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NEW LIMITS ON ASYLUM IN FRANCE: EXPEDIENCY VERSUS PRINCIPLE

John Guendelsberger*

INTRODUCTION

This article reviews recent French efforts to limit access to asylum and to streamline the processing of asylum claims. Requests for asylum in France steadily increased from just a few thousand per year in the 1970s, to 10,000 in 1980, with 60,000 marking a peak in 1989.¹ This growth in demand for asylum parallels what occurred in the United States and most other Western nations.

In the United States, the INS received fewer than 10,000 asylum applications per year in the 1970s.² While fluctuating over the years, the average number of requests grew to about 40,000 per year in the 1980s.³ Since 1989, the asylum caseload has approached or exceeded 100,000 claims per year.⁴ Approximately 150,000 claims were filed in

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1. Robert Solé, *Le flux d'immigration a augmenté en 1989*, LE MONDE, Nov. 7, 1990 at 1 (stating that from 1980 to 1984, asylum claims in France were relatively stable at about 21,500 applications per year). The numbers began to rise steeply after 1985 to over 27,000 in 1987, 34,000 in 1988, and 61,400 in 1989. *Id.*; see T. Alexander Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183 (1984) [hereinafter Aleinikoff] (providing a thorough review of French asylum procedure through the mid-1980s).

2. U.S. DEPT. OF JUSTICE, 1992 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 83 (1993) [hereinafter 1992 STATISTICAL YEARBOOK OF THE I.N.S.].

3. *Id.* Asylum applications during the 1980's peaked at over 100,000 in 1989. *Id.*

4. *Id.* These numbers do not include the applicants who first raise their claims as defensive claims in exclusion or deportation proceedings before immigration judges. *Id.*

1993.⁵ The asylum officer corps is not equipped to process this volume of cases.⁶ In 1992, for example, the 150-member asylum officers corps processed only 36,000 of the 103,000 new cases filed.⁷ As a result, the backlog of cases continues to grow each year and is expected to reach 600,000 claims by March 1995.⁸

Since the peak year of 1989 in France, applications for asylum tapered off by about 10,000 per year to 27,000 in 1992.⁹ France also eliminated its 1989 backlog of over 100,000 asylum applications. The time for processing claims through the two stages of administrative review has been reduced from an average of two to three years to a few months.¹⁰ Both the reduction in the number of claims and the improved efficiency in processing claims are credited to a number of significant changes in French asylum procedure.

The United States is now searching for ways to reduce its backlog of asylum claims and to discourage frivolous and unfounded claims.¹¹ Because France successfully eliminated its huge backlog of asylum requests and enormously sped up its current handling of claims, its recent refor-

5. *Id.*

6. 59 Fed. Reg. 14,779, 14,780 (1994). Regulations enacted in 1990 shifted decisionmaking authority for asylum applications from INS district directors to 150 specially trained personnel in the newly created Asylum Officer Corps. 55 Fed. Reg. 30,680 (1990).

7. *INS Proposes Asylum Reform Regulations*, 71 INTERPRETER RELEASES 445, 446 (1994); 59 Fed. Reg. 14,779 (1994) (to be codified at 8 C.F.R. pts. 103, 208, 236, 242, and 274a) (proposed Mar. 30, 1994).

8. Roberto Suro, *An Abundance of Asylum-Seekers: Overhaul Could Leave One Million Stuck in Backlog*, WASH. POST, Mar. 14, 1994, at A1 (noting that this figure does not include the over 100,000 Central Americans expected to be added to the asylum backlog as a result of the court settlement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991); see *Two Reports Recommend Changes in U.S. Asylum Policy*, 70 INTERPRETER RELEASES 1364 (1993) (citing reports issued by Harvard and the Justice Departments Justice Management Division that recommend drastic changes in the I.N.S. asylum system).

9. Hervé Morin, *L'exercice du droit d'asile et l'éventuelle réforme de la constitution: incertitudes sur le fonctionnement futur de l'office L'OFFRA, 'tuteur' des réfugiés*, LE MONDE, Sept. 4, 1993, available in LEXIS, Presse Library, MONDE File (noting that since 1989 applications have decreased by about 10,000 per year to 27,000 in 1992).

10. Philippe Bernard, *L'épouvantail du droit d'asile*, LE MONDE, Sept. 22, 1993, available in LEXIS, Presse Library, MONDE File.

11. See INTERPRETER RELEASES, *supra* note 8, at 1364 (discussing the ten year debate regarding the need for the efficient and equitable adjudication of asylum claims).

mation of asylum procedure serves as an intriguing model of what might be accomplished in the United States. The French reforms also serve as a reminder that much more than numbers, speed and efficiency are at stake in reforming asylum procedure.

The French asylum reforms have raised questions concerning the French commitment to basic principles of asylum law expressly protected in the French Constitution.¹² Bending to political pressures, the French government enacted legislation in 1993 which limited access to asylum in the context of European integration.¹³ The Conseil Constitutionnel, in its decision of August 13, 1993, invalidated various aspects of the 1993 asylum amendments, finding that they infringed upon the right to asylum afforded in the French Constitution.¹⁴ The French Parliament, with the assent of President Mitterrand, responded to this decision by amending the French Constitution to permit the reenactment of the invalidated legislative provisions.¹⁵

These recent French developments provide an interesting foil against which to evaluate the asylum reform proposals now pending in Congress. France succeeded in speeding up the application process and possibly discouraged some spurious claims. It is questionable whether the current French procedure provides sufficient safeguards to avoid the return of persons who legitimately fear persecution in their homelands. This concern may have discouraged legitimate applicants for asylum from coming forward with their claims. Continued review of the French procedure may shed some light on these concerns. The French changes expose the range of problems which must be addressed before the United States adopts international agreements allocating responsibility for determining asylum claims.¹⁶

12. CONST. of 1958, pmbi. (Fr.).

13. Decision of August 13, 1993, Conseil Constitutionnel [Con. Const.] No. 93-325 (Fr.), available in LEXIS, Public Library, CONSTI File (reviewing provisions of legislation concerning control of immigration and conditions of entry, reception, and stay of foreigners in France).

14. *Id.* The Conseil Constitutionnel, created by the 1958 Constitution, is the only French forum available for constitutional review of legislation. *Id.* Challenges to legislation must be raised during the interval between passage by Parliament and promulgation by the President. CONST. of 1958, art. 61 (Fr.).

15. Const. Law No. 93-1256. J.O. 16296, Nov. 26, 1993, 44 Recueil Dalloz-Sirey, *Legislation* [D.S.L.] 552 (1993) (Fr.) (concerning international agreements on the right to asylum).

16. See Arthur C. Helton, *Toward Harmonized Asylum Procedures in North America: The Proposed United States-Canada Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third*

I. FRENCH ASYLUM PROCEDURE

The French tradition of generous acceptance of persons fleeing political oppression, written into the Constitution of 1793, declared that France "gives asylum to foreigners banished from their country because of their struggle for freedom."¹⁷ Although never enacted as positive law, the 1793 declaration served as a basis for government authority to grant asylum. The Preamble to the 1946 Constitution renewed the French commitment to providing asylum. One clause of the Preamble promises that "any man persecuted because of his activities in the cause of freedom has the right of asylum within the territories of the Republic."¹⁸ This provision of the 1946 Preamble has been recognized as positive law affording a fundamental constitutional right of access to asylum.¹⁹

France quickly ratified the 1951 Convention Relating to the Status of Refugees.²⁰ From 1950 to 1980, the processing of asylum-seekers in France aroused little controversy. General immigration reform was discussed occasionally during this period, but asylum applicants had not yet

Countries, 26 CORNELL INT'L L.J. 737 (1993) (examining the terms and provisions of the United States-Canada Memorandum of Understanding and recommending changes to the proposed agreement).

17. CONST. of 1793, art. 1 (Fr.); see Nina Gamrasni-Ahlen, *Recent European Developments Regarding Refugees: The Dublin Convention and the French Perspective*, in *ASYLUM LAW AND PRACTICE IN EUR. AND N. AM.* 109, 120 (Jacqueline Bhabha & Geoffrey Coll, eds., 1992) (discussing limits imposed by the Conseil Constitutionnel regarding asylum seekers).

18. CONST. of 1946, pmbl. (Fr.), translated in Henry P. de Vries, et al., *FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION* at 2-6 (1989).

