

Restructuring the Asylum Process

IRA J. KURZBAN*

This article critically analyzes present and proposed asylum procedures. The author directs his attention to three significant problems in the asylum process: Structural defects within both the INS and the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA); the conflict between the bureaucratic goals of the INS and legal norms; and finally, the maintenance of a foreign policy contrary to eliminating asylum flight. The author proposes significant changes in the asylum process, which would meet the organizational objectives of the INS while protecting asylum applicants from the erroneous denial of their claims. The author further proposes the elimination of the role of the district director and the BHRHA in the asylum process; the maintenance of federal and administrative review; and a change in the burden and standard of proof to require an applicant to prove a prima facie case for asylum subject to INS rebuttal.

As the United States increasingly becomes a country of first asylum, particularly for people of the Caribbean and Central America, the conflict between our political ideology and bureaucratic goals in the treatment of persons seeking entry into the United States as their first country of asylum becomes more apparent. Our inability to establish a policy on matters pertaining to these people, however, does not arise merely from the vicissitudes of public opinion or changes in federal administration. Rather, it primarily arises from the traditional structural defects within the Immigration and Naturalization Service (INS) and the

* Member of the Florida Bar. B.A. Syracuse, 1971; M.A. University of California, Berkeley, 1973; J.D. University of California, Berkeley, 1976. Mr. Kurzban is a partner in the law firm of Kurzban & Kurzban, P.A., Miami, Florida, and an active member of the Immigration and Nationality Lawyers' Association.

Department of State, the conflict between bureaucratic goals and legal norms, and the maintenance of a foreign policy contrary to the elimination of factors causing asylum flight. This article analyzes these factors and suggests an alternative form for determining asylum claims that seek to reduce both the risk of error and the utilization of duplicative and non-error correcting procedures which are presently part of the asylum process.

THE PRESENT ASYLUM STRUCTURE

The Refugee Act of 1980 (Refugee Act)¹ specifically directs the Attorney General to establish procedures for granting asylum to aliens physically present in the United States or at land borders or ports of entry if the aliens fall within the definition of refugee established by section 208(a) of the Refugee Act.² Pursuant to this congressional directive, the Department of Justice promulgated interim regulations on June 2, 1980.³ These regulations, which were recently finalized,⁴ establish a complex regulatory scheme for the processing of asylum applications.

At present, the asylum applicant is provided two separate procedures for seeking asylum if deportation or exclusion proceedings have not been initiated. The applicant may apply to the district director of the INS for political asylum and may, if denied, renew that request before an immigration judge. Unlike the former procedure, which required the district director to make a decision even after deportation or exclusion proceedings had been initiated, the new regulations only permit the applicant to apply to the district director if he is not "under exclusion proceedings"

1. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. (Codified as 8 U.S.C. § 1157-1159 (1980)) [hereinafter cited as the Refugee Act].

2. 8 U.S.C. § 1158(a) (1980). The term "refugee" is defined in § 101(a)(42) of the Refugee Act, 8 U.S.C. § 1101(a)(42) (1976 & Supp. IV 1980).

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

(B) In such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

3. 45 Fed. Reg. 37,392 (1980).

4. 46 Fed. Reg. 45,116 (1981).

or "served with an order to show cause."⁵

If exclusion or deportation proceedings have not begun, the asylum process will be initiated before the district director. He is required to interview the applicant within forty-five days of the applicant's filing an I-589 form.⁶ Thereafter, he is directed to send the application, with supporting documents, to the Bureau of Human Rights and Humanitarian Affairs (BHRHA) at the State Department.⁷ Upon sending the application to the BHRHA, the district director is required to note whether he believes the application is meritorious, without merit, or undetermined, and to include questions or areas of doubt for State Department investigation.⁸ If the district director receives no response from BHRHA within forty-five days of the time that BHRHA received the request, he is directed to adjudicate the petition on its merits unless BHRHA requests additional time.⁹ If an asylum request is denied, the district director must "expeditiously" place the alien under exclusion proceedings, or if in deportation, grant voluntary departure or commence deportation proceedings.¹⁰ The district director's decision must be in writing¹¹ and no appeal is available from it. If the district director's decision is based in whole or in part on the BHRHA report, the statement must be made part of the record unless it is classified.

As stated, if the asylum request is denied by the district director, an applicant may renew it before an immigration judge. A request before an immigration judge is also to be considered a request for withholding exclusion or deportation pursuant to section 243(h) of the Refugee Act.¹² The Board of Immigration Ap-

5. 8 C.F.R. § 208.1 (1981).

6. An I-589 application is the form designated by the INS for making a request for political asylum. 8 C.F.R. § 208.2 (1981).

7. INS O.I. § 208.9(a)(b). At the interview, the district director may also inform the applicant that his claim is unsubstantiated and give him the option to withdraw it. However, if the applicant does not wish to do so, the district director *must* process it. See INS O.I. § 208.5.

8. INS O.I. § 208.9(d) (1980).

9. INS O.I. § 208.9(c) (1980).

10. 8 C.F.R. § 208.8(f)(3)-(4) (1981).

11. As the decision must be in writing, 8 C.F.R. § 103 (1981) would apply and particularly § 103.2(b)(2) [right of rebuttal] and § 103.3(a) [specific reasons for denial must be stated].

12. 8 U.S.C. § 1153(h) (Supp. IV 1980). 8 C.F.R. § 208.3 (1981). See also *Matter of Castellon*, I.D. No. 2847 (1981); *Matter of Saban*, I.D. No. 2870 (1981); *Matter of Martinez-Romero*, I.D. No. 2872 (1981). Section 243(h) states, in relevant part:

The Attorney General shall not deport or return an alien . . . to a country

peals (BIA), however, has recognized that some differences exist between a request for asylum and a request for withholding of deportation pursuant to section 243(h).¹³ After the judge receives an asylum application he is required to request an advisory opinion from the BHRHA if no previous opinion was obtained from the district director or if, in his discretion, he believes that conditions have substantially changed since the original BHRHA opinion was obtained.¹⁴ Subsequent to obtaining the BHRHA opinion, the judge must hold an adversary hearing where the claim will be determined. If asylum or section 243(h) relief or both are denied, the applicant may appeal the denial to the BIA.

In sum, the present regulations provide for a bifurcated asylum process, with both aspects being heavily dependent upon the determination made by the Department of State through BHRHA. Given this lengthy and complicated asylum process, serious questions have been raised as to the efficacy of the process to both the asylum applicant and the INS.¹⁵

PROPOSED LEGISLATIVE CHANGES

The Reagan Administration has proposed certain radical changes in the asylum process which would dramatically affect the applicant's ability to seek asylum as well as his ability to review the correctness of an asylum decision.¹⁶ The present proposed changes include the elimination of the present asylum process and its replacement by "asylum officers," designated by the INS, who would hold nonadversary asylum interviews and make final determinations of asylum claims.¹⁷ These asylum officers would presumably be specially, although not exclusively, trained to conduct asylum interviews. They would issue final decisions which could be reviewed only if the Attorney General or

if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion.

