

DON'T CALL U.S., WE'LL CALL YOU: A LOOK AT SUMMARY EXCLUSION AS A MEANS OF ASYLUM REFORM

I. INTRODUCTION

In October 1992, twenty Punjabi police roused Avtar Singh from his sleep, dragged him by his hair to a jeep, and drove him to a police station. After accusing him of supporting the Sikh independence movement and providing food and shelter to Sikh separatists, five police officers stripped Singh naked, bound his hands and feet, and suspended him upside down. As he dangled from the ceiling, the officers beat him with wooden rods until he fell unconscious. The next day, Singh was tied to a steel chair and, while he cried out for mercy, tortured by his interrogators with electric shock. Shortly after securing his release with a bribe, Singh fled India. Upon his arrival at San Francisco International Airport, he was arrested by Immigration and Naturalization Service (INS) agents for presenting a false passport. He was ordered detained because he was unable to convince an INS officer that he had a "credible fear" of persecution. Three months later, an immigration judge granted Singh's application for political asylum.¹

Despite the horrifying stories of Singh and others like him, asylum seekers have become the focus of controversy and suspicion in the United States.² A 1993 CBS news exposé revealed rampant abuse of the United States asylum and immigration laws.³ Other recent news stories have

1. Daniel Wolf & Robert B. Jobe, *The Detention Alternative*, WASH. POST, Aug. 17, 1993, at A21.

2. In 1993, members of Congress introduced nearly 50 bills designed to reduce the flow of immigrants into the United States. Vicki Shu, *Insist on Equality: The Struggle's Not Over*, ETHNIC NEWSWATCH, Sept. 10, 1993, at 2. According to a statement by the House Immigration Subcommittee, the publicity surrounding the incidents of Chinese alien smuggling has prompted strong bipartisan support for asylum reform. Carolyn Lochhead, *Asylum Reform Plans Take Shape in Congress: Smuggling Prompts Drive for INS Changes*, S.F. CHRON., June 10, 1993, at A1. Public opinion also supports asylum reform. In a 1993 *Newsweek* magazine poll, 60% of the respondents said immigration was "bad" for America, 62% said American workers lose their jobs to immigrants, and 59% believed that immigrants often end up on welfare. Nancy Mathis, *Bitter Fight Foreseen on Immigration Laws*, HOUSTON CHRON., Aug. 16, 1993, at A1. The Clinton Administration strongly favors a policy of summary exclusion, which would allow the INS to bar asylum seekers from the country at the point of entry. *Clinton Drafts Plan to Battle Immigration Abuse*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, June 19, 1993, at 7A.

3. *60 Minutes* (CBS television broadcast, Mar. 14, 1993).

linked the World Trade Center bombing and the Chinese alien smuggling rings to flawed immigration policies.⁴ As a consequence, calls to reform the asylum system have captured the political spotlight.

One aspect of reform proposals, summary exclusion, has generated both increasing bipartisan support and considerable controversy.⁵ Summary exclusion targets "excludable"⁶ asylum seekers who arrive at a port of

4. See, e.g., Dick Kirschten, *Shock Waves*, NAT'L J., June 5, 1993, at 1349. The House Judiciary Subcommittee on International Law, Immigration, and Refugees opened its April 26, 1993 hearings by noting that suspects in both the World Trade Center bombing and the January 1993 killings of two CIA agents had taken advantage of the asylum process to remain in the United States. *Id.* at 1351. The Clinton Administration justified its immigration reform legislation using examples of Chinese human-cargo ships and the alleged connection between an Islamic asylum seeker and the Trade Center bombing. Pamela Burdman, *Clinton Offers Plan to Fight Smuggling: President Asks Congress for \$172 Million for Crackdown*, S.F. CHRON., July 28, 1993, at A1.

5. At least three different versions of summary exclusion bills were pending in Congress at the time this Note was written. *The Immigration Enforcement and Asylum Reform Act of 1993*, H.R. 2602, 103d Cong., 1st Sess. (1993) [hereinafter H.R. 2602], was sponsored by Representative Romano L. Mazzoli, then-Chairman of the Subcommittee on International Law, Immigration, and Refugees, and Representative Bill McCollum, the ranking Florida Republican on the subcommittee.

The then-Chairman of the House Judiciary Committee, Representative Jack Brooks, sponsored the Clinton Administration's summary exclusion proposal. H.R. 2836, 103d Cong., 1st Sess. (1993). Senator Edward Kennedy sponsored the Administration's bill in the Senate. S. 1333, 103d Cong., 1st Sess. (1993). The bill sparked considerable controversy, with some critics arguing that the bill was necessary but not sufficient, and others complaining that passage of the bill could compromise basic notions of fairness. See generally 70 INTERPRETER RELEASES 1397 (Oct. 25, 1993).

In addition, Senator Alan Simpson, then the ranking Republican on the Senate Subcommittee on Immigration and Refugee Affairs, introduced a bill entitled, *Comprehensive Immigration and Asylum Reform Act of 1994*, S. 1884, 103d Cong., 2d Sess. (1994). This bill also included a provision for expedited exclusion of asylum applicants without proper documentation at a port of entry. *Id.* § 201.

Asylum reform proposals pending in the current Congress include: H.R. 375, 104th Cong., 1st Sess. (1995); H.R. 756, 104th Cong., 1st Sess. (1995); and S. 269, 104th Cong., 1st Sess. (1995).

6. See David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 165 n.1 (1983). The Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1551 (1988), distinguishes between excludable aliens and deportable aliens. The right of excludable aliens to enter or remain in the United States is determined according to 8 U.S.C. §§ 1225-1227 (1988). The right of deportable aliens to remain is determined in accordance with the more protective provisions of 8 U.S.C. §§ 1251-1253 (1988).

In general, an alien is considered deportable rather than excludable if the alien has made an "entry," whether legal or illegal, into the United States. The INA, in 8 U.S.C. § 101(a)(13), defines "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." The Board of Immigration Appeals (BIA) determines whether an entry has occurred based on the presence or absence of the following criteria:

- 1) a crossing into the territorial limits of the United States, meaning physical presence; 2)(a) inspection and admission by an immigration officer or (b) actual and intentional evasion of inspection at the nearest inspection point; and 3) freedom from official restraint.

In re Ching and Chen, 19 I. & N. Dec. 203, 205 (BIA 1984) (citing *In re Pierre*, 14 I. & N. Dec. 467, 468 (BIA 1973)).

entry without admitting documents.⁷ Summary exclusion would enable INS asylum officers to make on-the-spot determinations of the validity of an asylum claim upon an alien's arrival at a port of entry.⁸ If the officer determines that the applicant lacks a "credible fear" of persecution, the alien will be turned away immediately.⁹ Summary exclusion would severely limit rights currently enjoyed by asylum seekers, such as the right to an evidentiary hearing before an immigration judge and the opportunity for subsequent judicial review.¹⁰ Eventual passage of some form of summary exclusion legislation appears likely.¹¹ In Singh's case, had summary exclusion been in effect, the INS would have returned Singh to his torturers.

This Note contends that a summary exclusion policy would fail to achieve its proponents' desired reforms. Summary exclusion neither targets nor deters the major sources of immigration. Further, any deterrent effect that may flow from a summary exclusion policy would be outweighed by the policy's encroachment on basic notions of fairness and humanitarianism. Part II of this Note traces the historical development of asylum procedure. Part III describes the summary exclusion bills currently pending in Congress. Part IV evaluates various aspects of summary exclusion and identifies potential negative ramifications of implementing such a policy. Part V concludes that the time is not ripe for major immigration reform and suggests alternative reform measures that can be implemented within the existing asylum system. Specifically, this Note proposes that granting legalization to backlogged, long-term resident asylum applicants, increasing the number of asylum officers, and adjudicating claims within 90 days prior to granting work authorization would streamline the system, curb abuse, and allow for proper evaluation of the asylum corps.¹²

7. H.R. 2836, *supra* note 5, § 2(b).

8. H.R. 2602, *supra* note 5, § 101(a).

9. H.R. 2602, *supra* note 5, § 101. For a discussion of the credible fear standard, see *infra* notes 88-98 and accompanying text.

10. H.R. 2836, *supra* note 5, § 4(b).

11. See 70 INTERPRETER RELEASES 1397, 1402 (Oct. 25, 1993); Vlae Kershner, *Why Immigration Laws Are So Hard to Change: Reforms Likely for Asylum Rules, But Other Bills Face Gridlock in Sacramento, Split Votes in Washington*, S.F. CHRON., June 21, 1993, at A7 (reporting statements from both proponents and opponents predicting that the bill stands an excellent chance of passage).

12. For additional discussion of recent immigration reform proposals, see Sarah Ignatius, *Restricting the Rights of Asylum Seekers: The New Legislative and Administrative Proposals*, 7 HARV. HUM. RTS. J. 225 (1994), which was published following completion of this Note.

II. HISTORICAL OVERVIEW

A. Early Developments

The problems of refugees received little international attention until the period immediately following World War II.¹³ On December 10, 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights,¹⁴ the first successful attempt to define international human rights.¹⁵ Article 14.1 of the Declaration guarantees the right to seek and to enjoy asylum from persecution.¹⁶ In 1950, the United Nations (UN) created a new post, the UN High Commissioner for Refugees (UNHCR).¹⁷ The UNHCR is charged with providing international protection for refugees and seeking permanent solutions to the problems of refugees worldwide.¹⁸

One year after establishing the UNHCR, the UN adopted the 1951 Convention Relating to the Status of Refugees (1951 Convention).¹⁹ The 1951 Convention, as modified by the 1967 United Nations Protocol Relating to the Status of Refugees (1967 Protocol),²⁰ established the

13. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1253-54 (1990). Martin notes that, historically, states rather than individuals were entitled to the right of asylum. *Id.* However, the inadequate response to those fleeing Nazi persecution during World War II shamed the international community. As a result, an international structure was developed to respond more effectively to the needs of refugees. *Id.*

14. G.A. Res. 217 (III)(A), U.N. GAOR 3d Comm., 3d Sess., pt. I, 183d plen. mtg. at 135, U.N. Doc. A/C.3/1 (1948).

15. See generally EGON SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY: THE ROOTS AND GROWTH OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948-63 (1964).

