25	13	100
Ethiopia	39.0%	1,340	2,089	77.0%	441	131	525
Poland	38.0%	2,686	4,365	53.7%	433	373	2,099
Afghanistan	37.0%	402	684	39.5%	36	55	91
China	32.6%	167	345	69.7%	60	26	142
Vietnam	31.3%	68	149	80.0%	8	2	9
Hungary	30.0%	175	407	28.9%	24	59	172
Nicaragua	27.9%	7,255	18,688	53.1%	2,786	2,455	21,054
Uganda	26.0%	91	258	51.7%	15	14	34
Somalia	24.1%	143	449	67.9%	55	26	122
Philippines	18.0%	82	372	10.0%	4	36	94
Cuba	13.3%	321	2,080	31.9%	30	64	13,873
Yugoslavia	13.3%	53	344	9.2%	6	59	176
Pakistan	13.0%	63	420	57.8%	33	24	89
Liberia	10.5%	30	255	15.0%	3	17	32
Lebanon	7.0%	113	1,499	36.6%	56	97	222
Honduras	4.3%	18	398	7.4%	10	125	512
El Salvador	2.7%	667	23,805	2.7%	110	3,822	24,375
Guatemala	2.1%	45	2,086	5.0%	24	447	6,191
Haiti	2.0%	36	1,713	31.5%	6	13	399
Egypt	1.0%	8	754	0.5%	1	19	32
India	1.0%	4	379	15.0%	3	17	29
Bangladesh	0.2%	1	416	16.6%	1	5	10

^aSince May 1983, INS has kept asylum statistics by number of cases; each case, or application, may include more than one individual. The table cumulates the data only from the time this statistical uniformity was established.

^bThe total includes all nationalities, not only those designated here.

Source: Immigration and Naturalization Service, as compiled in Refugee Reports, Dec. 16, 1988, at 14.



Table III
Cases Received, Immigration Judges

<u>Fiscal Year</u>	<u>Deportation</u>	<u>Exclusion</u>	<u>Motion to Reopen</u>	<u>Total^a</u>	<u>Asylum Cases^b</u>	<u>Percent Asylum</u>
1985	102,044	9,122	3,521	114,687	11,663	10.2%
1986	89,680	9,576	3,555	102,811	11,156	10.9%
1987	64,133	9,178	2,711	76,022	8,659	11.4%
1988	71,308	10,167	2,387	83,862	11,200	13.4%

^aImmigration judges also hear a fourth category of cases, involving release on bond. But because asylum is not an issue in such proceedings, these totals omit that category in order to obtain a meaningful base for comparison.

^bEOIR does not break down asylum receipts according to the type of procedure (deportation, exclusion, motion to reopen) in which the application is received. The percentage is therefore stated as a portion of total combined caseload in those three categories for the year.

Source: Telephone interview with Gerald Hurwitz, Counsel to the Director, EOIR, March 8, 1989.



Table IV

Cases Received, Board of Immigration Appeals

<u>Fiscal Year</u>	<u>Total Cases</u>
1985	4,911
1986	8,608
1987	8,204
1988	10,191

Note: The EOIR computer system did not separately code asylum appeals before 1989, but observers agreed that asylum cases are appealed more often than other decisions by immigration judges. The percentage of asylum cases should thus be considerably higher than the percentage of receipts for immigration judges, Table III supra.

Source: Telephone interview with Gerald Hurwitz, Counsel to the Director, EOIR, March 8, 1989.



Table V
Direct Review in Federal Court

<u>Fiscal year</u>	<u>Total applications for review</u>	<u>No. presenting asylum issue</u>	<u>Percent asylum</u>
	<u>Deportation^a</u>		
1984	425	116	27.3%
1985	427	116	27.2%
1986	396	115	29.0%
1987	164	35	21.3%
1988	180	41	22.8%
1989 (first 5 mos.)	118	32	27.1%
	<u>Exclusion^b</u>		
1984	18	3	16.7%
1985	25	19	76.0%
1986	19	7	36.8%
1987	18	6	33.3%
1988	12	9	75.0%
1989 (first 5 mos.)	8	7	87.5%

^aThese statistics probably undercount asylum cases. Petitions for review are logged in on the OIL statistical system at the time of filing, but it may not be apparent until later stages that an asylum issue is presented. An effort is made to go back and correct or amplify the entries, but a few cases are overlooked in the process. That correction process is still underway for the most recent fiscal years; it is therefore likely that those years' asylum statistics will rise, perhaps substantially.

