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ASSESSING THE PROPOSED REFUGEE PROTECTION ACT: ONE STEP IN THE RIGHT DIRECTION

MICHELE R. PISTONE*

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) significantly changed United States law concerning asylum protection.¹ In particular, IIRIRA imposed, for the first time, a deadline for filing applications for asylum protection. In addition, the IIRIRA established expedited removal procedures, which authorize the removal of an arriving non-citizen from the United States without ever seeing a judge.

Some of the more controversial provisions of the 1996 legislation are being revisited by a bipartisan group of Senators, who recently introduced the Refugee Protection Act (RPA).² On the whole, the RPA is a welcome attempt to undo some of IIRIRA's most onerous, and most unwise, asylum provisions. Yet, as welcome as the RPA's changes are, the RPA itself could be improved in several ways.

This paper discusses the RPA, the appropriateness of its proposed changes to existing law, and how it can better meet its goal of helping to "ensure that those who arrive in the United States fleeing persecution have a fair and adequate opportunity to present claims for protection."³ Part I provides background information concerning current U.S. refugee and asylum law. Part II discusses the RPA's proposed changes to the deadline for filing for asylum implemented by IIRIRA and how the RPA proposal can be improved. Part III explains and critiques the proposed changes to the expedited removal process.

I. REFUGEE PROTECTION AND ASYLUM LAW

A. *Bases for U.S. Asylum Law*

Current U.S. asylum law derives from two international treaties—the 1951 Convention Relating to the Status of Refugees⁴ and the Convention's 1967 Protocol.⁵ The Convention and Protocol recognize States' obligation to provide protection to refugees, defined as individuals who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion," are outside the country of their nationality and are "unable or, owing to such fear,

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¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 3009-694.

² See S. 1940, 106th Cong. (1999). The purpose of the RPA is "to reduce the likelihood that a bona fide refugee will be returned to persecution in the refugee's home country of nationality . . . by the United States authorities because of expedited removal procedures or a lack of due process in the United States asylum system." *Id.* § 2(b).

³ *Id.* § 2(a)(5).

⁴ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

⁵ Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606; U.N.T.S. 267. The United States acceded to the Protocol in 1968. The Protocol provides that by ratifying it all signatory nations are also bound by Articles 2 through 34 of the Convention. *Id.* at 268 (art. 1(1)).

unwilling to avail" themselves of the protection of their home countries.⁶ *Nonrefoulement*, the duty not to return a refugee to a country in which his or her life will be threatened, is the treaties' most basic requirement.⁷

The United States ratified the Protocol in 1968, and the *nonrefoulement* obligations were implemented into U.S. law by the Refugee Act of 1980 ("Refugee Act").⁸ The Refugee Act authorizes the Attorney General to grant asylum to refugees present in the United States.⁹ In fiscal year 1999, the United States granted asylum to approximately 13,500 people.¹⁰

Though the number of asylum seekers granted protection each year is small, the range of persons and beliefs protected by the asylum program is broad. Among recent asylum applicants are Kurds from Iraq and Turkey who were persecuted because of their ethnicity; Christians from China and the Middle East who were prohibited by their governments from practicing their religions; Bosnian women who were threatened with rape and killing by Serbs because of their ethnicity; Somalis who fled their country because their families were being annihilated by rival clan members; journalists from countries such as Congo who escaped government-sanctioned persecution for criticizing their government's actions; Chinese families who protested forced abortion and sterilization; and Cubans who protested Castro's dictatorship.

B. *Asylum Procedures*

Generally, applications for asylum must be filed with the Immigration and Naturalization Service (INS) within one year of the applying individual's arrival in the United States.¹¹ (Two exceptions to this rule exist; they are discussed below in Part II). Refugees requesting asylum protection within the deadline—which did not exist prior to IIRIRA—can proceed through one of three adjudicatory procedures to obtain asylum protection in the United States depending upon whether they were

⁶ See Refugee Convention, *supra* note 4, at 152 (art. 1A(2)).

⁷ *Id.* at 176 (art. 33).

⁸ See Immigration and Nationality Act (INA) § 101, 8 U.S.C. § 1101 (Supp. II 1996).

⁹ See INA § 208(a), 8 U.S.C. § 1158(a) (Supp. II 1996). Individuals who are not present in the United States, such as those who are in a third country or a refugee camp, do not apply for protection under the asylum program. Instead, they can get protection through the overseas refugee program. See INA § 207(c), 8 U.S.C. § 1157(c) (Supp. II 1996). Each year the President, in consultation with Congress, sets a ceiling on the number of refugees the government will accept. In the event of an emergency, the ceiling can be increased. Each year the United States accepts only a small fraction of the number of refugees and asylum seekers worldwide. In 1998 there were approximately 13.5 million refugees worldwide. Under the Clinton administration, the number of refugees accepted by the United States declined 29 percent from 106,000 in fiscal year 1993 to 75,000 in fiscal year 1996. U.S. IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 80 (1997).

The Refugee Act also provides protection to refugees present in the United States in the form of withholding of removal. See INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (Supp. II 1996). A grant of withholding of removal differs from asylum in several significant ways. For example, a grant of withholding cannot result in permanent residency. In addition, withholding of removal is a mandatory form of relief and therefore, unlike asylum, it is not subject to the discretion of the immigration judge. Similarly, many of the bars to obtaining asylum protection, such as the one-year filing deadline discussed below, do not bar a grant of withholding of removal. Finally, the standards of proof for asylum and withholding of removal differ; withholding of removal is available when persecution is "more likely than not." *INS v. Stevic*, 467 U.S. 407 (1984).

¹⁰ See Immigration and Naturalization Service (INS), *Immigration and Naturalization Service, Asylum* (visited Mar. 24, 2000) <<http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrsep99/Asylum.htm>>.

¹¹ See *infra* notes 55-70 and accompanying text (discussing the one-year filing deadline).

apprehended by the INS before they applied for asylum, and, if so, where they were apprehended.¹²

So-called affirmative application procedures apply when the asylum applicant, after arriving in the United States, takes the initiative and applies for asylum prior to the INS initiating proceedings to remove the individual from the United States.¹³ In contrast, defensive procedures apply when the application for asylum is made only after the INS has begun proceedings to remove the individual from the United States.¹⁴ If the INS initiated removal proceedings after the refugee has entered the United States, with or without permission, the refugee can apply for asylum as a defense to removal.¹⁵ If, on the other hand, the refugee is apprehended at an airport or other port of entry after having arrived at the border without proper travel documents or with documents that INS inspections officers suspect were procured through fraud, the refugee is processed under expedited removal laws, which were enacted into law by IIRIRA.¹⁶

1. *Affirmative Asylum Claims*

Affirmative asylum claims are most common. Individuals who have entered into the United States, regardless of their immigration status, can affirmatively apply for asylum by submitting an asylum application to the INS.¹⁷ The application form is nine pages,¹⁸ but successful applications often contain a hundred or more pages of supporting documentation, including affidavits from the applicant and from the applicant's family, colleagues or friends, newspaper articles, statements by country experts, and reports from human rights organizations supporting the asylum claim.

When an affirmative application is made, the applicant's local INS asylum office¹⁹ schedules an interview for the asylum applicant with an asylum officer, typically within forty-five days of receiving the application.²⁰ Most INS asylum officers are not lawyers, yet they have been trained on asylum law and human rights conditions.²¹ During the interview, which is non-adversarial, an asylum officer questions the

¹² See *infra* notes 17-54 and accompanying text (discussing the asylum adjudicatory procedures).

¹³ See REGINA GERMAIN, A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 97-104 (1998) (describing affirmative application process).

¹⁴ See *id.* at 104-19 (describing procedure for filing a defensive application in response to INS's efforts to remove individual from the United States).

¹⁵ For purposes of this article, the term "removal" encompasses exclusion, deportation, and removal as such terms are used in the INA and its implementing regulations.

¹⁶ See *infra* notes 34-54 and accompanying text (discussing the expedited removal),

¹⁷ Their right to apply affirmatively for asylum ends if they are apprehended by the INS and put into removal proceedings.

¹⁸ See INS Application for Asylum and for Withholding of Removal Form I-589; see also 8 C.F.R. § 208.3 (1999) (stating asylum applicant must file a Form I-589 application).

¹⁹ 8 C.F.R. § 100.4(f) (1999) (listing each asylum office and its jurisdiction). The INS has eight asylum offices throughout the country. They are located in: Newark, New Jersey; New York, New York; Arlington, Virginia; Miami, Florida; Houston, Texas; Chicago, Illinois; Los Angeles, California; and San Francisco, California. See *id.*

²⁰ See INA § 208(d)(5), 8 U.S.C. 1158(d)(5) (Supp. III 1997) ("in the absence of exceptional circumstances, the initial interview or hearing . . . shall commence not later than 45 days after the date the application is filed"). The deadline for review of asylum cases was first implemented administratively as part of the INS's 1995 regulatory reforms and was later codified by IIRIRA. See INA § 208(d)(5), 8 U.S.C. 1158(d)(5) (Supp. III 1997). As a result of that change, asylum officers typically conduct interviews within 45 days of receiving the asylum application. Hearings before immigration judges are typically scheduled for no more than 60 days after the initial interview.