13. Although the BIA in *Matter of Lam*, I.D. No. 2857 (1981) and *Matter of Martinez-Romero*, I.D. No. 2872 found no practical difference in the standard to be applied in determining asylum as opposed to § 243(h) relief, the BIA in *Lam* did find that relief under § 243(h) is different than asylum because the former is country specific. In addition, the "firm resettlement doctrine" as well as the discretionary authority to grant or deny a valid asylum claim are not applicable to § 243(h) relief. See 8 C.F.R. §§ 208.8(f)(ii), 208.14 (1981).

14. 8 C.F.R. § 208.10(b) (1981).

15. *Hearings before the Senate Subcommittee on Immigration and Refugee Policy, Sen. Comm. on the Judiciary, October 14, 1981*, 97th Cong., 1st Sess. (1981).

16. Proposed Omnibus Immigration Act, S.1765 97th Cong. 1st Sess. (1981), 127 CONG. REC. 11993-12002 (daily ed. October 22, 1981) *continued in* 127 CONG. REC. 12065-85 (daily ed. October 23, 1981).

17. *Id.*, Title IV at § 403. Although the alien may have his counsel present to provide advice, the counsel "shall not otherwise participate in the interview."

the Commissioner of INS certified the decision for review.¹⁸ An applicant for asylum would only have fourteen days to file an application for asylum from the time he is brought under exclusion or deportation proceedings, and failure to do so, as a practical matter, would be fatal.¹⁹ All appeals to the United States District Court for *de novo* review or appeals to the United States Court of Appeals would be eliminated. A decision by the Commissioner could only be set aside if found to be "arbitrary and capricious" in a proceeding challenging the validity of a final exclusion or deportation order.²⁰ The burden of proof is specifically placed upon the applicant.²¹ Other matters, such as the actual burden of persuasion or the participation of the State Department, are not addressed although the proposed act specifically states "[t]he procedures set forth in this section shall be the sole and exclusive procedures for determining asylum."²² Finally, the legislation calls for the abolition of section 243(h).²³

GOVERNMENTAL ANALYSIS

The Administration's basis for establishing this radically abbreviated asylum process derives both from its analysis of the motivation of asylum applicants and the sheer numbers of persons who are now seeking to enter the United States as their first country of asylum. Many of the asylum applicants are viewed as using the asylum process merely as a subterfuge to remain in the United States as long as possible.²⁴ Additionally, the now often

18. *Id.*

19. *Id.*

20. *Id.* Under the proposed legislation, a denial of an asylum application may only be appealed in exclusion proceedings to the U.S. District Court and in deportation proceedings to the U.S. Court of Appeals as part of a final order of deportation or exclusion. Persons in exclusion proceedings who are undocumented are deprived of even these appellate rights. Additionally, the proposed statute effectively precludes class actions by tying judicial review to *final* orders in individual cases.

21. *Id.*

22. *Id.*

23. *Id.* at § 406.

24. *Proposed Omnibus Immigration Act: Hearings on S.1765 Before the Subcomm. on Immigration & Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981)* (Statement of Doris M. Meissner, Comm'r of the INS on Cuban-Haitian Refugee Policy, July 31, 1981) [hereinafter cited as Meissner]:

The procedures we propose would result in both fair and efficient adjudication of admissibility and asylum claims. Individuals with valid claims would receive timely relief and those whose claims lack merit would be prevented from *subverting immigration processing through procedural de-*

repeated phrase that we have “lost control of our borders,”²⁵ typifies the concern over the recent significant increase in asylum applications. By fiscal year 1980, 19,485 applications for asylum were received, and the number of pending applications is now in excess of 60,000.²⁶ This has led Attorney General Smith to state that “in the face of these circumstances our policies and procedures for dealing with asylum applicants . . . have crumbled under the burden of overwhelming numbers.”²⁷

This analysis of the present asylum process as a justification for radically restricting the right of first asylum, however, is insubstantial. The claim that asylum is being used as a subterfuge tells us very little about the deficiencies in the present process. Although certain individuals may abuse the right to claim asylum, what does this type of claim tell us about the process as a whole? Does this type of claim say anything more than that the asylum process, like any other system, is subject to abuse? To the degree that this rhetorical question makes a claim that the procedures are subject to abuse, clearly, anything short of complete elimination would be subject to the same attack.²⁸

The real claim that appears to be advanced is that the present process may be subject to greater abuse because of the ability to appeal one’s case, thereby creating longer delays. The Administration’s citation to statistics and the political message that “we have lost control of our borders,” however, are completely unrelated to the appellate abuse which the Administration inferentially suggests. The 60,000 applications presently pending are not applications at the appellate level. Rather they are applications at the *entry* level. Therefore, to the degree that a problem does exist in the backlog of applications, it does *not* exist at the appellate

lays. Under the conditions we currently face such streamlined procedures are absolutely essential if we are to *protect the integrity* of our immigration system and preserve the framework that Congress has established to govern the inspection and admission of persons seeking asylum. (Emphasis added).

25. *Proposed Omnibus Immigration Act: Hearings on S.1765 Before the Subcomm. on Immigration & Refugee Policy of the Senate Comm. on the Judiciary and the House Subcomm. on Immigration Re: Refugees and International Law*, 97th Cong., 1st Sess. (1981) (Statement of William French Smith)—July 30, 1981:

In recent years our policies intended to effect that necessary control of our borders have failed . . . We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively.

26. *Id.* at 14.

27. *Id.* at 14-15.

28. Speculation made several years ago by INS officials that Mexicans would abuse the asylum process and begin to claim political asylum by the thousands because the Haitians were has never occurred. See Court Transcripts, Haitian Refugee Center v. Civiletti, 501 F. Supp. 442 (S.D. Fla. 1980).

level. The use of statistics, and indeed, the underlying analysis of the Administration, fails to supply a reasoned basis for the radical paring of appellate and review rights presently proposed. Obviously, to the degree that a problem exists at the entry level, the radical reduction of appellate and review rights will do little to alleviate that problem.

The Administration's analysis also perpetuates the myth that asylees are not fleeing their own country but simply seeking to come to the United States. In bureaucratic terms this has been described as a "pull" as opposed to a "push" factor. This approach, of course, completely ignores the pattern of migration and flight of asylees, only some of whom find their way to the United States. For example, the people of Haiti are literally a people in exile. Between fifteen and twenty percent of the entire population of Haiti is in exile.²⁹ These people, however, do not only come to the United States. There are Haitians in the Dominican Republic, in the Bahamas, in Cuba, in Canada, in Venezuela, in Mexico and in France. There were, for example, more Haitian doctors and Haitian psychiatrists in Montreal, Canada by 1971 than there were Haitian doctors and psychiatrists in all of Haiti, and there were more Haitian economists working for international organizations by 1971 than there were Haitian economists in Haiti.³⁰ The same pattern is emerging with reference to El Salvadorians. There are presently substantial numbers of El Salvadorians throughout Central America including Honduras, Costa Rica, Nicaragua and Mexico. Moreover, the numbers of first asylees arriving in the United States, although significantly on the rise in the past two years, represent a statistically small number of immigrants when placed within the context of refugee and other admissions during any fiscal year. For example, in the past several fiscal years, we have admitted over one hundred thousand Indochinese refugees each year.³¹ In comparison, the number of Haitians who have sought to immigrate to the United States in the past ten years has only reached approximately half the yearly allocation of Indochinese.³²

29. Address of Father William Smart delivered at the Conference on the Solidarity of the Haitian People in Panama City, Panama, September 18, 1981.