^bExclusion cases are almost certainly undercounted. Review is obtained by petition for habeas corpus in the district courts, and the local U.S. Attorney's office represents the government. Not all such offices report full statistics to OIL.

Source: Telephone interview with Robert Bombaugh, Director, Office of Immigration Litigation (OIL), Dept. of Justice, March 8, 1989.



Figure 1

Canadian Refugee Determination System

IMMIGRATION AND REFUGEE BOARD - MANAGEMENT (HEADQUARTERS & REGIONS)

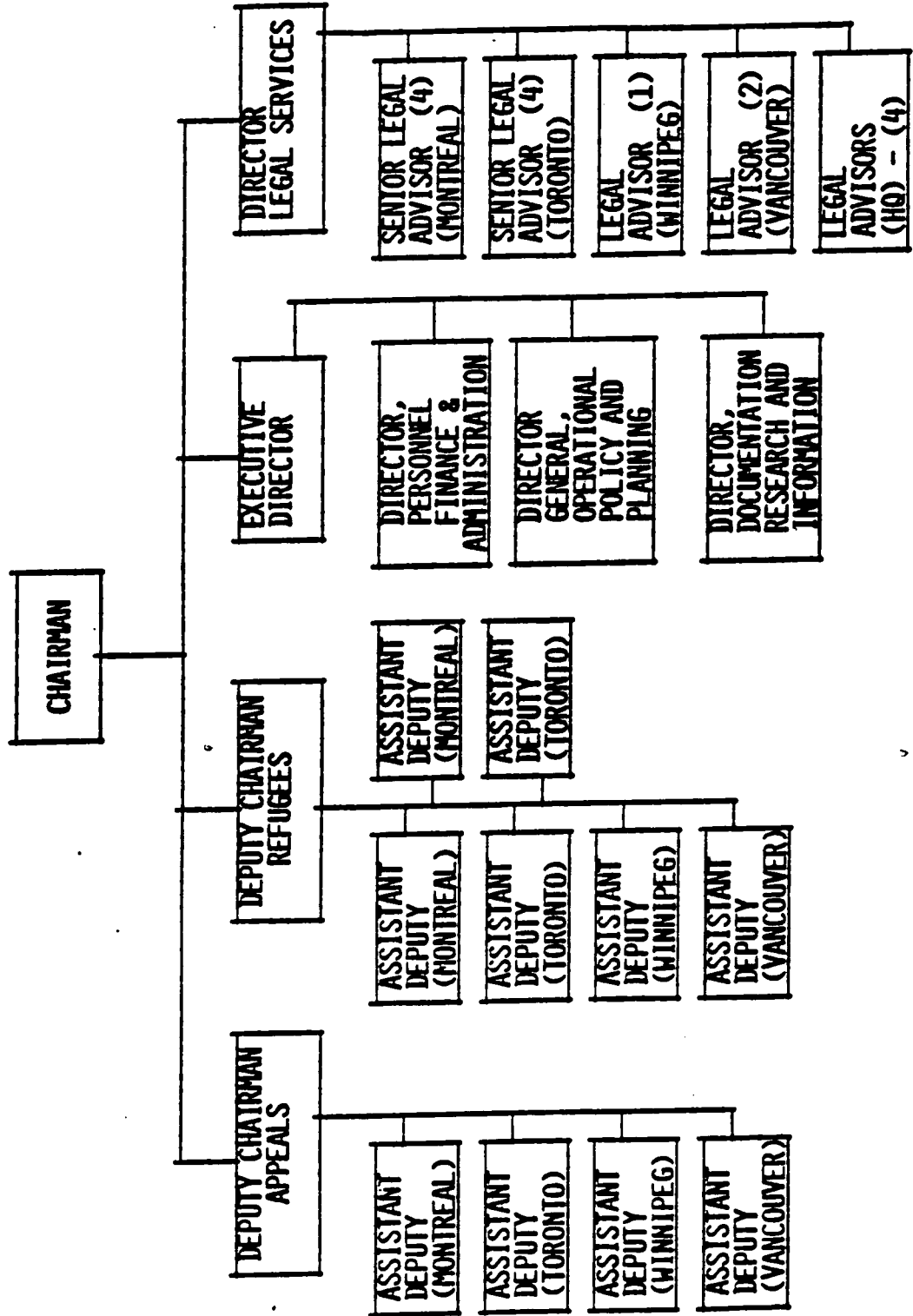


Diagram provided by Immigration and Refugee Board, Ottawa, Dec. 1988.