²¹ See 8 C.F.R. § 208.1(b) (1999) (requiring that asylum officers receive "information regarding the persecution of persons in other countries" and training in such things as "international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles"). INS regulations

applicant about his or her asylum claim.²² If the applicant does not speak English, he or she can bring an interpreter.²³ Counsel for the applicant also may be present at the interview but the counsel's role usually is limited to making a statement at the conclusion of the officer's direct questioning of the applicant.²⁴ At the conclusion of the interview, the applicant is typically requested to return to the asylum office on a certain date, usually within three weeks from the date of the interview, to pick up the decision in the case.²⁵

If the asylum officer grants asylum, the applicant is authorized to apply for an employment authorization document that authorizes the asylee to work legally in the United States.²⁶ One year after receiving asylum, the asylee may apply for permanent residency, and eventually U.S. citizenship.²⁷ After the applicant is granted asylum, he or she can also apply for asylum for a spouse and minor children, regardless of whether or not the relatives are physically present in the United States.²⁸

If the asylum officer does not grant asylum, when the applicant returns to the asylum office to receive the decision, he or she is required to acknowledge receipt of a notice to appear at proceedings before an immigration judge to remove the applicant from the United States.²⁹ These proceedings are referred to as "removal proceedings." Administrative law judges in the Executive Office of Immigration Review of the Department of Justice preside over these proceedings.³⁰ At removal proceedings, refugees can renew their application for asylum as a defense to removal, and the application is reviewed by the judge *de novo*. These defensive proceedings, before an immigration judge, are adversarial in nature, with trial attorneys from the INS's local district counsel's offices generally opposing the grant of asylum protection. At removal hearings, asylum applicants can be represented by counsel and can present and cross-examine witnesses.³¹

2. *Asylum as a Defense to Removal*

Individuals who have been apprehended by the INS before affirmatively applying for asylum, including asylum seekers who arrive at the border without proper travel documents, follow a procedure different from the affirmative application process. Such applicants are not entitled to an opportunity for an asylum officer to grant their claims for asylum. Rather, their asylum claims are adjudicated, if at all, by immigration judges at removal hearings.³² Like the hearings that affirmative asylum applicants are

also mandate that the INS Office of International Affairs, which oversees the asylum offices, maintain a "document center with information on human rights conditions." *Id.*

²² See 8 C.F.R. §208.9(b) (1999).

²³ See 8 C.F.R. §208.9(g) (1999). The interpreter must be at least 18 years old and fluent in both the applicant's native language and English. *Id.*

²⁴ See 8 C.F.R. §208.9(d) (1999). The asylum officer is authorized to limit the length of the representative's statement. *Id.*

²⁵ See 8 C.F.R. §208.9(d) (1999).

²⁶ See 8 C.F.R. §274a.12 (1999).

²⁷ See INA § 209(b)(2), 8 U.S.C. § 1159(b)(2) (1994). The INA limits the number of refugees who can adjust status to permanent residency in any fiscal year to 10,000. *Id.*

²⁸ See INA § 208(b)(3), 8 U.S.C. § 1158(b)(3) (Supp. III 1997); 8 C.F.R. § 208.19 (1999).

²⁹ See 8 C.F.R. § 208.9(d) (1999); 8 C.F.R. § 208.17 (1999).

³⁰ See INA § 240, 8 U.S.C. § 1229a (Supp. II 1996); 8 C.F.R. § 3.9 (1999).

³¹ See INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (Supp. II 1996).

³² See 8 C.F.R. § 208.2(b) (1999); 8 C.F.R. § 240.1(a) (1999). As explained in Section I.B.(3) below, asylum claims of individuals who are apprehended at the border are adjudicated by an immigration judge during a removal

referred to when the asylum officer does not grant their cases, at these hearings the immigrant has the right to testify and to present and cross-examine witnesses.³³

3. Expedited Removal

Under expedited removal procedures implemented in April 1997 pursuant to IIRIRA, refugees who arrive at the U.S. border without proper travel documents³⁴ or who carry documents that the airport or border inspectors suspect have been procured through fraud³⁵ have to overcome two independent procedural hurdles before they are even eligible to apply for asylum at a removal hearing before an immigration judge.³⁶ First, they must overcome potential removal by an INS inspections officer at an initial screening interview conducted during secondary inspections at the port of entry.³⁷ These interviews are conducted by INS officers whose primary focus is to enforce the immigration laws that prohibit unauthorized entry into the United States.³⁸ Pursuant to IIRIRA, most individuals who are interviewed under these expedited procedures are subject to immediate removal.³⁹ Refugees who may have claims for asylum protection, however, and identify themselves as such to the inspector, are not subject to immediate removal.⁴⁰ Those who the inspectors suspect to be asylum seekers must prove at a second interview—this time with an asylum officer—that they have a credible fear of persecution.⁴¹

The contrast with prior law is stark. Before April 1997, most people who came to the United States without valid entry documents were immediately and automatically placed into removal proceedings⁴² before an immigration judge.⁴³ The individual could raise a claim for asylum protection at the

hearing only if the individual passes two screening interviews that are conducted as part of the expedited removal process.

³³ See INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (Supp. II 1996). See *infra* notes 34-54 and accompanying text.

³⁴ See INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (1994).

³⁵ See INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (Supp. III 1997).

³⁶ Expedited removal may also be applied to an “alien who . . . has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility.” INA § 235(b)(1)(A)(iii)(II); 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (Supp. II 1996). The INS plans to expand its use of expedited removal to cover certain individuals who would be covered by this provision. See INS, *Advance Notice of Expansion of Expedited Removal to Certain Criminal Aliens Held in Federal, State and Local Jails*, No. 1998-99.

Natives or citizens from “a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry,” are exempt from the application of expedited removal. See INA § 235(b)(1)(F), 8 U.S.C. § 1225(b)(1)(F) (Supp. III 1997).

³⁷ See INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. II 1996).

³⁸ See Cornelius D. Scully, *Reorganizing the Administration of the Immigration Laws: Recommendations and Historical Context*, 75 INTERPRETER RELEASES 937, 939 (1998) (noting that the INS’s “adjudications function has always tended to be subordinate to its enforcement function”). Scully notes that border patrol officers, considered enforcement personnel, and others at the INS have recognized that “specializing in enforcement has been the way to the top at the INS.” *Id.* at 941.

³⁹ See INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. II 1996).

⁴⁰ See *id.*

⁴¹ See INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (Supp. II 1996).

⁴² At the time they were referred to as “deportation proceedings,” but were identical to today’s removal proceedings in all material respects.

⁴³ Cf. 59 Fed Reg. 62,284, 62,284 (1994). On December 5, 1994, the INS issued a set of rules and procedures for adjudication of applications for asylum proposing regulatory changes to permit asylum officers to grant meritorious

immigration court hearing as a defense to removal. Since April 1997, however, a single immigration officer can remove non-citizens who arrive at the border in the same situation from the United States, pursuant to the expedited removal laws, within hours of their arrival.⁴⁴ The removal decisions are made by low-level INS enforcement personnel with no intervention by judges and no opportunity to consult a lawyer.⁴⁵

Thus, to avoid immediate removal an asylum seeker must first prove to an inspections officer that he or she fears return to his or her home country or wants to apply for asylum protection.⁴⁶ Those who express fear or want to apply for asylum must then prove to the asylum officer that they have a "credible fear of persecution"—the second hurdle before gaining the right to apply for asylum at a removal hearing before an immigration judge.⁴⁷ IIRIRA provides that "credible fear of persecution" means "that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."⁴⁸ If the asylum officer determines, as a result of the credible fear interview, that the asylum applicant does not have a credible fear of persecution, the applicant must affirmatively request a review of the finding by an immigration judge or be subject to immediate removal.⁴⁹ The immigration judge's review is extremely limited in this procedural setting.⁵⁰ It must be concluded "to the maximum extent practicable within twenty-four hours" but no later than seven days after the credible fear determination and need not even be conducted in person; it can be conducted through a telephone or video connection.⁵¹ Asylum seekers cannot be represented by legal counsel at the immigration judge review (although counsel

applications and to defer remaining applications to an immigration judge. *See id.*; *see also* STEVEN C. BELL & AUSTIN T. FRAGOMEN, JR., IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 6-38 (4th ed. 1999).

⁴⁴ *See* INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. II 1996). Asylum seekers are often compelled to come to the United States without travel documents or with documents that were procured through fraud. In many cases their governments, which would normally grant them such documents, may also be their persecutors. It is unrealistic to expect these individuals to ask their government for travel documents so that they can flee the country or to require them to show their own passports to their persecutor upon fleeing. Simply having such documents with them could put their lives in danger. In addition, many asylum seekers are fleeing imminent harm. Consequently, they do not have the time to obtain travel documents before they flee.

⁴⁵ *See* INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (Supp. II 1996); 8 C.F.R. § 235.3(b)(5) (1999).

⁴⁶ *See* INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A) (Supp. II 1996). If the aliens do not indicate fear because, for example, they are afraid of telling a uniformed U.S. government official about their experiences back home, they are subject to being returned immediately to their country of nationality and barred from reentering the United States for five years, without any further hearing or judicial review. *See id.*

⁴⁷ *See* INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) (Supp. II 1996).

⁴⁸ INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (Supp. II 1996). By contrast, to establish eligibility for asylum, an alien must prove a well-founded fear of persecution on one of the grounds enumerated in the Act. *See* INA § 208. In interpreting the well-founded fear standard, the Supreme Court said that "there is simply no room within the United Nations' definition [of 'well-founded fear'] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 440 (1987).

⁴⁹ *See* INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (Supp. II 1996). Applicants may be represented during the credible fear interview. *See* 8 C.F.R. § 208.30 (1999); INS, Office of International Affairs, Asylum Division, *INS Mem.: Role of Consultants in the Credible Fear Interview* (Nov. 14, 1997). Interpretation is typically provided through telephonic hook-up with interpreter services, such as AT&T and LLE-Link. *See* INS, Office of International Affairs, Asylum Division, *Interpreters in the Credible Fear Process*, (Feb. 10, 1998).

⁵⁰ *See* INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (Supp. II 1996).

⁵¹ *Id.*

may be present), may not present evidence, and may not call witnesses.⁵² Moreover, almost no additional review of these truncated proceedings is permitted.⁵³ If, on the other hand, the asylum officer (or the immigration judge) believes that the refugee does have a credible fear of persecution, the refugee will then be permitted to present a proper claim for asylum to an immigration judge at a contested removal hearing.⁵⁴

II. THE RPA'S PROPOSED CHANGES TO THE ONE-YEAR FILING DEADLINE FOR ASYLUM APPLICATIONS

As mentioned above, under existing law a refugee unable to prove that his or her application was filed within one year of the individual's last entry into the United States is prohibited from obtaining asylum protection.⁵⁵ Those who do not apply within one year are barred from obtaining asylum protection without regard to the merits of their claims.⁵⁶ There are two current exceptions to this rule. Applications that are filed more than one year after the person's last entry may be considered if the individual can prove either: (1) "changed circumstances which materially affect the applicant's eligibility for asylum;" or (2) "extraordinary circumstances relating to the delay in filing."⁵⁷ "Changed circumstances" refer to circumstances materially affecting the applicant's eligibility for asylum.⁵⁸ By regulation, they may include changes in conditions in the applicant's home country, or changes in "objective circumstances relating to the applicant in the United States, including changes in applicable U.S. law, that created a

⁵² See Memorandum 97-3 from the Office of the Chief Immigration on Interim Operating Policy and Procedures for Credible Fear and Claimed Status Reviews 8 n.10 (1997) (available at <<http://www.usdoj.gov/eoir/efoia/ocij/oppm97/97-3.pdf>>) [hereinafter Memorandum 97-3].

