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Exploitation v. Expulsion: The Use of Expedited Removal in Asylum Cases as an Answer to a Compromised System

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EXPLOITATION V. EXPULSION: THE USE OF EXPEDITED REMOVAL IN ASYLUM CASES AS AN ANSWER TO A COMPROMISED SYSTEM

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I. INTRODUCTION

On the first of May in 1996, U.S. Senator Alan Simpson summarized a seemingly harsh proposed change to U.S. asylum law:

The present asylum system is vulnerable to . . . persons who exploit the numerous levels of administrative and judicial review to stay in this country for years even though they have . . . enter[ed] this

country with fraudulent documents and . . . have no grounds for being in the United States of America except the possibility of asylum. We are about to pass what many . . . will describe as a tough illegal immigration bill, and it will be, and it will pass.¹

This Comment provides an analysis of one of the most controversial changes to asylum law in the Illegal Immigration Reform and Immigration Responsibility Act of 1996:² the use of new expedited removal procedures. United States asylum law was born of a collective sense that basic human rights should be protected. Once compromised and abused, Congress answered in the form of progressively higher standards for asylum applicants.³ The most recent manifestation of these higher standards appeared with the passage of the 1996 Act. The effective date of many of the 1996 Act's new provisions was April 1, 1997.⁴ After nearly a year of review, numerous critics claim the pendulum has swung too far, and now cry out for a return to humanitarian sense.⁵

Beginning with a brief history of U.S. asylum law, this Comment includes a discussion of past and present asylum procedures. Next presented are the provisions of the 1996 Act, which mandate the use of expedited removal procedures in certain asylum cases. Following this groundwork is a review of the common criticisms of the new provisions, together with an analysis of the merits of each claim. The Comment concludes with the recommendation that ultimate success of the U.S. asylum program is dependent not on a choice between sense *or* sensibility, but on a combination of sense *and* sensibility.

II. BACKGROUND

A. Asylum Defined

Asylum, in its simplest definition, is a "place of retreat and security."⁶ Presently, in terms of U.S. immigration law, asylum is a discretionary benefit⁷ conferring at least temporary resident status⁸ to refugees. "Refugees"

1. 142 CONG. REC. S4462 (daily ed. May 1, 1996) (statement of Sen. Simpson).

2. See Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, §§ 1-671, 110 Stat. 3009, 3009-549 to 3009-724 (1996) (amending 8 U.S.C. §§ 1-1557).

3. See *infra* text and accompanying notes 6-11.

4. See *id.*

5. See discussion *infra* Part III.B.

6. See WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 116-17 (2d ed. 1979).

7. See DAVID A. MARTIN, ASYLUM CASE LAW SOURCEBOOK xix (1994 ed.). Asylum is granted at the discretion of the United States Attorney General (AG). See *id.*

are defined as foreign citizens (aliens) who are unwilling or unable to return to their country of citizenship because they have a well-founded fear of persecution.⁹ In the United States, the claim to asylum must be based on persecution because of the refugee's race,¹⁰ religion, nationality, membership in a social group, or political opinion.¹⁰

As the term's definition indicates, a refugee alien seeking asylum must demonstrate either actual persecution or a well-founded fear of persecution.¹¹ Persecution is "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."¹² A "well-founded fear" consists of a "reasonable" fear of persecution, rather than a "clear probability" of persecution.¹³ Thus, an alien may receive a discretionary grant of asylum by establishing past persecution or a well-founded fear of future persecution on one of the five enumerated grounds.

While the United States has had, since the late nineteenth century, some system in place to protect persons fleeing persecution, the present definition of "refugee" is a product of mid to late twentieth century developments in asylum and refugee law.¹⁴ An understanding of these developments is necessary for a meaningful analysis of the recent changes to asylum law brought by the 1996 Act.

B. History: 1945 to 1990

The aftermath of World War II prompted the United Nations to draft the Universal Declaration of Human Rights, which guaranteed all persons the right to seek asylum from persecution.¹⁵ Beginning in 1953, refugees of communism or Middle Eastern political unrest were admissible to the United States as a "fifth preference" under the preference category system

8. See INA § 209(b), 8 U.S.C. § 1159(b). Following a grant of asylum, foreign citizens are permitted to reside in the United States and, after one year, adjust their status from an asylee to that of a permanent resident, and may thereafter seek citizenship. Asylum status may be terminated if the circumstances giving rise to the claimed threat of persecution have ended. INA §§ 207(c)(4), 208(b), 209(a), 209(b)(3), 8 U.S.C. §§ 1157(c)(4), 1158(b), 1159(a).