Figure 2
Canadian Refugee Determination System

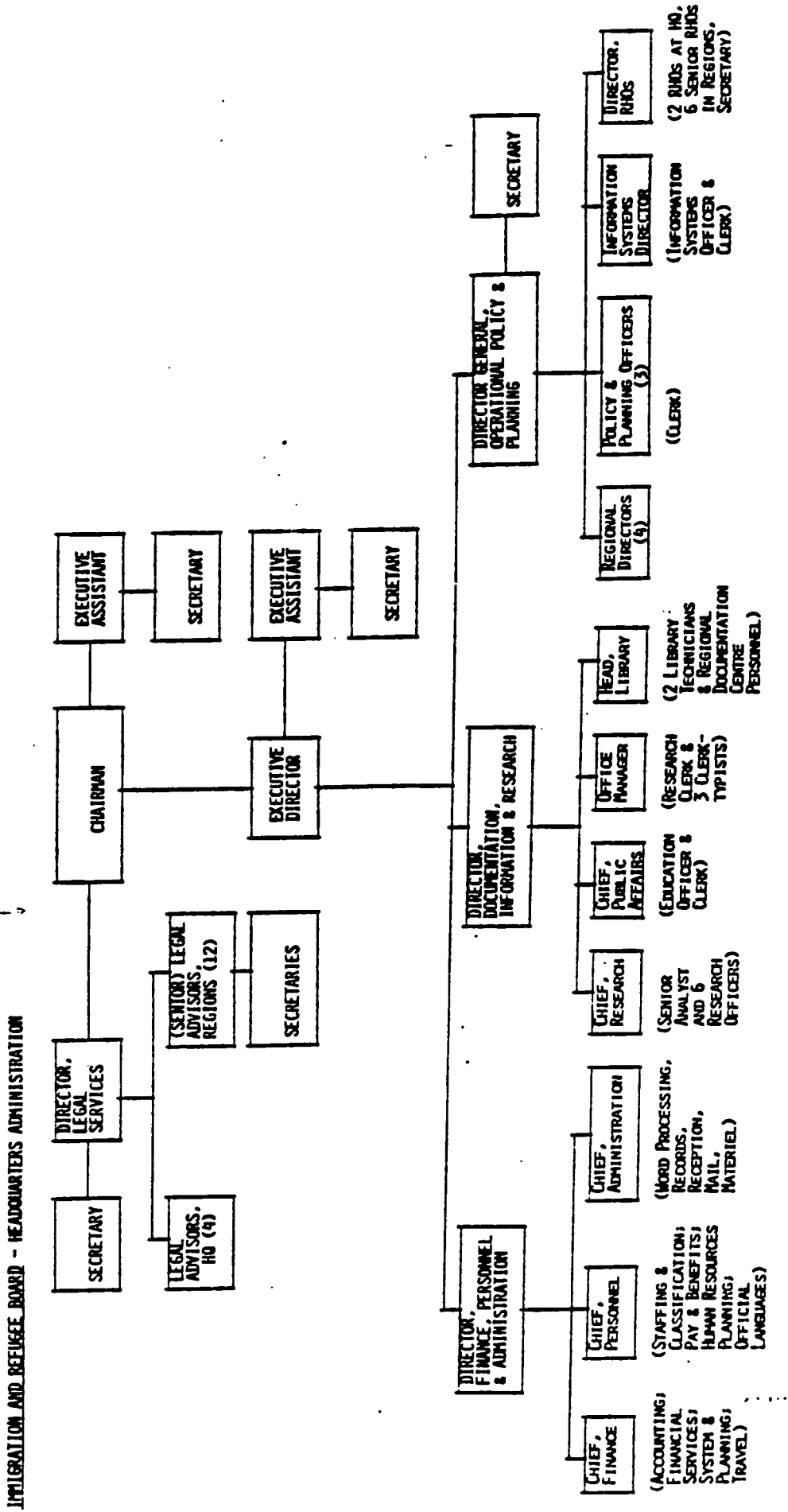


Diagram provided by Immigration and Refugee Board, Ottawa, Dec. 1988.