⁵³ In most cases, Article III courts are barred from reviewing the individual determinations of asylum officers or of the immigration judges who review their credible fear determinations. In addition, IIRIRA expressly prohibits courts from granting any injunction, declaratory or other equitable relief, or from certifying a class for a class action lawsuit. See INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A) (Supp. II 1996); INA § 242(e), 8 U.S.C. § 1252(e) (Supp. II 1996). Judicial review is limited to only three issues: whether the petitioner is an alien; whether the petitioner was ordered removed pursuant to the summary removal procedures; and whether the petitioner can prove by a preponderance of the evidence that he or she has become a lawful permanent resident, has been admitted as a refugee, or has been granted asylum. See INA § 242(e)(2), 8 U.S.C. § 1252(e)(2) (Supp. II 1996).

Statutory limitations were also imposed on actions concerning the implementation of the expedited removal procedures. The statute specifically required that such cases be filed only in the United States District Court for the District of Columbia within 60 days of the first implementation of the disputed regulation, policy or guideline. Review was limited to whether the section of IIRIRA or the implementing regulation was constitutional or whether a regulation, or a written policy, guideline or procedure to implement IIRIRA violated the law. Two cases challenging the application of IIRIRA were filed within the statutory deadline. See *AILA v. Reno I*, 18 F. Supp. 2d 38, 41 (D.D.C. 1998) (challenging the application of IIRIRA and implementing regulations to asylum seekers); *AILA v. Reno II*, 199 F.3d 1352, 1356 (D.C. Cir. 2000) (challenging the application of the new provisions to legal permanent residents and U.S. citizens). The D.C. Circuit dismissed both cases. See *Reno I*, 18 F. Supp. 2d at 62; *Reno II*, 199 F.3d at 1364.

⁵⁴ See INA § 240, 8 U.S.C. § 1229a (Supp. II 1996).

⁵⁵ See INA § 208(a), 8 U.S.C. § 1158(a) (Supp. II 1996).

⁵⁶ See *id.* The one-year filing deadline does not apply to applications for withholding of removal. See *id.* (stating that asylum applicants must file for protection within one year after their arrival in the United States). But see INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (Supp. II 1996) (outlining the bars to withholding of removal).

⁵⁷ INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) (Supp. II 1996).

⁵⁸ See 8 C.F.R. § 208(a)(4) (1999).

reasonable possibility that the applicant may qualify for asylum.”⁵⁹ INS regulations define “extraordinary circumstances” to include: serious illness or mental or physical disability during the one year period after arrival; legal disability; a very limited form of ineffective assistance of counsel based on a specific agreement with the lawyer; the maintenance of Temporary Protected Status until a reasonable period of time before filing the asylum application; and a submission of the application to the INS before the deadline expired that was rejected by the INS as not properly filed and returned to the applicant.⁶⁰

The RPA proposes to change existing asylum law by adding a third exception to the one-year deadline, which would allow applicants to avoid that deadline through a showing of “good cause.”⁶¹ On a very general level, this is a welcome change. There are numerous circumstances—including some noted below—which would seem to require relaxation of the deadline as a matter of elementary justice, and yet which might not fall within the “changed” or “extraordinary” circumstances exceptions.

The vagueness of the proposed exception, however—the meaning of “good cause” is not elaborated upon in any way—is certainly less than ideal. Indeed, it creates a potentially large and unnecessary obstacle to attaining the primary legislative objective, i.e., to ensure as much as possible that asylum claims are decided on the merits, while at the same time limiting “gaming” of the asylum system by persons lacking substantial claims who might file for asylum solely to prolong an otherwise unauthorized stay in the United States.⁶² A potential obstacle to this end is created because the vagueness of the proposed legislative language essentially leaves the content of the new exception—and hence its effectiveness—to the vagaries of the administrative rulemaking process. And this obstacle is largely unnecessary because, while “good cause” could never be defined with universal specificity, certain events or circumstances amounting to “good cause” do arise with predicable regularity. Such circumstances should be specifically noted in the RPA.

For example, many victims of persecution fear that their home countries' government will learn about their efforts to seek asylum protection in the United States and retaliate against the family, friends, and/or colleagues they left behind. Other asylum seekers may fear that a repressive government will use the fact that an individual applied for or received asylum protection as a means of discrediting the applicant and the activities that led to his or her persecution in the home country. For instance, if a political activist decided to seek political asylum, the mere fact that he applied for political asylum could be used to discredit him among his followers, colleagues, and fellow citizens back home. A well-founded showing of either of these fears should be specifically noted as satisfying the “good cause” exception.

In addition, inability on the part of the asylum seeker after reasonable efforts to find a legal representative similarly should satisfy the standard. The obstacles asylum seekers must overcome to obtain legal representation can hardly be overestimated. Indeed, any one of the following circumstances makes the likelihood of obtaining representation dubious: lack of money, lack of English skills, and lack of understanding the legal system— asylum seekers often suffer from all three shortcomings. Moreover,

⁵⁹ 8 C.F.R. § 208(a)(4) (1999).

⁶⁰ *See* 8 C.F.R. § 208(a)(5) (1999).

⁶¹ S. 1940, 106th Cong. § 4(a) (1999).

⁶² *See* 142 CONG. REC. S4462 [or 9767] (daily ed. May 1, 1996) (statement of Senator Simpson) (summarizing the rationale for the proposed change to asylum law: “The present system is vulnerable to . . . persons who exploit the numerous levels of administrative and judicial review to stay in this country for years even though they have . . . enter[ed] this country with fraudulent documents and . . . have no grounds for being in the United States of America except the possibility of asylum”); *see generally* PHILIP G. SCHRAG, A WELL-FOUNDED FEAR, THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 42-49 (2000). Removal, or deportation, from the United States cannot take place during the pendency of proceeding to adjudicate an asylum application.

asylum seekers additionally often suffer from post-traumatic stress disorder,⁶³ which, even if it does not altogether prevent obtaining counsel, may delay it enough to make a timely filing impossible.⁶⁴

Nor can the need to obtain legal representation be overestimated.⁶⁵ Without the help of an attorney or other legal representative, asylum cases are difficult to prove.⁶⁶ In addition to completing the form

⁶³ AM. PSYCHIATRIC ASS'N, DIAGNOSIS & STAT. MANUAL OF MENTAL DISORDERS 426 (4th ed. 1994) [hereinafter AM. PSYCHIATRIC ASS'N]. The American Psychiatric Association's Diagnosis and Statistical Manual of Mental Disorders, used widely to diagnose mental health disorders, explains that: "[i]ndividuals who have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of Posttraumatic Stress Disorder. Such individuals may be especially reluctant to divulge experiences of torture and trauma . . ." *Id.* Those suffering from post-traumatic stress disorder typically "avoid thoughts, feelings, or conversations associated with the trauma"; "avoid activities, places, or people that arouse recollections of the trauma"; and are often unable "to recall an important aspect of the trauma." *Id.*; see also Richard F. Mollica et al., *Psychological Impact of Trauma and Torture*, 144 AM. J. PSYCHIATRY 1567, 1571 (1987) (study revealing that "highly traumatized and tortured patients may have difficulty articulating their trauma-related symptoms."). See also *United States Policy Toward Victims of Torture: Hearing Before the Senate Subcomm. on Int'l Operations and Human Rights*, June 29, 1999 (statement by Lavinia Limon, Director of the Office of Refugee Resettlement, Dept. of Health and Human Serv.) (stating that torture victims "retain the impact of their torture; they are not able to speak about their experiences . . . they often cannot express themselves effectively in asylum interviews . . . [t]hey have learned to fear government and the police and they do not trust any government officials and authorities to help them").

⁶⁴ Torture victims, commonly thought of as the most deserving asylum applicants, often experience great difficulty relating the details of their persecution to their counsel (or to U.S. authorities) until they have recovered from the trauma. Recovery can take months or even years. Many victims of human rights abuses suffer from severe memory loss, depression, unresponsiveness, mistrust, flashbacks, and physiological symptoms when recalling the traumatic event. See AM. PSYCHIATRIC ASS'N, *supra* note 62, § 309.81. The symptoms are often so overwhelming that they cloud the victim's ability to seek asylum protection, primarily because he or she needs to suppress memories of the episodes in order to recover from the trauma. See *Letter from Allen S. Keller, MD., Assistant Professor of Clinical Medicine, NYU Medical Center, to Physicians for Human Rights, Defending the Right to Asylum: Opposition to 30-day Time Limit for Asylum Seekers in the United States* 3 (Dec. 18, 1995) (on file with author).

⁶⁵ The INS grants asylum to only 20 percent of affirmative asylum applicants, most of whom are unrepresented, and an even smaller percentage of litigated claims are granted by immigration courts. Indeed, less than 12 percent of the asylum cases adjudicated by immigration judges during the first three-quarters of fiscal year 1998 were granted. See Telephone Interview with Susan Eastwood, Executive Office of Immigration Review, Public Affairs Office (Aug. 14, 1998) (providing Asylum Statistics for the period from October 1, 1997 to June 1, 1998). However, the approval rates of the subgroup of represented asylum seekers far exceed these figures. For example, at the Center for Applied Legal Studies, a live-client clinic at Georgetown University Law Center that represents asylum seekers in removal proceedings, the approval rate is approximately 80 percent. The approval rate for asylum cases represented through the Lawyers Committee for Human Rights, which works with law firms in New York and Washington, D.C. to provide legal representation to asylum seekers, is similar. These figures clearly suggest that the low overall approval rates are attributable, at least in substantial part, to the fact that most asylum seekers are unrepresented, and consequently may wrongfully be denied protection because they are unable adequately to prepare their claims.