9. See 8 U.S.C. § 1101(a)(42).

10. See *id.*

11. See *id.*

12. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) (setting forth four elements which an applicant for asylum must demonstrate in order to establish a well-founded fear of persecution).

13. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 421 (1987). The Board of Immigration Appeals has adopted this general standard. See *Matter of Mogharrabi*, 19 I&N Dec. 439, 439 (BIA 1987).

14. See MARTIN, *supra* note 7, at xviii.

15. *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess. U.N. Doc A1810, at art. 14 (1948).

established for the admission of aliens.¹⁶ In 1968, the United States became a party to the United Nations Protocol,¹⁷ which established the definition of refugee as a person with a well founded fear of persecution based on race, religion, nationality, membership in a social group, or political opinion.¹⁸ The Protocol, in addition to creating the present definition of a refugee, provided that contracting states "shall not expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."¹⁹

It was not until twelve years later, with the advent of the Refugee Act of 1980, that the United States incorporated the U.N. provisions into domestic law.²⁰ The Refugee Act was described as "one of the most important pieces of humanitarian legislation ever enacted by the United States Congress . . . [T]he United States [had] demonstrated its concern for the homeless, the defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes."²¹ The Refugee Act was the first piece of legislation to establish asylum procedures for aliens already within the United States or arriving at U.S. ports of entry.²² Previously, in 1970, Congress began to craft a comprehensive body of refugee law.²³ Drawing attention to the shortcomings of the existing refugee law, Congressman Peter Rodino called for "quick, effective, and affirmative action to permit the orderly entry into the United States of . . . refugees seeking freedom. . . . We must uphold America's tradition as an asylum for the oppressed."²⁴ Senator Kennedy concurred, adding that "[a] comprehensive asylum policy for refugees is long overdue."²⁵ The intervening

16. See generally THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 119-215 (2d ed. 1991). The United States utilizes a "preference" system for determining the order in which aliens can immigrate. For example, a parent, spouse, or child of a United States Citizen is a "first preference," a category with no numerical limit. The United States assigns quotas to the remaining eight categories, which include other relatives of U.S. citizens, relatives of non-citizen permanent residents, business categories, and labor/employment categories. See *id.* at 119-20.

17. See MARTIN, *supra* note 7, at xviii.

18. See United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (requiring that nations not return aliens to a country where their lives or freedom would be threatened based on the same five enumerated grounds used for establishing refugee status).

19. See *id.* at art. 33.

20. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103 (1980).

21. See 126 CONG. REC. 1519, 1522 (1980).

22. See INA § 208, 8 U.S.C. § 1158(a).

23. See generally *Proposed Amendments to the Immigration and Nationality Act: Hearings on H.R. 9112, H.R. 15092 and H.R. 17370 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 91st Cong. 2d Sess. 57 (1970).

24. See *id.*

25. See *id.*

years brought proposed reforms,²⁶ culminating in the March 17 enactment of the Refugee Act of 1980.²⁷

The 1980 Refugee Act provided for the creation and implementation of a system of asylum application for both aliens physically present within the United States and aliens appearing at a land border or port of entry.²⁸ The system was to be administered by the Attorney General through the Immigration and Naturalization Service.²⁹ The INS initially implemented its asylum procedures via interim regulations, and codified the asylum procedures in 1990.³⁰ The interim rule borrowed sections from the Refugee Act, identifying procedures for both refugee resettlement processing and asylum processing.³¹

During the years prior to codification (1979-1981), the Select Commission on Immigration and Refugee Policy conducted an evaluation which included a study of the regulations governing the admission of refugees to the United States.³² The Commission recommended that officials reviewing asylum applications have the aid of experts who could provide information on country conditions.³³ In the years that followed, a number of groups proposed asylum legislation in an attempt to pass a final rule.³⁴ On April 6, 1988, the proposed final asylum rule, as revised by the Department of Justice, appeared in the Federal Register.³⁵ Additional modifications resulted in the establishment of an asylum corps, and the rule was finally promulgated by Attorney General Dick Thornburgh on July 27, 1990.³⁶

During the 1980-1990 developmental period, the infant U.S. asylum provisions were tested against a tide of refugees cast from the wake of unforeseen political developments. During the spring and summer of 1980, the Mariel Boatlift brought about 125,000 asylum seekers from Cuba.³⁷ Contemporaneously, thousands of Haitian asylum applications were

26. See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 27-32 (1981).

27. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103 (1980).