16. G.A. Res 217 (III)(A), *supra* note 14, at 138. Article 14.1 states: "Everyone has a right to seek and to enjoy in other countries asylum from persecution." *Id.* This language was adopted after vigorous opposition to alternative proposals that would have guaranteed the right "to seek and to be granted in other countries asylum from persecution." GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 69, 104 (1983). According to Goodwin-Gill:

The refusal of states to accept an obligation to grant asylum . . . is amply evidenced by the history of international conventions and other instruments The proposal to substitute 'to be granted' for 'to enjoy' was vigorously opposed as was the suggestion that the United Nations itself should be empowered to secure asylum. Contemporary opinion held that to grant asylum to refugees within its territory was the sovereign right of every state

Id.

17. Martin, *supra* note 13, at 1254.

18. See *Statute of the Office of the High Commissioner for Refugees*, G.A. Res. 428, U.N. GAOR 5th Sess., Supp. No. 20, at 46-47, U.N. Doc. A/1775 (1950).

19. 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

20. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

definition of refugee. A "refugee" is defined as a person outside his or her home country who is unable or unwilling to return because of a "well-founded fear" of persecution due to race, religion, nationality, membership in a particular social group, or political opinion.²¹ The 1951 Convention generally requires nonrefoulement, a mandatory prohibition against returning a refugee to a country where his or her life or freedom would be threatened.²² However, the 1951 Convention does not guarantee an international right to asylum.²³

The Refugee Act of 1980²⁴ marked the United States' first comprehensive statutory scheme for granting asylum to refugees at or within the country's borders.²⁵ The 1980 Act adopted the definition of "refugee" contained in the 1951 Convention and the 1967 Protocol.²⁶ Congress replaced earlier, informal administrative practices²⁷ with section 208, and

21. 1951 Convention, *supra* note 19, at 152. The 1951 definition referred only to those persons who fled due to events occurring prior to 1951. *Id.* The 1967 Protocol removed this date limitation. 1967 Protocol, *supra* note 20, 19 U.S.T. at 6225, 606 U.N.T.S. at 268. For a discussion of the well-founded fear standard, see *infra* notes 85-87 and accompanying text.

22. 1951 Convention, *supra* note 19, at 176. Article 33(1), paragraph (2), provides an exception to nonrefoulement for spies and dangerous criminals. *Id.*

23. Martin, *supra* note 13, at 1255 n.16. In the 1970s, reformers attempted to enlarge the scope of the Convention to guarantee the right of asylum. The reformers abandoned their efforts, however, when resistance by the 1977 Conference of Government Representatives threatened to weaken the rights already established in the 1951 Convention and the 1967 Protocol. *Id.*

24. Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157-1159 (1980)).

25. For a general discussion of the events leading up to the Refugee Act of 1980, see Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

26. The 1980 Act defines "refugee" as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

8 U.S.C. § 1101(a)(42)(A) (1988). In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the U.S. Supreme Court stated: "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol." *Id.* at 436.

27. See Martin, *supra* note 13, at 1294. The first regulations governing asylum procedure were established in 1953. The 1953 regulations implemented nonrefoulement under § 243(h) of the INA, 8 U.S.C. § 1253(h), and provided that an immigration officer would interrogate each alien under oath to determine the alien's chance of being persecuted if deported. *Id.*

In 1962, new regulations established procedures to be applied by immigration judges during deportation proceedings. Thus, by 1962, the two basic avenues for asylum adjudication had already emerged. *Id.* at 1294-95.

By 1974, regulations provided that both excludable and deportable aliens could apply to the INS

express asylum provision. Under section 208, the Attorney General has discretion to grant asylum to aliens who meet the statutory definition of "refugee."²⁸ In compliance with the 1951 Convention and the 1967 Protocol, section 243(h) of the 1980 Act creates a mandatory bar against returning an alien to a country where the alien's life or freedom would be threatened on account of race, religion, political opinion, or membership in a particular social group.²⁹ The 1980 Act also delegated responsibility to the Attorney General to establish and implement asylum procedures.³⁰

Pursuant to the 1980 Act's mandate, the INS promptly issued interim regulations.³¹ The interim regulations provided two routes through which an alien could pursue an asylum claim. Aliens who had not been arrested by the INS could file an application affirmatively with the local District Director of the INS.³² Aliens who had been arrested and were subject to exclusion or deportation proceedings could raise asylum claims defensively in those proceedings.³³ Affirmative applications rejected by the District Director, though not appealable, could be reasserted in subsequent exclusion or deportation proceedings.³⁴

The asylum system created by the interim regulations generated extensive criticism.³⁵ Critics charged that INS examiners, who worked under local

District Director for asylum. Deportable aliens could also renew such claims in front of an immigration judge during deportation proceedings. *Id.* at 1296. Excludable aliens challenged this distinction on due process grounds in *Pierre v. United States*, 547 F.2d 1281, 1290 (5th Cir.), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977). Although the Fifth Circuit ruled for the government, while petition for certiorari was pending in the Supreme Court, the Carter Administration acceded to the asylum seeker's demand. Martin, *supra* note 13, at 1296-97.

As a result of the Administration's concession, the INS proposed regulations which would have made the immigration court the sole forum for all asylum claims. *Id.* at 1297. Refugee advocates protested this policy, however, because it eliminated nonadversarial proceedings. Consequently, the rules implementing the Refugee Act of 1980 retained two-tier de novo consideration for both excludable and deportable aliens. Martin, *supra* note 13, at 1297-98.

28. Section 208 of the 1980 Act states in relevant part that "the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A)." 8 U.S.C. § 1158(a) (1988).

29. 8 U.S.C. § 1253(h) (1988 & Supp. II 1990).

30. 8 U.S.C. § 1158(a) states in pertinent part: "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum . . ." 8 U.S.C. § 1158(a) (1988).

31. See 45 Fed. Reg. 37,392 (1980) (codified at 8 C.F.R. § 208 (1980)).

32. 8 C.F.R. § 208.2(b) (1992). Such applications are commonly called affirmative or "walk-in" applications because the applicant comes forward voluntarily before arrest.

33. *Id.*

34. *Id.*

35. See, e.g., Martin, *supra* note 13, at 1322. Martin observed: "Almost no one regards the current asylum adjudication system as an effective and efficient scheme [for administering the sensitive asylum

INS District Directors, subordinated asylum policy to foreign policy, lacked knowledge and training in asylum law, and showed insensitivity to asylum applicants.³⁶ These complaints culminated in the filing of a major class action suit, *American Baptist Churches (ABC) v. Thornburgh*,³⁷ against the INS. The ABC plaintiffs alleged unfair treatment, improper consideration of foreign policy, bias, and incompetence on the part of the INS examiners.³⁸ The Department of Justice eventually settled the suit; as a result, the INS has agreed to reinterview the hundreds of thousands of ABC class members.³⁹

In 1987, the Attorney General proposed revisions to the interim regulations that would have eliminated immigration judges from the asylum process and vested sole adjudicatory power in the INS.⁴⁰ The proposal received strong opposition from those concerned about formal due process protections.⁴¹ As a result, the final regulations, which became effective October 1, 1990, created an asylum officer corps with an adjudicatory function but retained the role of the immigration judges.⁴²

The asylum corps was created to promote neutrality within the INS by establishing a separation between the INS' asylum adjudication functions and its enforcement functions.⁴³ Under the regulations, asylum officers must conduct asylum interviews in a nonadversarial manner.⁴⁴ The alien

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." *Id.*

36. See, e.g., SARAH IGNATIUS, HARVARD LAW SCHOOL IMMIGRATION AND REFUGEE PROGRAM, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 17-18 (1993); Christopher T. Hanson, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107 (1978); Carolyn Waller & Linda Hoffman, *United States Immigration Law as a Foreign Policy Tool: The Beijing Crisis and the United States Response*, 3 GEO. IMMIGR. L.J. 313, 339 (1989).

37. 760 F. Supp. 796 (N.D. Cal. 1991).

38. *Id.* The ABC plaintiffs, a class of Salvadoran and Guatemalan asylum applicants, specifically alleged that unfair policy considerations resulted in unfavorable treatment of asylum seekers fleeing noncommunist countries. *Id.* at 799.

39. See generally 67 INTERPRETER RELEASES 1480 (Dec. 21, 1990); 68 INTERPRETER RELEASES 97, 119 (Jan. 28, 1991). The Department of Justice explicitly conceded that foreign policy considerations were not relevant to a well-founded fear determination and agreed to reinterview the class members. 67 INTERPRETER RELEASES, *supra*, at 1481-83.

40. 52 Fed. Reg. 32,552 (1987).

41. See, e.g., 64 INTERPRETER RELEASES 1070, 1072 (Sept. 21, 1987).

42. See 64 INTERPRETER RELEASES 1214, 1215 (Nov. 2, 1987).

43. See 55 Fed. Reg. 30,674-75 (1990). The asylum officers corps is directly responsible to the INS Central Office and functions within the Office of Refugees, Asylum, and Parole (CORAP). See 8 C.F.R. § 208.1(b) (1992).

