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MAKING ASYLUM POLICY: THE 1994 REFORMS

David A. Martin*

The asylum reforms adopted in 1994¹ provide an intriguing glimpse into the making of immigration policy in the media spotlight—an intermittent spotlight, in this policy domain, with a short attention span. My primary aim here is to capture the history of those reforms, as it appeared to an outsider who was invited to play an insider's role as a nearly full-time consultant to the Immigration and Naturalization Service (INS) during certain crucial months in summer and fall 1993. The account should also help clarify certain central features of the reforms and offer some insight into key decisions in their shaping. I leave it to others to judge whether the story yields broadly applicable lessons about the policymaking process or instead merely reflects a unique constellation of political circumstances.

I. BACKGROUND

A. *Types of Claims and Traditional Forums*

Asylum claims in the United States have been heard traditionally in two separate administrative forums; indeed, this has been the pattern since the 1950s when the statute first provided for a version of political asylum.² What we now call “affirmative asylum claims” (although this

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1. The reforms were embodied in regulations published in final form at 59 Fed. Reg. 62,284 (Dec. 5, 1994) (chiefly amending 8 C.F.R. pt. 208), and took effect January 4, 1995. One should probably also count as part of the reforms a statutory amendment to section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, adopted in September 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994. That amendment made explicit the Attorney General's authority to regulate employment authorization for asylum applicants, in her discretion—thus providing a more reliable statutory foundation for what may be the most controversial element of the regulations, the changes in work authorization. Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994), adding a new INA § 208(e), 8 U.S.C. § 1158(e) (1994).

2. For a more detailed account of the history and the adjudicative structure described in this section, see David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1294-1322 (1990) [hereinafter *Coast of Bohemia*].

terminology did not gain acceptance until the 1980s) are claims filed by those who are not in exclusion or deportation proceedings. Such applicants, usually but not always in unlawful immigration status, come forward affirmatively, make themselves known to INS at their own initiative, and assert a claim for asylum by offering to demonstrate that they have a "well-founded fear of persecution" in their country of origin.³ If successful, they gain permission to stay, along with certain other benefits, especially work authorization, without ever appearing before an immigration judge (IJ), and they are eligible for permanent residence rights after a minimum of one year in "asylee" status.⁴ Affirmative claims have traditionally been decided by officers of the INS and heard in the rather informal setting of an office interview, although the exact venue, as well as the qualifications, background, and training of the deciding officers, has changed over time.

The second category, now known as "defensive asylum claims," consists of those lodged by aliens who are already in removal proceedings. These claimants assert that the risk of persecution in the home country should essentially trump their deportability or excludability and permit them to stay in the United States. The applicant and any other witnesses take the stand in the more formal and adversarial setting of the immigration court, where they can be examined or cross-examined by the alien's representative and the INS trial attorney. The immigration judge then decides on asylum and related relief in the course of his or her opinion dealing with all aspects of the case. A successful asylum claim here not only defeats deportation or exclusion, but also ordinarily leads to the same status and the more extensive rights granted to asylees who succeeded with an affirmative claim.⁵

3. Strictly speaking this is the standard only for asylum under INA § 208, 8 U.S.C. § 1158 (1994), which is technically granted only in the discretion of the Attorney General. A closely related form of relief, withholding of deportation under INA § 243(h), 8 U.S.C. § 1253(h), is mandatory for those who prove that persecution is "more likely than not" in the country to which deportation is contemplated. Compare *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (stating the standard for § 208) with *INS v. Stevic*, 467 U.S. 407 (1984) (holding that the more demanding standard applies for § 243(h)). Nevertheless, because of later rulings by the Board of Immigration Appeals (BIA), the less demanding asylum standard governs the crucial determinations in virtually all cases. See *Matter of Pula*, 19 I & N Dec. 467, 472 (BIA 1987) (establishing a strong presumption that discretion should be exercised favorably where the applicant demonstrates a "well-founded fear of persecution"); *Matter of Mogharrabi*, 19 I & N Dec. 439, 447 (BIA 1987) (establishing a general rule that asylum, "with its lower burden of proof, will be adjudicated first").

4. INA § 209(b), 8 U.S.C. § 1159(b).

5. Since 1980 it has been possible, but relatively rare, for an immigration judge to deny asylum in the exercise of discretion, but to grant the more limited withholding remedy (see *supra* note 3), which protects against deportation only to a particular country and does not entail eventual

The two forums are not mutually exclusive. One whose affirmative claim failed was still permitted to pursue the issue when haled before the immigration court. Some variations have appeared over the years, but historically, even applicants who had a full airing of an affirmative claim before an INS officer have been permitted to start afresh before the immigration judge, filing a whole new application form. The judge, ordinarily unaware of whether the person previously applied to INS for asylum, would decide the matter *de novo*. This feature led to considerable grumbling about an overly layered administrative system, the so-called "two bites at the apple."⁶ At the same time, it was defended as affording a better assurance that frightened or bewildered applicants could present their claims in an office setting that may be less intimidating—backstopped by the more formal immigration court hearing before a more highly trained and more clearly neutral official, as the ultimate guarantee of fairness.

Traditionally, affirmative asylum claims were handled by journeyman examiners in the INS district offices. These officers received a bit of specialized training before hearing asylum cases, but the district office essentially treated the function as simply one among many types of application routinely considered there—not too different from petitions to bring in family members as immigrants, for example, or from applications to extend a stay as a tourist or student. For district directors of this persuasion, the asylum challenge was basically just a matter of management, of meeting production quotas.

That view is now in retreat, even among members of Congress most concerned about asylum abuses, and even among INS district directors. Rightly so. Asylum determinations provide perhaps the most ambitious and challenging adjudication known to our administrative law. High stakes ride on the outcome: a secure status in a stable country versus, at best, return to an impoverished and troubled country (for most applicants), and at worst, deportation to a homeland where persecution awaits. The deciding officer or judge must determine what happened in the past in a distant country, based on a deeply imperfect factual record. The only available witness to the crucial individual facts is usually the applicant herself. She may, on the one hand, have reason to exaggerate past abuses or threats in order to gain a favorable ruling. Or she may be so distraught over past treatment or so fearful of any authority figure that

permanent residence rights. See *Matter of Salim*, 18 I & N Dec. 311, 315 (BIA 1982); 8 C.F.R. §§ 208.13, 208.14, 208.16 (1995).

6. *Coast of Bohemia*, *supra* note 2, at 1324.

she cannot give a convincing account of her travails.⁷ As difficult as these factual determinations can be, retrospective factfinding does not resolve the matter by itself. Ultimately the officer has to make a prediction about the future risks the individual faces. To do that effectively requires combining findings about individual facts with a fairly sophisticated understanding of political developments in a foreign country.⁸

When the international community adopted the treaties containing the refugee definition in 1951 and 1967,⁹ the assembled diplomats showed little appreciation of the formidable adjudicative challenges they were creating. Certainly the U.S. Senate did not explore these implications when in 1968 it accepted the Protocol relating to the Status of Refugees.¹⁰ But today the challenges are generally recognized—a recognition that took concrete form in 1990, when the Department of Justice adopted major institutional reforms. Those regulations created a specialized corps of asylum officers, recruited, trained and equipped for this particular, unique species of adjudication. They removed the asylum function altogether from the INS district offices.

B. *The History of the 1990 Reforms*

The 1990 reforms were adopted a full ten years after enactment of the Refugee Act,¹¹ the key statutory enactment governing modern asylum law, and they had followed a tortuous administrative path, with many sidetracks and detours. Why so slow? Some of the problems may actually have derived from the *lack* of a media spotlight at certain crucial points in their consideration. A brief detour of our own to consider that history may shed further light on the process that led to the 1994 reforms.

The Refugee Act passed in March 1980, designed largely to remedy manifest problems with this country's overseas refugee program. The

7. See Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 Int'l Migration Rev. 230 (1986); Neal P. Pfeiffer, Note, *Credibility Findings in INS Asylum Adjudications: A Realistic Assessment*, 23 Tex. Int'l L.J. 139 (1988).