28. See 8 U.S.C. § 1158(a) (added by § 201(b) of the Refugee Act of 1980).

29. See *id.*

30. See 55 Fed. Reg. 30,674, 30,674-88 (1990) (codified at 8 C.F.R. § 208); *Final Asylum Regulations Finally Published*, 67 INTERPRETER RELEASES 817, 817 (1990).

31. See 45 Fed. Reg. 37,392, 37,392-96 (1980) (codified at 8 C.F.R. §§ 207-09).

32. See SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT, (Rec. No. V.B. 4).

33. See *id.* at 173-74.

34. See 46 Fed. Reg. at 45,116, 45,116-20 (1981) (codified at 8 C.F.R. §§ 108, 207, 209); see also 58 INTERPRETER RELEASES 538 (1981); Immigration Reform & Control Act (IRCA) of 1983, S. 2222, H.R. 7357, 97th Cong. (1982); 53 Fed. Reg. 11,300, 11,300-10 (1988) (codified at 8 C.F.R. § 208).

35. See 53 Fed. Reg. 11,300, 11,300-10 (1988) (codified at 8 C.F.R. § 208).

36. See 55 Fed. Reg. 30,674, 30,674-88 (1990) (codified at 8 C.F.R. § 208).

37. See ALEINIKOFF & MARTIN, *supra* note 16, at 739.

filed.³⁸ Likewise, Iranians submitted thousands of applications following the fall of Iran's Shah during 1980 and 1981.³⁹ The fall of then-president Somoza in 1980 led to numerous Nicaraguan applications.⁴⁰ The result was a backlog of more than 170,000 asylum applications, which was cleared only by a special INS effort.⁴¹ The stability which followed was to be short lived.

By 1988, there was a statistical trend showing a marked increase in applications originating from Central America.⁴² This surge was attributed to the 1986 passage of the Immigration Reform and Control Act (IRCA) of 1986.⁴³ IRCA's employer sanction provisions made it difficult for undocumented aliens to obtain employment.⁴⁴ Aliens quickly adapted to IRCA's restrictions, and began to seek other avenues of obtaining work permits; they learned one option was filing for asylum.⁴⁵ Paradoxically, IRCA regulations had mandated employment authorization to aliens who filed non-frivolous asylum applications.⁴⁶ However, with no effective frivolousness screening system in place, the U.S. asylum process was vulnerable to fraud. Consequently, the United States' new asylum system was a process many aliens proceeded to abuse by filing frivolous applications.⁴⁷ A frivolous application allowed the alien to gain entry to the U.S., work while the application was pending, and establish a life in the U.S. which could lead to other forms of relief.⁴⁸ An overview of this process reveals

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See* ALEINIKOFF & MARTIN, *supra* note 16, at 739-40 (citations omitted). In early 1989, the INS was receiving approximately 2,000 applications a week in South Texas alone. *See id.* at 740.

43. *See* David A. Martin, *The End of De Facto Asylum: Toward a Humane and Realistic Response to Refugee Challenges*, 18 CAL. W. INT'L. L.J. 161, 163 (1987-88).

44. *See id.* *See generally* INA § 274A, 8 U.S.C. § 1324(a) (addressing the unlawful employment of aliens). The provision enumerates the circumstances under which an alien may be hired, and provides statutory guidance regarding documents as evidence of an alien's eligibility for employment. The section also establishes enforcement authority and a system of sanctions for noncompliance. *See id.*

45. *See* Martin, *supra* note 43, at 164.

46. *See id.*

47. *See generally* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1290-92 (1990) (attributing the filing of meritless asylum applications to the corresponding issuance of work permits to applicants whose cases were pending). The number of illegitimate applications served to slow the adjudication of all asylum applications, allowing the fraudulent filer to remain in the United States. Many such aliens disappeared altogether without pursuing their claims. *See id.*

48. *See id.* For example, aliens accruing seven years continuous physical presence in the United States were eligible for a benefit known as "suspension of deportation" if their removal would result in extreme hardship to certain U.S. citizen relatives. *See* INA § 244, 8 U.S.C. § 1254.

the major weaknesses therein.