30. HEINL, *WRITTEN IN BLOOD* (1978).

31. See REPORT OF PRESIDENT TO CONGRESS ON THE ALLOCATION OF REFUGEE QUOTAS FOR FISCAL YEAR 1980, 1981, 1982.

32. Dep't of Health and Human Services, Cuban-Haitian Task Force, MONTHLY REPORTS ON CUBAN-HAITIAN IMMIGRATION (1981).

In sum, the analysis of the Administration now being used to justify the radical reduction in appellate and review rights is deficient. It utilizes entry level statistics, which have no relationship to the appellate process, as a justification for streamlining the appellate process. More importantly, the analysis fails to touch upon the substantial and long standing structural weaknesses in the INS and the Department of State which have contributed to the present perceived dilemma.

STRUCTURAL DEFECTS IN PROCESSING ASYLUM APPLICATIONS

The present asylum case backlog of over 60,000 cases, although unrelated to the appellate and review processes that asylum applicants may use, is related to the inherent structural defects in the INS and the Department of State. As previously stated, the INS utilizes a bifurcated asylum process whereby an applicant may apply both to the district director and the immigration judge for the same relief. Both processes, however, are inextricably linked to the State Department's determination, through the BHRHA, of the genuineness of an asylum claim. The recommendations of the State Department, with extraordinarily few exceptions, are followed by the district director. The director's decision not to grant asylum will, in turn, be followed by the immigration judge who will have before him a copy of the State Department's negative recommendation. The chain of events is thus established. Rather than have any independent agencies or procedures which might reduce the risk of error, the three entities—BHRHA, district director, immigration judge—are merely duplicative. Thus, a negative finding by the State Department in virtually all cases will result in a denial of an asylum claim.

This duplicative, but non-error correcting process, is compounded by structural defects in the State Department's ability to meaningfully determine asylum applications. Congress has recognized the long standing inability of the State Department, even with very limited numbers of applications, to make a meaningful inquiry into an asylum claim.³³ The present system theoretically relies heavily upon American Embassies throughout the world to verify facts alleged by individual asylum applicants. Unfortunately, United States consular officers, often limited in number, do not have the time or resources to effectively investigate every asylum claim. The determination of asylum applications is therefore often left to the vicissitudes of either the desk officer in the

33. SUBCOMM. ON IMMIGRATION, CITIZENSHIP AND INTERNATIONAL LAW OF THE HOUSE COMM. ON THE JUDICIARY REPORT ON HAITIAN EMIGRATION, 94th Cong., 2d Sess. 8-9 (Comm. Print 1976).

State Department or the State Department's general policy toward a particular country. This structural defect results in procedures which are unequivocally contrary to our stated policy of determining each individual refugee application on its own merits.³⁴ As a result, the courts have roundly questioned and criticized the impartiality, utility and admissibility of State Department reports in the asylum process.³⁵ In *Kasravi v. INS*,³⁶ the United States Court of Appeals for the Ninth Circuit found the competency of the State Department reports highly questionable and stated:

Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world . . . [N]o hearing officer or court has the means to know the diplomatic necessities of the moment in the light of which the statements must be weighed.³⁷

Despite these obvious shortcomings, the INS continues to give great deference to the State Department's reports and recommendations.³⁸ The disastrous consequences of these policies have been most evident in the treatment accorded Haitian asylum applicants entering the United States.³⁹ Despite the several layers of interviews and adversary proceedings, the asylum applicant is offered little, if any, protection by these policies. Placed in a bureaucratic stream of procedures which are duplicative, but non-error correcting, the applicant's chance that an erroneous denial of his valid claim for asylum will be detected is not increased by these procedures. This bureaucratic failure to distinguish be-

34. The position that claims should be determined on a case-by-case basis was most recently reaffirmed in the testimony of the Acting Comm'r of the INS wherein she stated: "The Attorney General has instructed the Service to make determinations on a case-by-case basis These proposed procedures insure that each claim is adjudicated on an individual basis." Statement of Meissner, September 16, 1981, *Hearings on Refugee Consultation before the Subcomm. on Immigration, Refugees and International Law, House Comm. on the Judiciary, 97th Cong., 2d Sess.* (1981).

35. See *Zamora v. INS*, 534 F.2d 1055 (2d Cir. 1976); *Khalil v. INS*, 457 F.2d 1276 (9th Cir. 1972); *Hosseinmardi v. INS*, 405 F.2d 25 (9th Cir. 1968); *Kasravi v. INS*, 400 F.2d 673, 677 n.1 (9th Cir. 1968).

36. 400 F.2d 675 (9th Cir. 1968).

37. *Id.* at 677 n.1.

38. See Meissner's testimony of September 16, 1981 in regard to the processing of Indochinese refugees "[t]he Service had been additionally instructed to accord substantial weight to the views of the Department of State . . .," *supra* note 34.

39. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 422, 482-93 (S.D. Fla. 1980).

tween a system which is duplicative and non-error correcting and one which is redundant and error correcting is fatal.⁴⁰ Consequently, neither the asylum applicant nor the INS are benefited by the present procedures. To the contrary, the procedures increase the cost and time of adjudicating entry level applications without insuring that erroneous denials of asylum claims by State Department officials, district directors or immigration judges will be detected.

These problems are heightened by the applicant's inability to present effectively his asylum claim. Both the United Nations High Commission on Refugees (UNHCR)⁴¹ and our own federal courts⁴² have recognized the extraordinarily difficult and disadvantageous position that an alien seeking asylum must face. An asylum applicant finds himself "in an alien environment and may experience serious difficulties, technical and psychological in submitting his case to the authorities . . . often in a language not his own."⁴³ To the degree that an applicant may have difficulty in presenting his claim, thereby increasing the chance that his claim will not be fully understood, duplicative but non-error correcting procedures merely add to the applicant's confusion and misunderstanding without diminishing the risk of an erroneous denial of his claim.

THE CONFLICT BETWEEN BUREAUCRATIC GOALS AND LEGAL NORMS

The second major obstacle that prevents a facile solution to the utilization of appropriate procedures for first asylum applicants is the conflict between the goals of the INS as a bureaucracy and the legal norms which proscribe certain aspects of its conduct. The potential conflict between the pursuit of organizational goals and the broad pursuit of societal values, including those expressed through our legal standards, has long been recognized in the literature of public administration.⁴⁴ This form of conflict is unmistakably apparent in INS treatment of the refugee application process. Both the district director and the immigration judge have extraordinary pressure to expedite the processing of asylum applications to ease the backlog of applications generated in re-

40. See Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 Pub. Ad. Rev. 89 (1969).

41. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 189-194. [Hereinafter cited as HANDBOOK].

42. See *Coriolan v. INS*, 559 F.2d 376 (7th Cir. 1977); *Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir. 1976); See also *Matter of Martinez-Romero*, I.D. No. 2872 at 6 (1981); *Matter of Sihasale*, 11 I.&N. Dec. 531 (1966).