8. See *Coast of Bohemia*, *supra* note 2, at 1280–87.

9. Convention relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 137; Protocol relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

10. See S. Exec. Doc. 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 1967 Protocol, including a transcript of the brief Senate hearings held on the treaty).

11. Pub. L. No. 96-212, 94 Stat. 109 (1980).

media spotlight then focused on the boat people from Vietnam; by the time of enactment the United States was admitting people at a rate that would take 1980's total admissions over 200,000. Changes to the asylum provisions (which deal exclusively with people already on U.S. territory), although important, were a legislative afterthought. And as it turned out, the Act provided no easy way to deal with what became a massive asylum crisis within six weeks of enactment—the Mariel boatlift from Cuba, accompanied by a smaller flow of asylum seekers from Haiti. (Nor was this necessarily a defect in the Act; no one has found a good system for handling the sudden arrival of 125,000 asylum seekers.) Interim asylum regulations were adopted in mid-1980. Because of Mariel, considerable media attention was devoted to asylum during this period, but the regulations themselves attracted relatively little notice.¹² The Refugee Act had required new asylum regulations by June 1, less than three months after enactment.¹³ This tight timetable virtually dictated that the 1980 regulations would assume a minimalist caretaker function, simply melding the new statutory provisions with the institutional structure already in place. Affirmative claims continued to be heard in the INS district offices, and defensive claims *de novo* by immigration judges. Nevertheless, with the publication of the interim regulations the Justice Department launched a process to consider more thoroughgoing and permanent changes.

In the meantime, however, the Mariel boatlift was contained and eventually shut off; the media spotlight turned elsewhere. In early 1981, the White House changed hands, and a whole new set of political appointees who had not been engaged in the earlier discussions had to be educated in the intricacies of asylum law and procedure—not an easy prospect when the subject is no longer at crisis stage and hence has lost its priority claim on the scarce commodity of high officials' time. While the necessary education was proceeding, certain early informal proposals to change to a system involving specialized asylum adjudicators housed outside the INS district offices met strong internal resistance, both from district directors and from others who rejected the idea that asylum was sufficiently different to require its own custom-designed system for adjudication.

12. 45 Fed. Reg. 37,392 (1980). See also Doris Meissner, *Reflections on the Refugee Act of 1980*, in *The New Asylum Seekers: Refugee Law in the 1980s* 57 (David A. Martin ed., 1988) (describing other major asylum challenges in 1980, involving Iranians at the time of the Shah's ouster and Nicaraguans during the civil war that overthrew Somoza).

13. Pub. L. No. 96-212, § 204(d)(2).

The internal pulling and hauling finally resulted in the formal publication of proposed regulations in August 1987, six years into the Reagan Administration.¹⁴ The notice proposed to create a new corps of specialist asylum officers, accountable to the Office of Refugees, Asylum and Parole in the Central Office of INS, rather than to the district directors. But the regulations went further. They also proposed to eliminate the old "two bites" system and make these officers—who were yet to be recruited, trained, or supervised—the only forum for considering asylum applications. The immigration judges were to be stripped of jurisdiction over asylum claims.

Reaction from refugee advocates was predictably swift. They marshalled examples of highly questionable decisions by some of the INS officers currently considering asylum applications, pointing out that immigration judges would no longer be available to correct such errors. Of course the whole point of the proposed regulations was to shift to a different cast of INS players to make the decisions, thereby avoiding or minimizing exactly the errors and problems of which the opponents spoke. Nevertheless the advocates' opposition was understandable, given that the new asylum corps existed in concept only and was wholly untested.

Less predictable was the swift and stunning success of their effort. On the very day that the notice-and-comment period ended, the Deputy Attorney General issued a public statement promising to restore a role for the immigration judges.¹⁵ A revised set of proposed regulations, doing just this, then appeared in the Federal Register in April 1988. But final adoption required two more years.

Why such a retreat by the Department in 1987? It may trace in large measure to the very quietness of the issue in 1987, as far as most of the public was concerned. After the travails of Mariel, asylum applications had declined to a level of 16,000 to 26,000 in the middle years of the decade.¹⁶ Few spoke then of an asylum crisis, and asylum remained a low-visibility issue. Few in Congress paid close attention, and asylum was not on the radar scope for those who might be expected to be of a more restrictionist bent. Therefore, when refugee advocates protested the

14. 52 Fed. Reg. 32,552 (1987).

15. See *Coast of Bohemia*, *supra* note 2, at 1320–22.

16. *Asylum Cases Filed with INS, FY 1980–94*, in Asylum Division, Immigration and Naturalization Service, *Preliminary Fiscal Year 1994 Statistical Package* (Oct. 28, 1994) [hereinafter *Statistical Package*]. (These data focus only on affirmative cases handled by INS; they do not include cases before the immigration judges.)

draft regulations and arranged high-level meetings in the Justice Department to urge restoration of a role for the IJs, scarcely anyone outside the agency raised a voice on the other side. No sense of urgency pushed the decisionmakers to conclude the reform process promptly, especially after the new controversy had erupted.

The final regulations changing the institutional structure for affirmative asylum adjudications were at long last promulgated in July 1990. Ironically, during the nearly three years since the first draft regulations on the subject had been published, affirmative applications continued to be heard by the very INS examiners that both sides in the reform debate had hoped to take out of the business. In any event, the 1990 regulations finally delivered on the promise of a corps of specialized adjudicators, while maintaining the IJ backstop as a further guarantee of fairness while the new system got on its feet.

As promising as this new system may have been in design, however, it was never given adequate resources, particularly in light of the major jump in applications from 1987 (26,107) to 1990, when 73,637 were filed. INS's top officials assigned only 82 positions for asylum officers at the opening of the new system in 1991, grudgingly increased to 150 in 1992, but with a bare minimum of support staff.¹⁷ Moreover, the new corps was already saddled with a backlog of over 100,000 cases on the day of its inauguration. Over succeeding years it fell further behind. In fiscal year 1991, when 56,310 new asylum applications were filed with INS, the fledgling office was able to complete only 16,552 cases. In 1992 the comparable figures were 103,964 filings as against 21,996 completions.¹⁸

17. See Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 Int'l J. Refugee L. 453, 480-83 (1992); Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 Geo. Immigr. L.J. 253, 275 (1992); National Asylum Study Project, *An Assessment of the Asylum Process of the Immigration and Naturalization Service* (1993); Justice Management Div., U.S. Dep't of Justice, *Management Review of the INS Affirmative Asylum Processing System* (Sept. 1993). Mr. Beyer was the first head of the newly created Asylum Office, serving from 1990 to 1994, and the many successes of that office, despite numerous obstacles, owe a great deal to his vision, energy, political skills, and commitment to high quality and openness.

18. *Statistical Package*, *supra* note 16. Completions for fiscal year 1992 were greatly reduced by the Bush Administration's decision to divert dozens of experienced asylum officers to Guantanamo in November 1991, to screen the thousands of applications from interdicted Haitians who had taken to the seas after the coup against President Aristide in late September. That diversion of staff time continued until the following spring, when the Administration changed course and began returning all interdicted Haitians directly to Haiti, without screening. During this period, asylum officers considered over 33,000 Haitian claims, finding over 10,000 eligible to come to the United States for a final decision.