19. The Conseil Constitutionnel has ruled that the Preamble to the 1958 French Constitution incorporates as positive law at least some of the rights and principles contained in the Preamble of the 1946 Constitution. The Conseil Constitutionnel has, for example, invalidated legislation on grounds that it interfered with the right to strike guaranteed by the Preamble of 1946. Decision of July 25, 1979, Con. const., 1980 *Recueil Dalloz—Sirey, Jurisprudence* [D.S. Jur.] 201 (Fr.). In a more recent decision, the Conseil Constitutionnel has recognized the right to asylum provision of the 1946 Preamble as having the force of positive law. Decision of Feb. 25, 1992, Cons. const. No. 92-307 (Fr.) available in LEXIS, Public Library, CONSTI File (upholding the 1992 law on fines for carriers transporting aliens to France without proper papers but recognizing force of positive law of right to asylum provision in the 1946 Preamble).

20. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137. France was one of the first six countries to ratify the Convention.

been targeted by anti-immigrant or xenophobic movements.²¹ Asylum reform first emerged as a key issue in the mid-1980s, and has since remained one of France's foremost political issues.²²

The current attention to asylum in France stems from a combination of factors including a difficult economic climate, high unemployment, the recent election of a conservative-right coalition to Parliament, a vociferously anti-immigrant Interior Minister, and national self-doubt concerning the capacity or willingness to assimilate the most recent wave of foreigners.²³ It is striking how closely the rhetoric of the asylum debate in France resembles the current discussion in the United States. The media and politicians refer to "political" refugees and "economic" refugees as if two discrete groups exist, each easily distinguished from the other.²⁴ Commentators cite the percentage of unsuccessful applicants as proof of abuse of the system. A familiar refrain is that the asylum process requires reform to close loopholes to illegal immigration. In France, as here, the steep increase in the numbers of asylum applications and growing backlogs in processing applicants led to talk of an asylum "crisis."²⁵

If the asylum reforms in France weeded out unfounded claims as intended, the proportion of applicants granted asylum would increase. Just the opposite materialized. During the 1970s, the approval rate in France easily exceeded 50%.²⁶ The rate dropped to approximately 25% of applicants' claims examined between 1985 and 1991.²⁷ Overall, the

21. See generally John Guendelsberger, *The Right to Family Unification in French and American Immigration Law*, 21 CORNELL INT'L L.J. 1, 31 (1988) [hereinafter Guendelsberger] (stating that after the petroleum crisis of the early 1970s, France ended all immigration of unskilled workers). For the last 20 years, family unification and the overseas refugee program have been the principal means by which permanent resident status has been acquired by foreigners in France. *Id.*

22. See generally Aleinikoff, *supra* note 1, at 213 *et seq.* (discussing France's asylum procedure).

23. John Darton, *Western Europe is Ending Its Welcome to Immigrants*, N.Y. TIMES, Aug. 10, 1993, at A1.

24. Tim Weiner, *Pleas for Asylum Inundate System for Immigration*, N.Y. TIMES, April 25, 1993, at 1.

25. *Id.*

26. Aleinikoff, *supra* note 1, at 219.

27. Jean-Claude Chauvière, "Vers une restriction du droit d'asile en France," *Agence France Presse*, Sept. 25, 1993 (available on LEXIS, Presse Library, File AFP); see Hervé Morin, *Un quart des demandes d'asile examinées ont été acceptés depuis 1985*, AGENCE FRANCE PRESSE, Feb. 7, 1992, available in LEXIS, Presse Library, AFP File [hereinafter Morin] (stating that 78,665 out of 307,869 claims were

percentage of successful applicants has generally decreased, dropping from 85% in 1980 to between 15% and 30% in recent years. The current French approval rate, however, remains higher than that of most other Western European states.²⁸

The average approval rate in the United States in recent years has varied from 15% to over 30%.²⁹ When comparing overall numbers of applicants granted asylum, however, France approved an average of about 10,000 new applicants for asylum each year since 1981,³⁰ more than double the number of approvals by the INS during those same years.³¹ The following sections review the basic framework for processing asylum-seekers in France and the changes in that procedure during recent years as the government sought to cope with the growing numbers of applicants.

A. THE BASIC FRAMEWORK

Since 1952 the Office Français de Protection des Réfugiés et Apatrides (OFPRA) and the Commission des Recours des Réfugiés (Refugee Appeals Board) have been responsible for determining whether applicants for asylum constitute "refugees" within the meaning of the 1951 Geneva Convention on the Status of Refugees.³² The Council of OFPRA, an autonomous body within the Ministry of Foreign Affairs, consists of a Director appointed by the Ministry of Foreign Affairs, six representatives from various ministries, and a representative of organizations concerned with the protection of refugees.³³

approved between 1985 and 1991).

28. Morin, *supra* note 27. In Germany and Switzerland, for example, recent approval rates have been about 5%. Canada's acceptance rate, even following a considerable drop to 46% in 1993, is still higher than in most countries. Moira Farrow, *Canada a Paradise for Refugees Compared with Many Other Countries*, VANCOUVER SUN, Mar. 8, 1994, at B4.

29. 1992 STATISTICAL YEARBOOK OF THE I.N.S., *supra* note 2, at 83.

30. *Un réfugié politique par demi-heure*, LE MONDE, Jan. 28, 1992, available in LEXIS, Presse Library, MONDE File (finding that France approved about 14,000 applications per year from 1981 to 1984, 11,000 per year in 1985 and 1986 and 9000 per year in the years 1987 through 1989).

31. 1992 STATISTICAL YEARBOOK OF THE I.N.S., *supra* note 2, at 83.

32. Art. 2, Loi No. 52-893 du 25 juillet 1952, reprinted in JEAN RONDEPIERRE, STATUT DES ETRANGERS 159 (1953) (Fr.) [hereinafter RONDEPIERRE, STATUT] (création d'un office français de protection des réfugiés et apatrides) (Fr.).

33. Art. 3, Law No. 52-893, reprinted in RONDEPIERRE, STATUT, *supra* note 32, at 159 (Fr.).

The OFPRA is responsible for the initial determination of all requests for recognition of refugee status. If OFPRA finds in favor of the applicant, it then oversees the issuance of the documents affording the refugee long term resident status. A UNHCR representative participates in OFPRA deliberations and presents observations and suggestions in individual cases. A 1953 administrative decree directs that OFPRA should decide all cases within four months of receipt of the application for asylum.³⁴ Failure by OFPRA to decide a case within four months is treated as an implicit rejection.

An unsuccessful applicant may appeal from OFPRA to the Refugee Appeals Board.³⁵ Such an appeal must be taken within one month after receipt of the notice of denial in the case of an explicit denial or five months after filing the application with OFPRA in the case of implicit rejection.³⁶ Upon receipt of appeal documents, the Appeals Board forwards the file to OFPRA which has one month in which to present its observations. In some cases, OFPRA agrees at this stage that the applicant is entitled to asylum and the appeal is terminated.

The appellant has a right to appear before the Appeals Board to present his case with the assistance of counsel.³⁷ Procedures for deportation are stayed while an appeal is pending before OFPRA and the Appeals Board. No time limit exists within which the Appeals Board must render a decision.

A denial by the Appeals Board may be appealed to the Conseil d'Etat, the highest administrative court. Although this second stage of appeal is limited to questions of law and does not automatically stay deportation, the Conseil d'Etat possesses the discretion to suspend deportation while considering the appeal.

34. Décret No. 53-577 du 2 mai, 1953, *reprinted in* RONDEPIERRE, STATUT, *supra* note 32, at 165 (Fr.) (concernant l'office français de protection des réfugiés et apatrides) (Fr.).