43. See HANDBOOK, *supra* note 41.

44. See SIMON, *ADMINISTRATIVE BEHAVIOR* (1957).

cent years.⁴⁵ As an agency, the immigration bureaucracy is rewarded to the degree it can increase activity in deciding and "statisticizing" cases.⁴⁶ Unlike other areas of immigration law such as the granting of adjustment of status, the determination of preference petitions or the approval of certain nonimmigrant visas, the adjudication of asylum applications poses extraordinary obstacles to the goals of efficient adjudication due to the interrelationship between the Department of State and the INS on asylum matters. This process has been viewed as "tortuously slow" by INS officials.⁴⁷ The rational action of the INS, when faced with this process, is to review and determine expeditiously the entry level asylum applications and to "push off" the applications to the next highest level of organization—the BIA. This type of action results in furthering the organizational goals of "statisticizing" asylum cases. By initiating the process to remove them from the entry level, bureaucratic goals are satisfied because cases are "adjudicated" irrespective of the manner in which they are determined.⁴⁸

There is, however, an inevitable conflict between these goals and the maintenance of legal norms.⁴⁹ The INS drive to eliminate cases subordinates legal norms to bureaucratic goals. The immigration bureaucracy's unlawful appearance in a number of cases concerning asylum processing is not the result of error in decisionmaking but arises precisely because of rational bureaucratic

45. That extraordinary pressure could be brought to bear upon a bureaucracy such as INS in the asylum process was made apparent in *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 422 (S.D. Fla. 1980) where the district director and immigration judges were directed to expedite the processing of asylum applications because the "most practical deterrent to this 'Haitian problem' is expulsion . . . we will get the cases moved to hearings swiftly and keep things moving." (Memo of Charles Sava). *Id.* at 514.

46. Presently, the Central Office of the INS and the Chief Administrative Law Judge of INS are considering a procedure which would make the implicit goals of expeditiously determining cases into an explicit rating system for Immigration Judges. 58 INTERPRETIVE RELEASES 446 (1981).

47. See Meissner, *supra* note 24. In her testimony before the U.S. Senate, the Acting Comm'r of Immigration recently stated:

Under current regulations, an alien may apply for asylum to a District Director of the Immigration and Naturalization Service. Each application for asylum made to an INS District Director is forwarded to the Department of State for an individual advisory opinion before being adjudicated by the INS . . . The consequences of this tortuously slow adjudication process has been disastrous.

48. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 510-32 (S.D. Fla. 1980).

49. *Id.*

action. From the standpoint of the immigration bureaucracy, the unlawful treatment accorded applicants of first asylum in the United States is not a mistake nor a product of negligence. The repeated condemnation of the INS' illegal conduct with respect to first asylum applicants is the result of the rational pursuit of organizational goals over social values or legal norms. It is, therefore, no surprise that in case after case the INS' conduct has been severely criticized by the judiciary.⁵⁰

Of course, a successful legal challenge to the process ultimately makes the pursuit of these organizational goals irrational, as the INS is required to take expensive corrective action under court order. It is, however, only irrational to the degree that legal action is brought and that such action is successful. If legal action is precluded as the present administration bill suggests, then the INS is free to pursue its organizational goals even if they are illegal.⁵¹

THE GHOSTS OF FOREIGN POLICY

Any analysis of the difficulties that the INS is presently encountering in regard to persons of first asylum would be incomplete without mention of the relationship between foreign policy and asylee migration. Although the courts have recognized the delicate balance between foreign policy considerations and the adjudication of asylum applications,⁵² commentators have ignored the

50. See *Fernandez-Roque v. Smith* No. 81-1084A-CIV (N.D. Ga. 1981) (detention policy of Cuban refugees held unlawful); *Louis v. Meissner*, No. 81-1260-CIV-ALH (S.D. Fla. 1981) (mass processing of Haitian exclusion cases preliminarily enjoined); *Nat'l Council of Churches v. Shenefield*, No. 79-2959-CIV-WMH (S.D. Fla. 1980) (mass revocation of work authorizations for asylum applicants found unlawful); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980) (mass processing of Haitian asylum applicants found unlawful); *Sannon v. U.S.*, 460 F. Supp. 458 (S.D. Fla. 1978) (INS' failure to follow the Administrative Procedure Act, 5 U.S.C. § 553 (1976), resulting in injunction of exclusion hearings).

51. It appears to be the intent of the present Administration to preclude the present methods of judicial review in asylum matters. Meissner has testified that: "Judicial review of asylum decisions would be available only as part of the judicial review of final orders of exclusion and deportation. There would be no judicial review of asylum denials of cases of undocumented aliens subject to exclusion." See Meissner, *supra* note 24. These suggestions are an obvious attempt to prevent any impediments to the realization of the organizational goal of expeditiously treating asylum applications, even if such treatment is unlawful. Review will be completely eliminated as in the case of undocumented asylum applicants or permitted *after* the organizational goals of expeditious determination are met. This contrasts significantly with the present legal process which permits the injunction of such unlawful conduct as it is occurring. See *Louis v. Meissner*, No. 81-1260-CIV-ALH (S.D. Fla. 1981); *Nat'l Council of Churches v. Shenefield*, No. 79-2959-CIV-WMH (S.D. Fla. 1980); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980).

52. See *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968).

relationship between foreign policy and the *creation* of asylum applicants. In the past decade the relationship between foreign policy and the creation of asylees has become more apparent. The politicization of the asylum process, as in the case of Cuba, and the support of antidemocratic regimes in Haiti, Iran and El Salvador have substantially contributed to the creation of asylees in the United States. In some sense, these asylees represent the ghosts of our foreign policy and the failure of the asylum process. The description of the Mariel boatlift as a "freedom flotilla", while describing Haitians and El Salvadorians as "economic refugees"—a term which literally has no meaning because one is either a refugee or not under the terms of the Refugee Act⁵³—demonstrates to how great an extent the entire asylum process has been politicized. Indeed, the Mariel boatlift was nothing more than a horrifying consequence of the inherent contradictions, which Cuba so skillfully played upon, of our policy to embarrass the Cuban regime by continuing to accept Cuban asylees irrespective of their ability to come within the definition of an asylee or a section 243(h) applicant.

RESTRUCTURING THE ASYLUM PROCESS

If the present asylum process is duplicative without the advantages of correcting any errors which may arise in an asylum determination, the proposal presently before Congress is lopsided in that it seeks to reduce duplication without offering any measures to insure the reduction of the risk of an erroneous denial of an asylum claim. The present legislative proposal, if enacted, would have a number of ramifications: it would cut off judicial review, it would force an applicant, due to the shortness of time, to file an unprepared claim thereby justifying a denial, and lastly it would make the asylum officer, the judge, jury and prosecutor without the full benefit of judicial process. The complete absence of any error correcting mechanism to challenge an erroneous denial of an asylum claim when coupled with the need of asylum officers to conform to goals of expeditiously determining asylum claims, whatever the cost, deprives the applicant of a fundamentally fair procedure. A more appropriate procedure would seek to accommodate organizational goals of expeditious treatment with the protection of those applicants who truly have valid claims for asy-

53. 8 U.S.C. §§ 1157-1159 (1980).

lum. Such protection could be accomplished through error correction mechanisms. The failure to provide such mechanisms, however, would simply mean that applicants with valid claims would be swept up in the mass processing and closure of asylum cases when pressure is brought, as it has been,⁵⁴ on the INS to eliminate case backlogs.