Any new system requires start-up time, a period to break in new personnel and procedures, to work out the bugs and find an operating balance—a grace period before it can hope to function with real efficiency. Recognizing this fact, recent asylum reforms in many other countries have been accompanied by amnesties or legalizations or “global solutions” to resolve old cases speedily without burdening the infant structure with those responsibilities.¹⁹ Such an approach was virtually out of the question for the new U.S. asylum system in 1990. The amnesties enacted in 1986 as part of the Immigration Reform and Control Act (IRCA) had probably exhausted the political tolerance for such measures.²⁰ But rather than leaving well enough alone, the Commissioner and the General Counsel of the INS at the time managed, remarkably, to move radically *in the opposite direction*, adding a huge and unexpected new caseload on top of what the Asylum Office already faced. In December 1990 they agreed to settle long-standing litigation, known as the *ABC* case, filed by a class of Guatemalan and Salvadoran asylum seekers who alleged massive defects in the process the Department of Justice had used to make asylum decisions for those two nationalities. The settlement allowed all class members—that is, all Salvadorans and Guatemalans in the country before specified dates in 1990, whether or not they had previously been denied asylum and even if they had already been ordered deported—an opportunity to have their cases heard afresh by the new asylum officers.²¹ This ostensible vote of confidence in the new system was touching, and the earlier problems were sufficiently real to warrant some sort of response, but the step these officials took could hardly have been less auspicious for the new Asylum Office. The settlement dropped several hundred thousand potential new claims on an untested system that had not yet found its sea legs. This was challenge enough. But stunningly, top INS officials never actually budgeted additional officers or otherwise made any specific plans to deal with the coming onslaught of *ABC* cases. The net result was that such claims pended ominously over the whole system, very few achieving resolution before the “mandamus date” established in the consent decree—the time when those class members who wished could return to

19. For a description of Canada's backlog clearance process, adopted at the time of its major reforms in 1988, see Gerald H. Stobo, *The Canadian Refugee Determination System*, 29 Tex. Int'l L.J. 383, 391–92 (1994).

20. See INA §§ 210, 245A, 8 U.S.C. §§ 1160, 1255a (1994).

21. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (settlement decree). See 67 Interpreter Releases 1480 (1990). The offer excluded those with serious criminal records.

court for an order requiring INS to complete its adjudication.²² The unadjudicated backlog grew faster and piled higher.

II. THE 1994 REFORMS

Thus was the objective need established for further significant reforms, though few paid heed until certain galvanizing events recounted below. By 1993 the Asylum Office backlog stood at some 300,000 unadjudicated cases. In fiscal year 1992 it had been able to schedule for interviews only 37% of the applications currently being filed, let alone any claims in the backlog. The problem began to feed on itself, as this low interview rate fostered new abuses and even helped spawn a new form of questionable entrepreneurial enterprise.

A. *The Dimensions of the Problem: A Vicious Circle*

To appreciate the perverse dynamic that developed, one must understand the arrangements for work authorization for asylum applicants that governed until January 4, 1995, the effective date of the new regulations. Unlike most European countries, the United States makes almost no provision for public assistance to asylum seekers while an asylum application is pending. Nearly all asylum seekers are *prima facie* undocumented aliens; the usual bans on public assistance to this class of aliens therefore apply.²³ Thus, asylum applicants are expected to support themselves or to find private assistance through family, friends, or charitable organizations. Obviously if their claims are pending for long, they will need to work. And particularly after employer sanctions were adopted in the Immigration Reform and Control Act of 1986,²⁴ asylum applicants need work authorization papers (commonly known as

22. Relatively few pressed for early resolution anyway. Class members enjoyed work authorization and protection against deportation during the pendency of the claim (although they did not have the right to bring in close family members that obtains once one receives asylum status). Pressing for a decision might mean that the claim would fail and set in train the loss of even these interim benefits. Salvadorans in particular had reduced incentives to press INS to consider the cases. Through the end of 1994 they enjoyed a somewhat formalized safe haven status (initially "temporary protected status" and later "deferred enforced departure"). See T. Alexander Aleinikoff, David A. Martin, & Hiroshi Motomura, *Immigration: Process and Policy* 884-96 (3d ed. 1994) [hereinafter AM&M]; Pub. L. No. 101-649, § 303(a), 104 Stat. 4978 (1990). Moreover, the war in El Salvador had ended with a UN-brokered settlement in 1992, which doubtless made it more difficult to prove the threat of future persecution in the homeland.

23. On the public assistance bans applicable to undocumented aliens, see AM&M, *supra* note 22, at 283-84.

24. INA § 274A, 8 U.S.C. § 1324a.

EADs—employment authorization documents) from INS for these purposes.

Accordingly, IRCA's implementing regulations provided for the issuance of such authorization, in increments of one year, to those who have filed a "non-frivolous application for asylum."²⁵ Obviously this regulation contemplated a decision by some INS officer that an application is non-frivolous. To protect needy applicants against the development of a big backlog in adjudicating EADs, however, the regulations provided generally (and not just for asylum cases) that interim work authorization shall issue if no decision on an EAD application is forthcoming within ninety days.²⁶ Therefore, any asylum applicant with a claim pending for more than ninety days was entitled to work authorization, unless the claim had been found to be frivolous.

Hence by 1993 the procedure typically went like this: Applicants mailed asylum applications (Form I-589) and work authorization applications (Form I-765) *together* to the INS Regional Service Centers, whose personnel did the routine work of checking for completeness, logging in the claims, creating the necessary files, and assigning cases to the appropriate asylum office for interview, if capacity was available. If the interview could be scheduled within ninety days, then the EAD application would be sent to the asylum office, unadjudicated, along with the rest of the file. The asylum officer could then decide, in the best possible circumstances—after a face-to-face interview—whether the application was frivolous.

At that point three outcomes were possible. If the asylum claim were judged frivolous, no EAD would issue, even if the applicant chose to pursue the matter through the later renewals and appeals. If the asylum application were judged meritorious, then the individual would be granted asylum, a status that of course includes work authorization.²⁷ Or if the claim were deemed insufficient to merit asylum, yet non-frivolous, the person would almost surely receive an EAD, for use during the next stages: *de novo* consideration by the IJ and possible later review.²⁸

25. 8 C.F.R. § 274a.12(c)(8) (1994). *See also id.* § 208.7.

26. *Id.* § 274a.13(d). In addition, court decisions had mandated that INS use an extremely undemanding threshold in determining "frivolousness." *See, e.g.,* Grijalva v. Ilchert, 815 F. Supp. 328 (N.D. Cal. 1993); Ramos v. Thornburgh, 732 F. Supp. 696 (E.D. Tex. 1989); 69 Interpreter Releases 756-61 (1992) (INS guidance on the frivolousness standard).

27. 8 C.F.R. § 274a.12(a)(5).

28. *See id.* § 208.7(c).

But what if an interview could not be scheduled within ninety days? Nearly two-thirds of the 1992 receipts fell into this category. Moreover, Service Center personnel would know which category applied, essentially from the moment of the Center's initial in-processing, based entirely on the asylum office's interviewing capacity. Unscheduled cases simply went on a shelf, with no real prospect that they would be reached for interview. As a result, such applicants would plainly be covered by the 90-day rule. What about frivolousness? The system lacked the resources for anything other than a cursory paper review at the Service Center to weed out the most blatantly deficient claims. Hence the vast majority of such shelved cases received work authorization. And to avoid having to handle cases twice, Service Center personnel (quite understandably) began mailing out EADs to shelved applicants right away, without waiting until the end of the ninety-day period. As a result, such claimants would receive an EAD good for a full year within a few weeks of filing. And they had a good prospect of rolling annual renewals whenever the EAD expired, because interview capacity was (sensibly) devoted to new cases on a last-in first-out basis.²⁹

Here then is the situation that fed on itself and bred abuse. As more and more undocumented aliens received speedy work authorization through this mechanism and yet never had to appear before an INS officer even to establish identity, much less to justify the asylum claim, the word spread about this magical path to genuine, legitimate EADs. Entrepreneurs came to see this system defect as a promising source of new business. Nor was this a hidden, underground enterprise. INS collected notices prepared by immigration "consulting services," running in ethnic newspapers and elsewhere, advertising "work permits" and then stating in smaller type: "through political asylum." The ads did not ask: "Do you fear persecution in your homeland?"³⁰

Such operators were also the source of what asylum officers came to know as "boilerplate" applications—virtually identical asylum

29. A surprisingly high percentage of individuals initially granted work authorization did not return in a year to renew it, although renewal was available as of right, with only trivial exceptions. INS officers with whom I spoke guessed at the following explanation. The initial EAD had sufficed for the bearer to obtain other wholly valid documents (such as driver's license and social security card) that could forever after be used, quite legitimately, to satisfy the employment screening required by IRCA. In response to this apparent pattern, the executive branch had been considering for many years a change in the form of social security card issued to persons with time-limited employment authorization from INS. Finally in June 1992 the Social Security Administration implemented new procedures whereby such aliens receive cards bearing the legend "VALID FOR WORK ONLY WITH INS AUTHORIZATION." 57 Fed. Reg. 28,872-73 (1992).