35. Art. 5, Law No. 52-893, *reprinted in* RONDEPIERRE, STATUT, *supra* note 32, at 160 (Fr.). The Refugee Appeals Board is made up of members of the Conseil d'Etat, a representative of the UNHCR, and a representative of the Council of OFPRA. *Id.*

36. Art. 20, Décret No. 53-577, *reprinted in* RONDEPIERRE, STATUT, *supra* note 32, at 168 (Fr.). The applicant's written appeal to the Board must include the OFPRA decision of denial, if any, a memorandum presenting arguments, and all supporting documents. *Id.*

37. Art. 5, Law No. 52-893, *reprinted in* RONDEPIERRE, STATUT, *supra* note 32, at 160 (Fr.).

The framework described above worked well enough from 1954 through the late 1970s. As France restricted opportunities for immigration in the 1970s and immigration pressures increased in the 1980s, the numbers of asylum claims rose sharply. By 1985, OFPRA and the Appeals Board could no longer keep up with applications; the average time from filing of an application with OFPRA to final decision from the Appeals Board increased to over thirty months.³⁸

While claims were pending, asylum applicants in France were afforded temporary resident status which entitled them to work authorization and government assistance. Even after denial of an asylum request, the French authorities generally did not initiate proceedings to expel unsuccessful applicants. As a practical matter, the asylum process, whatever the result, ultimately led to *de facto* permanent residence in France. As the asylum backlog grew, pressures developed to adjust the procedure in response to charges of abuse of the asylum system by migrants who possessed no fear of political persecution but hoped to remain in France under cover of the asylum application process.

B. REDUCING THE NUMBERS OF ASYLUM-SEEKERS

Beginning in 1985, successive French administrations enacted measures to discourage asylum applications and to clear the administrative backlog that had developed. They hoped that rapid turnaround would reduce the incentive for filing frivolous claims by diminishing the attraction of work authorization and social benefits available during the pendency of an asylum claim.³⁹ In addition, the government implemented more restrictive policies on issuance of visas in source countries of asylum applicants.

Accelerated processing required doubling the staff and tripling the budget of OFPRA and the Appeals Board.⁴⁰ French officials streamlined operating procedures and established a computerized filing and tracking system. The procedures required fingerprinting of all applicants in order to prevent duplicate requests for asylum and to better track those denied asylum. A number of "fast track" procedures expedited the processing of particular classes of applicants. Within two years of implementation this combination of reforms yielded impressive results: it

38. Bernard, *supra* note 10 and accompanying text.

39. Robert Solé, *Immigrés dans la tourmente*, LE MONDE, Jan. 24, 1991, at 1.

40. Philippe Bernard, *L'accélération des procédures n'a pas réglé le sort des déboutés*, LE MONDE, Jan. 15, 1992.

eliminated the backlog and reduced the average time for adjudication of claims from nearly three years to under six months.⁴¹ The most significant of the procedural reforms are outlined below.

1. Speeding Up the Process: "Procedure TGV"

In 1990, OFPRA began screening applications to eliminate those considered not to merit an applicant interview. As a result, OFPRA began rejecting large numbers of claims when its paper review detected evidently false documents, clearly economic motives, or victims of measures which, although discriminatory, did not amount to persecution under the terms of the Geneva Convention on Refugees. Applicants not granted a full review as a matter of course came from countries considered generally "safe," including Poland, Hungary, and the Czech Republic in Eastern Europe, Benin in Africa, and Chile in South America.⁴² The task of this initial sorting of claims belonged to specially trained officers of OFPRA purportedly familiar with conditions in the claimants' countries of origin. Applicants in such cases did not receive an interview nor were they afforded an opportunity to appear in person before the decisionmaker. Some files received only a cursory review prior to rejection.⁴³

In 1992 and 1993, this paper review procedure resulted in summary rejection of over half of all claims.⁴⁴ These rejected applicants are entitled to appear in person with the assistance of counsel before the Appeals Board where the reversal rate runs about 5%.⁴⁵ Regulations establish an especially fast track for asylum claims filed by persons already in exclusion or deportation proceedings.⁴⁶ In such cases, the immigra-

41. Philippe Bernard, *Des réfugiés aux immigrés*, LE MONDE, June 13, 1992.

42. Jacqueline Bhabha, *Harmonization of European Immigration Law*, 70 INTERPRETER RELEASES 49, 56 (1993).

43. See Hervé Morin, *L'exercice du droit d'asile et l'éventuelle réforme de la constitution: Incertitudes sur le fonctionnement futur de l'office l'OFPRA, 'tuteur' des réfugiés*, LE MONDE, Sept. 4, 1993 (stating that some files are rejected in a matter of minutes). Immigration rights organizations have criticized the new procedure for failing to take into account the difficulties which legitimate refugees have in putting into writing an account of the persecution which they or family members have endured. *Id.*

44. Bhabha, *supra* note 42, at 43.

45. See J.O. 7857, July 5, 1990, 27 D.S.L. 289 (noting that the Appeals Board now consists of several panels which complete the review of cases and render decisions within a few months of appeal).

46. Interior Minister Circular No. 176C of Aug. 2, 1990, *Demandes d'asile*

tion authorities notify OFPRA of the request for asylum and ask for an immediate decision. Unless OFPRA determines that further information is required, it renders a decision within forty-eight hours of the request. If more information is required to develop the record, the applicant may be assigned residence status pending a decision by OFPRA. In the event of appeal from a negative decision of OFPRA, the public prosecutor handling the case may, when the appeal appears to be manifestly for purposes of delaying deportation, request permission of the Interior Minister to immediately execute the order of deportation.

In addition to expediting the asylum application procedure, the government promised to pursue deportation proceedings against unsuccessful asylum applicants. Through the late 1980s, however, unsuccessful applicants were rarely tracked down and deported. That practice has changed in recent years as the government takes steps to locate and expel undocumented aliens. Fingerprinting of applicants since 1989 reportedly eliminated a five percent duplication in claims.

2. Screening Out "Manifestly Unfounded" Claims at the Border

A 1992 law imposes strict sanctions on carriers who land undocumented aliens at French airports or seaports.⁴⁷ Each port is to be equipped with a transit zone for the detention of undocumented entrants while awaiting deportation. In the case of aliens requesting asylum at ports of entry, the law authorizes administrative detention for the time necessary to arrange deportation of any person whose claim is found by immigration authorities to be "manifestly unfounded."⁴⁸ In this situation, the detainee may communicate with an attorney, an interpreter, or any other person, and is free to leave for any country other than France.⁴⁹

présentées par des étrangers faisant l'objet ou susceptibles de faire l'objet d'une mesure d'éloignement, available in LEXIS, Loireg Library, BO File.

47. J.O. 9185, July 9, 1992, at 9185.

48. Art. 35 quater, Ord. No. 45-2658 of Nov. 2, 1945, as amended by Law No. 92-265, J.O. 9185, July 9, 1992; see Jacqueline Bhabha, *Harmonization of European Immigration Law*, 70 INTERPRETER RELEASES 49, 50 (1993) (noting criticism by human rights groups that such accelerated procedures do not sufficiently safeguard the nonrefoulement protections of Article 33 of the Geneva Convention on Refugees); see also *Critiquant indirectement la loi Pasqua, La Commission des Droits de l'Homme s'inquiète des restrictions européennes à l'asile politique*, LE MONDE, Sept. 20, 1993; *Après son adoption en conseil des ministres: Le projet de loi sur l'immigration est vivement dénoncé par les organisations de défense des droits de l'homme*, LE MONDE, June 4, 1993, at 24.

49. Philippe Bernard, *L'épouvantail du droit d'asile: Le Débat qui s'est engagé*

As originally proposed, the screening and detention provisions for persons presenting "manifestly unfounded" claims were challenged in the Conseil Constitutionnel as infringing upon the constitutional right to asylum. The Conseil Constitutionnel ultimately approved government screening of "manifestly unfounded" claims at the border, but interpreted the statute to limit administrative detention to the time necessary to assess the claim and to require prompt judicial review concerning the need for detention.⁵⁰ Assuming respect of these limitations on detention, the Conseil Constitutionnel held that the airport screening procedure violated neither the right to asylum in the French Constitution nor the Geneva Convention on Refugees.

3. Limits on Work Authorization and Public Benefits

In addition to streamlining the asylum procedure, French administrations implemented measures to reduce incentives for filing asylum applications. A critical change came in 1991 when the Edith Cresson administration suspended the granting of automatic work authorization for asylum applicants⁵¹ and terminated various social benefits which had been afforded to asylum applicants as a matter of course, in order to further reduce economic incentives associated with the filing of an asylum application.⁵² France now offers relatively less favorable treatment than Germany and other European states where housing and work authorization are provided to asylum applicants.⁵³

4. Toward Temporary Protection Programs

During this same period, France implemented a program for providing refuge to persons fleeing the former Yugoslavia, affording a form of temporary protective status with more generous benefits than those available to asylum applicants. The difference in benefits served as a

sur la révision constitutionnelle fait peu de cas d'une réalité complexe et nuancée, LE MONDE, Sept. 22, 1993 (stating that only about 4% of French asylum applications are presented at the border). The other 96% are made directly to the local prefectures at some point after entry into France. *Id.*

50. Decision of Feb. 25, 1992, Con. const., No. 92-307 (Fr.), available in LEXIS, Public Library, CONSTI File.

51. Circular of Sept. 26, 1991, (Fr.) J.O. 12606 Sept. 27, 1991.

52. Robert Solé, *Immigrés dans la tourmente*, LE MONDE, Jan. 24, 1991, at 12 (indicating that France had provided about 3300 FF per month per adult to asylum applicants).