44. 8 C.F.R. § 208.9(b) (1992).

may bring an interpreter and may have counsel present.⁴⁵ However, the INS will provide neither trained interpreters nor legal representation; applicants must bring their own.⁴⁶ The INS does not transcribe the interview; informal notes of the officer, attorney, or applicant are the only evidence available as to what transpired.⁴⁷

An applicant cannot appeal from an asylum officer's decision, but the alien can renew his application for asylum *de novo* before an immigration judge during exclusion or deportation proceedings.⁴⁸ Excludable asylum seekers whose claims have already been filed with the immigration judge must bring their claims in the course of an exclusion hearing.⁴⁹ An alien may appeal a decision of the immigration judge to the Board of Immigration Appeals (BIA),⁵⁰ and then to the federal courts.⁵¹

B. Problems with the Present System

The asylum program is overwhelmed. The system was not designed to accommodate the approximately 100,000 asylum applications received annually.⁵² Consequently, the backlog of pending asylum cases has now exceeded 354,000.⁵³ This constant influx of current receipts, in combination with the growing backlog, has resulted in lengthy delays in adjudicating claims.⁵⁴

45. 8 C.F.R. § 208.9(b) (1992). Although the asylum officer conducts the interview, counsel may comment or raise additional issues after the interview is completed. 8 C.F.R. § 208.9(d) (1992).

46. See IGNATIUS, *supra* note 36, at 22-23. Applicants usually bring a family member or a friend to serve as an interpreter. The applicant's attorney, however, may not act as an interpreter. *Id.* at 23 (citing Memorandum from John Cummings, Acting Assistant Commissioner, INS, to All Asylum Directors (Aug. 12, 1991)).

47. 8 C.F.R. § 208.9(f) (1992).

48. 8 C.F.R. § 208.18(b) (1992).

49. 8 C.F.R. § 208.2(b) (1992).

50. 8 C.F.R. §§ 3.1(b)(1), 3.38(a) (1992).

51. 8 U.S.C. § 1105a(a)-(b) (1988). Following deportation proceedings, an applicant may appeal to the court of appeals. Following exclusion proceedings, an applicant may appeal to the district court for habeas corpus review. *Id.*

52. *Alien Smuggling: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House of Representatives Comm. on the Judiciary*, 103d Cong., 1st Sess. 2 (1993) (statement of Romano L. Mazzoli, Chairman of the Subcommittee). The asylum system was designed to accommodate perhaps 5,000 or 10,000 new cases annually, not the 100,000 yearly applications it receives currently. The flow of asylum seekers is unlikely to decrease, because an estimated 19 million refugees are presently dislocated and seeking accommodation. *Id.*

53. 71 INTERPRETER RELEASES 185 (Jan. 31, 1994).

54. See IGNATIUS, *supra* note 36, at 52. The INS asylum branch follows a "last-in, first-out" policy, which gives current claims priority over backlogged claims. *Id.* The INS has stated that it will delay adjudicating cases in the backlog until it can handle current receipts adequately. 71 INTERPRETER

The situation is further complicated by the question of what to do with excludable aliens pending the adjudication of their claims. The INS may either detain these aliens⁵⁵ or, following careful screening, release them into the United States.⁵⁶ Release from detention increases the risk that claimants may abscond entirely.⁵⁷ Detention, however, raises additional space, cost, and humanitarian concerns.⁵⁸

Work authorization grants to asylum seekers create additional problems. Under current regulations, an alien waiting for the adjudication of a "nonfrivolous"⁵⁹ asylum application receives automatic employment authorization.⁶⁰ Critics charge that this policy increases the incentive for

RELEASES 245, 248 (Feb. 14, 1994). Even optimistic forecasts predict that the backlog will not be eliminated completely before the year 2000. *Id.*

The INS originally envisioned 150 asylum officers, spending an average of three hours per case, adjudicating approximately 89,000 cases annually. According to INS Asylum Director Gregg Beyer, 150 officers could keep up with current receipts, but the INS would need additional resources to adjudicate the backlog. Gregg Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 275-76 (1992). However, the original goal of three hours per case has proven unrealistic. Nationwide, asylum officers average five to seven hours per case. IGNATIUS, *supra* note 36, at 49.

55. 8 C.F.R. § 235.3(b) (1992).

56. 8 C.F.R. § 212.5 (1992) (allowing for parole of certain detained aliens into the United States).

57. See generally IGNATIUS, *supra* note 36, at 35. Approximately 16% of asylum applicants failed to appear for their INS asylum office interviews during the first eleven months of fiscal year 1993. *Id.* Asylum seekers in exclusion proceedings were less likely to appear. The INS did not begin to keep records regarding the failure-to-appear rate of asylum seekers at exclusion hearings until October 1992. However, during the six months prior to April 1993, the failure-to-appear rate at these exclusion hearings was almost 30%. *Id.* (citing testimony of Chris Sale, Acting Commissioner, INS, before the Judiciary Committee Subcommittee on Immigration and Refugee Affairs (May 28, 1993)).

58. See, e.g., Ira H. Mehlman, *The New Jet Set: How Questionable Political Asylum Claimants Enter the U.S. at N.Y., New York's John F. Kennedy International Airport Without Any Difficulty*, NAT'L REV., Mar. 15, 1993, at 40. Mehlman reports that New York's John F. Kennedy airport (JFK) lacks the space to detain all excludable aliens. JFK has a maximum detention capacity of only 100 beds, but it receives about 1300 new excludable aliens per month. In total, the INS detains only about 7% of inadmissible aliens who arrive at JFK. *Id.* at 41. Although enlarged detention facilities may alleviate the problem, this approach might also simply result in a shift of alien traffic to a less well-equipped airport. *Id.* at 47. Further, detention costs between \$30-\$35 per person per day. Thus, detaining 4500 aliens for one week would cost the government one million dollars. Martin, *supra* note 13, at 1380. In addition, detaining alien asylum seekers may violate the United States' commitment to uphold its international obligations under the 1967 Protocol. See, e.g., Deborah M. Levy, *Immigrants in American Law: Detention in the Asylum Context*, 44 U. PITT. L. REV. 297, 317-20 (1983).

59. The regulations define "frivolous" as "manifestly unfounded or abusive." 8 C.F.R. § 208.7(a) (1992).

60. 8 C.F.R. § 274a.12(c)(8) (1992). If the INS does not adjudicate a work authorization request within 90 days, the applicant is automatically entitled to work authorization for a period not to exceed 240 days. 8 C.F.R. § 274a.13(d) (1992).

Under the ABC settlement, see *supra* notes 39-41 and accompanying text, the INS must approve work authorization within 60 days for all class members, provided they have paid the appropriate fee.

aliens to file fraudulent asylum claims, especially if the applicants are fleeing countries due to poor economic conditions.⁶¹

Finally, the asylum appeals system arguably causes unnecessary delay by giving applicants "two bites at the apple."⁶² Asylum seekers applying affirmatively, whose claims are rejected by the INS, can renew their claims *de novo* in the course of a subsequent exclusion or deportation hearing.⁶³ If rejected upon renewal, the asylum seeker can appeal to the BIA, and then to the federal courts.⁶⁴ In sum, the present system creates a vicious cycle—long adjudicatory delays, lack of detention, work authorization, and a lengthy appeals process increase the incentive to file frivolous claims, and the increase in the number of claims filed causes further delay.

III. SUMMARY EXCLUSION

This Note focuses on recent summary exclusion bills introduced in Congress. However, the ultimate success or failure of the current legislative proposals will not foreclose the issue of summary exclusion. The INS, along with other immigration reform advocates, has lobbied for the inclusion of a summary exclusion provision in United States asylum law several times in the past and will likely continue their efforts in the future.⁶⁵

760 F. Supp. at 805.

61. See, e.g., 70 INTERPRETER RELEASES 1361, 1362 (Oct. 18, 1993); Martin, *supra* note 13, at 1287-89.

62. See, e.g., Martin, *supra* note 13, at 1322-24; Ira J. Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 112-13 (1981).

63. 8 C.F.R. § 208.18(b) (1992).

64. 8 C.F.R. §§ 3.1(b), 3.38(a) (1992); 8 U.S.C. § 1105a (1988).

65. Summary exclusion is not a new idea. Legislation to include a summary exclusion provision was introduced as part of the 1982 version of the Immigration Reform and Control Act. See 64 INTERPRETER RELEASES 1070, 1071 (1987). However, the proposal was dropped in 1984 due to strong opposition. See *The Immigration Reform and Control Act: Hearings on H.R. 1510 Before the Subcomm. on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 98th Cong., 1st Sess. 948-60, 1099-1112 (1983) (statements of Maurice A. Roberts, Editor, *Interpreter Releases* and Robert Ervin, American Bar Association).

Representative Bill McCollum, Chairman of the Subcommittee on Immigration, Refugees, and International Law, introduced similar summary exclusion legislation twice between 1984 and 1989. The first bill passed the House of Representatives but died with an attached immigration bill. Again in 1986, McCollum introduced a summary exclusion provision. However, the provision was out of order because the adjudication reform section of the earlier legislation was dropped when the new bill was introduced. See Bill McCollum, *U.S. Asylum: Stretched Too Far*, MIAMI HERALD, Feb. 5, 1989, at 4C.