30. See, e.g., World Sikh News, July 30, 1993, at 11.

applications filed by dozens or hundreds of different applicants. Better control of, or punishment for, such dishonest applications became a major objective of asylum reform, because boilerplate accounted for a significant portion of the steep increase in claims from 1991 through 1993. That reform was needed to address this problem may require some explanation; misunderstanding about boilerplate applications and their treatment under the old system surfaced often during the deliberations on the 1994 reforms. Some critics who worried about the new reform proposals initially suggested that boilerplate claims could be controlled through existing authority. They suggested that such applications should be adjudged frivolous and therefore insufficient to justify interim work authorization, even if no interview could be scheduled. But this assertion underestimates the entrepreneurial skill of those who were preparing such filings. If the preparers were any good, they based their mass-produced allegations on claims that had already succeeded. The language in the application form described *prima facie* valid claims—often exceptionally strong claims. An individualized adjudication looking only at the individual's application form would have to say that the case passed the frivolousness threshold. And it is at least questionable, and perhaps a due process violation, to deny one individual's claim on the basis of papers being filed in other, ostensibly unrelated, cases at the same time. After all, the boilerplate language might accurately describe *one* applicant's honest case.

Moreover, it appeared that some genuine refugees were resorting to the boilerplate practice on the advice of friends or under pressure from the entrepreneur. Even those whose own honest claim would merit asylum might well be insufficiently knowledgeable about the system or insufficiently confident in the legal significance of their own histories to override their "adviser's" insistence to use the boilerplate that had already been proven to win work cards quickly. Such cases—bona fide claims buried beneath the boilerplate—occasionally came to light when Asylum Office interviews were held. Aware of this risk, several voices within INS resisted wholesale denials of boilerplate claims, even as the agency began looking for other ways to deal with this serious problem.

This point bears emphasis. Although concern about abuses dominated the push for asylum reform in 1993 to 1994, many in the Asylum Office and elsewhere in the government worried equally about the way the system was failing bona fide applicants. Not only did the apparent success of shady operators risk tempting real refugees into using their deceptive wares, but bona fide refugees were also more deeply damaged by the system. Marginal or bogus claimants might be quite happy to

glide along for years enjoying work authorization and an infinitely receding hearing date. But those with real fears of persecution, and especially those who still bear the past scars, both mental and physical, of earlier abuse, genuinely need the security of status that could only come with a grant of full asylum. Such status permits the rebuilding of a life derailed by past violence and ongoing threats, and haunted by lingering worries over possible deportation. Perhaps more concretely, shelved asylum applicants have no right to bring family members into the United States and out of harm's way in the country of origin. Those granted asylum, in contrast, may bring in their immediate families,³¹ thus protecting loved ones and fostering their own healing process. The avalanche of questionable applications often buried the possibility of even interviewing bona fide claimants.

B. *The Precipitating Events*

There were INS voices crying in the Justice Department wilderness from the early days of the Asylum Office's existence, pointing out the compounding problems sketched above and calling for more resources and for consideration of deeper reforms.³² But the cries evoked little action. Some other stimulus was needed.

When 1993 dawned, stimuli started appearing in abundance, drawing the media spotlight back to the asylum issue and the manifest weaknesses of the existing adjudication system. Asylum had already found a major place on the policy map just before President Clinton's inauguration, when he surprisingly announced a continuation of President Bush's policy of interdicting and returning Haitians without any refugee screening.³³ Then, just one week into the new Administration's tenure, a lone gunman fired into cars waiting in traffic just outside the CIA headquarters in northern Virginia, killing two. Though never apprehended, he was eventually identified as a Pakistani national who had allegedly entered illegally and gained an extended stay in this country, with work authorization, as an asylum applicant. Some who were charged in the World Trade Center bombing a month later also turned out to be asylum applicants who had stayed in the United States as

31. INA § 208(c), 8 U.S.C. § 1158(c).

32. See Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, *supra* note 17; Beyer, *Affirmative Asylum Adjudication in the United States*, *supra* note 17; 68 Interpreter Releases 401 (1991).

33. Howard W. French, *Haitians' Advocates Admit Some Feelings of Betrayal*, N.Y. Times, Jan. 15, 1993, at A2.

part of the backlog.³⁴ And the "60 Minutes" television program ran a segment in March portraying individuals who arrived at Kennedy airport in New York having destroyed or concealed the documents they used to board the plane in the foreign airport. Paperless, they claimed asylum when they encountered an INS inspector. A great many were simply released, with work authorization, owing to inadequate detention space—even if INS had not been able to establish their identity reliably. Few ever appeared for their scheduled exclusion hearings in immigration court. Then, as summer approached, several large ships were reported on both coasts discharging passengers, mostly Chinese, at unauthorized locations. The *Golden Venture*, which ran aground off Long Island in June 1993, became the best known smuggler's vessel. Many of its desperate passengers tried to swim to shore. Six drowned. The rest applied for asylum.³⁵

Suddenly the problems of the asylum system, well-known to insiders who had been pushing higher-ups to deal with them, became a favorite media story. These events had a major effect on Capitol Hill. Hearings proliferated on what was suddenly being portrayed as an asylum crisis. Bills to deal with the situation crowded the legislative hopper. Some were thoughtful; some were hasty attempts to climb aboard the issue without paying much heed to the practical implications of the changes being proposed. Some carried draconian provisions, such as requirements that people apply for asylum within a few days or weeks of arrival in the country, or mandates for detention of all asylum seekers. These bills were alarming, but they had one salutary effect. They fostered a highly pragmatic outlook on the part of refugee advocates who had sometimes fought tooth and nail to defeat earlier changes in the asylum system—as they had in the successful battle to defeat the regulations proposed in 1987. Advocates knew that this time the system's failings would have to be addressed through visible reforms. The issue was what sort of reforms. Indeed, many advocates themselves deeply resented the abuses being perpetrated, seeing them as a cynical manipulation of a humanitarian system, which was poisoning the well of good will that refugees have often enjoyed in the United States. In the end, the traditional refugee advocacy groups proved quite willing to engage with

34. Michael S. Arnold, *Calls to Change Asylum System Gain Urgency*, Wash. Post, June 13, 1993, at A24; Robert Blumenthal, *The Bombing: Retracing the Steps*, N.Y. Times, May 26, 1993, at B1.

35. Malcolm Gladwell, *Courts Log Tragic Seagoing Saga; Golden Venture's Crew Charged as Human Cargo Heads to Detention*, Wash. Post, June 8, 1993, at A3; Matter of G—, Interim Decision No. 3215 (BIA 1993).

the Administration in considering a wide range of reform ideas. Their hope was to head off the scariest of the legislative proposals by showing that the genuine problems of the system could be mastered, that abuses could be defeated, by other means that still preserved a genuine opportunity for asylum for those in real need.

C. *Summary or Expedited Exclusion*

Once key policymakers in both the congressional and executive branches were focused on the issue, their attention turned first to exclusion cases. Several proposals were offered to provide for summary exclusion of asylum applicants at the border, provided their claims did not meet some threshold of seriousness in a quick initial screening. Viewed in larger compass, exclusion was not an obvious place to begin the reform effort, because asylum claims filed in exclusion cases accounted for only about ten percent of asylum applications received in a given year. But it seemed that the *Golden Venture* incident evoked acute feelings of national vulnerability. And “60 Minutes” still resonated deeply, especially on Capitol Hill, perhaps because of the blatancy of the airport scams depicted on the show (especially by those who refused to give their identities but steadfastly invoked the mystical incantation of asylum and were then released into the community). In the summer of 1993, the brightest spotlight fell on exclusion cases, it seemed, and so the reform process started there.