Error Suppression in Bureaucratic Organizations

Organizational theory has long recognized the value of redundant systems, as opposed to tightly ordered systems, within an organization as a means of suppressing or reducing error.⁵⁵ Martin Landau in an often cited paper⁵⁶ explains how redundancy in the sense of duplication and overlap of function may be a prime asset in an organization if it serves to reduce error. The suppression or reduction of error is achieved to the degree that duplicative or overlapping systems prevent the breakdown of the whole system when one of the parts fails. This concept is suggested in Landau's statement of a theory by Von Neumann "that the probability of failure in a system decreases exponentially as redundancy factors are increased."⁵⁷ Landau draws the analogy to the braking system of an automobile and states "if there is no duplication, if there is no overlap, if there is no ambiguity, an organization will neither be able to suppress error nor generate alternate roots of actions."⁵⁸

Error Suppression in Law

Over the past two decades a comparable theory of error suppression has evolved in the courts. The United States Supreme Court recognized more than twenty years ago "that there is always in litigation a margin of error representing error in fact finding."⁵⁹ The Court recognized that one method to rectify erroneous fact determinations is to adjust the standard and burden of proof to the likelihood of error and interest at stake. Justice Brennan articulated this approach when he stated that "where one party has at stake an interest of transcending value—

54. See *Nat'l Council of Churches v. Shenefield*, No. 79-2959-CIV-WMH (S.D. Fla. 1980); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980).

55. See ORGANIZED SOCIAL COMPLEXITY (Laporte ed. 1975); Landau, *supra* note 40; W. Alonso, *Predicting With Imperfect Data*, 34 J. Am. Inst. Plan. 248-55 (1968); MODERN SYSTEMS RESEARCH FOR THE BEHAVIORAL SCIENTIST (W. Buckley ed. 1968); R. CYERT & J. MARCH, A BEHAVIORAL THEORY OF THE FIRM (1963).

56. See Landau, *supra* note 40.

57. *Id.* at 350.

58. *Id.* at 356.

59. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

as a criminal defendant his liberty—his margin of error [in fact finding] is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact finder.”⁶⁰ Similarly, in *In Re Winship*,⁶¹ Justice Harlan stated in his concurring opinion that “[as] the standard of proof affects the comparative frequency of . . . erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative disutility of each.” More recently, Chief Justice Burger made a similar observation in *Addington v. Texas*.⁶² The Chief Justice, in determining what standard of proof should be applied in civil commitment proceedings, stated:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding is to ‘instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’ *In Re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J. concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions.⁶³

Legal commentators have likewise recognized the utility of shifting or changing the burden or standard of proof as a means of insuring a fair procedure through a more reasonable allocation of the risk of error.⁶⁴

The Use of Shifting Burdens and Standards of Proof in Immigration

Within the immigration area itself, the BIA and the courts have recognized the importance of the use of different burdens and standards of proof for different issues. In *Woodby v. INS*⁶⁵ for example, in finding that the INS must establish deportability by “clear, unequivocal and convincing evidence,” the Court reasoned that while a deportation proceeding was not a criminal prosecution:

it does not syllogistically follow that a person may be banished from his

60. *Id.* at 525-26.

61. *In Re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

62. *Addington v. Texas*, 441 U.S. 418 (1978).

63. *Id.* at 423. *Accord* *Cooper v. Mitchell Bros.*, 50 U.S.L.W. 3444 (1981).

64. See *Kerner v. Flemming*, 283 F.2d 916 (2d Cir. 1960). See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 14.14 (1st ed. 1958); 4 MEZINES, *STEIN & GRUFF, ADMINISTRATIVE LAW* § 24.01 (1981).

65. *Woodby v. INS*, 385 U.S. 276 (1966).

country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.⁶⁶

In contrast to the government's burden of proof by clear, convincing and unequivocal evidence in deportation proceedings, an alien in exclusion proceedings has the burden of proof of establishing his admissibility into the United States. That burden never shifts and must be proven by a preponderance of the evidence.⁶⁷ Similarly, the burden of proof to establish eligibility to obtain a visa rests upon the applicant.⁶⁸ Shifting the burden of proof to the applicant in these two latter cases clearly reflects a decision that the granting of a visa or the admission of a party into the United States is a benefit which should be conferred on a party only if that party can prove his entitlement. It also reflects, however, the fact that the consequences of an erroneous decision in deportation is substantially greater (because it results in the loss of residence akin to banishment) than the initial denial of entrance to a person seeking to gain admittance into the country. The subtlety and delicacy of line drawing in this area is most evident in the treatment of persons seeking admission to the United States on the grounds that they are citizens. The BIA has established a shifting burden of proof in cases where persons seek admission to the United States on these grounds. The initial burden is upon the applicant to prove that he is a citizen; thereafter, the burden shifts to the government to prove any expatriating acts.⁶⁹ Although the government's burden was originally a standard of proof higher than mere preponderance,⁷⁰ the subsequent establishment of a preponderance of the evidence test in this area has been upheld.⁷¹

Burden of Proof and Burden of Persuasion in Political Asylum

INS regulations, pursuant to the Refugee Act, specifically place the burden of proving a claim for asylum on the asylum applicant.⁷² This is comparable to the burden placed upon the appli-

66. *Id.* at 285.

67. *See* Matter of M, 3 I. & N. Dec. 777, 781 (Cent. Office 1949).

68. Matter of Brantigan, 11 I. & N. Dec. 493, 495 (1966).

69. Matter of G - R, 3 I. & N. Dec. 141, 146-48 (1948).

70. *Id.*

71. Vance v. Terrazas, 444 U.S. 252 (1980).

72. 8 C.F.R. § 208.5 (1981) states:

the burden is on the asylum applicant to establish that he/she is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of the country of such person's nationality or, in the case of a person having no nationality, the country in which such person

cant seeking relief under section 243(h).⁷³ Although there has been no decision by the federal courts confirming the vitality of the burden in asylum proceedings, the applicant's burden of proof under section 243(h) is a matter of long standing.⁷⁴ Various attempts to shift the burden of proof to the government after some form of initial *prima facie* showing by the applicant have been explicitly⁷⁵ or implicitly⁷⁶ rejected.

The standard of proof or burden of persuasion, however, is far less clear. Although no decision by the BIA or the federal courts has yet arisen interpreting the standard of proof for an applicant for asylum under the Refugee Act, substantial authority exists concerning the quantum of proof necessary to establish a claim pursuant to section 243(h). This authority, however, is far from unified. Some courts require that the section 243(h) applicant prove his claim by a preponderance of the evidence;⁷⁷ other courts require proof by "clear probability";⁷⁸ and still other courts appear to require a standard of proof so high as to make it impossible to prove a claim.⁷⁹ At least one circuit of the United States

habitually resided, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

73. 8 C.F.R. § 242.17(c) (1981) states: "the respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed."