The INS has long believed that the only way to control abuse at ports of entry is to give asylum officers the authority to summarily exclude fraudulent applicants. See Al Kamen, *New York's JFK an Easy Gateway for Illegal Entry*, PHILA. INQUIRER, Jan. 27, 1992, at A5. In 1987, the INS attempted

The basic purpose behind summary exclusion is to streamline the asylum procedure and remove any incentives for abuse.⁶⁶ The policy would apply to any alien who arrives at a port of entry and either 1) fails to present proper entry documentation or 2) fails to indicate an intent to apply for asylum or to establish a fear of persecution.⁶⁷ Upon application for asylum, an asylum officer immediately determines whether the alien has a "credible fear of persecution."⁶⁸ Although the current proposals define "credible fear of persecution" differently,⁶⁹ each proposed definition is

again, this time administratively, to streamline asylum adjudications by eliminating the role of the immigration judge. Once more, the proposal was dropped due to strong opposition. 64 INTERPRETER RELEASES 1214 (1987). In 1989, the INS drafted the "Asylum Anti-Abuse Act." This Act, also unsuccessful, would have enabled INS officials to exclude aliens who failed to show a clear probability of persecution. See 66 INTERPRETER RELEASES 477, 478 (May 1, 1989).

The concept of expedited exclusion has also gained support on an international level. See, e.g., Andrew Marshall, *U.N. Agency Attacks Asylum Law*, INDEPENDENT, Dec. 3, 1992, at 10 (reporting UN's concern over new European Community accelerated procedures for adjudicating "manifestly unfounded" asylum claims); *Portugal Proposes Fast-Track Asylum Procedure*, REUTERS, June 30, 1993 (discussing Portugal's proposal to establish a fast-track procedure for unfounded claims).

66. See 139 CONG. REC. H3517 (June 15, 1993) (statement of Rep. Bereuter) (arguing that there is no alternative to summary exclusion to deal with patently fraudulent claims and the ensuing backlog).

67. The Mazzoli bill provides in pertinent part:

(B) Inspection and Exclusion by Immigration Officers.-

(1) An immigration officer shall inspect each alien who is seeking entry to the United States.

(2) (A) If the examining immigration officer determines that an alien seeking entry-
(I) does not present the documentation required (if any) to obtain legal entry to the United States; and

(II) does not indicate either an intention to apply for provisional asylum (under section 208) or a fear of persecution, the officer shall order the alien excluded from the United States without further hearing or review.

H.R. 2602, *supra* note 5, § 101(a). See also H.R. 2836, *supra* note 5, § 2(b); S. 1333, *supra* note 5, § 2(b).

68. The Administration's bill provides: "[T]he immigration officer shall refer the matter to an asylum officer who shall interview the alien to determine whether presentation of the document was pursuant to direct departure from a country in which the alien has a credible fear of persecution or of return to persecution"

H.R. 2836, *supra* note 5, § 2(b)(5)(A). Accord H.R. 2602, *supra* note 5, § 101(a).

69. The Mazzoli bill defines the credible fear standard as requiring that it be:

(I) . . . more probable than not that the statements made by the alien in support of his or her claim are true, and (II) that there is a significant possibility, in light of such statements and of such other facts as are known to the officer that the alien could establish eligibility for provisional asylum under section 208 [8 U.S.C. § 1158a].

H.R. 2602, *supra* note 5, § 101(a).

The Administration proposal defines the credible fear standard as requiring:

(A) that the statements made by the alien in support of his or her claim are true; and

(B) in light of such statements and country conditions,

(i) that the alien could establish eligibility as a refugee within the meaning of section 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)]; or

more stringent than the existing standard.⁷⁰ If the officer concludes that the alien lacks a credible fear of persecution, the alien would be excluded without further hearing.⁷¹ The only avenue of appeal open to the alien would be an immediate review by another asylum officer or an officer with qualifications equivalent to those of an asylum officer.⁷² Judicial review would be available only in habeas corpus proceedings and would be limited to the issues of whether the petitioner is an alien and whether the petitioner was ordered excluded.⁷³

IV. EVALUATION OF SUMMARY EXCLUSION

The summary exclusion proposals raise concerns on a number of different levels. First, summary exclusion targets only excludable aliens, a small subset of the entire immigrant population.⁷⁴ Second, the new and complex "credible fear" standard contemplated in the various proposals increases the risk of erroneous denials of asylum. Third, summary exclusion severely curtails the current right to administrative review of asylum decisions.⁷⁵ Consequently, it raises concerns regarding the adequacy of

(ii) that the alien could be returned, without access to a full and fair procedure for refugee status determination, to a country with respect to which there is a substantial likelihood that he or she could establish eligibility as a refugee within the meaning of section 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)].

H.R. 2836, *supra* note 5, § 2(b)(6); S. 1333, *supra* note 5, § 2(b)(6).

70. See *infra* Part IV.B.

71. The Mazzoli bill states:

(ii) (I) Subject to subclause (II), if an asylum officer determines that an alien does not have a credible fear of persecution the officer shall order the alien excluded from the United States without further hearing or review.

(II) The Attorney General shall promulgate regulations to provide for the immediate review by another asylum officer at the port of entry of a decision under subclause (I).

H.R. 2602, *supra* note 5, § 101(a).

72. S. 1333, *supra* note 5, § 2(b)(5)(C).

73. See H.R. 2836, *supra* note 5, § 4(a). No court would have the authority to review any individual determination. *Id.*

74. Observers have called summary exclusion "nothing more than a symbolic gesture that would be paid for by the blood of innocent refugees," because undocumented aliens who abscond into the general population represent only a small fraction of the total number of illegal immigrants. Wolf & Jobe, *supra* note 1, at A21. Representative Lamar Smith, Chairman of the Republican Task Force on Illegal Immigration, dismisses Clinton's proposal as a "1-percent solution" because political asylum seekers account for only one percent of the people who gain illegal entry. Mathis, *supra* note 2, at A1. See also Liz Balmaseda, *New Immigration Plan Responds to Wrong Pressures*, MIAMI HERALD, Aug. 4, 1993, at 1B (stating that the Clinton plan pursues asylum seekers because they are an easier group to track than the much larger anonymous population that arrives daily using tourist visas or forged documents).

75. See *supra* notes 48-51 and accompanying text.

procedural due process. Finally, summary exclusion greatly restricts judicial review of agency action, the absence of which increases the risk of administrative error and abuse.

A. *Missing the Target*

Summary exclusion targets asylum seekers who arrive at a port of entry without proper documents—i.e., excludable aliens.⁷⁶ However, asylum claims made by excludable aliens constitute only a small percentage of the total number of asylum claims made annually.⁷⁷

Under current procedures, most excludable aliens are prohibited from filing an affirmative application for asylum with the INS, and must claim asylum defensively in an exclusion hearing before an immigration judge.⁷⁸ In fiscal year 1992, the immigration court received only 13,025 asylum claims compared with the 103,441 claims received by the INS.⁷⁹ Because summary exclusion applies only to excludable aliens, who generally assert asylum defensively, the policy would have no effect on the 103,441 asylum seekers applying affirmatively, a distinguishable class of asylum claimants. Moreover, of the 13,025 asylum claims made in immigration court, only a portion represent claims pursuant to an exclusion hearing. The remainder constitute claims renewed after the INS' rejection of an affirmative application, a category unrelated to excludable aliens.⁸⁰ Thus, summary exclusion would not affect the bulk of aliens seeking asylum.

Furthermore, summary exclusion does not address the problem of illegal immigration. In 1992, the INS apprehended approximately 1.2 million aliens attempting to enter the United States illegally.⁸¹ The INS estimates

76. H.R. 2602, *supra* note 5, § 101(a).

77. *See supra* note 74.

78. Once exclusion proceedings have been filed against an alien, the alien may not file an affirmative asylum application with the INS. 8 C.F.R. § 208.2(b) (1992). Under current regulations, aliens subject to exclusion proceedings must be detained unless the INS deems them suitable for parole. *See* 8 U.S.C. § 1225(b) (1992); 8 C.F.R. §§ 235.3(b), 215.5 (1992). The INS generally denies parole until it has scheduled the asylum applicant for a hearing before the immigration judge. *See* Mehlman, *supra* note 58, at 41 (describing INS policy of scheduling a hearing prior to allowing an alien to leave the port of entry). As a consequence of these procedures, most asylum seekers arrested at a port of entry without documents present their claims in an exclusion hearing before an immigration judge, rather than to the INS.

79. IGNATIUS, *supra* note 36, at 32.

80. 8 C.F.R. § 208.2(b) (1992). Immigration judges determine asylum claims *de novo* regardless of whether the claim was adjudicated by an asylum officer prior to the initiation of exclusion or deportation proceedings. *Id.*

81. *Alien Smuggling*, *supra* note 52, at 33. (statement of Laurie E. Ekstrand, Associate Director, Administration of Justice Issues, General Government Division, U.S. G.A.O.).

that for every alien apprehended, two aliens successfully enter.⁸² Summary exclusion would do nothing to curb this flood of approximately two million aliens sneaking across U.S. borders annually.⁸³ Because summary exclusion procedure affects only a minority of asylum seekers, and has no effect on the flow of illegal immigrants, many observers view summary exclusion as a severe reform measure that misses the target.⁸⁴

B. *The "Credible Fear" Standard*

Current regulations require an asylum officer to determine whether an applicant has suffered actual past persecution or has a "well-founded" fear of future persecution.⁸⁵ The regulations state that an applicant shall be found to have a well-founded fear if there is a "reasonable possibility" that the applicant will suffer persecution upon return.⁸⁶ This construction of the well-founded fear standard has developed through years of administrative and judicial interpretation.⁸⁷

82. *Id.*

83. Given their limited numbers, why have the rights of asylum seekers at a port of entry been singled out for restriction? See, e.g., Deborah Sontag, *Sexual Terrorism: Immigration Law Attorneys Want Rape Classified as Grounds for Political Asylum*, CHI. TRIB., Jan. 23, 1994, at 12. Gregg Beyer, the INS Director of Asylum, notes that asylum seekers at a port of entry represent "only the smallest tip of the illegal immigration iceberg." See Dick Kirschten, *Catch-Up Ball*, NAT'L J., Aug. 7, 1993, at 1977. They are, however, a visible minority and, thus, an easy target for control. Beyer further observes that asylum excites such controversy because many view it as something of a "wild card" in comparison with other asylum programs, such as the INS overseas refugee program. *Id.* Although the overseas refugee program is much larger and more expensive, it sparks less controversy because the government exercises control, through quotas, over the total number of refugees resettled. In contrast, the asylum program is not restricted by yearly quotas or ceilings; anyone who reaches United States shores has the right to apply for asylum. *Id.* at 1979-80.