The newly installed Clinton Administration began working earnestly on its own summary exclusion bill in the spring of 1993. Because of the political saliency of the issue, a host of agencies and players became involved, including a great many White House staff, each with a different angle of approach and each at a different level of understanding and sophistication with regard to immigration and asylum issues. Apparently the painful series of meetings had seemed endless. Often, I was told, just as certain issues were reaching resolution, new players would enter the game—worrying that the package was either too tough or not tough enough, or otherwise demanding that some component be rethought. I did not become involved as a consultant to INS until late July, just as the Administration’s bill, repackaged as “expedited exclusion,” was being revealed to the public.³⁶ A friend who had played a lead role in the internal debates remarked to me on my first day on the job: “We’ve both called for more attention to immigration from the top

36. It was introduced as S. 1333, 103d Cong., 1st Sess. (1993).

levels of the White House. Sometimes the worst thing that can happen is for your wishes to come true." Others who had been involved simply moaned or rolled their eyes when asked about the experience of shaping the expedited exclusion bill.

Nonetheless, by July 27 the internal battles over exclusion had been largely resolved. The Administration bill set forth an agreed summary procedure. Certain categories of exclusion cases were designated for speedy rejection at the border without going before an immigration judge. Aliens in these categories who claimed asylum, however, would be interviewed promptly by senior asylum officers, who were not to decide the full merits of the application, but only to decide whether the individual had proven a "credible fear" of persecution, as carefully defined in the bill. The legislation also mandated an opportunity for further speedy review by "an officer who shall possess qualifications at least equivalent to those of an asylum officer, who shall be employed by an agency or division independent of the Service [INS]." ³⁷ If a credible fear was established, the claimant could have her case heard in the ordinary course by an immigration judge. If not, she was subject to speedy removal with greatly restricted appeal rights. Assigning the chief screening responsibility to an experienced asylum officer was an important and hard-won provision. It meant that the crucial determinations would at least be made by officers with substantial training and experience in asylum adjudication, not by border inspectors. ³⁸

The very setting for the public unveiling of the new Administration bill revealed the remarkable political prominence the issue had achieved by summer 1993. It was announced at a press conference where the President, the Vice President, and the Attorney General all spoke. Seated

37. *Id.* § 2(b) (proposing to add a new INA § 208(e)(5)(C)). The baroque complexity of this language, describing what is in essence a speedy administrative appeal, reflects the internal battles. The expedited exclusion procedure would not achieve its goals if appeal rights were too elaborate, yet many new Administration players were unwilling to entrust such an important determination to a single officer. Requiring review by a Justice Department official outside INS reveals lingering suspicions of the latter agency—which could not be dispelled despite widespread confidence in the just-nominated commissioner, Doris Meissner, a widely respected scholar of immigration issues who had had many years of experience in INS and the Justice Department (As it happened, her confirmation process was not concluded until October 1993.)

38. This was also consistent with international doctrine on the matter. The Conclusion of the UNHCR's Executive Committee dealing with special fast-track procedures for "manifestly unfounded" asylum claims states: "The manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status." Conclusion No. 30 (XXXIV), *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, U.N. GAOR, 38th Sess., Supp. No. 12A, at 25, UN Doc. A/38/12/Add. 1 (1983).

in the front row of the audience were congressional Democrats from California and other key legislators.

In succeeding months, however, some of the political steam went out of the summary exclusion effort, perhaps in part because the Coast Guard was able to intercept other Chinese smugglers' ships before they reached U.S. territory. Mexico and Guatemala, under considerable U.S. diplomatic pressure, assumed responsibility for the swift repatriation of the passengers.³⁹ Lacking new *Golden Ventures*, and without other provocative events or galvanizing TV news shows, the legislation languished. Indeed, by the summer of 1994, the Administration itself was no longer asking for enactment in the original form. Instead, it sought only standby legislation of the same general design, to be implemented only when the Attorney General declares, in essence, an immigration emergency. The 103d Congress expired without floor action on any summary exclusion measures, but the issue remains alive in the current session.⁴⁰

D. *The Main Event*

1. *The Setting*

When the President unveiled the expedited exclusion legislation in late July, he also promised that the Justice Department would prepare, by the end of September 1993, comprehensive reforms for the rest of the asylum system—covering the ninety percent of claimants who apply for asylum after effecting an entry into the country. It turned out that this presidential commitment, coupled with the history of deliberations over the expedited exclusion legislation, helped smooth the path of later reform—and hence eased my job as consultant—although I came to appreciate this fact only much later. When presidents set firm deadlines, especially while the TV cameras roll, the rest of the bureaucracy knows it must respond. Asylum reform moved to the top ranks of high priority tasks. When we called meetings, people made time in their schedules for them, whether they came from INS, other parts of the Department of

39. For an account of these events, and of the convoluted U.S. policy regarding asylum claimants from China who base their claims on abuses in China's family planning program—a confused policy that probably exacerbated the smuggling problem—see AM&M, *supra* note 22, at 808–19.

40. See 71 Interpreter Releases 1351 (1994). The Administration's latest bill, dubbed the Immigration Enforcement Improvements Act of 1995, S. 754, 104th Cong., 1st Sess. § 106 (1995), continues the standby approach, but is less detailed about the procedure to be employed in making the "credible fear" determination than was the 1993 bill.

Justice, the State Department, the Office of Management and Budget, or other White House units. When I needed statistical information or simply had to claim a half-hour of someone's time so that I could understand the details of some part of the existing system, the officials who had the knowledge were unfailingly cooperative. Moreover, the summary exclusion debates, as difficult and nasty as they had apparently been for the participants, had served as a rolling seminar. Nearly anyone who might feel a need to be heard in the remaining stages of the reform effort had already been exposed to the central issues. They had learned the institutional landscape and the lingo. We did not have to start from scratch.

One other unique feature deserves mention—again something I did not fully appreciate until much later. A lot of people for a lot of different reasons wanted serious and thoroughgoing reform in the asylum system at that particular moment. No one seriously argued for the status quo. Still, asylum is a sufficiently arcane area that the various players, including members of Congress, were not completely dug in on the exact form that the change should take. This meant that politics did not have to be the main determinant of the system that we adopted. From many quarters we found real interest in looking for innovation, for insight based on a close understanding of how the current system operated, and for detailed reflection on how various new proposals might work in the real world. As a result, thinking—actually debating the merits and demerits—really counted. That phenomenon is unfortunately all too rare in today's Washington. An academic has to savor the opportunity for involvement when the stars align in just that fashion. Whether the reformed structure really lives up to the opportunity opened by that unique set of circumstances will have to be judged by others after a few years of experience under the new system.

2. *The Process*

The process for considering and adopting the main proposals worked reasonably well and may have some application in other policy settings. We began with a pair of fairly open-ended meetings on asylum reform in late July 1993 (we even presumed to label them "seminars"). One involved mid- to upper-level government personnel, the other primarily the nongovernmental organizations (NGOs) that were deeply interested

in reform.⁴¹ (Similar but less elaborate meetings were held in the early weeks with congressional staff.) In preparation for the meetings, the participants received a list of key decision points that would have to be addressed in the course of serious asylum reform. There were roughly 20 points on the seven-page list, including, for example, identity of the adjudicator (IJs, asylum officers, a new body, a combination); forms of administrative and judicial review; arrangements for claimants pending decision (release with work authorization, detention, collective boarding in asylum processing centers); time limits requiring application within a specified period after entry; possible fast-track procedures for the weakest claims; arrangements for applicants' legal representation; and many others. The list did not purport to offer a solution or direct readers in a particular direction. Instead, most items were followed by a range of possible options for dealing with the specific issue, including doing nothing.