C. Overview of the 1990 Asylum Process

Under the 1990 asylum procedures,⁴⁹ two remedies were available to refugees who reached the United States.⁵⁰ The first, termed “withholding of deportation” in the context of U.S. law, provided that the asylum claimant could not be returned to his or her country of claimed persecution.⁵¹ However, the 1951 United Nations Convention Relating to the Status of Refugees, adopted by the United States, mandated return to any third country which would accept the refugee.⁵² In other words, the applicant for withholding of deportation has not been accorded a benefit of any permanency—he or she can be sent to any safe, accepting country other than the persecuting country.

Asylum is a second, stronger remedy, which allows refugees, as asylees, a broader spectrum of privileges. Unlike withholding of deportation, which merely prevented immediate return to a hostile country, a grant of asylum often allows the alien to seek permanent residence in the United States.⁵³

Both asylum and withholding applicants completed a single application form entitled “Application for Asylum/Withholding of Deportation;”⁵⁴ most aliens applied for both forms of relief. Two procedural

49. See Parts I.E and II for a discussion of the development of these procedures.

50. See MARTIN, *supra* note 7, at xix. An alien is excludable when his or her right to enter the United States is put into question at the border. Deportable aliens are those whose right to stay is placed in issue after they have made an entry into the United States, even if such entry is made without inspection. This distinction was prospectively eliminated with the passage of the Immigration Individual Responsibility and Reform Act of 1996, but still applies to aliens placed under deportation or exclusion proceedings prior to the 1996 Act’s April 1, 1997 effective date. See INA §§ 239, 8 U.S.C. 1229a (governing the initiation and effective dates of the newly termed “removal” proceedings, which displaced the “deportation” and “exclusion” terminology).

51. See *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137, art. 33; see also INA § 241(b)(3) (repealed), see now 8 U.S.C. §1253(h) (setting forth the criteria for withholding of deportation). Withholding of deportation, once within the Attorney General’s discretionary authority, became mandatory with the passage of the Refugee Act of 1980 and expanded to include aliens in exclusion proceedings. Return must be withheld if the alien shows his life or freedom would be threatened on account of race, religion, nationality, membership in a social group, or political opinion. See MARTIN, *supra* note 7, at 735-36.

52. See *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137, art. 33.

53. See INA § 209(b)(2), 8 U.S.C. § 1159(b)(2) (authorizing adjustment of status to that of a permanent resident after one year).

54. See INS Form I-589, reprinted in Jeanne A. Butterfield, *The New Asylum*

tracks of review existed. First, an alien could file an application directly with the INS, termed an "affirmative" application.⁵⁵ Second, an alien charged with an immigration violation could seek asylum before an Immigration Judge during what were commonly referred to as "deportation" or "exclusion" proceedings.⁵⁶

If immigration court proceedings had not yet commenced, the alien could file an application for asylum and/or withholding of deportation⁵⁷ "affirmatively," that is, directly with the INS through its newly established offices of asylum.⁵⁸ After conducting an asylum interview,⁵⁹ the reviewing asylum officer could either grant or deny the application.⁶⁰ Prior to a denial, the asylum officer would prepare a letter to the applicant, known as a Notice of Intent to Deny, setting forth the grounds for the anticipated denial.⁶¹ The applicant was afforded a period of sixty days in which to submit additional supporting documents, which were then considered by the asylum officer.⁶² If the asylum officer denied the application, the alien would face deportation or exclusion proceedings commenced by the issuance of a charging document known as an Order to Show Cause and Notice of Hearing.⁶³ In those proceedings, asylum applicants essentially received *de novo* adjudication of their applications by an immigration judge,⁶⁴ whose decision was subject to further review by both the Board of Immigration Appeals and the federal courts.⁶⁵

If an alien failed to file an affirmative asylum application prior to being placed in deportation or exclusion proceedings, the alien could submit an asylum application to the Immigration Court. The alien then received an evidentiary hearing before an immigration judge.⁶⁶ As with affirmative asylum cases, the decision of the immigration judge could be appealed to the Board of Immigration Appeals (BIA).⁶⁷ Likewise, the de-

Regulations: A Practitioner's Guide, IMMIGR. BRIEFINGS, Feb. 1995, at 60-67.

55. See *INS Finalizes Asylum Reform Regulations*, 71 INTERPRETER RELEASES 1577, 1578 (1994). Affirmative applications make up nearly ninety percent of all asylum applications. See *id.*

56. See *id.*

57. See Butterfield, *supra* note 54, at 7.

58. See *INS Finalizes Asylum Reform Regulations*, *supra* note 55, at 1578.

59. See 8 C.F.R. § 208.9 (1997).

60. See *id.* §§ 208.14(a), 208.16-17 (1997).

61. See Mary Waltmire, *An Analysis of the Clinton Administration's Proposed Asylum Reform Regulations*, 1 U.C. DAVIS J. INT'L L. & POL'Y, 1, 9 (1995).