⁶⁶ In asylum cases the burdens of proof and persuasion rest on the applicant. See 8 C.F.R. § 208.13(a) (1999); *Matter of M-D*, Int. Dec. No. 3339 (BIA 1998); *Matter of Y-B*, Int. Dec. No. 3337 (BIA 1998); *Matter of S-M-J*, Int. Dec. No. 3303, (BIA 1997); see also Larry Katzman, *Increased Corroboration Requirements of Asylum Cases*, 3 BENDER'S IMMIGR. BULL. 837 (1998); Thomas Ragland, *Presumed Incredible: A View from the Dissent*, 75 INTERPRETER RELEASES 1541 (1998). Determinations as to whether or not an individual has met her burdens, and thus warrants asylum protection, are fact specific and made on a case-by-case basis, with much attention given to the documentation submitted in support of the claims. Courts expect that "general background information about a country, where available, [will] be included in the record as a foundation for the applicant's claim." *Matter of S-M-J*, Int. Dec. No. 3303, at *6 (BIA 1997). The burden falls on asylum applicants to produce such "supporting

application thoroughly, successful applications often require a hundred or more pages of supporting documentation, such as affidavits from the applicant⁶⁷ and from the applicant's family, colleagues or friends, newspaper articles, statements by country experts, and reports from human rights organizations. Unlike most other legal briefs or applications, much of the supporting documentation for an asylum application is not readily available in the United States and therefore may need to be obtained from sources in the applicant's home country, which itself often takes months. In sum, to impose the one-year deadline without recognizing asylum seekers' need for representation and the scarcity of available counsel renders the asylum benefit more illusory than real for many applicants.

Other circumstances amounting to "good cause" also might be noted in the statute.⁶⁸ In all events, incorporating these circumstances into the RPA should not prove difficult. Instead of the current language stating "[a]n application for asylum of an alien may be considered [notwithstanding the deadline] if the alien demonstrates, by a preponderance of the evidence, good cause for filing after the expiration of the [filing] period,"⁶⁹ the RPA could state, for example, that "[a]n application for asylum of an alien may be considered [notwithstanding the deadline] if the alien demonstrates, by a preponderance of the evidence, a fear of retaliation against other persons by the home government because of the alien's filing of an application for asylum; a fear of a discrediting or attempted discrediting by the home government of the applicant's human rights activities because of the alien's filing of an application for asylum; an inability, after reasonable efforts, to have timely obtained a legal representative; or other good cause for filing after the expiration of the [filing] period."

While these changes would improve the RPA, it is worth noting that probably the best change, most in accord with the deadline's rationale, would be to apply the deadline only to applications filed in the first instance as a defense to removal. Such a limited provision actually passed in the Senate as part of IIRIRA, but was deleted by the conference committee. The version of the deadline provision that was voted on by the Senate provided that: "[a]n application for asylum filed for the first time during a [removal] proceeding shall not be considered if the proceeding was commenced more than one year after the alien's entry or admission into the United States."⁷⁰ By applying the deadline to defensive asylum cases only, the Senate version would have targeted the subset of asylum applicants who are most likely to be abusing the process—those who apply for asylum within the context of a removal proceeding. Affirmative asylum seekers would have been exempt from application of the deadline. Under current law, affirmative applicants who are in the United States illegally for more than one year now have no incentives to come forward and identify themselves to the U.S. government. By giving them an ability to apply for asylum, my proposal would encourage them to come out from "underground." The INS would then know about them and could order deported those not eligible for asylum protection.

evidence, both of general country conditions and of specific facts sought to be relied on by the applicant." *Id.* Failure to provide such supporting evidence is seen as a failure to establish the burden of proof: "[e]ven if an alien is found to be credible, if there is no context within which to evaluate her claim, she has failed to meet her burden of proof because she has not provided sufficient evidence of the foundation of her claim." *Id.* at *23.

⁶⁷ Applicant affidavits take substantial time to prepare, particularly if the client does not speak fluent English. For instance, if the client's native language is not widely spoken it is difficult to find interpreters. When an interpreter is finally located, it often requires numerous meetings before the attorney can gather sufficient information for the affidavit.

⁶⁸ Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 276-78 (1997) (providing other circumstances that should satisfy an exception to the standard).

⁶⁹ Refugee Protection Act of 1999, S. 1940, 106th Cong. § 4(a).

⁷⁰ S. Rep. No. 104-249, at 99 (1996). This general rule would have become inapplicable upon a showing of "good cause." *Id.*

Perhaps the bill's sponsors left this provision out this time as a bow to political reality. But the fact remains that "gaming" is most likely in defensive claims and a universal application of the deadline is much more likely to deny bona fide asylum applicants much needed protection. If the political climate changes, Congress ideally will return to the timeliness provision deleted from the Senate's 1996 version of the deadline.

III. THE RPA'S PROPOSED CHANGES TO THE EXPEDITED REMOVAL PROCESS

The provisions of the RPA related to the expedited removal process are more extensive and more varied than the provisions related to the filing deadline. Nonetheless, the changes proposed by the RPA fall far short of what has been called for by many organizations (most notably the Advisory Committee to the Secretary of State and the President on Religious Freedom Abroad): the complete repeal of expedited removal.⁷¹ The RPA would instead introduce numerous safeguards into the expedited removal process that would, according to its sponsors, "prevent the return of bona fide refugees who are too frightened or confused to articulate a claim of 'credible fear.'"⁷² These safeguards would (1) limit the use of expedited removal, and (2) add certain due process protections to the expedited removal process. Other provisions would lessen the likelihood of detention for asylum seekers who have been found by an asylum officer to have a "credible fear of persecution."

On the whole, these provisions—all of which are discussed below—would bring a welcome change to the current law. Section III(A) will discuss the RPA's limiting of the use of the expedited removal process. Section III(B) will discuss the RPA's adding of procedural protections within that process. Finally, Section III(C) will discuss the provision liberalizing detention policies for persons who have been through the process.

A. *The RPA's Proposed Limitations on the Use of Expedited Removal*

As currently drafted, the RPA would limit the use of expedited removal in several significant ways. First, it would limit the INS's authority to use expedited removal to situations that the Attorney General designates as "extraordinary migration situations." Second, it would limit the application of expedited removal to those non-citizens who arrive at the border either with no travel documents or with facially invalid documents. Finally, the RPA would make the definition of a "credible fear of persecution" less restrictive, so that more persons could meet the standard and thereby avoid expedited removal. Each of these proposed changes is discussed below.

1. *The RPA Limits Use of Expedited Removal to Extraordinary Migration Situations*

Under the RPA, expedited removal would no longer apply universally at all ports of entry all the time. Instead, INS could invoke expedited removal procedures only in the event of an extraordinary migration situation.⁷³ An "extraordinary migration situation" would exist in the face of "the arrival or

⁷¹ See BUREAU FOR DEMOCRACY, HUMAN RIGHTS, AND LABOR, DEPARTMENT OF STATE, *Final Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States* (May 17, 1999).

⁷² Refugee Protection Act of 1999, S. 1940, 106th Cong. § 2(b).

⁷³ See *Id.* § 3(a)(2)(A)(i).

imminent arrival in the United States or its territorial waters of aliens who by their numbers or circumstances substantially exceed the capacity for inspection and examination of such aliens.”⁷⁴

Authority to declare an extraordinary migration situation would rest in the “sole and exclusive discretion of the Attorney General.”⁷⁵ However, expedited removal procedures could not be applied to individuals who have fled countries that have been determined by the Attorney General, in consultation with the Department of State, to engage in serious human rights violations.⁷⁶ For example, citizens of countries in which the government engages in torture, prolonged arbitrary detention without charges or trials, abduction or forced disappearance or systematic persecution, or where an ongoing armed conflict would pose a serious threat to safety, would be exempt from expedited removal procedures.⁷⁷ One of the RPA’s sponsors noted that this exception “will help ensure that even during an immigration emergency, we will provide added protection for many of our most vulnerable refugees.”⁷⁸ Unaccompanied minors would also be exempt from expedited removal.⁷⁹

An extraordinary migration situation declaration would be valid for ninety days, during which time the INS would be authorized to use expedited removal procedures.⁸⁰ The Attorney General could extend the declaration for additional ninety-day periods after consultation with the Senate and House Judiciary Committees.⁸¹

By limiting the Attorney General’s authority to use expedited removal, the RPA’s sponsors intend to “limit the use of expedited removal to times of immigration emergencies.”⁸² As Senator Leahy explained when he introduced the bill, the RPA’s “framework allows the government to take extraordinary steps when a true immigration emergency threatens our ability to patrol our borders. At the same time, the RPA recognizes that expedited removal is an extraordinary step, and is not an appropriate measure under ordinary circumstances.”⁸³

The notion of limiting expedited removal to emergencies closely mirrors proposals by the Commission on Immigration Reform. In its 1997 Refugee Policy Report to Congress, the Commission on

⁷⁴ *Id.* § 3(a)(2)(A)(ii).

⁷⁵ *Id.* § 3(a)(2)(A)(iii).

⁷⁶ *See id.* § 3(c). For purposes of this article, this exception is referred to as the “poor human rights record exception.”

⁷⁷ *See id.* Other factors that would be considered include whether the country engages in cruel, inhuman, or degrading treatment or punishment or clandestine detention. *Id.*

⁷⁸ 145 CONG. REC. S14702 (daily ed. Nov. 17, 1999) (statement of Sen. Leahy).

⁷⁹ *See id.* § 3(c) (1999). Unaccompanied minors are exempt under current policy pursuant to an INS internal memorandum. *See* INS Office of Programs, *INS Memorandum: Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997).

In addition, the so-called “Cuban airplane traveler” exemption for citizens from “a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry,” which was enacted by IIRIRA, would remain in effect under RPA. S. 1940, 106th Cong. § 3(c) (1999).

⁸⁰ *See* S. 1940, 106th Cong. § 3(a)(2)(A)(iv) (1999).

⁸¹ *See id.*

⁸² 145 CONG. REC. S14702 (daily ed. Nov. 17, 1999)(statement of Sen. Leahy). The Commission on Immigration Reform recommended in 1997 that Congress limit expedited removal to “exceptional circumstances.” *See* COMMISSION ON IMMIGRATION REFORM, 1997 REFUGEE POLICY REPORT TO CONGRESS, U.S. REFUGEE POLICY: TAKING LEADERSHIP 29 (1997). [hereinafter Commission on Immigration Reform].