53. Bernard, *supra*, note 10 and accompanying text.

disincentive to the filing of asylum applications by persons in this program. Of 50,000 persons from the former Yugoslavia admitted under this program, only 1,500 sought political asylum.⁵⁴

II. THE LEGALIZATION PROGRAM

While improving the efficiency of its asylum process, France also sought to deal fairly with those persons whose lives had been disrupted by delays in the processing of applications. It did so primarily by instituting a legalization program for unsuccessful applicants who had established strong ties to France while awaiting a hearing on their asylum applications.

By late 1989, in addition to an enormous asylum application backlog, as many as 100,000 unsuccessful asylum applicants remained in France in undocumented status.⁵⁵ Many of these applicants lived in France for years while awaiting a decision from OFPRA and the Appeals Board. During the interim, they arranged housing, secured employment, and enrolled their children in French schools. Some continued to fear persecution or death if returned to their country of origin.

In 1989 and 1990, anti-immigrant sentiment permeated the general population. A lenient legalization program would have opened the administration of Prime Minister Michel Rocard to attacks from the right. On the other hand, the French asylum tradition and the pressure from well organized immigrant advocacy groups suggested that some form of legalization program was necessary. The government avoided resolution of the issue until the summer of 1991, when measures to enforce deportations led to hunger strikes by 200 unsuccessful asylum applicants and massive demonstrations by human rights groups in Paris. After agreeing to afford temporary residence status to the hunger strikers, the government finally promised to enact a legalization program for other "well settled" asylum seekers in France.⁵⁶

The eventual legalization program announced on July 23, 1991 by the administration of Prime Minister Edith Cresson, afforded long term

54. Hervé Morin, *L'exercice du droit d'asile*, LE MONDE, Sept. 4, 1993; Laure Delrieux, *Offensive du ministre de l'intérieur pour réviser la constitution afin de mieux 'maîtriser' l'immigration*, AGENCE FRANCE PRESSE, Aug. 23, 1993.

55. Robert Solé, *Les clandestins du droit d'asile: Une campagne nationale en faveur de cent mille étrangers auxquels le statut de réfugié a été refusé*, LE MONDE, Dec. 7, 1990, at 14.

56. *Pour raisons humanitaires plusieurs milliers de demandeurs d'asile déboutés vont être régularisés*, LE MONDE, July 2, 1991, at 11.

resident status to asylum applicants who: 1) applied for asylum prior to January 1, 1989; 2) waited over three years for a decision (two years in the case of families with children in French schools); 3) worked for over two years (one year in the case of families with children); and 4) presented no danger to public order.⁵⁷ Out of 50,000 applicants for legalization, about 20,000 persons eventually received legal resident status in France.⁵⁸

Although the amnesty program affected only a small portion of the asylum applicants whose cases had been denied, it did afford important relief to many undocumented families in France and alleviated some of the uncertainty and disruption caused by OFPRA's poor functioning during the years in which claims were severely backlogged. Yet the amnesty program did not solve the problem of the tens of thousands of other undocumented foreigners living in France nor that of the thousands who continue to request asylum each year. The government's promise of no additional rounds of amnesty seems solid in the current political climate.

Meanwhile, France and other European states sought to formulate international agreements allocating responsibility for determining asylum claims. The following section examines the importance of these international agreements in the processing of asylum applications in France.

III. LIMITING FRENCH RESPONSIBILITY FOR ASYLUM SEEKERS

The goal of free movement of persons among European Union member states will eventually require the harmonization of immigration and asylum policies. While the European Union has not yet agreed upon a community-wide approach on these issues, member states of the Union have initiated international agreements on removal of border controls.

57. J.O. 12606, Sept. 27, 1991 (allowing applicants three months, until Nov. 30, 1991, to file for amnesty).

58. Philippe Bernard, *La fin de l'opération de régularisation: Les demandeurs d'asile déboutés seront peu nombreux à bénéficier d'un titre de séjour*, LE MONDE, Dec. 3, 1991; Philippe Bernard, *La manifestation antiraciste à Paris: Un rassemblement pour la défense des demandeurs d'asile et des immigrés*, LE MONDE, June 25, 1992; see A. CORDIÉRO, L'IMMIGRATION 107 (1984) (stating that France had previously granted amnesty to some 120,000 undocumented aliens with long term residence in 1981). The United States similarly legalized the status of some three million undocumented aliens under the Immigration Reform and Control Act of 1986.

These agreements include important provisions for the sharing of responsibility and information on the handling of asylum claims.

A. THE SCHENGEN AND DUBLIN CONVENTIONS

In June 1990, various member states of the European Union signed two international agreements, the Schengen Convention⁵⁹ and the Dublin Convention.⁶⁰ The Dublin Convention focuses on the issue of asylum while the Schengen Convention broadly addresses a number of issues concerning elimination of internal border controls in the European Union.⁶¹ Both Conventions allocate responsibility for asylum claims among participating states in order to eliminate repeat claims and forum shopping for asylum.

The 1990 Schengen Convention originated in a 1985 agreement between France, Germany, and the Benelux countries to gradually abolish checkpoint controls and to work toward free movement of persons across their common borders.⁶² Under the Schengen Agreement, as it became known, border checks were to be abolished for all persons travelling between contracting states. Control of external borders was to be strengthened and a system for police cooperation and exchange of information established.

Chapter 7 of Title II of the Schengen Convention allocates responsibility for hearing asylum claims. In principle, the Schengen state which first offers a visa or residence status becomes responsible for handling the asylum claim in accordance with national law, regardless of the origin of the asylum claim.⁶³ In the case of undocumented residents,

59. 30 I.L.M. 84 [hereinafter Schengen Convention] (applying the Schengen Agreement of 14 June 1985 Between Governments of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 19, 1990).

60. 30 I.L.M. 427 [hereinafter Dublin Convention] (determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990). The Dublin Convention was signed by eleven states of the European Community (all but Denmark) on June 15, 1990. *Id.* Thus far, the Dublin Convention has been ratified by six member states: Denmark, Greece, Italy, Luxembourg, Portugal, and the United Kingdom. *Id.*; see J.O. 2156 Feb. 8, 1994, at 2156 (indicating that the French Parliament authorized ratification of the Dublin Convention on Feb. 5, 1994).

61. Schengen Convention, *supra* note 59, ch. 7 (addressing the issue of allocation of member state responsibility for determining asylum claims).

62. Schengen Convention, *supra* note 59 and accompanying text.

63. *Id.* at art. 30(1)(a).

the Schengen state through which the alien first entered Schengen territory is responsible for handling an asylum claim filed in any other Schengen state.⁶⁴ Thus, Germany would be responsible for a claim filed in France by an undocumented applicant having entered Europe by way of Germany. Conversely, once Germany rejects an asylum applicant, other Schengen Convention states would be free of any obligation to consider the same applicant.

Schengen Convention Article 29(3) provides that “[r]egardless of the Contracting Party to which an alien addresses an application for asylum, only one Contracting Party shall be responsible for processing that application.” The agreement, however, explicitly grants each state the option to afford asylum to applicants whose cases have been heard and denied by other Schengen Convention states: “Notwithstanding paragraph [29]3 every Contracting Party shall retain the right, for special reasons concerning national law in particular, to process an application for asylum even if under this Convention the responsibility for doing so is that of another Contracting Party.”⁶⁵ As discussed below, this safety valve provision proved to be important to eventual French ratification of the Schengen Convention.