62. See 8 C.F.R. § 208.17 (1997).

63. See Butterfield, *supra* note 54, at 10.

64. See *id.*

65. See *supra* notes 30-31.

66. See 8 C.F.R. § 3.10 (1997).

67. See 8 C.F.R. § 3.1(b)(1),(2) (1997). The Executive Office for Immigration Review administers operation of the Board of Immigration Appeals. See *id.*

cision of the BIA was then subject to judicial review in the federal courts.⁶⁸

The INS formed a corps of asylum officers to administer the application process.⁶⁹ Where asylum applications had been reviewed by the INS Examiners at the District Office level, the new asylum corps took over the function.⁷⁰ The corps, which operated as an entity separate from the established INS district offices, was overseen by the INS Central Office of Refugees, Asylum, and Parole in Washington, D.C.⁷¹

The first class of eighty-two asylum officers received training in asylum law and country conditions in February and March of 1991.⁷² Seven asylum offices were created, six opened by the target date of April 2, 1991.⁷³ In March of 1992, the INS increased the asylum officer corps to 150 officers.⁷⁴ The backlog of nearly 100,000 cases in need of adjudication, coupled with a significant increase in new cases, caused the total number of pending cases to swell to 422,105 by the end of 1994.⁷⁵ This backlog, arguably the result of an underfunded asylum program coping with the challenge of thousands of allegedly fraudulent claims, became the catalyst for the 1994 immigration asylum reforms.

D. The Asylum "Problem"

As early as 1990, criticisms of the asylum program were voiced by a variety of groups. First, from an enforcement standpoint, a widely shared concern was that procedural delays encouraged marginal and fraudulent asylum claims.⁷⁶ Second, media coverage of the 1993 bombing at the

68. See INA § 106(a),(b) (repealed 1996), 8 U.S.C. § 1105a(a), (b) (repealed 1996) (allowing petitions for review of deportation orders in courts of appeals and allowing habeas corpus review of exclusion orders in district courts).

69. See 55 Fed. Reg. 30,674, 30,674-88 (1990) (codified at 8 C.F.R. § 208).

70. See Butterfield, *supra* note 54, at 1.

71. See *id.*

72. See *INS Opens Asylum Offices Amid Large Backlogs, Charges of Inadequate Funding*, 68 INTERPRETER RELEASES 401, 401-02 (1991).

73. See *id.*

74. See Greg Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. OF REFUGEE L. 467, 467-72 (1992) (noting the creation of an interim cadre of officers which operated from October 1990 to April 1991).

75. See Butterfield, *supra* note 54, *citing* Asylum Division, INS, *Asylum Cases Filed with INS FY 1980-1994*, (Oct. 27, 1994), in ASYLUM DIVISION, INS PRELIMINARY FISCAL YEAR 1994 STATISTICAL PACKAGE (Oct. 28, 1994). In 1991, pending asylum cases numbered 137,046, with 103,964 new cases filed during fiscal year 1992. See *id.* Asylum officers completed 21,996 cases in fiscal year 1992. Fiscal year 1993 saw 144,166 cases added with only 34,228 cases completed. See *id.* Similarly, in fiscal year 1994, 146,468 new cases were filed, with only 54,196 cases completed in that fiscal year. See *id.*

76. See, e.g., David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1290-92 (1990). See generally Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671, 671-72 (1992) (providing a thorough analysis of the challenge of meet-

World Trade Center in New York and the shooting at CIA Headquarters in Washington, D.C. served to fuel public dissatisfaction with U.S. asylum policy.⁷⁷ Third, some immigration policy analysts theorized that broad asylum policy "had expanded into an alternative form of immigration, rather than the extraordinary remedy it was once envisioned to be."⁷⁸ These commentators further maintained that work authorization, a benefit available to aliens with pending asylum applications, encouraged unfounded claims.⁷⁹

Immigrant rights advocates countered that the processing delays were the product of insufficient INS resources.⁸⁰ Some blamed the INS's inability to adequately confront real and widespread human rights abuses.⁸¹ Such a delay, according to the advocates, was prejudicial to refugees with meritorious asylum claims because it contributed to the hardships of assimilation to United States culture.⁸² Moreover, a refugee's access to evidence necessary to substantiate claims of persecution arguably eroded with the passage of time.⁸³

In 1993, the National Asylum Study Project had issued a final report which set forth recommendations addressing the asylum case backlog and attendant fraud.⁸⁴ The report suggested that the asylum corps be doubled.⁸⁵ Additionally, the report advised that asylum interviews be conducted within ninety days of the application date.⁸⁶ Meanwhile, the Clinton administration was conducting its own study of the "asylum problem,"⁸⁷ while members of Congress introduced legislation during the

ing the procedural burdens of the U.S. asylum process).