84. See *supra* note 74 and accompanying text.

85. 8 C.F.R. § 208.13(b) (1992).

86. 8 C.F.R. § 208.13(b)(2) (1992).

87. Following the enactment of the 1980 Refugee Act, controversy arose regarding the proper interpretation of the "well-founded fear" standard used in the definition of refugee. In *INS v. Stevic*, 467 U.S. 407 (1984), the Supreme Court ruled that in order to claim mandatory protection under the nonrefoulement provisions of the Immigration and Naturalization Act (INA), an applicant must show a "clear probability" of persecution. *Id.* at 430. The Court interpreted "clear probability" as requiring a showing that persecution was "more likely than not." *Id.* at 429-30.

However, *Stevic* did not determine whether the same interpretation of the standard applied to the asylum provisions. The Supreme Court answered this question three years later in *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The Court held that to establish a "well-founded fear of persecution," an alien does *not* have to show that persecution is "more likely than not" if the alien is returned home. *Id.* at 423. The Court distinguished nonrefoulement, which becomes mandatory once the asylum seeker has met the burden of proof, from asylum, which remains discretionary. Thus, the Court found that Congress did not intend that the two standards be identical. *Id.* at 423-24.

Summary exclusion would require asylum seekers to meet a new and complex standard of proof based on "credible fear." The Clinton Administration's bill requires an alien to establish to a substantial likelihood the truth of her claims as well as her eligibility as a refugee.⁸⁸ This credible fear standard has no basis in either the Refugee Act of 1980 or in the asylum regulations.⁸⁹ In addition, the proposed legislation makes no effort to clarify the relationship between its standard and the existing well-founded fear standard.

The INS uses a variation of the credible fear standard in just two other contexts. First, since 1981, the United States has screened Haitian asylum applicants interdicted on the high seas to determine if each had a credible fear of persecution.⁹⁰ Available statistics suggest that the asylum officers have been unsuccessful in applying the credible fear standard with any degree of consistency in this context.⁹¹ The INS also applies a variation of the credible fear standard in screening detained asylum applicants for parole.⁹² Although no statistics are available on the application of this standard, observers suggest that it also has been applied inconsistently.⁹³

The *Cardoza-Fonseca* Court did not, however, delineate a test for applying the well-founded fear standard. It anticipated that the term would accumulate meaning as lower courts applied it on a case-by-case basis. *Id.* at 448. After *Cardoza-Fonseca*, lower courts generally held that a well-founded fear meant that a reasonable person would fear persecution. *See, e.g., In re Mogharrabi*, 1987 WL 108943, at *13 (B.I.A. June 12, 1987) (holding that an asylum applicant has established a well-founded fear if he shows that "a reasonable person in his circumstances would fear persecution"); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (suggesting that a well-founded fear exists when an alien "on the basis of objective circumstances personally known to him, believe[s] that he has at least one in ten chance of being killed by guerrillas").

88. For the complete text of the Administration's proposed definition, see the discussion of H.R. 2836 § 2(b)(6) in *supra* note 69.

89. IGNATIUS, *supra* note 36, at 150.

90. *See Hiroshi Motomura, Interdiction and Immigrants' Rights*, 26 CORNELL INT'L L.J. 695, 700 (1993). Credible fear, in this context, is defined as "an apprehension or awareness which appears to be truthful . . . of serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* at 701 (quoting INS Memorandum of Nov. 22, 1991). This standard was intended as a preliminary screening device and meant to require a lower burden of proof than the asylum statute's "well-founded fear" standard. *Id.*

91. Under this standard, the rate of Haitian applicants found to have a credible fear has fluctuated widely during a time period when political conditions remained relatively constant. *See* IGNATIUS, *supra* note 36, at 149. For example, in January 1992, 85% of all applicants were screened in; in February 1992, 40% of all applicants were screened in; in the first week of April 1992, 10% were screened in; and in the second week of April 1992, 2% were screened in. *Id.* (citing Susan Beck, *Cast Away*, AM. LAW 54, 57 (Oct. 1992)).

92. *See* 69 INTERPRETER RELEASES 503, 526 (Apr. 27, 1992).

93. *See, e.g.,* 70 INTERPRETER RELEASES 1397, 1398 (Oct. 25, 1993) (statement of Representative Nadler); Wolf & Jobe, *supra* note 1.

The proposed "credible fear" standard may seem innocuous on its face, but it could well prove problematic in practice. The standard has no basis in either international⁹⁴ or domestic law,⁹⁵ and INS experience in applying the standard shows that it can yield inconsistent results.⁹⁶ Further, there has been no judicial development of the meaning of "credible fear"⁹⁷ and, because summary exclusion severely restricts judicial review,⁹⁸ no future development is likely. Consequently, a credible fear standard could result in confusion and erroneous denials. Summary exclusion, by making the initial burden of proof more difficult for an asylum applicant to meet, while simultaneously restricting the applicant's right to procedural safeguards, significantly increases this risk of error.

C. Procedural Due Process Concerns

Summary exclusion places almost complete decisionmaking authority in the hands of INS asylum officers. The officer must determine the applicant's claim immediately upon the applicant's arrival at a port of entry. The applicant does not have the opportunity to present his or her claim *de novo* in front of an immigration judge nor the ability to appeal an unfavorable decision to the Board of Immigration Appeals (BIA).⁹⁹ These restrictions may infringe on an asylum applicant's right to procedural due process.

The determination of whether summary exclusion violates due process requirements depends initially on whether the asylum applicant has an interest, protected by due process, in petitioning for asylum. In a series of

94. The European Community recently considered a fast-track procedure which excludes only "manifestly" or "clearly unfounded" asylum claims. *See, e.g., Sue Baker, EC Immigration Ministers Agree to Streamline Asylum Procedures*, REUTERS, Nov. 30, 1992; Martin, *supra* note 13, at 1367-72. Martin discusses the procedure used in some countries to deal with "manifestly unfounded" asylum claims. Such procedures bear some analogy to summary exclusion, but the threshold burden of proof is much lower. The UNHCR cautiously endorsed expeditious procedures for clearly fraudulent or abusive claims, but warned against overuse, realizing the grave consequences of an erroneous determination. *Id.* at 1367-68. Martin concludes that a manifestly unfounded procedure would probably screen out only a handful of individuals coming from countries, such as Guatemala and El Salvador, with well-known human rights problems. *Id.* at 1370. He warns, however, that an approach any more restrictive carries too high a risk of return of true refugees. *Id.*

95. *See supra* note 89 and accompanying text.

96. *See supra* notes 91-93 and accompanying text.

97. IGNATIUS, *supra* note 36, at 74.

98. *See infra* Part IV.D.

99. The current summary exclusion proposals provide that the asylum officer's decision may only be reviewed by another asylum officer or a functional equivalent. *See, e.g., S. 1333, supra* note 5, § 2(b).

early decisions, the United States Supreme Court recognized an inherent federal power to exclude aliens without due process limits on the exercise of that power.¹⁰⁰ In *United States ex rel. Knauff v. Shaughnessy*,¹⁰¹ the Supreme Court held that the admission of aliens into the United States is a privilege, not a right, granted by, and contingent on terms prescribed by, the sovereign.¹⁰² The Court denied the presence of a protected interest and concluded that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."¹⁰³ The Court reaffirmed *Knauff* three years later in *Shaughnessy v. United States ex rel. Mezei*.¹⁰⁴ Although several commentators have sharply criticized these cases,¹⁰⁵ they remain the framework for analyzing the due process rights of an alien seeking admission into the United States.¹⁰⁶

100. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (holding that every sovereign nation may forbid the entrance of foreigners and that, in the United States, this power belongs to the President and Congress); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (stating that Congress may exclude aliens, determine their conditions of entry, or enforce its policy through the executive branch without judicial intervention).

101. 338 U.S. 537 (1950).

102. *Id.* at 542.

103. *Id.* at 544. In *Knauff*, the government denied entry without a hearing to the alien wife of an American soldier under a regulation permitting the Attorney General to bypass a hearing upon a finding, based on confidential information, that the alien is inadmissible. *Id.* at 539-40. Although the government refused to disclose the confidential information to the federal court, the Supreme Court found no constitutional violation. The Court stated:

[T]he decision to admit or exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive official under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien.

Id. at 543.

104. 345 U.S. 206, 212 (1953). In *Mezei*, the petitioning alien had resided in the United States for twenty-five years. Following 19 months of travel abroad, he was denied reentry to the United States on security grounds without a hearing. No other country would accept *Mezei*; thus he was detained on Ellis Island for 21 months. *Id.* at 207-09.

105. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391-96 (1953); T. Alexander Aleinikoff, *Aliens, Due Process, and 'Community Ties': A Response to Martin*, 44 U. PITT. L. REV. 237, 237-39 (1983). Aleinikoff also criticizes the distinction made between aliens at the border and those who have entered the country, albeit illegally. Under current law, an alien who sneaks across the border is entitled to full due process protections, yet an alien (like *Mezei*) who is stopped at the border while attempting return to a lawful permanent residence is entitled to no more than Congress is willing to give him. *Id.* at 238-39.

106. For an extensive analysis of the Supreme Court's exclusion decisions, see generally Richard F. Hahn, Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982).

However, these cases do not foreclose the possibility that excludable asylum seekers are entitled to due process protections. Initially, the *Knauff-Mezei* line of cases were decided in the context of aliens seeking permanent admission to the United States. Asylum seekers arguably constitute a distinct group because they seek only temporary refuge rather than permanent admission.¹⁰⁷ Thus, the due process limitations established in *Knauff* and *Mezei* for aliens seeking admission should not be applied automatically to aliens seeking asylum.

Furthermore, since *Knauff* and *Mezei* were decided, the Supreme Court rejected the rigid distinction made in due process cases between rights and privileges. Under its new approach, the Court has recognized that a statutory entitlement to a government benefit may create a constitutionally protected interest.¹⁰⁸

A number of courts have held that the right of an alien to apply for asylum is a statutorily created entitlement.¹⁰⁹ In *Haitian Refugee Center*

See also John A. Scanlan, *Asylum Adjudication: Some Due Process Implications of Proposed Immigration Legislation*, 44 U. PITT. L. REV. 261, 270 (1983). Scanlan argues that should Congress decide to renounce the 1967 Protocol and abolish any right to asylum, such a decision, despite its patent inhumanity, might well prove nonjusticiable. *Id.*

107. In the INA, Congress explicitly exempted asylum seekers from the numerical quotas placed on aliens seeking admissions. 8 U.S.C. § 1151(a) provides in relevant part:

Exclusive of special immigrants . . . , immediate relatives . . . , and aliens who are admitted or granted asylum under § 1157 or § 1158, . . . the number of aliens . . . who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, shall not . . . in any fiscal year exceed two hundred and seventy thousand.

8 U.S.C. § 1151(a) (1988). See also Steven G. Scheinfeld, *The Second Circuit Review—1982-1983 Term: Immigration: Due Process Rights of Asylum Applicants Expanded to Include Stowaways*, 50 BROOK. L. REV. 751, 773 (1984) (arguing that the INA evidences a clear congressional intent to differentiate admission requests from political asylum requests).

108. In *Goldberg v. Kelley*, the Supreme Court held that a welfare recipient was entitled to an evidentiary hearing before the government could terminate benefits. 397 U.S. 254, 260-61 (1970). The Court reached this holding even though such benefits were not constitutionally required and neither the statute nor the administrative procedures provided for such a hearing. *Id.* at 257-60. Two years later in *Board of Regents v. Roth*, the Supreme Court recognized that constitutionally protected property interests can have their source in statutory law, creating an entitlement to a governmental benefit. 408 U.S. 564, 577 (1972). The Court stated that to have a property interest in a benefit, a "person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* See also *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975) (holding that state law creates a legitimate claim of entitlement to public education); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding that property interest exists in prisoner's right to good-time credit). See generally Susan N. Hermann, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984).

109. See *Jean v. Nelson* 727 F.2d 957 (11th Cir. 1984) (reaffirming a protected statutory and regulatory right to petition for asylum), *aff'd*, 472 U.S. 846 (1985); *Chun v. Sava*, 708 F.2d 869, 877

v. *Smith*,¹¹⁰ the Fifth Circuit specifically recognized an entitlement, worthy of due process protection, in the right to petition the government for asylum.¹¹¹ The court based its holding, in part, on the United States' accession to the 1967 Protocol and the accompanying obligation not to return refugees to persecution.¹¹² Although *Haitian Refugee Center* was decided in the context of deportable aliens, the court's reasoning arguably applies to excludable aliens as well, particularly those who are detained within the United States.

If an asylum applicant can establish a protected due process interest, the Constitution requires that some form of hearing be conducted "at a meaningful time and in a meaningful manner."¹¹³ In *Matthews v. Eldridge*,¹¹⁴ the Supreme Court established the test for determining whether adequate process has been afforded. The Court identified three factors to be balanced: 1) the private interest at stake; 2) the risk of error under current procedures and the likely value of additional safeguards; and 3) the government interest involved, including any burdens accompanying new procedures.¹¹⁵ Under the *Matthews* test, summary exclusion fails to afford an asylum applicant adequate process.

The initial balancing factor, the private interest threatened by government action, is "off the charts" in this context.¹¹⁶ The asylum applicant's

(2d Cir. 1983) (stating that a refugee with a well-founded fear of persecution has an interest protected by both treaty and statute and may enjoy some due process protection not available to aliens seeking only admission); *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (concluding that some due process protection likely surrounds the determination of an alien's claim that return to a particular country will jeopardize the alien's life or freedom). See generally Aleinikoff, *supra* note 105; Scanlan, *supra* note 106, at 273-74.

110. 676 F.2d 1023 (5th Cir. 1982).

111. *Id.* at 1038.

112. *Id.* See *supra* Part II.A. for a discussion of the 1967 Protocol. The court found that to implement this agreement, the United States must allow aliens the opportunity to seek political asylum. 676 F.2d at 1038. Congress expressed its intent to comply with the letter and spirit of the UN Protocol by directing the Attorney General to establish procedures so that an alien can submit and substantiate an asylum claim. *Id.* See also 8 U.S.C. § 1158 (1988). The Fifth Circuit noted that due process is violated when the government "creates a right to petition and then makes the exercise of that right utterly impossible." 676 F.2d at 1039.

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

114. 424 U.S. 319 (1976).

115. *Id.* at 335.

116. *Martin*, *supra* note 6, at 190. *Martin* notes that, assuming the asylum seeker's allegations are true, no other systematic adjudication procedure potentially subjects a person to torture or death. *Id.* By comparison, the government's interest in administrative convenience seems negligible. *Id.* *Martin* argues, however, that this application of *Eldridge* is problematic because the individual's interest is exactly what is at issue. *Id.* at 222.

interest in avoiding return to a place of persecution must be afforded the highest weight.

The second *Matthews* factor, the risk of an erroneous deprivation of the individual interest through the procedures used, and the probable value of additional safeguards, also carries a high value in this context. Proposed summary exclusion procedures call for a nonadversarial interview between the alien and an asylum officer upon arrival at a port of entry.¹¹⁷ This interview carries a high risk of error for several reasons.

First, studies have shown that the availability of counsel significantly improves the applicant's chance of success.¹¹⁸ However, the alien's right to counsel is functionally limited; counsel would not be allowed to delay the process, and must be paid for without government expense.¹¹⁹ Realistically, few entering aliens will be able to satisfy these criteria.

Second, courts have long recognized that an alien can rarely offer more than his or her own testimony as to the specific events that have caused a fear of persecution.¹²⁰ For this reason, the applicant's credibility is a crucial element of the interview process. Assessing credibility is an inherently difficult task, especially when the applicant speaks no English

Aleinikoff disagrees with Martin's assertion that giving weight to a persecution claim before it is tested allows an alien to "bootstrap his way to the highest level of procedural protection." Aleinikoff, *supra* note 105, at 248. Aleinikoff analogizes the asylum seeker's situation to that of the welfare recipient in *Goldberg v. Kelley*, 397 U.S. 254 (1970). He argues that Kelley's "stake," i.e. welfare benefits, was also exactly at issue in *Goldberg*. Aleinikoff, *supra* note 105, at 248-49. If the Court found that Kelley should not receive those benefits, then the Court arguably should have discounted the asserted stake. The Supreme Court, however, did not examine the issue of entitlement or lack thereof. Instead, it focused on the harms caused by a denial of benefits, namely deprivation of the necessary means to live. *Id.*

According to Aleinikoff, the purpose of due process guarantees is "to ensure that persons eligible for entitlements are not wrongfully denied—not to ensure that persons not entitled are properly denied." *Id.* at 249. See also *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

117. H.R. 2836, *supra* note 5, § 2(b).

118. See STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 955 (1992) (citation omitted). Legomsky reports the results of a General Accounting Office study, which found that, of the aliens who affirmatively applied to the INS for asylum, 36% of those with attorneys won approval, while only 1% of those without attorneys were approved. Similarly, for aliens claiming asylum in front of an immigration judge, approval rates with attorneys were 12%, but approval rates without were only 4%. *Id.*

119. The Mazzoli bill provides: "The examining immigration officer shall refer [the alien] for immediate inspection at the port of entry by an asylum officer . . ." H.R. 2602, *supra* note 5, § 101(a) (emphasis added). See also 70 INTERPRETER RELEASES 965, 966 (July 26, 1993).

120. See *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987). The INS accepts such testimony if it appears to be credible. See generally Henry G. Watkins, *Credibility Findings in Deportation Proceedings: "Bear[ing] Witness unto the Truth,"* 2 GEO. IMMIGR. L.J. 231 (1987).

and is fleeing a catastrophic event.¹²¹ This difficulty may be compounded by the asylum applicants' initial distrust and fear of government officials.¹²² Forcing an applicant to convince an officer of his or her credibility, without time to gather witnesses, affidavits, counsel, or simply his or her composure, increases the likelihood of an erroneous determination.