The Commission on Immigration Reform was “mandated by the Immigration Act of 1990 [Public Law 101-649] to examine and make recommendations regarding the implementation and impact of U.S. immigration policy.” *Id.* (providing cover letter).

⁸³ CONG. REC. S14702 (daily ed. Nov. 17, 1999)(statement of Sen. Leahy).

Immigration Reform expressed reservations about the expedited removal provisions and the adverse impact the procedures have on bona fide asylum seekers. It suggested, however, that “expedited procedures may be needed in exceptional circumstances.”⁸⁴ In particular, “[i]f the number of asylum applications increases significantly within a short period, the Attorney General could be given stand-by authority to institute ‘credible fear’ determinations to sort legitimate asylum applications from those that are manifestly unfounded.”⁸⁵

The sponsors of the RPA clearly anticipate using expedited removal only in the event of influxes of large groups of people, such as the mass influxes of Cubans and Haitians in the 1980s and early 1990s.⁸⁶ Historically, those mass influxes have overwhelmed INS inspections and examination processes.⁸⁷ However, while the “extraordinary migration” language of the RPA is clearly intended to reduce the scope of expedited removal, as currently drafted the proposed statutory language is fraught with ambiguity. This ambiguity, coupled with the broad discretion afforded the Attorney General in declaring an extraordinary migration situation, could permit results that plainly undermine the drafters’ intent.

⁸⁴ Commission of Immigration Reform, *supra* note 82, at 28.

⁸⁵ *Id.* at 29.

⁸⁶ In such instances, the declaration may be limited by the poor human rights record exception.

⁸⁷ The United States has been grappling with the issue of how to handle mass influxes from the Caribbean since the 1980s. In the spring of 1980, President Carter announced that refugees from Cuba could apply for asylum in the United States, pursuant to the newly-enacted Refugee Act of 1980. *See United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir. 1983). Responding to this news, Fidel Castro announced that anyone who wanted to leave Cuba could do so through the Mariel harbor, leading to the Mariel boatlift or “Freedom Flotilla.” Over the course of a few months, approximately 114,000 Cuban refugees crossed 90 miles of ocean on nearly 1,800 boats to seek a safe haven in the United States. *See id.* at 1389. In response to the boatlift, the U.S. government instituted a detention policy under which undocumented individuals who arrived at U.S. shores were detained. *See Michele R. Pistone, Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 225-28 (1999) [hereinafter Pistone, *Justice Delayed*]. The hope was that, if prospective refugees knew that they could be detained if they came to the United States without documentation, they would decide not to make the trip, thereby relieving the inspections and examinations functions. *See id.*

In addition to the detention policy for those who successfully arrived at our shores, the Coast Guard was also authorized to interdict and return to their home countries migrants seeking to travel to the United States by sea. *See Exec. Order No. 12,324*, 46 Fed. Reg. 48,109 (1981). Without expedited removal authority, all undocumented immigrants who arrived at U.S. shores at the time were entitled to a hearing before an immigration judge to determine their admissibility. But if they did not enter U.S. territory, they were not so entitled. The INS used a version of expedited removal to review the refugees’ claims: “the migrants were individually interviewed by INS agents while onboard the cutter [outside of U.S. waters] to determine if any had potentially valid claims to refugee status. . . . While their status was being decided [which often took days] the cutter remained at sea and out of sight of land.” Captain Gary Palmer, *Guarding the Coast: Alien Migrant Interdiction Operations At Sea*, 29 CONN. L. REV. 1565, 1573 (1997) [hereinafter Palmer]. By keeping them at sea, the interdicted refugees who did not assert a refugee claim could be returned to their home countries without a hearing. Thereby, “comprehensive and burdensome hearing entitlements” would not be implicated. *Id.* at 1585. According to Captain Gary Palmer of the U.S. Coast Guard, “[t]his would enable the cutters to perform their primary mission in their area of responsibility for longer periods of time, rather than merely acting as an inadequate holding facility with migrants on board for extended periods awaiting disposition.” *Id.* But, despite the detention policy and interdiction efforts, mass groups of refugees from Cuba and Haiti have, over the years, continued to head toward U.S. shores and often overwhelm the INS’s inspections and examinations processes. *See CNN World News, U.S. Coast Guard removes Haitians from boat stopped near Miami*, (visited Mar. 19, 2000) <<http://www.cnn.com/2000/US/01/01/haitians.intercepted.03/index.html>>; *Cuban/Caribbean: Immigration, Remittances*, 5 MIGRATION NEWS 1 (Jan. 1998) <http://migration.ucdavis.edu/MN-Archive/jan_1998-08.html>.

The ambiguity arises in large part from the definition of the term “extraordinary migration situation,” which would occur under the RPA upon “the arrival or imminent arrival in the United States or its territorial waters of aliens who by their numbers or circumstances substantially exceed the capacity for inspection and examination of such aliens.”⁸⁸ This definition is sufficiently broad to allow the Attorney General to declare extraordinary migration situations with respect to situations that the sponsor’s would likely find outside of the bill’s intended scope. For example, the southern border conceivably could fall within this definition right now. Missing from the RPA is language that would limit a declaration of an “extraordinary migration situation” to circumstances under which there has been a substantial and rapid increase or anticipated increase in the number of arriving aliens.

The absence of such language is particularly likely to be keenly felt given that the INS has strong incentives to maintain expedited removal. First, the INS is evaluated in large part by its yearly removals and related enforcement efforts.⁸⁹ Through expedited removals, the INS has experienced significant increases in the number of people that it “removes” from the United States each year. In 1995, before expedited removal was implemented, the INS formally removed approximately 50,000 individuals from the United States.⁹⁰ In 1998, however, close to 170,000 individuals were removed, more than 75,000 of whom were removed through the expedited removal process.⁹¹ Indeed, in recent months the INS has moved toward further expanding its use of expedited removal in the southern border states.⁹² Second, for an agency like the INS, which constantly asserts a lack of sufficient funding, a declaration of an emergency need, to maintain expedited removal, may be an attractive way for it to appeal and garner support for additional funding.

In sum, the RPA appears not to contemplate—but may well countenance—efforts by the Attorney General broadly to apply expedited removal.⁹³ Attorney General discretion to declare an emergency

⁸⁸ S. 1940, 106th Cong. § 3(a)(2)(A)(ii) (1999).

⁸⁹ See Anthony Lewis, *This Can't Possibly Be Free America*, N.Y. TIMES, Sept. 21, 1999, at A29.

⁹⁰ See 1996 INS STATISTICAL YEARBOOK 173 (1997). This statistic includes both exclusions and deportations. In 1994, approximately 45,000 individuals were removed. *See id.*

⁹¹ See Immigration and Naturalization Service, *Immigration and Naturalization Service, Removals* (visited Mar. 24, 2000) <<http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrfy98/Removal.htm>>. Much of the increase may not reflect an increase in the number of people who were made to leave the country in absolute terms. Before expedited removal was implemented, INS statistics included “detailed statistics on exclusions only for those aliens who are denied entry after a formal exclusion hearing before an immigration judge.” However, the INS recognizes that pre-expedited removal, “the overwhelming number of aliens who [were] found by INS inspectors to be excludable [were] allowed to withdraw their applications for admission and depart almost immediately.” 1996 INS STATISTICAL YEARBOOK 169 (1997). Thus, pre-expedited removal removes the individuals who were made to leave the country through withdrawals of their applications for admission were not reflected in INS statistics. Now, many of them are, in the form of expedited removals. While the absolute increase in “removals” may represent a shell game, it is real to the INS because they are judged in large part based on the number of removals they effectuate in any given year.

⁹² See Advance Notice of Expansion of Expedited Removal to Certain Criminal Aliens Held in Federal, State, and Local Jails, INS No. 1998-99, RIN 115-AF50 (Sept. 20, 1999); *see also* Immigration and Naturalization Service, *INS News Release, Pilot Of Expedited Removal Procedures at Three Institutional Removal Program Sites* (Sept. 20, 1999) (describing plans to apply expedited removal to people who have been physically present in the United States for less than two years, were never officially admitted or paroled into the United States, and are serving criminal sentences in certain detention facilities located in remote parts of Texas).

⁹³ Indeed, the RPA would not even plainly prohibit the Attorney General from taking a more expansive view and extending the same logic to the entire border (including airports) by declaring that the border as a whole constitutes an extraordinary migration situation, leaving the INS with insufficient resources properly to inspect and examine the

migration situation under the bill would be absolute. While the bill does provide that renewals of a declaration after the ninety day effective period can be made only after consultation with the Judiciary Committees of the House and Senate, the consultation requirement places little restraint on the Attorney General. Indeed, the law is clear that Congress does not have any authority to veto an executive action except through legislation.⁹⁴ Thus, the only recourse that Congress would have in the event that it disagrees with a declaration under the RPA would be to amend the law. To make the event of disagreement—which the RPA’s current language invites—less likely, the RPA’s definition of “extraordinary migration situation” should be narrowed to encompass only situations in which there has been a substantial and rapid increase or anticipated increase in the number of arriving aliens.

2. *The RPA Limits Application of Expedited Removal to Those with No Documents or Facially Invalid Documents*

In addition to restricting expedited removal’s use to extraordinary migration situations, the RPA also would limit expedited removal to a subset of inadmissible individuals. Under current law, expedited removal is applied to any “arriving aliens” who INS airport or border inspectors suspect are inadmissible under INA § 212(a)(6)(C), because they procured a visa or other travel document by using fraud or by willfully misrepresenting a material fact, or under INA § 212(a)(7), because they do not have a valid passport, visa, or other document entitling them to entry into the United States.⁹⁵ Under the current standard, inspectors are afforded much leeway in determining whether someone fits within the scope of these provisions.⁹⁶ Thus, inspectors may conclude that even though an individual has a valid entry document, he or she nevertheless is inadmissible because in the inspector’s judgment the document was procured through fraud or misrepresentation.⁹⁷ In essence, this standard gives border and airport inspectors the capacity to second-guess the U.S. government officials who issued the travel authorization document in the first place.