74. See *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977); *Cisternas-Estay v. INS*, 531 F.2d 155 (3d Cir. 1976); *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976); *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971); *Shkukani v. INS*, 435 F.2d 1378 (8th Cir. 1971); *Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969); *Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967); *Matter of Dunar*, 14 I.&N. Dec. 310 (1973); *Matter of Cavlov*, 10 I.&N. Dec. 94 (1962).

75. See *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976) (expressly rejects claim that burden rests on INS to disprove claim based on naked assertion of petitioner); *Shkukani v. INS*, 435 F.2d 1378 (8th Cir. 1971) (expressly rejects petitioner's argument that burden should shift to the government after petitioner makes a "reasonable showing" of an asylum claim).

76. *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967) (rejects petitioner's argument that burden by clear, convincing and unequivocal evidence should shift to government to rebut petitioner's *prima facie* claim).

77. See *Henry v. INS*, 552 F.2d 130 (5th Cir. 1977); *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976); *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969).

78. See *Martineau v. INS*, 556 F.2d 306 (5th Cir. 1977); *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977); *Cisternas-Estay v. INS*, 531 F.2d 155 (3d Cir. 1976); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967); *Matter of Dunar*, 14 I. & N. Dec. 310 (1973); *Matter of Tan*, 12 I. & N. Dec. 564 (1967).

79. See *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978) (despite proof that appli-

Court of Appeals appears to have adopted all three standards.⁸⁰

In addition to meeting the requisite burden and quantum of proof, whatever the standard, there is some authority to require an applicant for section 243(h) relief to show a particularized fear of persecution.⁸¹ This "particularized" standard, if followed to the extreme, can make it extraordinarily difficult, if not impossible, to prove an asylum claim.⁸² Moreover, the utilization of background or general evidence concerning the political conditions in the applicant's country of origin is often severely circumscribed by this standard.⁸³

When these factors are coupled with the asylum applicant's lack of necessary skills⁸⁴ and restrictive time pressures⁸⁵ the pro-

cant fled persecution, must show that government wishes to persecute him today); *Henry v. INS*, 552 F.2d 130 (5th Cir. 1977) (in face of unimpeached testimony and documentary evidence, court denied claim despite lack of rebuttal evidence by government); *Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969) (despite eyewitness to facts, court rejected claim stating that petitioner failed to establish that he "would definitely be persecuted"); *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968) (despite expert testimony, documentary evidence, and no suggestion of impeachment, the court upheld § 243(h) denial); *Matter of McMullen*, I.D. No. 2831 (1980) *rev'd*, *McMullen v. INS*, No. 80-7580, slip op. (9th Cir. 1981).

80. The cases of the U.S. Court of Appeals in the Fifth Circuit are confusing at best. *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975), *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976), and *Henry v. INS*, 525 F.2d 130 (5th Cir. 1977), all appear to adopt the preponderance of the evidence test. However, a careful reading of *Henry* indicates that the Fifth Circuit is requiring, as in *Fleurinor*, a standard which could never be met. In *Henry*, despite the presentation of documentary and testimonial evidence, the court rejected petitioners' claims in the absence of rebuttal testimony by the government or a finding of the lack of credibility of petitioners' witnesses. The same may be said of *Paul*, where the court upheld the denial of petitioners' § 243(h) claim despite the lack of rebuttal evidence by the government or a determination of the credibility of the petitioner. Lastly, *Martineau v. INS*, *supra* note 78, in disregard of any other Fifth Circuit standard, adopted the "clear probability" test.

81. *See Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978); *Henry v. INS*, 525 F.2d 130 (5th Cir. 1977); *Cisternas-Estay v. INS*, 531 F.2d 155 (3d Cir. 1976); *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969); *Matter of Tan*, 12 I. & N. Dec. 564 (1967); *U.S. v. Holton*, 248 F.2d 737 (7th Cir. 1957), *cert. denied*, 356 U.S. 932 (1958).

82. *See Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978); *Hamad v. INS*, 429 F.2d 645 (D.C. Cir. 1969); *Matter of McMullen*, I.D. No. 2831 (1980) *rev'd*, No. 80-7580, slip op. (9th Cir. 1981).

83. *Ishak v. INS*, 432 F.Supp. 624 (N.D. Ill. 1977). *See also* note 70 *supra*. Some courts, however, have taken a more hospitable view toward the introduction of evidence of general political conditions to assist in proving a particular asylum claim. *See Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977); *Fung Foo v. Shaughnessy*, 234 F.2d 715 (2d Cir. 1955); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980); *Mercer v. Esperdy*, 234 F. Supp. 611 (S.D.N.Y. 1964).

84. *See text supra* at 209-10.

85. The filing of even an adequate asylum application, with substantial corroborative evidence is a lengthy process. *See Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 522-23 (S.D. Fla. 1980) (transcript of testimony of D. Carliner at 1494-95). Although present regulations do not specify the time in which an immigration judge can adjourn a hearing to permit an asylum application to be filed, the prac-

cant, a fundamentally fair process requires the reallocation of the burden and standard of proof, particularly where the consequence of an erroneous decision may lead to persecution or possibly death.

DEVELOPING A MODEL ASYLUM PROCEDURE

The development of an asylum procedure requires recognizing and accommodating the organizational goals and expeditious processing of cases by the INS. Such a procedure must also insure that some mechanism is provided which reduces the likelihood of erroneous denials of valid asylum claims. The present procedures and those proposed by the Administration fail to accommodate either of these goals. At present, there exist too many duplicative, non-error correcting structures which fail to assist either the INS or the asylum applicant. In contrast, the Administration's proposal strips the INS of all redundant systems, thereby depriving the applicant of even minimal procedural protections.

The New Asylum Structure

There exists little controversy regarding the need to change the present asylum structure.⁸⁹ Certain suggested changes, however, particularly those which seek to eliminate procedures should be carefully scrutinized. For example, the Administration has proposed the elimination of section 243(h).⁹⁰ Under present regulations, an application for political asylum pursuant to section 208 of the Refugee Act, made during an exclusion hearing or after the initiation of a deportation hearing, is also considered a request for withholding deportation under section 243(h).⁹¹ In this unified hearing the applicant under section 243(h) and asylum proceeding must practically present the same type of information to the same judge under the same procedures. Consequently, from both a practical and legal standpoint, the "structure" of an asylum and section 243(h) hearing is the same. The BIA has noted some differences between asylum and section 243(h).⁹² The extent of these differences, however, do not affect the structure of the

89. *Hearings before the Subcomm. on Immigration and Refugee Policy, Sen. Comm. on the Judiciary, October 14, 1981, 97th Cong., 1st Sess. (1981).*

90. See note 23 and accompanying text *supra*.

91. *Matter of Castellon*, I.D. No. 2847 (1981) at 7; 8 C.F.R. § 208.3(b) (1981).