Third, summary exclusion eliminates the current right to administrative and judicial appeal.¹²³ An officer's decision may only be reviewed by another asylum officer or the functional equivalent.¹²⁴ Because the risk of an erroneous decision after an on-the-spot interview is so high, additional procedural safeguards, in the form of an evidentiary hearing before an impartial immigration judge, hold great value.¹²⁵

The final *Matthews* factor, the government interest at stake and the burdens accompanying supplemental safeguards, is of insufficient weight in the asylum context to overcome the other factors. The government appears to have two major interests: 1) to reduce fiscal and administrative burdens, and 2) to deter abuse of the asylum process. Because summary exclusion streamlines asylum procedure, it would slightly decrease costs. However, given that the system of immigration courts and judges is already

121. See *id.* at 253; Neal P. Pfeiffer, Note, *Credibility Findings in INS Asylum Adjudication: A Realistic Assessment*, 23 TEX. INT'L. L.J. 139 (1988). To determine credibility, the INS considers the applicant's demeanor, consistency, specificity and detail of testimony, and consistency of description with known country conditions. *Id.*

122. See Aleinikoff, *supra* note 105, at 250-51. Aleinikoff notes:

It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own.

... A person who, because of his experience, was in fear of the authorities in his own country may still feel apprehensive vis-a-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.

Id. (quoting OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 45, 47 (1979)).

During congressional hearings on the asylum issue, Representative Pelosi of California stated:

It is well known that a person fleeing State-sponsored repression learns not to confide in people wearing the official uniforms of government. To expect that within 5 minutes or even 5 hours they will place enough trust in a stranger in uniform, to tell them of extremely personal, very traumatic events, I believe is an unreasonable request.

Alien Smuggling, *supra* note 52, at 12.

123. See *supra* notes 48-50 and accompanying text; see also *infra* Part IV.D.

124. H.R. 2602, *supra* note 5, § 101(a); H.R. 2836, *supra* note 5, § 2(b).

125. But see Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433 (1992). Anker conducted an eighteen-month study of the Immigration Court and concluded that the current adjudicatory system is systemically flawed. Immigration judges are making asylum decisions on an inconsistent and ad hoc basis. *Id.* at 446.

in place and will continue to hear nonexcludable alien asylum cases, its discontinuation in excludable alien asylum cases will not significantly reduce the current fiscal and administrative burden.¹²⁶

Summary exclusion may succeed in deterring abuse of the asylum process. Currently, long delays in adjudication, lack of detention, and frequent grants of work authorization while claims are pending increase the incentive to file frivolous claims.¹²⁷ However, summary exclusion does not directly confront the sources of this incentive. Rather, it attempts to deter fraudulent claims by eliminating the asylum seeker altogether. This solution risks eliminating the bona fide asylum seeker with the fraudulent one. Although the government possesses a significant interest in controlling abuse, that interest must be tempered by its obligation to provide a fair hearing in accord with the 1951 Convention and the 1967 Protocol.¹²⁸

Balancing the three *Matthews* factors, it seems clear that the asylum seeker's life and liberty interests outweigh the government's interest in reducing administrative and fiscal burdens and in deterring the filing of frivolous claims. A decision of such gravity and complexity should not be placed in the hands of one lone asylum officer.¹²⁹

D. *Restrictions on Judicial Review*

Summary exclusion seeks to streamline asylum procedure by limiting judicial review. Under current procedure, an asylum determination is fully reviewable, usually as part of the review of a deportation or exclusion order. Courts apply either a "substantial evidence" test or an "abuse of discretion test," depending on the particular circumstances.¹³⁰ Summary

126. IGNATIUS, *supra* note 36, at 32. The Immigration Court received 13,025 asylum cases in fiscal year 1992 compared with 103,441 received by the INS. In 1989, asylum cases constituted only 15% of the Immigration Court's deportation and exclusion caseload. Further, a 1987 study by the GAO concluded that only 7% of applications rejected by the INS are renewed in the course of immigration or exclusion proceedings. *Id.*

127. *See supra* Part II.B.

128. *See* Arthur Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2343-44 (1991); Michael P. Brady, *Asylum Adjudication: No Place for the INS*, 20 COLUM. HUM. RTS. L. REV. 129, 147 (1988). Brady also argues that an asylum system perceived as unfair may encourage asylum seekers to avoid the system altogether and attempt surreptitious entry. Such an incentive would increase illegal immigration, a consequence obviously not in the government's interests. *Id.*

129. *See* Scheinfeld, *supra* note 107, at 780-81. Scheinfeld notes that it is "a fundamental premise of our jurisprudence that the decision of weighty matters should almost never be placed in the power of a single individual free from the control of a superior reviewing body." *Id.* at 781 n.184.

130. *See* Martin, *supra* note 13, at 1361.

exclusion would allow only habeas corpus review, limited to an examination of whether the petitioner is an alien and was ordered excluded.¹³¹

Judicial review of administrative decisions should survive any reform of the asylum process.¹³² Judicial review plays an important role in checking against administrative error or abuse in asylum decisions.¹³³ Moreover, the outcomes of asylum cases often hinge on subjective views of social obligation, foreign policy, and the extent of our nation's duty towards the world community.¹³⁴ Judicial review, and the resulting debate between circuits, ensures that the legal doctrine surrounding asylum decisions evolves on a thoughtful basis.¹³⁵

V. ALTERNATIVE REFORMS

Although the asylum system demands attention, the solution does not lie with radical reform proposals such as summary exclusion. These proposals are no more than knee-jerk responses to a current wave of anti-immigration sentiment,¹³⁶ and do not reflect rational policymaking. Congress should proceed slowly, with caution, and allow time to assess the effectiveness of the changes made through the 1990 regulations before overhauling the process again.

Less severe and more effective alternatives can be implemented to

131. See, e.g., H.R. 2602, *supra* note 5, § 101(a).

132. For a thorough discussion of the benefits and costs of judicial review in asylum cases, see Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205 (1989).

133. See Martin, *supra* note 13, at 1362.

134. See Legomsky, *supra* note 132, at 1215. Judicial review also allows uniformity where desirable as the Supreme Court can settle an issue splitting the circuits if it deems the issue ripe for review.

Legomsky also identifies further benefits to judicial review including the independence review brings to the administrative process; the benefit of added influence of decisionmakers who possess broad, generalist legal knowledge; and the freedom from bias a court of general jurisdiction can offer. *Id.* at 1211-15.

Furthermore, eliminating judicial review would do little to streamline the asylum process. In 1984, for example, asylum seekers sought judicial review in only 100 deportation cases and 17 exclusion cases. *Id.* at 1216.

135. *Id.* at 1214.

136. See, e.g., Fred Barnes, *No Entry: The Republicans' Immigration War*, NEW REPUBLIC, Nov. 8, 1993, at 10 (citing Gallup Poll figures showing 76% of Americans believe immigration should be reduced until the economy improves); Dan Cordtz, *The Fraying Welcome Mat: Worried About Jobs and Values, Americans Are Turning Against Immigration*, FIN. WORLD, Nov. 9, 1993, at 58 (referring to Latino National Political Survey showing that Hispanics in the U.S. are in favor of raising the bars against aliens); Rich Thomas, *The Economic Cost of Immigration*, NEWSWEEK, Aug. 9, 1993, at 18 (quoting *Newsweek* poll indicating that 62% of those surveyed worry immigrants are taking jobs from American workers, and 60% believe immigration is a "bad thing" for America).

address the system's weaknesses. Specifically, the following four measures, if enacted, would improve the current situation and curb abuse of the asylum process. First, Congress could reduce the backlog significantly by granting legal status to asylum seekers whose cases were filed prior to 1991, and to long-term resident Guatemalans and Salvadorans entitled to apply for asylum under the *ABC* settlement.¹³⁷ Second, the INS should be given the resources to increase the number of asylum officers. Third, the INS should not implement its proposed \$130 filing fee for asylum applications.¹³⁸ Should the INS assess a fee, the fee should be subject to an enforceable waiver provision and take the form of a bond returnable upon the alien's appearance at his or her asylum hearing. Finally, the INS should issue work authorization permits to aliens after 90 days, rather than the proposed 150 days,¹³⁹ to promote speedier adjudications and prevent undue hardship on genuine refugees. Congress should defer proposals for more radical reform, including summary exclusion, until the effectiveness of these moderate measures can be evaluated.

A. *Eliminating the Backlog*

Current estimates place the number of backlogged asylum cases at over 354,000.¹⁴⁰ This number includes 165,000 cases filed prior to the creation of the asylum officer corps on April 1, 1991.¹⁴¹ Approximately 50,000 of these cases were filed by Salvadorans and Guatemalans entitled to apply for asylum as a result of a settlement reached in the *ABC* suit against the INS.¹⁴² Under the terms of the settlement, another 185,000 Salvadorans may also file asylum claims.¹⁴³

This enormous backlog of pending cases must be reduced and eventually eliminated. The backlog is detrimental to the system for two reasons: 1) it impedes efficiency by causing delays in adjudication of asylum claims, and 2) it encourages the filing of frivolous claims because the applicant can remain in the country pending the outcome of his or her claim. Congress should reduce the backlog by 1) granting amnesty to the applicants in the 165,000 cases on file prior to April 1, 1991, and 2) granting legal status to the class of Salvadoran and Guatemalan long-term residents eligible to file

137. See *supra* notes 37-39 and accompanying text.

138. See Tim Weiner, *U.S. to Charge Immigrants a Fee When They Seek Political Asylum*, N.Y. TIMES, Feb. 17, 1994, at A1.

139. See 71 INTERPRETER RELEASES 245, 247 (Feb. 14, 1994).

140. 71 INTERPRETER RELEASES 185 (Jan. 31, 1994).