INS border inspectors use this standard to bar ordinary business travelers and tourists with facially valid visas from entering the country.⁹⁸ For example, if an immigration officer suspects that the immigrant

approximately 300 million foreigners who apply for admission to the United States each year at a port of entry. *See* Immigration and Naturalization Service, *Fact Sheet, INS 1998 Update on Expedited Removals* (June 21, 1999).

⁹⁴ *See* *INS v. Chadha*, 462 U.S. 919, 922 (1983) (“Congress must abide by its delegation of authority to the Attorney General until that delegation is legislatively altered or revoked.”).

⁹⁵ *See* INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (Supp. II 1996); INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (1994).

⁹⁶ The leeway the INS inspectors are granted in determining whether an individual fits within INA § 212(a)(6)(C) or § 212(a)(7) has resulted in the erroneous removal of genuine asylum seekers. *See Morning Edition* (Nat’l Public Radio broadcast, Oct. 14, 1997) (Transcript No. 97101408-210) (describing how two Ecuadorians who sought asylum protection for fear of death threats related to their efforts to expose police corruption, were accused by INS officials of lying and ordered removed in expedited removal; they were forced to live in hiding after being removed from the United States).

⁹⁷ *See* 62 Fed. Reg. 10,318 (1997). The INS has interpreted INA § 212(a)(6)(C) to give its inspection officers authority to reevaluate whether a visa was properly granted by U.S. officials abroad; “[i]n addition to the presentation of fraudulent documents, . . . the fraud and misrepresentation referred to in [INA § 212(a)(6)(C)] may include falsehoods told by the alien concerning his or her admission or other misrepresentations told to the Government officials now or in the past.” *Id.*

⁹⁸ There are reports of numerous business travelers being wrongfully removed by INS inspectors pursuant to the expedited removal authority. For example, in 1997, Mr. Guillermo Pena, a Venezuelan citizen who was employed by a Miami-based company, attempted to enter the United States with a valid passport and visa that he had used

intends to enter the United States for reasons other than what she explained to the U.S. Embassy abroad when applying for the visa, the officer can order the immigrant summarily expelled from the country. The inspections officer need not prove to any judge or other tribunal that his or her suspicions are accurate. The decision is the inspector's to make, subject to a cursory paper review by a supervisor. And the immigrant who is removed pursuant to this process, even an executive business traveler with a valid multi-use visa on a legitimate business trip,⁹⁹ will be returned to her home country and barred from reentering the United States for five years or longer.¹⁰⁰

The RPA would limit airport and border inspectors' ability to exercise this discretion. Under the RPA, when expedited removal procedures are activated, they would apply only to arriving individuals who are inadmissible, under INA sections 212(a)(6)(C) or 212(a)(7), because they either have *no* travel documents or have documents that are invalid *on their face*. Thus, expedited removal would no longer apply to individuals who arrive at the border with proper travel documents and visas that the INS border inspector, in his discretion, suspects were procured through fraud. This proposed change is appropriate, and is well-drafted to achieve its purpose.

3. *The RPA Broadens the Definition of "Credible Fear of Persecution"*

The final proposed limitation on the use of expedited removal is the RPA's amendment to the definition of "credible fear of persecution." Under current law, a person is found to have a credible fear of persecution if there is a "significant possibility, taking into account the credibility of statements made by the alien in support of the alien's claim and such other facts as are known to the officer," that the individual could establish eligibility for asylum protection.¹⁰¹ The RPA would change the standard for evaluating whether a "credible fear of persecution" exists from a "significant possibility" of eligibility for asylum under the statute to requiring that the claim "is related to the criteria for granting asylum."¹⁰²

many times previously for business travel to the United States. An INS inspector accused him of misrepresenting his intent. The officer "knew" that despite having traveled to and from the United States and Venezuela several times, this time Mr. Pena planned to live permanently in the United States. Therefore, under the officer's authority to expeditiously remove Mr. Pena from the United States without any judicial oversight, Mr. Pena was ordered removed and barred from reentering the United States for five years. Eventually, after receiving substantial political pressure, the INS acknowledged its mistake and lifted the bar and recognized the validity of Mr. Pena's visa. *See* Jacob Bernstein, *Welcome to America: Now Go Home*, MIAMI NEW TIMES, Jan.1-7, 1998, at 23. A similar injustice befell Steve Williamson, a Canadian businessman who was entering the United States for vacation when the INS found some business documents in his luggage and accused him of lying about the purpose of his trip. He was removed and barred from reentering the United States for five years. *See* Tim Doran, *Immigration "Cowboys" Irk Canada—Belligerent Low-Level Inspectors and U.S. Borders are Exceeding Their Authority, Critics Say*, HOUSTON CHRON., May 17, 1998, at 31.

⁹⁹ *See* Anthony Lewis, *It Can Happen Here*, N.Y. TIMES, Sept. 8, 1997, at A23 (describing the true story of Meng Li). Meng Li was traveling to the United States on a buying trip for her company. She had a business visa, which she had used to enter the country twice before, that had been issued by the U.S. Embassy in Beijing. The immigration officer at the Anchorage airport suspected the visa was procured by fraud. She was "strip searched, handcuffed, put in an Anchorage jail and told she was barred from the United States for five years." *Id.*

¹⁰⁰ Another INS inspector expelled a business traveler because the traveler was carrying a resume and diploma on his business trip to the United States, the unmistakable conclusion being, according to the inspector, that the diploma and resume necessarily meant that the traveler intended to find a permanent job and permanently stay in the United States. *See* MUSALO ET.AL, REPORT ON THE SECOND YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL 76 (May 1999).

¹⁰¹ *See* INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (Supp. II 1996).

¹⁰² S. 1940, 106th Cong. § 3(e) (1999).

The RPA's decisional standard is lower than the current standard, and appropriately so. Credible fear interviews should serve as initial screenings of the asylum claim, not full interviews to determine asylum eligibility. Given the facts that the interviews take place within days of the individual's arrival in the United States, and that the asylum officers are not authorized to grant any affirmative rights as a result of the interviews—those who pass this screening must prove eligibility for asylum before an immigration judge—the standard should be designed to eliminate arriving individuals with patently fraudulent claims and no one else. All other claimants should have an opportunity to present claims for asylum protection before a judge. To do otherwise—to require asylum officers to make more comprehensive judgments—wastes agency resources and is too likely to result in erroneous decisions.

The new decisional standard would be an improvement for at least two other reasons. First, it would be sufficiently broad to encompass novel claims that are raised for the first time by arriving individuals. Second, it would eliminate the requirement that arriving individuals prove the nexus between their fear of persecution and one of the five legal grounds for asylum protection, which requirement often proves insurmountable. These latter two reasons are discussed at greater length below.

a. The revised definition would permit novel asylum claims

On occasion, the asylum claim of an individual who is processed through expedited removal may raise a novel issue of law. Indeed, the issue of what constitutes persecution on account of one of the five grounds, like other legal standards, evolves in response to “changing notions of human rights violations” abroad.¹⁰³ For that reason, the term “persecution” is not defined by statute and “various attempts to formulate such a definition have met with little success.”¹⁰⁴ For purposes of expedited removal, the definition of credible fear of persecution should take account of the evolving notion of persecution and encompass cases that challenge the boundaries of existing asylum law. However, as currently defined, the term credible fear of persecution is not sufficiently flexible to account for novel claims. That is because under the current definition of credible fear, asylum seekers have to demonstrate a significant possibility of gaining asylum protection in order to pass the credible fear of persecution review. Yet, before a claim is adjudicated at least once through the system, and thus is no longer novel, there is little chance that an asylum officer would find a significant possibility that the claim will succeed.¹⁰⁵ Accordingly, under the existing definition, novel claims will rarely, if ever, pass credible fear screening and warrant a full-blown adjudication before an immigration judge. By so burdening refugees with novel claims, the existing credible fear standard undermines the Refugee Convention and Refugee Act, which anticipates an evolving notion of asylum protection.

¹⁰³ T. Alexander Aleinikoff, *The Meaning of “Persecution” in U.S. Asylum Law*, 3 INT. J. REFUGEE L. 5, 11 (1991) (explaining that the term “persecution” was intentionally left undefined so that it would evolve in response to changing notions of human rights).

¹⁰⁴ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 51 (1992).

¹⁰⁵ For example, before the asylum case of Fawziya Kasinga, in which the Board of Immigration Appeals granted asylum on the basis of Ms. Kasinga's membership in a group of women who were fearful of being subjected to female genital mutilation, was adjudicated, the claim was novel. An asylum officer likely would not have found that Ms. Kasinga had a significant possibility of success. Thus, she may have been found not to have a credible fear of persecution and would have been prohibited from applying for asylum. Indeed, an immigration judge initially denied her case, finding that her claim did not fall within the scope of existing asylum protection. *See In re Kasinga*, Int. Dec. No. 3278 (BIA 1996).

By contrast, the RPA’s “related to the criteria for granting asylum” standard would be sufficiently flexible to allow for the presentation of novel and borderline asylum issues. Under the proposed definition, if the individual’s novel claim was not “clearly fraudulent” and it also was “related to the criteria for granting asylum,” the asylum officer could refer the case to an immigration judge for a full adversary hearing.¹⁰⁶ There, the novel or borderline issue of law would be given considered review and the applicant would have an opportunity to obtain further review by the Board of Immigration Appeals, the appellate body of the Executive Office of Immigration Review.

b. The revised definition would eliminate the need to prove a legal nexus

Similarly, the RPA’s proposed definition of credible fear of persecution would lessen the burden on an arriving asylum seeker, by removing the requirement to show a nexus between his or her claim and one of the five statutory grounds for protection.¹⁰⁷ The proposed definition would simply require a showing that the claim “is related to the criteria for granting asylum.”¹⁰⁸ Asylum seekers, particularly when unrepresented, often do not understand the necessity of proving a connection between their persecution and one of the five statutory grounds for asylum.¹⁰⁹ For example, a woman may credibly explain at a credible fear interview that she fears returning to her home country because her family will kill her, but not explain why they plan to kill her. The asylum officer may actually believe that she will be killed if sent back. But if a nexus is not established between the fear and one of the five grounds—fear of reprisals by one’s family alone is not sufficient for a grant of asylum under the INA—the asylum officer would be compelled to find that the individual does not have a significant possibility of success and, thus, no credible fear of persecution.