92. In *Matter of Lam*, I.D. No. 2857 (1981), the BIA found that the principal differences between asylum and § 243(h) is one of relief. Relief granted under § 243(h) is "country specific" whereas a grant of asylum, in the absence of any changed conditions in the country of origin, insures that the applicant can remain in the U.S. and adjust his status to permanent residency after one year.

processes, but merely the relief. To the degree that section 243(h) does not create any additional structures, and therefore any additional organizational burdens on INS, its use as an alternative form of relief does not impede INS organizational goals. For this reason section 243(h) should be retained.

The same may not be said of the asylum procedure before the district director as well as the institutional role of the BHRHA, within the Department of State. The present reliance upon BHRHA merely places undue emphasis upon a procedure that, at best, fails to perform its appropriate function, and at worst, provides misleading results. Additionally, it does so at a substantial loss of time to the INS and the applicant, because at a minimum, both must wait forty-five days to obtain a response or a non-response from BHRHA.⁹³ A more sensible procedure would be one which, as a matter of practice, is often implemented by the State Department in federal and state litigation. In those cases where the State Department believes that their opinion should be heard and noted for the record, they submit a letter or some form of pleading to the court.⁹⁴ By leaving it to the discretion of the Department of State to intervene in matters which they think significant, the present delay which produces results not beneficial to either party would be avoided. Presumably, an asylum applicant or the INS would be free to make a request, in a special case, to the State Department to intervene as litigants presently do.⁹⁵ This type of informal, nonbinding procedure would expedite the present process by permitting the State Department and the litigants, in certain exceptional cases, to seek a full investigation of an individual claim. This procedure would obviously also have the additional effect of eliminating substantial backlogs that presently exist at BHRHA.

Similarly, the elimination of the district director's role in determining asylum applications would expedite the present process, while doing little to alter any protections to the asylum applicant. The present process before the district director as well as the proposed "asylum officer" concept is not intended to provide, from a

93. INS O.I. 208.9(c) (1980).

94. See generally *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

95. *Id.*; *Banco Nacional de Cuba v. Chase Manhattan Bank*, No. 80-7375, slip op. (2d Cir. 1981).

structural point of view, a fully deliberative process.⁹⁶ Its utility, as a redundant system, is severely restricted. Moreover, the organizational incentives to move cases quickly through the district director's process, as well as the lack of resources and heavy reliance upon BHRHA for guidance, magnifies the nondeliberative, non-error correcting aspects of the process.

The elimination of BHRHA and the district director from the asylum process will effectively streamline the present procedures at no substantial loss to asylum applicants, thereby permitting INS to meet critical organizational goals. The applicant would then be left with one hearing before an immigration judge wherein full procedural safeguards would be guaranteed. He would be permitted to have an attorney or representative actively engaged in his case. Also, the applicant would be permitted to obtain and present evidence, cross-examine witnesses, and engage in discovery and other procedures consistent with a full evidentiary hearing. To the degree that discovery is presently limited, regulations should be adopted which are consistent with present federal practices.

As an additional safeguard, the immigration judge hearing the case should be specially designated for that purpose. By separating the asylum claim from the deportation process, psychological and organizational pressures to view an asylum claim or request for section 243(h) relief as a "defense" or delay to deportation would be curtailed. Requiring immigration judges to sit by special designation to hear asylum claims would also eliminate the need to create any new structure such as "asylum officers" and could be accomplished with existing resources. The existing body of immigration judges could hear these asylum claims, the only limitation being that the "asylum judge" would be different than the judge hearing the initial exclusion or deportation hearing.⁹⁷

A final necessary structural safeguard to enhance the reduction of erroneous denials of asylum claims is the provision for appellate review. The Administration's proposal that an administrative

96. Under the proposed "asylum officer" concept, as well as the present process before a district director, the ability of an applicant's attorney or representative to participate is severely restricted. An applicant's attorney or representative cannot actively participate in the process, nor can they present evidence on their client's behalf, nor can they perform any other function for the applicant except rendering advice.

97. Although not directly related to the issue addressed in this article, the hiring practices of immigration judges should be carefully reviewed and revised. At present, the position of immigration judge is a promotional position within the INS itself. All judges are selected from the ranks of service employees. If a percentage of the immigration judges were selected from outside INS there is some likelihood that long standing prejudices would be alleviated.

appeal should be limited to those instances where the Commissioner or Attorney General request a review is meaningless.⁹⁸ In contrast, the BIA, although rarely reversing a denial of an asylum claim, does perform a limited error correcting function. The goal of expeditious processing by INS would be better served by placing a time limit upon the filing of an appeal and the determination of a claim by the BIA, rather than completely eliminating the BIA.

Additionally, the Administration's proposal to restrict federal court review solely to an appeal of the final exclusion or deportation order is ultimately, if made the exclusive remedy, contrary to the INS organizational goals. The present failure to provide a jurisdictional exception for federal review of class-wide abuse⁹⁹ prevents the correction of administrative error at its initial stages.¹⁰⁰ Such a failure also requires the INS, and ultimately the Department of Justice, to litigate each individual case through the appellate process at substantial organizational and financial expense.

The only basis for rejecting the class action jurisdictional exception would be the assumption that individual appeals would not be taken or would not reveal class-wide errors. These aims, however, are clearly not legitimate, as their intent is to deprive an applicant of the benefit of an error correction procedure where his claim has not been properly heard or lawfully denied.

Changing the Burden of Proof

As stated above, the judiciary has long recognized the use of the burden of proof as a means of allocating the risk of error in light of the magnitude and the severity of an erroneous decision. In asylum matters, there is little question that an erroneous denial has serious consequences, possibly as serious as an errone-

98. In *Louis v. Meissner*, No. 81-1260-CIV-ALH (S.D. Fla., Oct. 2, 1981), the Attorney General engaged in just this type of review for applicants who were subjected to mass exclusion proceedings. After reviewing transcripts of approximately ninety-five Haitians who were ordered excluded at mass hearings during the week of June 1 or June 5, 1981, the Attorney General determined that the Haitians knowingly waived their rights to an attorney and to claim political asylum, and that their exclusion orders were appropriate. After the filing of the *Lucien Louis* case in federal court in the Southern District of Florida and after six days of testimony, the Attorney General, despite his previous decision, agreed that the Haitians had not been given fair hearings where they knowingly and intelligently understood the process they were subjected to.

99. See note 20 *supra*.

100. See note 50 *supra*.

ous finding of guilt in a capital case. In no other area of law, apart from capital punishment, are the consequences of an erroneous decision as severe. Asylum applicants, however, are hampered with obstacles of language, culture and accessibility to evidence not experienced to as great a degree by criminal defendants. In addition, unlike criminal defendants, an applicant who cannot afford an attorney must represent himself unless he can obtain free counsel at no expense to the INS.¹⁰¹ In these circumstances, the burden of proof should be more equitably distributed to insure that in the face of expedited procedures there exists some provision for reducing the risk of an erroneous denial of an asylum claim.