77. See generally Daniel A. Stein, *Immigration Dilemma: Humanity vs. Terrorism—America Must Remain a Safe Haven*, NAT'L L. J., May 3, 1993, at 15 (writing of the necessity of additional procedures in the immigration process). See also John J. Miller, *Immigrant Bashing's Latest Falsehood*, THE WALL ST. J. EUR., March 9, 1994, at 1, available in 1994 WL-WSJE 2023545 (providing statistics of U.S. sentiment toward immigrants following the bombing of New York City's World Trade Center); Holly Idelson, *Asylum Requests Strain System at Seams, Fraud Charges Don't Aid Mood in Congress*, SAN DIEGO UNION TRIB., May 22, 1993, at A8 (documenting heightened public and congressional concern about the U.S. asylum system following the 1993 shooting outside CIA headquarters and World Trade Center bombing).

78. See Daniel C. Horne & L. Ari Weitzhandler, *Asylum Law After the Illegal Immigration Reform and Immigration Responsibility Act*, IMMIGR. BRIEFINGS, Apr. 1997, at 2.

79. See Legomsky, *supra* note 76, at 675.

80. See Butterfield, *supra* note 54, at 3.

81. See *id.*

82. See Legomsky, *supra* note 76, at 675.

83. See *id.*

84. See Butterfield, *supra* note 54, at 3.

85. See *id.*

86. See *id.*

87. See Butterfield, *supra* note 54, at 3-4. In 1993, Clinton ultimately asked Congress for \$172.5 million to tighten border enforcement and speed the asylum

103rd session proposed to markedly restrict asylum.⁸⁸

By 1994, it became apparent that it was possible for several years to pass between the date of application and the date a final asylum determination was made, with the asylum corps able to review a mere thirty to thirty-five percent of new applications.⁸⁹ The common denominator of most asylum concerns was the universal undesirability of the large backlog of unadjudicated asylum claims. The INS issued proposed reform regulations in the spring of 1994.⁹⁰ Those regulations took effect less than a year later, in January of 1995.⁹¹

E. The 1994 Asylum Reform

The 1994 reform regulations aimed to "streamline the [asylum] process to protect legitimate asylum seekers while curbing abuses of the asylum system."⁹² The regulations established a system of "referral," whereby the asylum officers would grant asylum to the applying alien in meritorious, uncomplicated cases and refer the remainder to the Immigration Court for evidentiary hearings.⁹³ Additionally, the regulations authorized that employment permits be available only to those asylum applicants whose cases had been pending for more than 180 days.⁹⁴ Consequently, a "clock" was established, whereby the INS would then have thirty days to adjudicate a work authorization application, however, the Immigration Judges were encouraged to adjudicate claims within the 180 day period.⁹⁵ This limitation was designed to deter aliens from filing meritless asylum applications for the sole purpose of obtaining an employment authoriza-

adjudication process, having found many aliens never appear for asylum hearings and instead become part of a large and growing illegal alien population. See U.S. DEP'T. ST. DISPATCH, August 9, 1993, available in 1993 WL 2977068 (reporting remarks made by President Clinton in Washington D.C. during an announcement of immigration policy).

88. See Butterfield, *supra* note 54, at 4. One of the proposed changes included replacing the well-founded fear test with a requirement the applicant establish that he would "more likely than not" be arrested or incarcerated if returned to his home country. 140 CONG. REC. S2779 (daily ed. Mar. 10, 1994) (statement of Sen. Reid). A recommendation was a new, expedited procedure for refugees establishing a "credible fear of persecution." 139 CONG. REC. H1262 (daily ed. Mar. 16, 1993) (statement of Rep. McCollum).

89. See Waltmire, *supra* note 61, at 15.

90. 59 Fed. Reg. 14,779, 14,779 (1994).