A failure to demonstrate the nexus does not necessarily mean that the nexus does not exist. Rather, the asylum seeker may simply not know the legal standard or understand its significance. In the above example, the woman may not be able to articulate to an INS official that her family has targeted her because she plans to marry outside of her faith—the possible nexus being on account of religious persecution.

With the existing credible fear standard, the stakes for failure to understand the law are too high—return to likely future persecution, torture, or death—and likely too common as well.¹¹⁰ The issue of nexus should be determinative at the removal hearing stage of the process when the asylum seeker is more likely to be represented by counsel, understand the legal standard and burdens of proof, and have an opportunity to flesh out the intricacies of the situation. Otherwise, genuine refugees will be unjustly

¹⁰⁶ S.1940, 106th Cong. § 3(e)(v) (1999).

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See* Matter of E-P, Int. Dec. No. 3311, at 6 (BIA 1997) (denying asylum because, among other things, the applicant’s testimony “did not provide a sufficient nexus between the applicant’s fear of harm and one of the five enumerated grounds”).

¹¹⁰ Indeed, according to a scholarly report on the implementation of expedited removal, more than 30% of the individuals (50% of the women) who are found not to have a credible fear of persecution failed to show a nexus between their persecution and one of the five statutory grounds. *See* MUSALO ET.AL, REPORT ON THE SECOND YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL (1999); *see also* MUSALO ET.AL, REPORT ON THE FIRST YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL (1998). The Government Accounting Office also conducted a study of the implementation of expedited removal, but it was limited to the first seven months after implementation. *See* United States Government Accounting Office, *Illegal Aliens: Changes in the Process of Denying Aliens Entry into the United States*, GAO/GGD-98-81 (March 1998).

returned to a country in which their lives are endangered, in violation of U.S. obligations under the international refugee conventions.

B. *The RPA's Providing of Additional Due Process Protections*

In addition to limiting the application of the expedited removal provisions, the RPA also would guarantee certain due process protections during both the initial screening and credible fear determination stages of the expedited removal process.

1. *The RPA Requires Additional Disclosures Before Secondary Inspections Screening Interviews*

During the initial screening stage of the expedited removal process, INS regulations require the secondary inspector to read orally "all information contained on the Form I-867AB." Form I-867AB states, in relevant part:

U.S. law provides protection to certain persons who face persecution, harm, or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.¹¹¹

Under the RPA, before the INS could order a person removed from the United States or authorize the person to withdraw his or her application for admission, the INS would be required to disclose certain additional information to the individual¹¹² "in writing and in a language the alien understands."¹¹³ In particular, arriving individuals would be informed "of the consequences of withdrawal or issuance of a removal order, the availability of review of the removal order [by an immigration judge], and that the alien shall have access to counsel in connection with such review."¹¹⁴

This mandatory disclosure requirement is a sound idea, but the timing of the disclosure will be crucial in determining whether it serves to educate refugees early enough in the process to impact their ability to navigate the process adequately. Unfortunately, the RPA does not state in specific terms when the disclosure must be given; it simply says that the disclosure should be made "[p]rior to withdrawal of an application for admission or issuance of a removal order . . ."¹¹⁵ The disclosure should be made before the secondary inspections screening process begins. That way, from the inception of the process, the individuals involved would understand the process and the consequences of their actions.¹¹⁶

¹¹¹ Form I-867AB, Record of sworn statement in proceedings under section 235(b)(1) of the Act (Apr. 1, 1997). Form I-867AB also requires an INS officer to disclose that in the event the immigrant is denied admission to the United States he or she could be barred from reentry for five years or longer. *See id.*

¹¹² *See* S. 1940, 106th Cong. § 3(b) (1999).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 3(b)(B)(i) (1999).

¹¹⁶ This is particularly important given that one of the consequences of not withdrawing an application before being ordered removed is a five year bar to re-entry. Indeed, since expedited removal and the five year bar were implemented into law, expedited removal has increasingly been exercised as an alternative to permitting withdrawals of applications for admission. Indeed, in 1996, the year before IIRIRA was implemented, "the

The requirement that the mandatory disclosure be “in writing and in a language that the alien understands”¹¹⁷ itself represents a change from existing law. The basic thrust of this common-sense change seems incapable of generating good faith opposition, but the specifics could be improved by requiring that the language used in drafting the disclosure (i.e., word choices) is understandable by unsophisticated arriving refugees. The Security and Exchange Commission’s “plain English” regulations might serve as a model in this regard.¹¹⁸ Indeed, sensitivity to the fact that some refugees may have minimal education and may not understand a disclosure that contains sophisticated or complex language seems much more necessary here than the corresponding requirement in the realm of the securities markets.¹¹⁹ Finally, in the event that an individual does not read his or her native language, the RPA should also require that the disclosure be given orally in that language.

overwhelming number of aliens who [were] found by INS inspectors to be excluded [were] allowed to withdraw their applications for admission and depart almost immediately.” 1996 INS STATISTICAL YEARBOOK 169 (1997). In that year alone 994,633 individuals withdrew their applications for admission during the inspections process; only 25,529 individuals chose not to withdraw. *See id.* In contrast, in 1998 after expedited removal was implemented, only 80,000 withdrew their applications for admission. *See* INS, Fact Sheet, INS 1998 Update on Expedited Removal (June 21, 1999).

¹¹⁷ S. 1940, 106th Cong. § 3(b) (1999).

¹¹⁸ The Securities and Exchange Commission adopted a plain English rule on October 1, 1998. *See* Plain English Disclosure, Release No. 33,7497 (Oct.1, 1998). This rule requires public companies to use plain English in certain parts of its prospectuses. *Id.* According to the rule, registrants must draft language that “complies with each of the following plain English writing principles: active voice; short sentences; definite, concrete, everyday words; tabular presentation or ‘bullet’ lists for complex material, whenever possible; no legal jargon or highly technical business terms; and no multiple negatives.” *Id.* at 6-7. Several SEC regulations implement the rule. *See, e.g.*, 17 C.F.R. § 228.501 (1999); *see also* 17 C.F.R. § 228.502 (1999); 17 C.F.R. § 228.503 (1999); 17 C.F.R. § 229.501 (1999); 17 C.F.R. § 229.502 (1999); 17 C.F.R. § 229.503 (1999); 17 C.F.R. § 230.421 (1999); 17 C.F.R. § 230.481 (1999). The SEC offers a plain English handbook to encourage and further the use of plain English in communicating to the public. *See* Securities and Exchange Commission, *A Plain English Handbook*, (visited Mar. 14, 2000) <<http://www.sec.gov/consumer/plaine.htm>>.

This SEC initiative is part of a larger attempt within the Federal Government to communicate more effectively with the public. The President issued a plain language order in 1998 requiring federal agencies to revise any publicly accessible materials to meet plain language requirements. *See* Plain Language in Government Writing, 63 Fed. Reg. 31,885 (1998). The federal agencies subject to the Presidential order include the Department of Education, Department of Defense, Department of the Army, Securities and Exchange Council, and the Inspector General. *See* Plain Language Action Network (PLAN) Contacts List, (visited Mar. 14, 2000) <<http://plainlanguage.gov/contrib.page1.htm>>. Indeed, the INS itself is a member of PLAN, which “is a government-wide group working to improve communications from the federal government to the public.” *See* About the Plain Language Action Network, (visited Mar. 14, 2000) <<http://www.plainlanguage.gov/pen.htm>>. The PLAN acknowledges that “people should be able to understand what [the government writes] the first time they read it, especially materials that tell people how to obtain benefits or comply with requirements.” *Id.* Moreover, the Court of Appeals has followed suit in the plain language movement, specifically requiring plain language to ensure due process protections. *See* *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998).

¹¹⁹ In 1998, the Ninth Circuit ordered the INS to revise its legal forms issued to aliens. *See* *Walters*, 145 F.3d at 1052. The Ninth Circuit found that the forms used by the INS did not plainly and simply communicate the legal actions pending against non-citizens. *Id.* at 1041. These forms were found to be “uninformative”, “misleading” and as such, they violated due process. *Id.* The court ordered the INS to revise its deportation forms and refrain from deporting non-citizens who were served such forms. *Id.* at 1051-52.

2. *The RPA Permits Review of Removal Decisions Made by Secondary Inspectors at Secondary Inspections Screening Interviews*

Perhaps the most important change with respect to the initial screening stage of the process, the RPA would permit immigration judge review of all removal orders issued by border inspectors in expedited removal before the individual is sent back to his or her country of nationality.¹²⁰ The review would be *de novo* and include an opportunity for the individual “to be heard and questioned by the immigration judge in person and to be represented . . . by a person or persons of the alien’s choosing at no expense to the Government.”¹²¹ The individual would have the right to waive immigration judge review,¹²² but absent a waiver, all decisions would be given meaningful administrative review. According to Senator Leahy, one of the bill’s sponsors, this “provision takes away from low-level INS officers the unilateral power to remove an alien from the United States.”¹²³ If the judge determines that the person is inadmissible and not fearful of returning to his or her home country, then the judge may either order the individual removed or permit withdrawal of the application for admission.¹²⁴

These provisions represent a drastic change from existing law, which currently does not provide for any meaningful administrative review of removal orders made at secondary inspections. They are a welcome improvement to the expedited removal process as they introduce minimal due process protections into a procedure that, if not exercised with great care, could result in the return of genuine refugees to their persecutors, in violation of the United States’ *nonrefoulement* obligation under the Refugee Protocol.

Detractors of the bill may be concerned that by requiring meaningful administrative review the RPA is adding a costly and burdensome step to the process. That concern is overstated. The review could be conducted economically at the border or airport at which the individual arrives. Indeed, the INS successfully experimented with a so-called “port court” in 1996.¹²⁵

3. *The RPA Adds Safeguards to Immigration Judge Review of Negative Credible Fear Filings*

Under existing law, immigration judge review of negative credible fear findings by asylum officers is available, but limited sharply. The reviews need not be conducted in person. Rather, they can by statute take place by telephonic or video connection. An immigration court memorandum of procedure notes, “those courts equipped with video teleconferencing equipment may use it to conduct the proceedings.”¹²⁶ An immigration court operating memorandum further limits the review. According to it, “there is no right to representation prior to or during the review.”¹²⁷

The practice of conducting removal hearings through video-conference is confusing to asylum seekers, who may well be technologically unsophisticated.¹²⁸ During video conferenced hearings, the

¹²⁰ See S. 1940, 106th Cong. § 3(e) (1999). The individual could waive the right to judicial review. *See id.*

¹²¹ *Id.*

¹²² *See Id.* § 3(b)(B)(i).