Figure 3
Canadian Refugee Determination System

IMMIGRATION AND REFUGEE BOARD - REGIONAL ADMINISTRATION

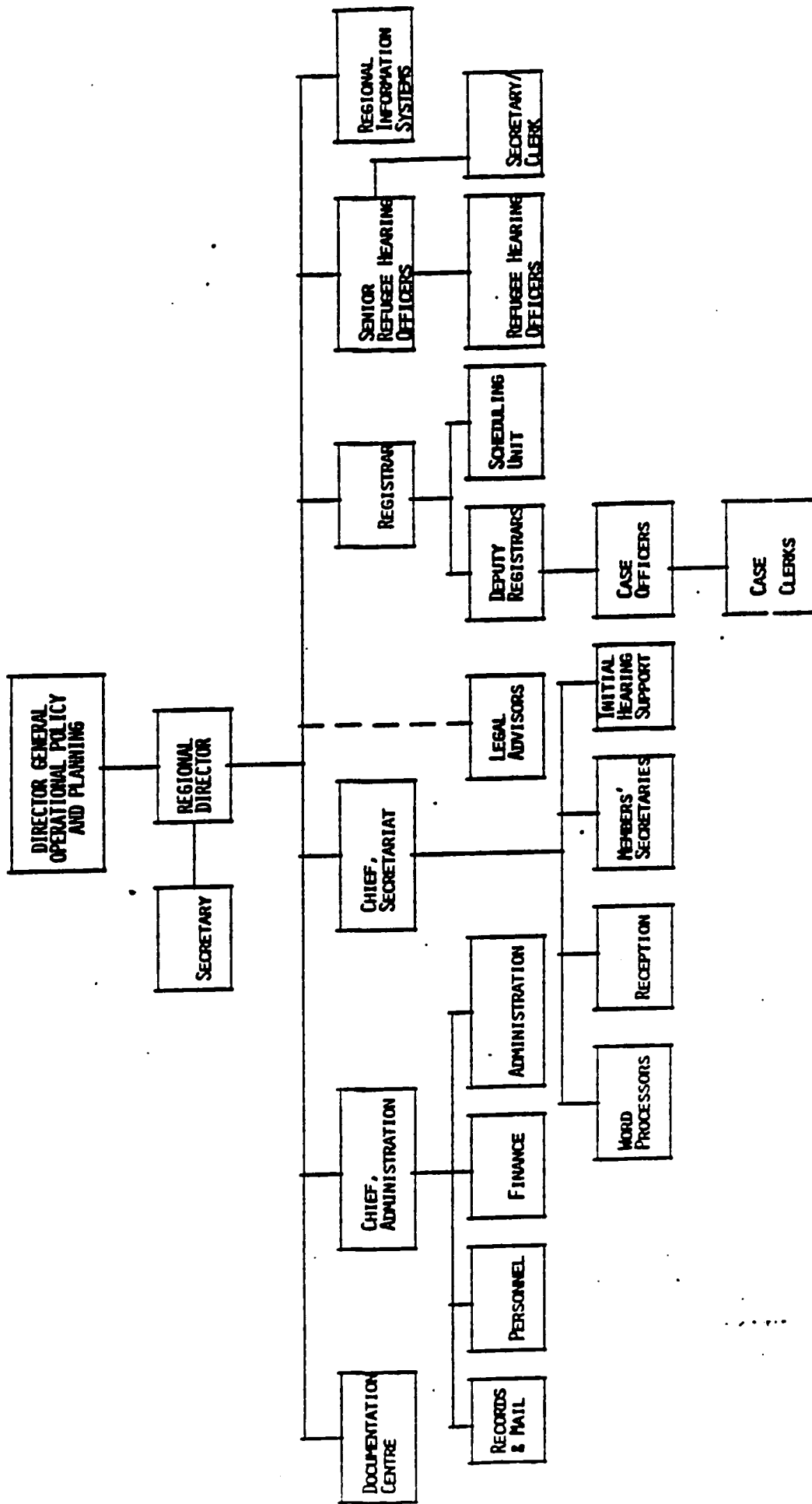


Diagram provided by Immigration and Refugee Board, Ottawa, Dec. 1988.