Asylum status granted by one Schengen Convention state is to be respected by the other states and entitles the asylee to free movement in the territory of the other signatory states.⁶⁶ The Schengen Convention calls for exchange of information between the contracting states in order to prevent duplicate or repeat applications for asylum.⁶⁷ What remains unclear under the Schengen Convention is how disputes between states as to which has responsibility for an applicant will be resolved. Article 31 provides that a state in which an asylum application has been filed should request the “responsible” state to take charge of the application. If such a request is made within six months of the filing of the application, the “responsible” state is then “bound to take responsibility” for the application.⁶⁸

64. *Id.* at art. 30(1)(e).

65. *Id.* at art. 29(4). Article 9 of the Dublin Convention similarly provides that “[a]ny Member State, even when it is not responsible under the criteria laid out in this Convention, may, for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires.” Dublin Convention, *supra* note 60, at art. 9.

66. *Id.* at art. 19(2).

67. *Id.* at art. 31(3).

68. Schengen Convention, *supra* note 59, art. 31(3). It is not at all clear that the

On June 19, 1990, France, Germany, and the Benelux countries signed the Convention incorporating the terms of the June 14, 1985 Schengen Accord. Italy, Greece, Spain, and Portugal, subsequently signed the agreement. By its terms, the Convention for Application of the 1985 Schengen Accord will enter into force upon ratification by all contracting parties.

B. INITIAL TEST OF CONSTITUTIONALITY OF THE SCHENGEN CONVENTION

French ratification of the Schengen Convention in 1991 was immediately challenged in the Conseil Constitutionnel. The crux of the challenge was that abdication of responsibility for an asylum claim initially filed in France would violate the constitutional guarantee of asylum in the 1946 Preamble to anyone "persecuted because of his activities in the cause of freedom."⁶⁹ This provision, the challengers argued, afforded a right to applicants filing for asylum in France to have their claims considered by the applicable French authorities (OFPRA and the Appeals Board), a constitutional right which could not be denied by treaty or international agreement.

The 1946 Preamble's guarantee of asylum arguably protects a wider range of persons than does the definition of "refugee" in the 1951 Geneva Convention. For example, Algerians who claim fear of persecution by the FIS, (Front Islamic Salvation), may be precluded from the protections of the Geneva Convention on grounds that they do not face persecution by government authorities. The 1946 Preamble protects anyone fighting in the cause of freedom without regard to the source of the potential persecution.⁷⁰ Even if the constitutional protection of the right to asylum was no broader than the protection afforded by the Geneva Convention, other nations may not apply the terms of the Gene-

Article 31 procedure would eliminate the "refugee in orbit" problem in cases in which two states disagree over which is responsible for an asylum applicant. *Id.* Bhabha, *supra* note 42, at 55.

69. CONST. of 1946, pmb. (Fr.), translated in GEORGE A. BERMAN ET AL., FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION 2-6 (1989) [hereinafter BERMAN].

70. Philippe Bernard, *Le projet de révision constitutionnelle adopté par le conseil des ministres: Il s'agit de 'rendre le droit d'asile a sa vocation première' nous déclare Jean-Jacques de Bresson, Président de la Commission de Recours*, LE MONDE, Oct. 21, 1993 (noting statements Jean Jacques Bresson made as President of the Refugee Appeals Board).

va Convention in as generous a fashion as would OFPRA and the Appeals Board.⁷¹

In responding to these initial challenges to the Schengen Convention, the Conseil Constitutionnel found that the Convention could be ratified as written without violating the French Constitution.⁷² The Conseil concluded that Convention Article 39(4) reserved to each contracting nation the right to consider applicants for asylum who are the responsibility of another contracting nation. The broad scope of this reservation of power permitted French protection of the guarantee of the right to asylum under the 1946 Preamble. In other words, the terms of the Schengen Convention itself assured that the guarantees of the 1946 Preamble need not be ignored. The OFPRA and the Appeals Board could hear any claim in which the constitutional right to asylum was invoked.

Of course, the broader goals of Schengen, avoidance of forum shopping and duplicate claims, could be undercut to the extent that applicants in France insisted on invoking the protections of the French Constitution in order to gain access to OFPRA and the Appeals Board. When the French government passed additional legislation in anticipation of the eventual implementation of the Schengen agreement, this constitutional issue resurfaced.

C. FRENCH LAW IMPLEMENTING THE CONVENTION

In Spring 1993, France's newly elected conservative-right Parliament enacted a series of new controls on immigration and nationality.⁷³ These controls narrowed access to citizenship to persons born on French soil.⁷⁴ Furthermore, a new restriction required affirmative steps to ac-

71. Schengen Convention, *supra* note 59, art. 32. Article 32 of the 1990 Schengen Convention provides that "[t]he Contracting Party responsible for the processing of an application shall process it in accordance with its national law." *Id.*

72. See Decision of July 25, 1991, Conseil Constitutionnel, No. 91294 (Fr.), available in LEXIS, Public Library, CONSTI File (finding no constitutional problem with the Schengen agreement so long as it is interpreted to reserve for France the right to examine asylum applications in addition to those for which it is responsible under Schengen).

73. See loi No. 93-1027 du 24 août 1993 (Fr.), J.O. 29 août. 1993, at 12,196.

74. See generally John Guendelsberger, *Access to Citizenship for Children Born Within the State to Foreign Parents*, 60 AM. J. COMP. L. 379 (1992) (stating that for over a century, children born in France to parents who were not French citizens attained citizenship automatically at age 18 by the simple fact of birth in France and five years of residence prior to age 18); see loi No. 93-1027 du 24 août 1993 (Fr.) (imposing a requirement that children born to foreign parents make an affirmative

quire French citizenship, suppressing the old law that permitted automatic acquisition of citizenship at age eighteen for children born in France to foreign parents.⁷⁵ The Parliament also enacted new security measures allowing police to request identification and immigration papers.⁷⁶

Another set of 1993 amendments to the 1945 ordinance sought to close perceived loopholes in the immigration law by imposing additional restrictions on family unification, by relaxing the rules for detention of aliens awaiting deportation, and by further limiting access to asylum.⁷⁷ These amendments would have placed severe restrictions on prospective applicants for asylum determined by the local prefecture to be the responsibility of another state under the Schengen agreement. According to French requirements, an undocumented asylum applicant must first report to the local prefecture for temporary residence status before filing an asylum claim. This requirement necessitates the prefecture's involvement on a constant basis. Under the 1945 Ordonnance, the prefecture granted temporary residence status as a matter of course to persons indicating an intent to apply for asylum.⁷⁸ The 1993 law vested the local prefecture with the responsibility for determining Schengen responsibility and barred aliens determined to be the responsibility of another state from submitting an asylum application to OFPRA. Instead, aliens

request for French citizenship between the ages of 16 and 21). It also afforded the government the discretion to deny such citizenship requests in the case of various infractions of the law. *Id.*

75. Decision of July 20, 1993, Con. const. No. 93-321, available in LEXIS, Public Library, CONSTI File, The Conseil Constitutionnel upheld most provisions of the nationality law amendments, finding that the *jus soli* principle was not a fundamental or constitutional principle of French law and was therefore not immune from legislative adjustment. *Id.*; see Thierry Brehier, *Saisi par les Parlementaires Socialistes et Communistes, le Conseil Constitutionnel valide la réforme du Code de la Nationalité*, LE MONDE, July 22, 1993 (noting that the Conseil invalidated a provision authorizing denial of requests for citizenship for minor infractions such as illegal residence in France, finding the consequence of loss of access to citizenship disproportionate to the offense). It upheld denial of citizenship for more serious offenses. *Id.*

76. *La nouvelle loi sur les contrôles d'identité est entrée en vigueur*, LE MONDE, Aug. 12, 1993, at 12.

77. See loi No. 93-1027 du 24 août 1993 (Fr.) (amending Ordonnance No. 45-2658 du 2 novembre 1945 (Fr.) to add new restrictions on immigration through marriage, family unification and on applicants for asylum).