91. See *id.*

92. See *INS Proposes Asylum Reform Regulations*, 71 INTERPRETER RELEASES 445, 447 (1994).

93. See Butterfield, *supra* note 54, at 5.

94. See *id.*

95. See *INS Proposes Asylum Reform Regulations*, 71 INTERPRETER RELEASES 445, 447-48 (1994).

tion card.⁹⁶ The 1994 Crime Bill earmarked \$64 million for fiscal year 1995 asylum reform, which allowed the INS to double the asylum corps and add sixty-three new immigration judges.⁹⁷

Despite these enhancements to the asylum process, immigration reform, asylum included, became a major campaign issue in the 1996 U.S. presidential election.⁹⁸ Asylum was a controversial issue not only in the United States, but also in Europe, where many countries were restricting their asylum laws.⁹⁹ Among industrial nations, France, Germany, Belgium, and England each faced an asylum crisis as political changes swept through eastern Europe.¹⁰⁰ Public indignation in the United States peaked with the airing of a 1993 "60 Minutes" episode, in which the television news magazine program detailed asylum procedures at John F. Kennedy International Airport in New York.¹⁰¹ Among the spotlighted abuses was an organized smuggling ring who coached immigrants to destroy their travel documents and file for asylum.¹⁰² It was in this simmering political climate that further asylum reform was enacted as the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.¹⁰³

96. See Waltmire, *supra* note 61, at 20-21.

97. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (amending 8 U.S.C. § 1158); 60 Fed. Reg. 23,509, 23,518 (1995); Butterfield, *supra* note 54, at 5.

98. See Horne & Weitzhandler, *supra* note 78, at 2.

99. See *id.* (explaining that congressional actions relative to U.S. asylum concerns may have been an expression of global ambivalence with immigration, a frustration which appears to have grown out of a European fear of losing cultural identity).

100. See generally CONTROLLING IMMIGRATION (Wayne A. Cornelius, et al. eds. 1994) (providing the results of a comprehensive study of nine industrial nations struggling with immigration policy issues); MIGRATION AND EUROPEAN INTEGRATION: THE DYNAMICS OF INCLUSION AND EXCLUSION (Robert Miles & Detrich Thranhardt eds. 1995) (exploring the asylum policies of European nations). For example, France underwent a crisis of its republican identity following the fall of the Berlin Wall, the collapse of the Soviet Union, and the end of the Cold War. See CONTROLLING IMMIGRATION, *supra*, at 165-68. Fear of the multiculturalism evidenced in America has caused anti-American sentiment in France and shaped that country's immigration policy. See *id.* at 166. Polls in Germany reflected that 60% of all Germans wanted immigration there reduced or stopped. See *id.* at 189. In 1992 and 1993, police reported an average of 50 to 100 anti-foreigner incidents in Germany each day. See *id.* Belgium saw a sharp increase in asylum seekers, forcing that country to restrict asylum policies by identifying "safe countries" from which asylum could not be sought. See *id.* at 249. Great Britain entertained a zero-immigration policy. See *id.* at 273-94.

101. See Idelson, *supra* note 77, at A8.

102. See *id.*; see also Mike Brown, *Asylum System is Under Scrutiny; Mazzoli Pushing for Law's Reform*, COURIER-JOURNAL (Louisville, KY) May 3, 1993, at 1A (pointing out that asylum applicants are on their honor to appear for their asylum interview, but the no-show rate for asylum seekers flying into U.S. airports is about 50%).

103. See Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, §§ 1-167, 110 Stat. 3009, 3009-546 to 3009-724 (1996)

III. THE 1996 ACT AND THE EXPEDITED REMOVAL PROCESS

The Illegal Immigration Reform and Immigration Responsibility Act of 1996 made profound changes in U.S. Immigration law.¹⁰⁴ Moreover, the 1996 Act is said to constitute the "most significant revision to U.S. asylum law since the adoption of the Refugee Act of 1980."¹⁰⁵ While the 1996 Act primarily codified procedural changes instituted in 1995, many provisions were altered.¹⁰⁶

One of the most controversial changes was the creation of a process termed "expedited removal," which was to be used in certain asylum cases.¹⁰⁷ This new provision has been attacked by immigrant advocates as contrary to legislative intent,¹⁰⁸ hastily written,¹⁰⁹ potentially harmful,¹¹⁰ and possibly in violation of constitutional rights.¹¹¹

The U.S. Commission on Immigration Reform, while endorsing those changes which streamlined the adjudication process while reducing abusive asylum claims, suggested the expedited removal process was unnecessary.¹¹² Such a process, hinted the Commission, was only needed in mass migration emergencies.¹¹³ The next section addresses the rudiments of this "unnecessary" process.