The burden of proof may be altered in a variety of ways. First, the burden may be placed upon the government to disprove an asylum applicant's claim once such claim is made. Second, the burden may be placed on the applicant to establish a *prima facie* case after which time the burden would shift to the government to disprove the claim.¹⁰² Third, the government might establish a rebuttable presumption that persons arriving in the United States from certain countries or areas of the world, such as Indochina, Cuba or Haiti are presumptively asylees, which presumption could only be overcome by evidence from the government.¹⁰³ A rebuttable presumption may be one of two types: One type of rebuttable presumption is one which, upon being overcome by contrary evidence, simply vanishes—the so called bubble bursting theory.¹⁰⁴ The second type of rebuttable presumption is one which, after being overcome by affirmative evidence, does not vanish, but is simply weighed against the rebuttable evidence

101. 8 U.S.C. § 1362 (1976).

102. The shifting burden of proof upon the showing of a *prima facie* case, has recently been reaffirmed by the United States Supreme Court in Title VII cases. See *Texas Dep't of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981). In *Burdine*, the court held that a plaintiff in a Title VII action has the burden of proving, by the preponderance of evidence, a *prima facie* case of discrimination. Thereafter, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for rejecting the employee. Should the defendant carry that burden, the plaintiff would then have an opportunity to prove by a preponderance of the evidence, that the defendant's reasons were pretextual.

103. Ms. Meissner came close to establishing this type of presumption for Indochinese refugees in her testimony on September 16, 1981, concerning Indochinese refugees before the Comm. on the Judiciary, Subcomm. on Immigration, Refugee and Int'l Law, House of Representatives, wherein she stated: "We believe that only a small percentage of cases will require extensive handling because the political conditions in Vietnam remain such that the majority of those fleeing will likely be found to be refugees."

104. See *Texas Dep't of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1095 n.10 (1981); 4 MEZINES, STEIN & GRUFF, *supra* note 64, at § 24.36.

presented.¹⁰⁵ Finally, the burden of proof could remain, as it does presently, on the applicant.¹⁰⁶

In determining which burden of proof to apply, consideration should also be given to the standard of proof or burden of persuasion within each element of the burden of the proof. For example, by what standard of proof—preponderance of the evidence or clear, convincing and unequivocal evidence—must an applicant prove his *prima facie* case? Alternatively, what standard is required to overcome the *prima facie* case?

An analysis of the four alternatives, with varying standards of proof/burdens of persuasion, suggest that the most appropriate standard is the establishment of a *prima facie* standard. This standard would be most appropriate because it is consistent with the compatible resolution of INS organizational goals and the applicant's need for protection from erroneous denials. Under this standard, the applicant must prove, by a preponderance of evidence, his *prima facie* case for asylum, which could be rebutted by INS proof by something more than the preponderance of the evidence (but less than clear, unequivocal and convincing evidence) that the applicant does not have a valid asylum claim.

All other alternatives lopsidedly shift the balance in favor of one side or the other. The first alternative, for example, that the government would have to disprove every claim for asylum that was filed, would place an unrealistic financial and administrative burden upon the INS when frivolous claims were filed. Alternatively, the rebuttable presumption argument, although apparently applied in practice, undermines the basic principles of the United Nations Convention and Protocol relating to the Status of Refugees that asylum claims must be determined on a case-by-case basis.¹⁰⁷ Additionally, the decision as to which countries would get preferential treatment would rapidly disintegrate the integrity of the asylum process and make it merely an appendage of the Department of State—the very problem sought to be eliminated by removing BHRHA from the asylum process. Finally, for the

105. See *Breeden v. Weinberger*, 493 F.2d 1002 (4th Cir. 1974); 4 MEZINES, STEIN & GRUFF, *supra* note 64.

106. 8 C.F.R. § 208.5 (1981).

107. There is little doubt that Congress in passing the Refugee Act intended to incorporate the UN Convention and Protocol standards. See Conf. Rep. on the Refugee Act of 1980 No. 781, 96th Cong., 2d Sess. (1980); H.R. REP. No. 608, 96th Cong., 1st Sess. 9, 17-18 (1979); S. REP. No. 256, 96th Cong., 1st Sess. 4-9 (1979).

reasons stated previously, including the handicaps of language, culture and ability, the present burden of proof on the applicant is highly inadequate for it unfairly tips the balance in favor of INS.

The establishment of a *prima facie* case by the preponderance of the evidence is a reasonable accommodation to all parties. The applicant does not have a burden of proof which is so high as to make his ability to obtain asylum merely a matter of judicial or administrative whim. Alternatively, the INS will only be expected to utilize its resources when there is, at least, some minimal showing of the likelihood of persecution. The requirement that the government respond by something more than the mere preponderance of the evidence, but less than clear, convincing, and unequivocal evidence, helps to reduce the risk of an erroneous denial of a valid asylum claim. A higher standard, while achieving this end as well, would do so at enormous institutionalized expense. The utilization of a "clear, convincing and unequivocal" standard, for example, would require the INS to engage in a level of fact finding incompatible with its present structure and resources.

Under a *prima facie* concept, the government's successful rebuttal would not, of course, necessarily be fatal. If the INS is successful in rebutting the *prima facie* case by something more than a preponderance of the evidence, the applicant would still have the opportunity to present additional evidence. The applicant, thereafter, could prevail by a preponderance of the evidence.

Time, Place and Manner

In addition to the structural and evidentiary changes outlined above, the restructuring of the asylum process also requires that attention be given to matters concerning the timing of asylum claims, the submission of asylum applications and the conduct of the asylum hearings. The present time restraints on filing applications for asylum, and the more restrictive time restraint proposed by the present Administration, make it virtually impossible to file an adequate asylum claim. As a result, the incomplete asylum application becomes a self-fulfilling prophecy, thereby justifying its denial. Given the length of time it would take an attorney working with a client to file an asylum application,¹⁰⁸ a thirty day time limit with the provision for extension for good cause, would be a practical alternative to the present and proposed restrictions. The time period should run from the time the

108. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 521-22 (S.D. Fla. 1980) (testimony of D. Carliner).

request for asylum was made and not from the time the alien is placed in proceedings.

The "place" for holding such hearings should, as previously stated, be before an immigration judge sitting independently and separately from the applicant's deportation or exclusion hearing.

Finally, the manner in which such hearings should be conducted has been outlined by the United Nations High Commissioner in the Handbook on Procedures and Criteria for Determining Refugee Status. In the *Handbook*, the interviewer is to elicit in the most positive manner possible, information which will assist the applicant's claim. The atmosphere for conducting such hearings should also be conducive to eliciting the information.¹⁰⁹ Such procedures would obviously preclude mass hearings or hearings designed to frustrate the applicant's ability to present information on his behalf.¹¹⁰

CONCLUSION

The present and proposed asylum processes are inadequate to meet either the organizational demands of the INS or the applicant's right to a fundamentally fair asylum process. One solution to the present dilemma is to eliminate duplicative but non-error correcting asylum procedures while changing the burden and standard of proof to provide for a more realistic allocation of the risk of an erroneous denial of an asylum application. Where life itself may be at stake, great care must be taken to insure that the likelihood of an erroneous denial of a valid asylum claim is substantially reduced.

109. HANDBOOK, *supra* note 41 at §§ 189-205.

110. *See Louis v. Meissner*, No. 81-1260-CIV-ALH (S.D. Fla., Oct. 2, 1981).