141. IGNATIUS, *supra* note 36, at 36.

142. *Id.*

143. *Id.*

for asylum under the *ABC* settlement.¹⁴⁴

Although this proposal may sound extreme, Congress has made similar grants in the past. For example, the Immigration Reform and Control Act of 1986¹⁴⁵ (IRCA) gave a one-time opportunity to achieve lawful permanent resident status to unlawful aliens who had been living in the United States from January 1, 1982 or before.¹⁴⁶ The INA also contains various provisions which offer similar grants of amnesty.¹⁴⁷

Granting legal status to long-term resident asylum seekers makes sense for both humanitarian and fiscal reasons. The targeted group consists of aliens who have been living and working in the United States for years. They have become part of American society. Through no fault of their own, their claims are now at the bottom of the INS' priority list.¹⁴⁸ Furthermore, granting legal status to the group would relieve an enormous monetary burden. To adjudicate the backlog over three years, the INS would require an estimated 250 asylum officers,¹⁴⁹ working solely on the backlog, spending four hours per case,¹⁵⁰ at a cost of approximately thirty million dollars.¹⁵¹ The concern that others may be motivated to attempt entry into the United States in the hope that they may receive a similar grant of legal residence would be greatly diminished once the backlog is reduced and the system is under control.

B. Increasing the Number of Asylum Officers

In addition to reducing the backlog, the INS should be allowed to increase the number of asylum adjudicators. The first comprehensive,

144. *Id.* at 61. The authors of the asylum officer study proposed a similar recommendation. The Clinton Administration has also considered this option.

145. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986).

146. See 8 U.S.C. § 1255(a); see also 63 INTERPRETER RELEASES 1020, 1021-29 (Nov. 10, 1986). The purposes behind this grant of amnesty were varied: a compassion for this group who had become a part of American society; a realistic acknowledgement that it would be impossible to apprehend and remove millions of illegal aliens; and a political judgment that the success of IRCA's employer sanctions provisions relied on such a grant. See LEGOMSKY, *supra* note 118, at 547.

147. See 8 U.S.C. § 1254 (suspension of deportation); 8 U.S.C. § 1255 (adjustment of status); 8 U.S.C. § 1257 (registry). These provisions are distinguishable from legalization, which created a one-shot mandatory eligibility program, because they ultimately remain subject to agency discretion.

148. See *supra* note 54 and accompanying text. The INS has implemented a "last-in, first-out" policy for adjudicating asylum claims. Unless the size of the asylum corps dramatically increases or the number of future receipts dramatically drops, the INS will not be able to adjudicate these backlogged claims before the year 2000. See 71 INTERPRETER RELEASES 245, 248 (Feb. 14, 1994).

149. IGNATIUS, *supra* note 36, at 61. The 250 officers would be over and above the 300 needed to remain current with new case filings. *Id.*

150. *Id.*

151. *Id.*

independent study of the asylum corps¹⁵² found that the asylum officers are substantially more competent than the INS examiners who adjudicated claims previously.¹⁵³ Although the asylum corps encountered start-up problems due to inadequate management and lack of resources,¹⁵⁴ the authors of the study concluded that the program is moving in the right direction.

Although the INS plans to double the number of asylum officers, from the current 150 to 334, by early 1995,¹⁵⁵ a mere doubling may not be sufficient.¹⁵⁶ The INS plan appears modest when compared to the staff-to-caseload ratio in other countries. For example, Switzerland has an asylum staff of 500 for 32,000 cases, Germany has a staff of 2500 for 700,000 cases, and Sweden has a staff of 800 for 140,000 cases. By contrast, the United States has only 297 adjudicators and staff for 244,000 cases.¹⁵⁷

C. *Eliminating the Filing Fee*

To deter new asylum applicants and decrease backlogged cases, the INS recently announced its intent to charge each asylum seeker a \$130 filing fee for processing asylum applications.¹⁵⁸ If the INS implements the fee, the United States will be the only nation in the world to charge asylum

152. *Id.* at 1. The Harvard study represents the only nongovernmental effort thus far to assess the asylum officer corps. The study extended from November 1991 to July 1993, analyzed over 1300 asylum cases, and evaluated the performance of 151 asylum officers handling cases from 60 countries. *Id.*

153. IGNATIUS, *supra* note 36, at 1. The study found that, overall, the asylum corps comprised a substantially more knowledgeable and impartial body of examiners than previous adjudicators. Specifically, the study reported that in approximately 70% of asylum interviews, officers conducted the interviews in a sensitive and nonadversarial manner. *Id.* Further, approximately 55% of the officers appeared knowledgeable about country conditions. *Id.*

154. *Id.* at 42-52. The study found the asylum corps underfunded and understaffed. Management problems, such as an insufficient number of clerical support staff, and a lack of computers, office space, and file shelves, proved obstacles to effective implementation. As a result, asylum officers spent almost 10% of their time on clerical duties. *Id.* at 42-44. Even so, they were unable even to enter all of their pending cases into the asylum applicants database. By December 31, 1991, the database contained only 6,000 of the 177,000 pending asylum applications. *Id.* at 45.

The study also found that asylum officers made fundamental errors of law or analysis in 50% of the cases reviewed. *Id.* at 1. This suggests that asylum officers currently do not possess the qualifications to be the sole adjudicators of asylum claims.

155. See 71 INTERPRETER RELEASES 245, 247 (Feb. 14, 1994).

156. In fiscal year 1993, the corps of 150 asylum officers received 103,441 asylum cases; they completed 33,885. IGNATIUS, *supra* note 36, at 31-32. Unless other improvements are made to increase the corps' efficiency, a mere doubling of the number of officers would still not enable the INS to keep up with current receipts.

157. See *id.* at 60.

158. See Weiner, *supra* note 138, at A1; 59 Fed. Reg. 14,779-89 (1994).

applicants alleging flight from persecution.¹⁵⁹

Charging applicants a fee is neither a just nor effective way to eliminate the backlog. The fee will likely prevent genuine refugees without resources from receiving asylum. Accordingly, the INS should not implement the fee.

However, if the INS does impose such a fee, the fee provisions should include two safeguards to protect against the fee's potential discriminatory effect. First, the fee must be subject to a strictly enforced waiver provision for refugees without any resources. Without such a waiver, the fee will only separate the wealthy asylum seeker from the poor, not the genuine refugee from the fraudulent one. Second, the fee should take the form of a bond returnable upon the alien's appearance at his or her hearing.¹⁶⁰ This structure would help ensure that the alien does not abscond into society, without imposing too great a hardship on the bona fide asylum seeker.

D. Work Authorization

Current regulations require the INS to grant work authorization to aliens in nonfrivolous asylum cases not adjudicated within 90 days.¹⁶¹ The INS recently announced a policy requiring applicants to wait at least 150 days before filing a work authorization request.¹⁶²

Although this policy is intended to curb abuse of the asylum process, extension of the waiting period is problematic for several reasons. First, an asylum seeker rarely will have the means to sustain himself or herself for five months. Thus, the policy would in effect "starve" refugees out of filing claims.¹⁶³ Second, in the absence of assistance from friends, family, or voluntary agencies, the extended waiting period may encourage asylum

159. Weiner, *supra* note 138, at A1.

160. Analogous measures exist in other contexts, including situations in which excludable aliens are paroled from detention. See 8 C.F.R. § 212.5(c)(1) (1992). This provision gives the District Director authority to require reasonable assurances, including the exacting of a bond in such amount as the Director deems appropriate, that the alien will appear at all hearings. *Id.*

161. 8 C.F.R. § 208.7 (1992).

162. 71 INTERPRETER RELEASES 245, 247 (Feb. 14, 1994); 59 Fed. Reg. 14,779-89 (Mar. 30, 1994).

163. See, e.g., Martin, *supra* note 13, at 1379. Although Martin advocates denial of work authorization, he acknowledges that a system must be put in place to provide for these applicants during the pendency of their claims. *Id.* Otherwise, such a denial would result inevitably in people being starved out of applying for asylum. This policy would harm aliens with valid claims as much as abusers who are the intended targets of the policy. Thus, Martin argues that until the process is sufficiently expedited, denial of work authorization must be coupled with some sort of welfare system or detention. *Id.* at 1374-76. A welfare system at taxpayer expense would generate stiff political opposition; detention is expensive. Martin approximates that detention of 4500 aliens for one week would cost one million dollars. *Id.* at 1379.

seekers to work or act outside of the law. Third, this proposal gives the INS sixty additional days to adjudicate claims. Because the number of asylum officers will soon double, the INS should retain their 90-day goal in adjudicating claims. If the INS meets this goal, then no applicant would receive work authorization prior to the adjudication of his or her claim.

VI. CONCLUSION

Summary exclusion is nothing less than a recipe for disaster. Until very recently, bias and mismanagement plagued the asylum system.¹⁶⁴ The 1990 regulations created the asylum officer corps and enacted other changes to ensure that those seeking protection within the United States encounter a fair and sensitive legal process.¹⁶⁵ Upon signing the new regulations, Attorney General Thornburgh stated that the rules reflected two guiding principles: a fundamental belief that asylum is a humanitarian act separate from the normal immigration process and a recognition of the need for fair and orderly adjudicatory procedure.¹⁶⁶ Summary exclusion defeats both of these principles.

Although radical reform proposals seem appealing in times of crisis, sound asylum policy requires patience. Summary exclusion would impose severe risk of deprivation on a visible but very small minority while leaving the majority of asylum claims unaddressed.¹⁶⁷ Before granting sole adjudicatory power to the INS, Congress must give the newly created asylum corps more time, money, and serious evaluation.

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164. *See supra* notes 35-39 and accompanying text.

165. 55 Fed. Reg. 30,674-75 (1990).

166. *Id.* at 30,675.

167. *See supra* Part IV.A.