The list was meant to help the meetings become a kind of brainstorming exercise, to expand the range of thinking on the issues without necessarily requiring anyone's endorsement, at that stage, of any particular option. In this basically nonthreatening setting (where no one initially had to protect their own turf), all the participants received a first-hand knowledge of the specific issues that were up for consideration. No one could later claim to be blindsided by particular proposals or by the far-reaching scope of the reform effort. Participants began to develop a certain stake in the process, and all knew that they were being consulted early, well before decisions had been taken. (NGOs particularly welcomed this opportunity for early involvement.) The central players in the reform effort also received from the meetings an early set of reactions to specific elements, which proved quite helpful in beginning to shape specific options for later debate and decision. Finally, because of the announced White House commitment to reform, plus the widespread support in Congress for some sort of change, all participants could indulge in more expansive thinking than had been common in earlier year's meetings on the woes of the existing asylum system. When some

41. Those in attendance included, for example, representatives of the American Immigration Lawyers Association, the U.S. Committee for Refugees (USCR), the American Bar Association, the Lawyers Committee for Human Rights, the National Immigration Forum, the Organization of Chinese Americans, various voluntary agencies that have long been involved in refugee resettlement in the United States, and many others. At the risk of slighting others who certainly contributed important insights during this process, I would like to mention in particular Bill Frelick of USCR, long one of our society's most insightful writers on refugee issues, who was especially helpful and innovative at critical moments in the reform process.

ventured comments that in the past had been conversation-killers—such as “the district directors will never go along with this,” or “you’ll never get enough money to do that”—others chided them. This, they pointed out was a new ball game; let your minds be bold.

The next task was to take the results of these meetings, and of various less elaborate consultations that went on during the early weeks, such as with the office of the UN High Commissioner for Refugees, and crystallize them into more precise options. Four principal ones emerged (each with various suboptions and alternatives on subsidiary features). It was obvious that the asylum system had to be brought even with its caseload, both to provide a secure asylum status, with its attendant possibilities for family reunification, to genuine refugees, and to help deter abuses. This objective was plainly going to require additional resources, but it also necessitated some streamlining of the existing system. Consequently the “two bites” arrangement, allowing initial consideration by both asylum officers and IJs, was a favorite target, especially of voices being heard from Capitol Hill. Thus two of the options involved assigning initial adjudication responsibility exclusively to either the IJs or the asylum officers (subject to later administrative and/or judicial review). The remaining two options retained “two bites”: one essentially the existing system with certain modest refinements but enhanced by greatly increased funding; the other a modified and integrated version that tried to preserve the best of the functions currently being performed by asylum officers and IJs.⁴²

It was my task as consultant then to talk with key officers in the Asylum Office, Examinations, Regional Service Centers, the Executive Office for Immigration Review, and elsewhere, to help refine each of these options and to make sure we knew the operational details involved in the projected functioning of each. We had to work through such matters as how the paper would flow, what computer systems were available, how decisions would be served on the applicant, and the like. Progress along these lines was shared with a core working group of officials, which also was asked to make certain interim decisions to narrow the scope of options and thereby simplify the task of fleshing out the details. We were also in frequent contact with NGOs and the other members of the earlier interagency meetings.

42. For a summary of the four principal options, see Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, Am. U. J. Int'l L. & Pol'y 43, 63–66 (Special Joint Issue 1994).

As the proposals took shape, an increasing amount of effort went into "costing out" the options by determining exactly what staffing, facilities, and support services would be necessary. Some parts of the cost projections were fairly straightforward, based, for example, on standard increments of cost for each new asylum officer or immigration judge hired, including salary, office space, support staff, computer facilities, and the like. But other elements were greatly dependent on assumptions about future world events and especially about how potential applicants would respond to the package of reforms. In this process I gained a new appreciation for the professional skill of the budget staff of INS and the Department of Justice. Their art consists of far more than numbers-crunching. For this kind of cost projection, they must also know in detail how each component of the affected bureaucracy works and especially how the pieces fit together. Their understanding of the latter, their overview perspective of the various components of the bureaucracy, was quite impressive.

During this process, the core working group came more and more to focus on the fourth option, which appeared to carry numerous advantages. The consensus on that option became so strong that the final decision papers mentioned the other possibilities only briefly before describing in detail the preferred framework. Once approval was obtained from the highest levels of the Justice Department, and in cooperation with key White House agencies, the basic features of the reform plan were revealed in a public briefing on October 15, 1993.⁴³ The completion of the actual regulations required far longer, perhaps because again the previous summer's sense of urgency had dissipated. Proposed regulations were finally published for notice and comment in March 1994.⁴⁴ They were made final, with modifications in light of the comments received, in December.⁴⁵

3. *The Major Substantive Changes*

Option four, which retained a role for both asylum officers and immigration judges as asylum decisionmakers (albeit with better integration of the two functions), was not an obvious choice, despite the wide consensus it had commanded in the core working group. Indeed many who heard of the direction of the reform effort expressed initial

43. See *id.* at 54; 70 Interpreter Releases 1,361 (1993).

44. 59 Fed. Reg. 14,779 (March 30, 1994).

45. 59 Fed. Reg. 62,284 (Dec. 5, 1994).

disappointment that it retained two separate forums. I too had argued for a one-bite system in the course of an earlier study completed in 1989.⁴⁶ But we all became convinced that a better integration of the functions of asylum officers and IJs, while retaining the disparate advantages of each, offered the optimal solution, particularly in light of certain procedural changes affecting deportation cases that Congress had enacted in 1990.

A central imperative was to assure that the reformed system could quickly become current with incoming caseload, using resources efficiently toward this end. To achieve this goal, it had to provide, first, for speedy identification of the good cases, leading to a prompt grant of asylum status. It also had to hold out a credible prospect of prompt deportation for those whose claims failed and who had no other defense. Without a doubt the former task, granting the good cases, could be performed by asylum officers more efficiently than by IJs. Asylum office proceedings cost the government about \$600 per case, according to my rough 1993 calculations, whereas immigration court proceedings in which asylum was claimed cost in the neighborhood of \$1300 on average, counting all expenses, including salaries for both immigration judges and INS trial attorneys.

Those advocating a one-bite system, including my own 1989 study, had generally focused on the combined cost of these two forums—looking singlemindedly, in other words, at the costs for *denied* cases. This distorted the focus. First of all, no one was seriously proposing a one-bite system that would assign the actual issuance of final deportation orders to asylum officers alone. They are trained and equipped to decide on asylum only. Too many other legal determinations remained to be made, regarding deportability and other forms of relief from deportation; IJs would have to play a role in some fashion. Realistically, then, a one-bite system would have to be built around the IJs, the more expensive decisionmakers. Whether that was cost-effective, then, depended far more than earlier studies acknowledged on the expected percentage of affirmative asylum claims that would be *granted*. Keeping good claims away from immigration court—providing for speedy grants at the asylum offices—might well save money and reserve IJ time for more complicated cases.

In short, a cost-driven judgment as between the realistic options depended crucially on the ratio of good claims. INS statistics showed a fairly steady grant rate of between twenty and thirty percent by the

46. *Coast of Bohemia*, *supra* note 2.

Asylum Office itself.⁴⁷ Moreover, that rate should increase if other features of the system eventually could deter the filing of weak claims—and we were working hard to achieve that objective. To resolve a third of the affirmative asylum caseload—maybe someday a half—in the less expensive forum might bring considerable savings. At least, we concluded, the cost projections for the various options were close enough that the other virtues of preserving the nonadversarial office interviews could weigh importantly in the balance.

Moreover, it eventually dawned on us that the asylum office procedure already included mechanisms that could be modestly reshaped to give a real boost to the second paired objective: that is, to create a real prospect of deportation for abusive or marginal claimants. And we discovered ways to accomplish better integration between the functions previously performed by immigration court and asylum office, so as to cut out duplicative steps and achieve significant economies.

First, consider duplication. One of the more highly professional parts of the job of an asylum officer under the previous system was the preparation of denial letters setting forth the reasons for rejecting a claim. These were often works of real professional skill, carefully summarizing the evidence, drawing effectively upon country-conditions information available through the Asylum Office's Resource Information Center, and fitting the result within the legal framework summarized in the Office's Basic Law Manual. Such a letter clearly apprised the applicant of the shortcomings of his case. The problem from a systemic point of view, however, was that such a document, no matter how well crafted, had no greater operative significance. It could not be the basis for deportation; indeed, the IJ, the only official empowered to issue deportation orders in such cases, would probably never see it. The time spent on such a letter, generally several hours per case, was not truly productive.