78. Aleinikoff, *supra* note 1, at 214.

would be directly deported to the country responsible under Schengen for determining their asylum claim.⁷⁹

These asylum amendments would have also barred several other categories of aliens from access to temporary residence status during the application process.⁸⁰ Under Article 31 of the amendments, the local prefecture was instructed to deny admission to temporary residence status to three categories of prospective asylum applicants: 1) those who have a safe haven available in another country which would admit them and not return them to persecution; 2) those who might present a danger to public order; 3) those involved in deliberate fraud, or abuse of the asylum process.⁸¹ Aliens in these three categories could apply for asylum and remain in France during the pendency of their applications, but their undocumented status would prevent them from qualifying for various benefit programs and would expose them to deportation in the event of denial by OFPRA.⁸²

A group of deputies in the General Assembly and a group of Senators invoked the jurisdiction of the Conseil Constitutionnel to challenge these new restrictions on access to asylum. They objected to the removal of OFPRA jurisdiction to consider asylum claims in cases in which the prefecture determined that another Schengen country was responsible and to the provisions directing that temporary residence status be denied to asylum applicants in the other three categories listed above.⁸³

D. DECISION OF THE CONSEIL CONSTITUTIONNEL

The decision of the Conseil Constitutionnel on the 1993 asylum amendments resulted in its longest decision and one of its most controversial since it began issuing decisions in 1958.⁸⁴ The Conseil invalidated eight of the fifty-one articles of the amendments and imposed limits on interpretation of a number of the provisions that survived its review.⁸⁵ The Conseil struck down two provisions amending the asylum

79. See loi No. 93-1027 du 24 août 1993 (Fr.).

80. See *id.* art. 31-1.

81. See *id.* art. 32 *bis*.

82. See *id.* at art. 31-1 *bis*.

83. CONST. art. 61, in BERMANN, *supra* note 69, at 2-24 to 2-25.

84. Thierry Brehier, *Le Conseil constitutionnel et la loi relative à la maîtrise de l'immigration: Le texte de M. Pasqua comporte des 'atteintes excessives' aux droits fondamentaux*, LE MONDE, Aug. 16, 1993.

85. Among the eight provisions invalidated by the Conseil, several would have restricted family unification rights). While upholding a provision which extended from

law on the ground that they violated the right to asylum in the French Constitution.⁸⁶ The Conseil also ruled that other provisions of the proposed amendments would have to be narrowly interpreted in order to avoid unconstitutional application.⁸⁷

The Conseil opened its decision with an expansive review of the rights of aliens under French law. Although noting that aliens are not entitled to the same treatment as citizens in all respects, the Conseil reaffirmed that the Constitution guaranteed to all residents, not just citizens, a number of rights including the right to liberty and security, the right to travel and the right to marry and lead a normal family life. The Conseil affirmed that aliens are also entitled to social benefits so long as they reside legally in French territory.⁸⁸

In addressing the asylum issues, the Conseil began by noting that the 1946 Preamble of the French Constitution explicitly protects the right to asylum to all persons who claim to have been persecuted because of "activities in the cause of freedom."⁸⁹ Because the right of asylum assures the protection of other constitutional rights and liberties, the Conseil imposed a heavy burden of justification, requiring that legislation restricting this fundamental right would have to be shown to be necessary for the achievement of goals of constitutional value.⁹⁰

Turning to the merits, the Conseil invalidated the provision which would have precluded applications to OFPRA by asylum seekers found to be the responsibility of another state under Schengen. The Conseil concluded that the French government could not restrict the right of such individuals to file a claim with OFPRA without violating the French constitutional right to asylum.⁹¹ On the issue of the right of a

one year to two years the time in which an alien must reside in France before being joined by family members, the Conseil ruled that students could not be denied the right to be joined by family members. The Conseil also struck down a provision denying spousal unification until two years after divorce of the previous spouse. It also invalidated a provision granting mayors discretion to rule on legitimacy of marriages for determination of immigration benefits. The Conseil relied upon the protection of family rights in the Preamble to the 1946 Constitution in striking these provisions. Other provisions annulled were an automatic one year bar on entry from time of attempted use of fraudulent documents and administrative prolongation of detention for aliens awaiting expulsion. *See generally* Guendelsberger, *supra* note 21, at 31.

86. Decision of Aug. 13, 1993, Con. Const. No. 93-325 (Fr.).

87. *Id.*

88. *Id.*

89. *See id.* (citing the 1946 Constitutional preamble).

90. *Id.*

91. *Id.* While the legislation specifically limited its application to situations which

Schengen applicant to remain in France during the pendency of an asylum claim before OFPRA and the Appeals Board, the Conseil distinguished the situation of applicants who invoked the French constitutional right to asylum from claimants who did not invoke this right. The Conseil reasoned that the constitutional right to asylum ordinarily implies that an applicant for asylum be permitted to remain in France in order to be able to present the claim effectively. The constitutional guarantee of the right to asylum, it held, imposes an obligation on French administrative and judicial authorities to assure protection of that right to all persons claiming they would be persecuted because of their "activities in the cause of freedom."⁹² This right to asylum requires that applicants be granted temporary admission into France until a final decision is reached on their asylum application. International treaties, such as Schengen, which allocate spheres of competence in determining claims for asylum, must be interpreted to protect this constitutional right. Legislation which could potentially impact this right must be construed strictly so as not to restrict access to residence. The Conseil concluded that the constitutional right to present a defense implies that asylum applicants be permitted to remain in France while awaiting the determination of their claims unless concern for public order demands otherwise.⁹³

On the other hand, the government could refuse to allow an applicant to remain in France during the pendency of the asylum claim in cases in which the applicant did not invoke the constitutional right to asylum. Such applicants, however, have the right to apply to OFPRA while residing outside of France.⁹⁴ Applicants within the other three categories of Article 31 *bis*, those relegated to remaining in France in undocumented status during the pendency of the claim before OFPRA, could be deported during the course of their appeal before the Appeals Board.⁹⁵

would not infringe upon Article 33 of the 1951 Geneva Convention on Refugees, the Conseil pointed out that the law must be applied in a way which would respect the entire text of the 1951 Geneva Convention and the 1967 Protocol on Refugees. *Id.* Such an approach to interpretation, the Conseil noted, was necessary in order to avoid a violation of the principle established in Article 55 of the French Constitution that treaties occupy a rank above that of legislation in the hierarchy of French law. *Id.*

92. *See id.* (citing the 1946 Constitution preamble).

93. *Id.*

94. *Id.*

95. *Id.*

Finally, the Conseil noted that Article 31 *bis* of the 1993 amendments provided that the state retain the sovereign right to afford asylum to any person in one of the four special categories.⁹⁶ The Conseil referred to its decision of July 25, 1991 which held that Schengen and other international agreements that allocate responsibility among states for determining individual asylum claims must contain a clause guaranteeing France the right to adjudicate under its own law the case of any asylum claimant it chooses to afford such protection.⁹⁷

E. THE CONSTITUTIONAL AMENDMENT

The French administration vehemently criticized the Conseil Constitutionnel's decision that the Schengen agreement could not serve as a basis for categorical preclusion of claims to OFPRA, viewing the decision as an open invitation to thousands of potential claimants to seek asylum in France.⁹⁸ The French administration also attacked the decision by categorizing it as a defeat for European integration, because the French Constitution effectively reserved to France the right to decide asylum claims that under Schengen became the responsibility of another state.⁹⁹

The conservative government of Prime Minister Edouard Balladur, prodded on by alarmist claims of Interior Minister Charles Pasqua, promptly began a campaign for a constitutional amendment to neutralize the decision of the Conseil Constitutionnel.¹⁰⁰ A good deal of discus-

96. *Id.*

97. *Id.* Decision of July 25, 1991, Con. Const. No. 91-294 (Fr.), available in LEXIS, Public Library, CONSTI File.

98. See *Après la censure de huit des cinquante et un articles de la loi sur l'immigration*, LE MONDE, Aug. 17, 1993; Laure Delrieux, *Offensive du Ministre Français de l'Intérieur pour réviser la Constitution afin de mieux 'Maîtriser l'immigration'*, AGENCE FRANCE PRESSE, Aug. 23, 1993; Oliver Biffaud, *L'accueil des réfugiés et la polémique sur la décision du Conseil Constitutionnel*, LE MONDE, Aug. 26, 1993.

99. Thierry Brehier, *Pour mieux contrôler l'accueil des réfugiés: le gouvernement étudie une réforme de la Constitution, un droit sacré*, LE MONDE, Aug. 26, 1993.