¹²³ See 145 CONG. REC. S14702 (daily ed. Nov. 17, 1999) (statement of Sen. Leahy).

¹²⁴ See S. 1940, 106th Cong. § 3(e) (1999).

¹²⁵ See *Reno Announces New Border Enforcer, Port Court*, 72 INTERPRETER RELEASES 1458, 1458-59 (1995); Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 306 (1998).

¹²⁶ Memorandum 97-3, *supra* note 52, at 9.

¹²⁷ *Id.* at 10.

¹²⁸ Under the INA, removal hearings can be conducted in person or via video conferencing, or, via telephone conference, subject to the applicant’s consent. See INA § 240(b)(2)(A), 8 U.S.C. § 1229a(b)(2)(A) (Supp. III 1997); INA § 240(b)(2)(B), 8 U.S.C. § 1229a(b)(2)(B) (Supp. III 1997). Pursuant to this authority, the asylum cases for detainees in a county jail in Virginia Beach, Virginia, are currently being conducted via video conference. And,

asylum seekers are not physically present in the courtroom, but connected to the courtroom via video, while the judge, INS counsel, asylum seeker's counsel, and an interpreter, if necessary, are all physically present in the courtroom.¹²⁹ The asylum seeker's view of the courtroom proceedings is limited to what is picked up by a fixed camera in the courtroom. Direct and cross-examination takes place through video. This system is less than optimal both because asylum seekers are not able to consult privately with their attorneys during the hearing and because asylum seekers' ability to establish his or her credibility when testifying via video is handicapped.¹³⁰

In apparent recognition of the shortcomings of the current system of review, the RPA would include certain procedural protections to safeguard the refugee's interests. For example, review of negative credible fear findings would include "an opportunity for the alien to be heard and questioned by the immigration judge in person and to be represented at the review at no expense to the Government."¹³¹ Existing law does not offer those protections.

The RPA also would improve existing law by *requiring* prompt review by immigration judges of negative credible fear findings by asylum officers. Presently, such review is available, but must be affirmatively requested by the applicant.¹³²

One potential problem with the RPA is that the proposed statutory language does not require these credible fear reviews to be *de novo*. This omission is curious because the RPA's language regarding the immigration judge's review of removal orders after secondary inspections explicitly provides that those reviews would be *de novo*. This anomaly suggests a simple drafting oversight and should be rectified by an express statement that these credible fear reviews also should be *de novo*, as the RPA's differing treatment of the two reviews could inadvertently provide some basis for an argument that Congress intended a less intensive review when it did not specify *de novo*.

C. *The RPA's Liberalizing of Detention Policies*

The RPA also attempts to eliminate the current policy essentially requiring the detention of individuals as they make their way through the expedited removal process by liberalizing IIRIRA's broad detention mandate.¹³³ While placing expedited removal detention decisions into the Attorney General's

according to the immigration court, the use of video conferencing with detainees is the "wave of the future." Immigration Judge Christopher Grant, Remarks at the American Immigration Lawyers Association, D.C. Chapter, Liaison Meeting with the Baltimore and Arlington Immigration Courts (Oct. 29, 1997) (transcript available with author). The Chief Immigration Judge plans "to video link all immigration judge offices . . . in all kinds of permutations." *Id.*

¹²⁹ See Pamela Constable, *Video-conferencing Violates Due Process Rights*, WASH. POST, Dec. 21, 1997, at B1.

¹³⁰ Some Immigration Judges are not optimistic about the use of video conferencing. One judge complained about video conferencing, saying that "he is not convinced that he can make credibility findings over video." Immigration Judge Wayne Iskra, Remarks at the American Immigration Lawyers Association, D.C. Chapter Liaison Meeting with the Baltimore and Arlington Immigration Courts (Oct. 29, 1997) (transcript available with author). He compared the experience of conducting a removal hearing via video-conference to watching a sports event on television as opposed to being in the stands, which he much prefers.

¹³¹ S. 1940, 106th Cong. § 3(d) (1999).

¹³² See INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (Supp. II 1996); 8 C.F.R. § 208.30(f) (1999).

¹³³ Current expedited removal laws mandate the detention of individuals both pending a final determination of credible fear of persecution and after a credible fear of persecution has been established. See INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii) (Supp. II 1996); INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (Supp. II 1996).

discretion,¹³⁴ the RPA seeks to clarify that “the Attorney General is not obligated to detain applicants while their claims are pending . . .”¹³⁵ It recognizes that the costs of detention are high¹³⁶ and that detention is not warranted, particularly for individuals who have been deemed to have a credible fear of persecution.

The intent of this change is laudable. However, as currently drafted, the RPA will likely fall far short of its intended goal. While the RPA’s underlying motive may be to reduce the use of detention of individuals who pose neither a security risk nor a risk of absconding, if detention decisions are left to the discretion of the Attorney General, and hence the INS, a detention policy similar to the one that exists today will prevail. As I have described at length in a previous article, certain bureaucratic realities¹³⁷ and budgetary considerations¹³⁸ of the INS bureaucracy make a strict detention policy for asylum seekers, including those who have been deemed to have a credible fear of persecution, likely to prevail—even in the face of opposition by more highly ranked political appointees.¹³⁹ Thus, under the RPA, the INS, in all likelihood, would exercise its discretion in much, if not exactly, the same way it does under its current policies. Indeed, current law provides the Attorney General with discretion to parole individuals from detention “under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”¹⁴⁰ Despite the current existence of this discretionary authority to release individuals from detention, the INS bureaucracy continues to favor a strict detention policy. Nothing in the RPA indicates that this preference would alter. As long as the bureaucratic incentives and budgetary concerns continue to favor detention over release, there is little hope that an effort to give the Attorney General discretionary authority will change the status quo.

A preferred means of reaching the RPA’s intended goal—to promote release of credible asylum seekers pending adjudication of their claims—would be to remove detention decisions from the jurisdiction of the INS, which is fraught with bureaucratic biases favoring detention, and place it into the hands of neutral immigration judges. I previously have proposed such a statutory amendment.¹⁴¹ The

¹³⁴ See S. 1940, 106th Cong. § 3(f) (1999).

¹³⁵ See 145 CONG. REC. S14701 (daily ed. Nov. 17, 1999) (statement of Sen. Leahy).

¹³⁶ In addition to the monetary costs, there are costs related to psychological and medical well-being of asylum seekers who are held under prison-like conditions during the pendency of their asylum cases, and costs associated with impeding the asylum seekers’ ability to present their claims in a thorough and credible manner. See Pistone, *Justice Delayed*, *supra* note 88, at 204-24; see also Margaret Taylor, *Promoting Legal Representation of Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997). See generally WOMEN’S COMMISSION ON REFUGEE WOMEN AND CHILDREN, LIBERTY DENIED: WOMEN SEEKING ASYLUM IMPRISONED IN THE UNITED STATES (1997); Philip S. Anderson, *Torture in the County Jail*, WASH. POST, Dec. 23, 1998, at A23.

¹³⁷ Those realities include the facts that bureaucratic performance concerns and bureaucratic ease favor detention over parole, and that a strict detention policy appeals to the self-preservation instinct of INS personnel. See Pistone, *Justice Delayed*, *supra* note 88, at 239-44.

¹³⁸ Detention of people who attempt to enter the United States at airports without proper documentation is financed through a user fee imposed on international air travelers. See INA § 286, 8 U.S.C. 1356 (1994); see also Pistone, *Justice Delayed*, *supra* note 88, at 244-47.

¹³⁹ See Pistone, *Justice Delayed*, *supra* note 88, at 239-44.

¹⁴⁰ INA § 212(d)(5)(A), 8 U.S.C. § 1158(d)(5)(A) (Supp. III 1997). INS regulations currently permit parole in limited circumstances including for: (1) “those who have serious medical conditions;” (2) “pregnant women;” (3) certain juveniles; (4) witnesses in certain administrative, judicial, or legislative proceedings; and (5) people whose “continued detention is not in the interest of justice.” 8 C.F.R. § 212.5(a) (1999).

¹⁴¹ See Pistone, *Justice Delayed*, *supra* note 88, at 255-62. My proposal would entitle all asylum seekers who have been found to have a credible fear of persecution to a parole hearing before an immigration judge. At the hearing the immigration judge would solicit information about the substantive standards for release in an effort to gauge whether the asylum seeker is likely to appear at all subsequent immigration hearings or poses a risk to public

proposal is for a system under which impartial decision-makers, rather than the INS, use well-articulated substantive standards in a process with increased procedural protections that contemplate alternative conditional release.¹⁴² Given that the RPA does not provide incentives for the INS to release asylum seekers that would in any way overcome the institutional biases favoring detention, it seems unreasonable to expect that the amendments proposed by the RPA would improve the INS's detention decision-making for asylum seekers. Instead, the RPA should be amended to incorporate a detention decision-making practice such as that proposed in my earlier article on the subject.

IV. CONCLUSION

The RPA plainly recognizes that IIRIRA's authorization of expedited removals and imposition of the one year filing deadline seriously impede the ability of asylum seekers and refugees to seek and enjoy asylum protection in the United States. The RPA's sponsors are appropriately concerned about these provisions and should be commended for their efforts in beginning the process to rectify them. Indeed, the RPA would improve the situation for asylum seekers in many respects. In some respects, however, it falls short and would even fail to remedy certain flaws in the current system keenly recognized by the RPA's sponsors.

Many of the RPA's shortcomings, however, can easily be remedied so that the bill could offer appropriate protection to refugees and undo the worst excesses of IIRIRA. This article has offered numerous such remedies, which hopefully will be adopted and thus ensure that the RPA, upon adoption, will have an effect equal to the hopes of its sponsors.

safety. If the judge determines that the applicant does not pose a security risk and is not likely to abscond, he or she would be released from detention. Conditional release would also be available in certain circumstances. *Id.*

¹⁴² The proposal is based on the Bail Reform Act of 1984. *See* 18 U.S.C. §§ 3141-3156 (1984).