Thus was born one central feature of the reforms. Instead of granting or denying the case, as they had before, asylum officers would either *grant* asylum or *refer* the case to immigration court, in a form that would permit a quick uptake of the issues in the latter forum. Rather than writing a denial letter, asylum officers would instead check off on a preprinted form the reason for finding themselves unable to grant the case at that stage. They would serve that form on the applicant, along

47. See *Statistical Package*, *supra* note 16; Refugee Reports, Dec. 31, 1994, at 12. The IJs, for a comparison, granted asylum in 21.1% of asylum cases they decided in fiscal years 1989–94. *Id.* at 13. The data do not separately identify how many of these IJ cases were renewals of affirmative claims and how many were heard only as defensive asylum claims.

with a charging document initiating deportation proceedings (known as an Order to Show Cause or OSC), as approved and signed by a supervisory asylum officer. The papers would also make clear that the referral was not a final denial of the asylum claim. Instead, the applicant would have a genuine opportunity to present the case in greater detail to the immigration judge, whose judgment is by no means predetermined by the fact of referral.

Here a second bit of duplication was eliminated. Rather than waiting additional months after the launching of deportation proceedings while the applicant prepared a new asylum application form, the reforms provide for transmittal of the original Form I-589 to the immigration court along with the charging documents. Although the applicant is allowed to supplement the form and the record, this change makes for significant streamlining.

Having asylum officers prepare and serve OSCs was not a new role for them. Since the Office started operation in 1991, asylum officers gradually had been assuming more and more of this function in denied cases. This practice developed, ironically, not as an enforcement measure but as a kind of counterintuitive service to the applicants. Once again, the oddities of work authorization practice account for this development. The pre-1994 regulations provided for work permission throughout the process to persons with non-frivolous asylum claims, for so long as an application was pending.⁴⁸ But after an asylum office denial, the applicant could not keep the application "pending" through his own efforts alone, even if he were absolutely determined to reapply and litigate the issue vigorously before the immigration court. He could do nothing until INS took the initiative to serve and file a charging document and thereby begin deportation proceedings. If this task assumed a low priority at the district office, the gap might stretch for several months. In 1991, responding to concerns over this gap, supervisory asylum officers were given the authority to issue OSCs, so that charges could be lodged quickly and the renewed application would be pending by the time the initial work authorization expired.⁴⁹

Over time, cooperation between certain asylum offices and immigration courts had refined this charging process to make better use

48. 8 C.F.R. § 208.7(b), (c) (1994).

49. See 56 Fed. Reg. 50,810 (1991) (amending 8 C.F.R. § 242.1(a) to give supervisory asylum officers the authority to issue orders to show cause). By 1994, asylum offices were issuing 17% of all OSCs generated by INS. Nonetheless, the 1991 regulatory change was not accompanied by added resources for the Asylum Office.

of new computer capacity and also of certain procedures made possible under INA § 242B.⁵⁰ That section, enacted in 1990, derived from congressional anger that relatively little use was being made of existing statutory authority to issue deportation orders *in absentia* when respondents failed to show up for their hearings. The new law refined the procedures for issuing OSCs and for keeping track of aliens' addresses, made better provision for assuring adequate notice to charged deportation respondents, and reflected a strong congressional mandate that IJs issue *in absentia* orders when the new procedures had been followed. Under § 242B, the key element permitting such an order when the alien fails to appear is proof the alien had received not only an OSC, but also specific notice of the date and time of the hearing on his particular case.

For most of the Office's existence, asylum officers were equipped only to issue OSCs detailing the charges but without specifics regarding the hearing. A later notice from the immigration court would be necessary to notify of date and time; often, owing to mailing difficulties and moves by respondents, it could not be adequately proved that the alien received the second notice. In response, the Chicago asylum office and immigration court developed, as a pilot project, a way to link the asylum office into the scheduling computer for IJ cases. An asylum officer preparing an OSC could therefore obtain an exact date and time for the "master calendar" hearing (roughly equivalent to an arraignment at which the individual pleads to the charges) at which a charged alien initially appears. If the alien simply dropped out after service of the OSC, the IJ should then be in a position to issue a fully enforceable deportation order. The technology was at a stage where the same linkages could soon be established nationwide. The reform effort therefore provided for systematic use of this system, to assure that OSCs showed a date and time for required appearance before the immigration court.

The next challenge was to assure valid service of this new, improved OSC on referred claimants. Mailing is a possibility, but it is subject to the problems described above. Instead, the new regulations provide for a more reliable procedure. At the end of asylum office interviews, the officers inform applicants of the specific date and time (usually a week to ten days later) when they must return in person to receive the decision on the affirmative application. At that point, of course, applicants retain an important incentive to show up, because the envelope they receive might contain a letter notifying that asylum has been granted and instructing

50. 8 U.S.C. § 1252b (1994).

how to obtain a durable work card as an asylee. But if the asylum officer instead has decided to refer the case to immigration court, the papers will consist of the charging document and referral form described earlier. Physical return to the asylum office assures that personal service of the OSC can be fully documented.⁵¹

The resulting integrated procedure, as established under the 1994 reforms, can now be summarized.⁵² Asylum officers hear all affirmative claims and are projected to grant perhaps 20 to 30 percent—an increasing percentage over time, it is hoped, as bad claims are deterred from the system. If the officers are unable to grant, they no longer spend time preparing lengthy denial letters.⁵³ Instead they now check a box on a preprinted referral form that concisely indicates the general reasons for this disposition, and promptly refer the case on to immigration court. To do so, they serve a fully effective OSC on the applicant, along with the referral checklist form, and then they transmit a copy of the OSC, along with the complete asylum application form, to the immigration court. If the applicant appears for master calendar at the stated time, the court can then schedule a merits hearing where the individual will have a full opportunity to present his or her case. Applicants who fail to appear before the IJ, however, will become subject to a fully enforceable deportation order issued by the court *in absentia*. In this way, the new system greatly improves the enforcement function, not through indiscriminate measures, but by efficiently moving toward deportation for those whose claims lack merit, and especially by speeding the process, using the full potential of INA § 242B, for those who simply drop out of the process before it runs its course.

Still, it is important to remember that the reform is not designed singlemindedly to speed deportations. Affirmative applicants still have

51. 8 C.F.R. § 208.9(d) (1995). The regulations impose an additional inducement: if the applicant fails to appear to receive the decision, the failure is treated as a default that suspends the running of the time toward qualifying for interim employment authorization. *Id.*

52. A more complete description may be found in Jeanne A. Butterfield, *The New Asylum Regulations: A Practitioner's Guide*, 95-01 Immigration Briefings (1995).

53. There are limited exceptions under which asylum officers do issue full denial letters, principally in the case of asylum applicants who are in status (e.g., as a nonimmigrant student) at the time when the affirmative application is being considered. Such cases are only a small fraction of the caseload. Because these aliens are not otherwise deportable, referral to immigration court would not be appropriate; asylum officers in these cases are supposed to issue a fully reasoned decision letter if asylum is denied. 8 C.F.R. § 208.14(b) (1995). With the termination of denial letters in most cases, the Asylum Office also dispensed with another time-consuming procedure, the notice of intent to deny (NOID), which had been used to signal to applicants the deficiencies in their cases and to give them a specified period to file additional information.

two separate forums for presenting their claims, one nonadversarial and presumably somewhat less imposing or intimidating, the other more formal with a full range of traditional trial-type guarantees of fairness. Anyone who feels that the asylum officer improperly failed to grant the claim may present witnesses before the immigration court. Although several applicant-friendly stages have been trimmed (such as notices of intent to deny and full denial letters), the referral checklist still gives some indication of the reasons for initial failure of the claim. Moreover, even with streamlining and added resources, the process allows applicants several weeks after referral for them to bolster their cases. This period also permits NGOs to spot the stronger claims or the more questionable referrals and help assure that such aliens will be well represented at the immigration court hearing.