100. CONST., art. 89, in BERMANN, *supra* note 69, at 2-31 to 2-32. Article 89 of the French Constitution provides for constitutional amendment through initiatives introduced by the Government or by Parliament. *Id.* Constitutional amendments ordinarily become final after approval by a referendum. Sophie Huet, *Vote d'une réforme de la constitution Française restreignant le droit d'asile en fonction des accords de Schengen*, AGENCE FRANCE PRESSE, Nov. 19, 1993. Yet, a referendum is not required in the event that the President of the Republic submits a Government bill of amendment to a joint session of Parliament which approves the bill by a three-fifth majority

sion followed about the need for a constitutional amendment, the best procedure for amending the Constitution, and the appropriate language to reverse the impact of the Conseil's decision without directly eliminating the right to asylum guaranteed in the 1946 Preamble.¹⁰¹

On November 25, 1993, the Parliament voted into law the following amendment adding a new Article 53-1 to the Chapter of the French Constitution addressing the European Union:

The Republic may enter into agreements with other European states, bound by the same obligations as France in matters of asylum and the protection of human rights and fundamental freedoms, concerning their respective responsibilities for the determination of requests for asylum presented to them.

However, even if a request is not within their competence under these accords, the authorities of the Republic retain the right to grant asylum to any foreigner persecuted because of his activities in the cause of freedom or who seeks the protection of France for any other reason.¹⁰²

This language makes clear that the French constitutional reference to asylum is no longer an individual right to be invoked against the government; instead, it is the state's prerogative to confer the right to asylum at its discretion when the government identifies individuals in particular need of protection.¹⁰³

After amending the Constitution, the Parliament quickly reenacted the provisions of the 1993 asylum amendments which had been invalidated by the Conseil Constitutionnel.¹⁰⁴ With these amendments in place, applicants qualifying as the responsibility of another Schengen state have no right to file a claim with OFPRA regardless of whether they invoke a right to asylum under the French Constitution. Such applicants will be

of the votes cast. *Id.* Six hundred eighty-seven of the 844 members of Parliament approved the asylum law amendment. *French Parliament Limits Political Asylum Rights*, AGENCE FRANCE PRESSE, Nov. 19, 1993.

101. François Luchaire, *Droit d'asile: faut-il reformer la Constitution? Point de vue: Inutile*, LE MONDE, Aug. 28, 1993; Patrice Burchkalter, *L'éventuelle réforme de la Constitution sur le droit d'asile: une menace pour la 'Cohabitation Douce'*, AGENCE FRANCE PRESSE, Aug. 31, 1993.

102. Loi Constitutionnelle No. 93-1256 du 25 novembre 1993 (Fr.), J.O. 26 novembre 1993, at 16,296.

103. At the same time, the amendment clearly reserves authority to consider asylum claims and grant asylum on a case by case basis in situations in which another European state has responsibility for the claim under the Schengen agreement, thus confirming the guarantee in Article 29(4) of the 1990 Schengen Convention.

104. Loi No. 93-1417 du 30 décembre 1993 (Fr.) J.O. 1 janvier 1994, page 11.

subject to deportation to the responsible state under Schengen except in those rare instances in which the French government desires to undertake responsibility for such a claim.¹⁰⁵

Ironically, the Schengen-related restrictions on asylum applications now lie dormant. After all the effort to amend the French Constitution and enact legislation to implement Schengen, the Schengen nations decided to further delay the effective date of the agreement from the target date of February 1, 1994 to some unspecified future date.¹⁰⁶

The French constitutional amendment, a shameful compromise of the guarantee of a right to asylum, and much of French legislation designed to enforce the Schengen Convention now appear to have been enacted prematurely and perhaps unnecessarily. Nonetheless, the constitutional amendment had an important symbolic impact. Invoking goals of European integration enabled the French government to proffer an ostensible "community" justification for narrowing asylum protections, while placating those seeking to limit access to the French asylum procedure.

As this article indicates, France thoroughly reversed its asylum crisis and managed to bring the numbers under control. Whether France found the correct balance between expediency and principle remains to be seen. The United States is now poised to implement significant changes in its own asylum procedure. The following section briefly reviews these pending regulatory and legislative proposals and suggests that important systemic reasons exist for refraining from hastily enacting limits on procedural protections for asylum seekers.

IV. REFORMING UNITED STATES ASYLUM PROCEDURE

Various proposals for speeding up the asylum procedure and for discouraging new claims are now being considered in the United States.

105. *Id.* In Germany, the Constitution was also recently amended in reaction to the over 400,000 asylum seekers who entered Germany in 1992. *Department of State, Country Reports on Human Rights Practices for 1993*, at 891-92. The 1993 amendment diluted the nation's constitutional guarantee of the right to political asylum by excluding from that protection persons who proceed through countries "presumed free of persecution, ('safe third countries');" see Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 *VIRG. J. INT'L L.* 503 (1993). The amendment also limits legal recourse available against negative decisions on asylum applications. *Id.*

106. Philippe Bernard, *Au nom de Schengen: L'ajournement de la mise en oeuvre de la convention rend inopérantes plusieurs lois contre l'immigration clandestine*, *LE MONDE*, Feb. 15, 1994 (declaring that Schengen states have put off the effective date for the Schengen Convention indefinitely).

The INS proposed regulations for "streamlining" the asylum process issued in March 1994, closely resemble steps taken in France (and other European countries) during the last few years.¹⁰⁷

One of the recent lessons from France is that adequate staffing and funding, prompt consideration of claims, effective enforcement of deportation orders, and a well-planned legalization program can reduce or eliminate the backlog problem. Under current regulations, asylum officers conduct an interview, await a report from the State Department, and then prepare a written decision granting or denying asylum.¹⁰⁸ Unsuccessful applicants may renew their asylum claims before an immigration judge in exclusion or deportation proceedings. Asylum officers must decide to grant or deny asylum and, in case of denial, must issue a notice of intent to deny including reasons for the denial. The preparation of the written record of reasons for denial requires analysis and attention to detail in each case.

The proposed regulations would implement a "grant-refer" system for quick identification of meritorious claims and referral of all others to immigration judges in exclusion or deportation proceedings. Three aspects of the "grant-refer" system are expected to speed up the process: 1) asylum officer interviews with applicants will be discretionary,¹⁰⁹ 2) notices of intent to deny and written decisions in the case of denials will be eliminated,¹¹⁰ and 3) instead of waiting for advisory opinions from the Department of State, asylum officers will consult a database on country conditions.¹¹¹ The INS has already instituted a policy of returning "boilerplate" applications under regulations enacted in 1994.¹¹²

The proposals would also add provisions which will discourage asylum applications. First, a filing fee of \$130 will be required for each

107. 59 Fed. Reg. 14,779 (proposed Mar. 30, 1994)(to be codified at 8 C.F.R. pts. 103, 208, 236, 242, and 274a).

108. See *INS Proposes Asylum Reform Regulations*, 71 INTERPRETER RELEASES 445, 446 (1994) [hereinafter *Reform Regulations*] (maintaining that affirmative applications for asylum filed with asylum officers account for the initiation of about 90% of all asylum claims). Defensive applications first filed in exclusion and deportation proceedings account for the other 10% of applications. *Id.*

109. 59 Fed. Reg. 14,780. Although the regulations offer no guidance on this point, INS Commissioner Doris Meissner has suggested that interviews would be held in all but "truly frivolous" cases. *Reform Regulations*, *supra* note 108, at 447.

110. 59 Fed. Reg. 14,780, 14,786.

111. *Id.* at 14,781, 14,786.

112. See 59 Fed. Reg. 1455, 1462 (1994) (to be codified at 8 C.F.R. § 103.2(b)(8)) (clarifying that the applicant is afforded twelve weeks to respond with additional evidence).

applicant for asylum.¹¹³ Second, the new procedures will delay work authorization for 180 days after filing of the completed asylum application. The expressed goal is that nearly all new claims will be decided within five months so that work authorization will rarely be issued. Finally, in looking ahead to possible international agreements along the lines of the Schengen and Dublin accords, the regulations authorize eventual discretionary denials of asylum when an applicant is found to have traversed a state in which the claim might have been presented:

When the applicant can and will be deported or returned to a country in which the alien would not face persecution or harm and would have access to a full and fair procedure for determining his or her refugee status in accordance with a bilateral or multilateral arrangement with the United States governing such matters.¹¹⁴

As in the Schengen and Dublin Conventions, the regulations make clear the United States discretion to consider applications which are the responsibility of another state under such an agreement.¹¹⁵

Bills now pending in Congress would make much more drastic changes to the current asylum procedure. Some proposals would impose an initial threshold test which would subject to immediate exclusion, aliens who do not pass a preliminary screening test when they first claim asylum at the border (e.g., "credible fear of persecution" or "non-frivolous claim").¹¹⁶ This initial determination would not be reviewable before an immigration judge or in any court other than through habeas

113. 59 Fed. Reg. 14,779, 14,781 (proposed Mar. 7, 1993) (to be codified at 8 C.F.R. § 103.7(b)(1)).