The application form, Form I-589, has also been revised, in order better to capture the necessary information and also to warn applicants with clarity that the information being provided may be used to prove deportability if the asylum claim fails. Some refugee advocates have criticized these warnings as heavy-handed. But it would seem to be a straightforward way to notify people of the real stakes when asylum is sought. Asylum applications are not a quick ticket to work authorization—unless the claim is genuine and well-founded. The government is serious about offering asylum to the eligible. But it now expects to be equally serious about taking the appropriate action against those who prove not to qualify. For most, this means deportation. And the new arrangements for OSCs (usually basing the deportation charge on information regarding entry and status that the I-589 requires) mean that disappointed applicants can no longer simply drop out without consequences. The reformed asylum process is not a sting. A real benefit is genuinely available for those who qualify. Good claims should receive speedy recognition from the asylum officer, but if somehow they are missed, the claimant will have another opportunity in a more formal setting before the immigration court in fairly short order. At the same time, those with only marginal or abusive claims might well be deterred from filing by the legend on the form and the new process of which it warns—and they should be.

As a final signal of this seriousness, the reforms include significant new funding to augment the staff of the asylum office and the ranks of

the immigration judges and trial attorneys.⁵⁴ At the Administration's urging, Congress appropriated an additional \$49 million for these purposes for FY 1995. INS is now in the process of doubling the asylum officer corps, to over 300 officers, and major increases are also in the works for the ranks of immigration judges, trial attorneys, and related support staff. As a result, as of May 1995, seventy-one percent of calendar year 1995 affirmative applications have been scheduled for interviews within forty-four days from filing, and eighty percent of all 1995 cases have been completed by asylum offices within sixty days of filing. The immigration courts have also picked up the pace of their consideration considerably. Apparently as a result of this new capability, new asylum filings have declined considerably, from a rate of about 12,000 per month in fiscal year 1994 to an average of 8800 for March through May 1995.⁵⁵ At the same time, the recognition rate remains reasonably high by world standards and by U.S. historical standards. Asylum officers granted asylum in 17.7 percent of the cases adjudicated during that three-month period in 1995.⁵⁶ Deterrence is being achieved, as it should be, not by narrowing the standards but by implementing a process that can reach conclusions quickly but fairly, and then can act on them resolutely, whether they are positive or negative.

4. *The Most Controversial Elements of the Proposed Reforms*

Three features of the proposed regulations, as published in March 1994,⁵⁷ had drawn particular criticism and deserve closer attention before concluding this account. First, the March draft proposed to collect a fee of \$130 from all applicants, in order to defray some (though still only a fraction) of the cost of the procedure. Second, interviews before asylum officers were made discretionary under the proposed regulations; that is, some people could have their cases referred (and presumably some could have theirs granted) without ever being called to the asylum office for a face-to-face presentation of the evidence. The central intent of this

54. The BIA, which hears administrative appeals, is also expanding from five to 12 members, 60 Fed. Reg. 29,469 (1995), at least in part to help deal with the added caseload expected from asylum reform, and to be able to resolve such cases speedily after receipt of the appeal.

55. INS Asylum Reform Report (May 28, 1995). If not for applications by ABC class members who enjoy certain special protections and now have added incentives to file, given the ending of "deferred enforced departure" for Salvadorans, *see supra* notes 21-22, the decline would be closer to 40%.

56. *Id.*

57. 59 Fed. Reg. 14,779 (March 30, 1994).

provision, unfortunately left obscure in the notice of proposed rulemaking, was to allow speedy referral of manifestly unfounded or abusive claims when such flaws were evident from the written filings. Third, the new system altered the work authorization provisions so that applicants could not even *apply* for EADs until 150 days had elapsed from the initial filing of a complete asylum application.⁵⁸ INS then has thirty additional days to issue the EAD. No work authorization would be allowed, even pending administrative or judicial appeals, if the claim has been finally denied by the immigration judge (not just referred by the asylum officer) before the expiration of that thirty-day period.

INS gave careful consideration to the criticisms, and it backed off on the first two points when the final regulations were issued on December 5, 1994. Imposing a fee did not comport well with the humanitarian intent of asylum under international law in any case. More tellingly, it fit poorly with the new restrictions delaying work authorization a minimum of 180 days (unless asylum were granted before then). Like all INS fees, the asylum application fee would be subject to waiver in case of proven indigency. All applicants would have a solid basis for claiming indigency, however, precisely because they were forbidden to work. INS concluded that it might spend more adjudicating waiver requests than it could hope to collect through the fee.⁵⁹ The fee provision was rightly jettisoned.

The provision making interviews discretionary was also widely misunderstood and widely criticized. By the time of final promulgation, in any event, INS concluded that it could probably manage the increased workload, even if all cases were scheduled for an interview. And it is managerially simpler to provide for uniform treatment of all cases. The final regulations thus continued the previous practice of scheduling mandatory interviews in all affirmative cases.⁶⁰ This too was a wise decision. Sometimes a poor written application reflects only failures of understanding on the part of the applicant, or perhaps bad advice from a friend or "consultant." Assuring a face-to-face interview in all cases will help make sure that such diamonds in the rough can be discovered.

As a result of this decision, the new U.S. system, unlike most of those in Western Europe, makes no special provision for fast-track treatment of "manifestly unfounded" or other specially identified ultra-weak claims.

58. The running of the clock is also suspended whenever delays occur that are attributable to the applicant. 8 C.F.R. § 208.7(a)(3) (1995).

59. 59 Fed. Reg. 62,286-87 (1994).

60. *Id.* at 62,291-92.

The U.S. model bets instead that prompt disposition of all cases, with renewed determination to deport failed claimants, will provide adequate deterrence of such claims and thereby return filings to a manageable level. If this works, it is probably a better model than the European one. But if the current round of asylum reform proves insufficient to master the caseload, one can expect that the next round of reform will focus on fast-track procedures for cases judged "manifestly unfounded" or otherwise abusive. Should that day come, it may be more productive to truncate the later stages of the process for such cases, the stages of administrative and judicial review, rather than trying to stint on first-round interviews.

After yielding on the first two major controversies, however, the Justice Department adhered steadfastly to the basics of its original proposal regarding work authorization, even in the face of numerous adverse comments.⁶¹ It judged that the system needed these rather dramatic changes in the old EAD procedures, despite potential hardship on applicants, in order to decouple asylum applications from work authorization—both in the way the system actually functions and in the minds of potential clients of the asylum entrepreneurs. The account in part II.A. above may help to explain why the decisionmakers regarded such a change as so important.

Moreover, the Department had other solid points to make in defense of the work authorization changes. First, the new period is not radically longer than that envisioned in the earlier system, which already allowed INS ninety days before work authorization was required.⁶² Second, it does not require all applicants to go without work for 180 days—a point sometimes missed by the critics. Those implementing the new system are working hard to assure that all new claimants are interviewed and receive a decision within sixty days of the time they file their affirmative applications. Applicants with good claims should therefore find it possible to be granted asylum promptly; a grant of asylum carries with it full entitlement to employment authorization. And still others will win their cases before immigration judges before the 180-day period elapses. The claimants deprived of work authorization for that full period will therefore be those who were unable to persuade an asylum officer—and generally also an immigration judge—of the merits of their cases.

61. *Id.* at 62,291. The final regulations did make several minor modifications regarding employment authorization, however, in response to the commenters' suggestions.

62. Admittedly, many shelved applicants received EADs much earlier. But no one at the point of application could be assured of anything other than a 90-day wait.

III. CONCLUSION

The overarching theme of the panel for which this paper was prepared addresses international influences on immigration policy. Other than the triggering events—the appearance of additional claimants from foreign lands—the international influences on the 1994 asylum reforms are not obvious. But perhaps one needs to look more closely. All these reforms were enacted within the framework of international refugee obligations that the drafters sincerely wished to honor and strengthen. The 1994 reforms represent a serious effort, in the face of mounting political pressure, to sustain a genuine opportunity for bona fide asylum seekers to find refuge here. The objective has been to create a fair system free of many of its predecessor's handicaps—a system sufficiently reliable and efficient, sufficiently serious about enforcement against abusers, that it might divert politicians from the temptation to erect higher barriers or to adopt procedural gimmicks in a desperate attempt to return to political sustainability.

Though it is still quite early in the implementation of the new system, the initial results appear encouraging. Much of international significance is riding on its successful implementation.