114. 59 Fed. Reg. 14,783; *see id.* at 14,787 (proposing amendment to 8 C.F.R. § 208.14).

115. *See* 59 Fed. Reg. 14,783 (stating that "nothing in this provision would limit the discretion of the Attorney General to permit consideration of the application in instances where there is good reason for the applicant to remain in the United States").

116. *Republicans Call for Immigration, Asylum Reform*, REFUGEE REP. 1 (Mar. 31, 1994); *Sen. Simpson Introduces Major Immigration Reform Bill*, 71 INTERPRETER RELEASES 311 (Mar. 7, 1994); Comprehensive Immigration and Asylum Reform Act of 1994, S. 1884, 103d Cong., 2d Sess. (1994), introduced by Senator Alan Simpson (R-WY) on March 2, 1994. A showing of "credible fear" would require a demonstration that "(A) it is more probable than not that the statements made by the alien in support of his or her claim are true; and (B) there is a significant danger that the alien would be returned to a country in which the alien would have a credible fear of persecution". *Id.*

corpus.¹¹⁷ Others have proposed a time limit after entry on filing for asylum.¹¹⁸

Analysis of the Congressional proposals for amending asylum law is beyond the scope of this paper. In considering the desirability of legislative change, however, it is useful to keep in mind the peculiar systemic limits which apply to asylum law in the United States. The French comparison highlights these limitations. First of all, the United States Constitution, unlike the French Constitution, provides no explicit protection of the right to asylum.¹¹⁹ Although the recent constitutional amendment compromised the French constitutional right, the amendment affects only the narrow issue of shared responsibility under Schengen or other international agreements.¹²⁰ It can be expected that future legislation affecting the right to asylum will be carefully scrutinized by the Conseil Constitutionnel.

Second, to the extent that equal protection or due process might impose some limits on asylum legislation, the United States Supreme Court has assumed an extremely deferential role in reviewing laws affecting immigration.¹²¹ In France, by way of contrast, the Conseil Constitutionnel has assumed a more vigorous role in reviewing immigration law for compliance with the Constitution.¹²²

117. S. 1884, 103d Cong., 2d Sess. (1994).

118. Comprehensive Immigration Control Act of 1994, H.R. 3860, 103d Cong., 2d Sess. (1994), introduced by Representative Lamar Smith (R-Texas) on Feb. 10, 1994.

119. Note the absence of constitutional issues in *Sale v. Haitian Centers Council*, ___ U.S. ___, 113 S. Ct. 2549 (1993).

120. The French constitutional amendment represented the political will of a supra-majority of representatives (three-fifths of votes cast), as opposed to simple majority.

121. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). The Court has engaged in only cursory review of laws concerning entry or stay of aliens, emphasizing that:

[a]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Id. See also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting that this Court's cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control") (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

122. See John Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 TUL. L. REV. 669, 681 (1993).

Third, the United States is bound by treaty to respect the terms of the United Nations Convention Relating to the Status of Refugees.¹²³ Congress, however, has the authority to limit obligations previously undertaken in international agreements.¹²⁴ Under the French Constitution, by way of contrast, treaties have an authority superior to that of laws and can never be compromised or diluted by subsequent legislation.¹²⁵

Finally, unsuccessful asylum applicants in France who have exhausted all French procedures may seek the review of the European Commission and the European Court of Human Rights for enforcement of provisions of the European Convention on Human Rights which relate to protection of refugees.¹²⁶ In the event that the European Community enacts community-wide legislation harmonizing immigration and asylum procedure,

123. Although the United States is not a signatory to the Convention, it acceded in 1968 to the Protocol Relating to the Status of Refugees under which it is bound to comply with Articles 2-34 of the Convention.

124. *See* *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889) (noting that the last expression of the sovereign, whether statutory or treaty, must control). *Id.* Of course, latter passed legislation will be interpreted, if at all possible in order not to conflict with treaty obligations. *Id.* In the event, however, of clear conflict, latter passed legislation will control over treaty obligations. Notably, at the time of accession to the Protocol, the United States included an "understanding" which stated that its adoption would work no substantive change in existing immigration law. *Sale v. Haitian Centers Council*, 113 S. Ct. 2253-4, n.10. In addition, the Protocol has been ruled not to be self-executing. *Id.* at 2557, n.14, (citing *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1982)).

125. Article 55 of the French Constitution provides: "Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party." CONST. art. 55 (Fr.).

126. *See* *Vijayanathan and Pusparajah v. France*, App. No. 17550/90 15 Eur. H.R. Rep. 62 (1992) (Sri Lankan citizens of Tamil origin whose asylum requests had been denied by OFPRA and the Refugee Appeals Board alleged that their imminent expulsion by France to Sri Lanka would violate Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment"). The Court held unanimously that the case was not ripe for consideration of the merits because French authorities had not yet commenced expulsion proceedings and, in the event deportation was ordered, French appellate procedures existed which must be exhausted before the applicants could invoke the protection of the European Commission or Court of Human Rights. *Id.* Had the applicants exhausted all French procedures, however, the court made clear that it would consider the merits of the Article 3 challenge. *See id.* ¶ 89 (citing *Cruz Varas v. Sweden*, App. No. 15576/89, 14 Eur. H.R. Rep. ¶ 70, and *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989)).

recourse is also available to applicants through the European Court of Justice in Luxembourg.

These aspects of the French system provide a series of checks on political branch power in the area of asylum. In the United States, however, political adjustments to asylum rights are not limited by the Constitution, nor by judicial review, nor by international conventions or their enforcement bodies. Congress establishes the bottom line. As a result, the American system for affording protection to asylum applicants is peculiarly vulnerable to political pressures and compromises. This systemic peculiarity in American asylum law suggests that legislative adjustments which diminish protections should be enacted only for serious consideration when all else has failed.

CONCLUSION

What is clear from the French reforms is that improving the efficiency of American asylum procedure will require significant increases in staffing and funding. The French experience and comparative surveys illustrate the need for better staffing of the asylum officer corps.¹²⁷ France, for example, has a current ratio of one staff member for every fifty asylum applicants.¹²⁸ In the United States, when the asylum offi-

127. See SARAH IGNATIUS AND DEBORAH ANKER, NATIONAL ASYLUM STUDY PROJECT: AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 61 (1993) (stating that the INS plans to first become current with claims as they are being filed and then begin to work on reducing the backlog of pending claims). If asylum applications continue to be filed at the current rate of over 10,000 per month, it is unlikely that the INS will be able to keep pace even if the "streamlining" regulations are enacted. *Id.* The proposed doubling of the asylum officer corps from 150 to 300 officers may not keep pace with applications currently being filed much less alleviate the existing backlog. *Id.*

128. *Senate Hearing Reacts to Terrorist Incidents: Calls for Asylum Reform*, REFUGEE REP., May 31, 1993, at 6. The report provided the following statistics concerning the size of asylum staffs in various countries:

<i>Country</i>	<i>Asylum Staff</i>	<i>1992 Claims</i>
Germany	3,500	438,191
Sweden	800	83,963
Netherlands	750	17,462
France	600	27,486
U.K.	500	24,610
Switzerland	500	17,960
United States	297	103,447
Austria	460	9,765

cer corps is increased to 300 persons, the staff ratio will be about one to 400.¹²⁹

The French reforms also make clear the importance of eventual consideration of a general amnesty program for those applicants who have waited for many years in this country for processing of their claims. The 1991 French amnesty program provides a useful model both in terms of political feasibility and successful implementation.

Finally, the United States should resist the temptation to legislate a quick procedural "fix" of the so-called asylum crisis. We should not compromise the current procedural protections afforded asylum applicants solely in order to reduce the numbers of applicants. The current political turmoil in Haiti, Bosnia, and other areas of the world reaffirms the need for an asylum procedure which carefully and thoroughly reviews the claims presented.

129. This calculation does not include the expected backlog of 500,000 claims and assumes that claims will occur at the current rate of about 10,000 per month.