A. *The Expedited Removal Process*

1. *Persons Affected*

The 1996 Act creates three classes of aliens affected by the expedited

(amending 8 U.S.C. §§ 1-1557).

104. *See id.*

105. *See* Horne & Weitzhandler, *supra* note 78, at 1.

106. *See id.* at 3. Altered provisions include those dealing with the expanded definition of a refugee, time limits on filing for asylum, and cutting off asylum relief for certain criminal aliens. *See id.* at 3-7.

107. *See generally* INA § 235, Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-579 to 3009-584 (1996) (amending 8 U.S.C. § 1225(b)) (describing process for expedited removal of inadmissible arriving aliens).

108. *See* Horne & Weitzhandler, *supra* note 78, at 12; Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 269 (1997).

109. *See* Schrag & Pistone, *supra* note 108, at 301.

110. *See* Michele R. Pistone & Philip G. Schrag, *The 1996 Immigration Act: Asylum and Expedited Removal - What the INS Should Do*, 73 INTERPRETER RELEASES 1565, 1580 (1996).

111. *See* Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction - Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245, 246 (1997).

112. *Immigration Reform Commission Issues Refugee and Asylum Recommendations*, 74 INTERPRETER RELEASES 957, 958 (1997).

113. *See id.*

removal provisions.¹¹⁴ The first class includes persons appearing at ports of entry 1) without valid travel documents, 2) with false travel documents, or 3) with documents obtained by fraud.¹¹⁵ For example, a person making misrepresentations on a visa application, while holding apparently valid travel documents issued by the consulate, would be nonetheless subject to the provision.¹¹⁶ Stowaways comprise a second class of inadmissible persons subject to the expedited removal provisions.¹¹⁷ The third class of persons subject to expedited removal are aliens who are determined inadmissible for having entered the United States without inspection.¹¹⁸

Those aliens who cannot establish at least two years of continuous residence in the United States are subject to the expedited removal provision.¹¹⁹ To escape the scope of the provision, the alien must establish two years of continuous residence in the United States prior to the date an inadmissibility determination is made by an INS officer.¹²⁰

2. Inspection and Referral

An expedited removal determination is within the discretion of immigration officers, usually Immigration Inspectors posted at the U.S. ports of entry.¹²¹ Ports of entry include major airports, coastal shipping ports, and land ports (commonly known as border stations).¹²² Customs and immigration inspection at a port involves "primary" and sometimes "sec-

114. See INA § 235(b)(1)(A)(i), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-580 (1996) (amending 8 U.S.C. § 1225(b)(1)(A)(i)). "If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under Section 212(a)(6)(C) or 212(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under Section 208 or a fear of persecution." See *id.*; see also INA § 212(a)(6)(c), Pub. L. No. 104-208, § 344, 110 Stat. 3009, 3009-637 (1996) (amending 8 U.S.C. § 1182(a)(6)(C)); INA § 212(a)(7), 8 U.S.C. § 1182(a)(7).

115. See INA § 235(b)(1)(A)(i), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-580 (1996) (amending 8 U.S.C. § 1225(b)).

116. See *id.*

117. See INA §§ 212(a)(6)(C), 212(a)(7), 8 U.S.C. §§ 1182(a)(6)(C), 1182(a)(7).

118. See INA § 235(b)(1)(A), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-580 (1996) (amending 8 U.S.C. § 1225(b)).

119. See *id.*

120. See *id.*

121. See Horne & Weitzhandler, *supra* note 78, at 13. Such determinations may also be made by Special Agents upon encountering an alien already present in the United States, who was not inspected at a port of entry. However, the Attorney General has not yet implemented this portion of the provision. See 62 Fed. Reg. 10,312, 10,313 (1997) (preamble).

122. See Horne & Weitzhandler, *supra* note 78, at 13. U.S. citizens, who are not subject to the inspection process at these ports, are naturally exempt from expedited removal. See *id.*

ondary” inspection.¹²³ In primary inspection, an immigration officer examines travel documents, checks the information against computer records, and asks questions of the traveler to determine admissibility.¹²⁴ According to the INS, nearly 475 million persons were inspected during the 1996 fiscal year.¹²⁵

Secondary inspection is designed to resolve questions unanswered during primary inspection through a more thorough examination.¹²⁶ While most travelers are admitted at this stage, it is here that the Immigration Inspector may find that an alien seeking entry is inadmissible to the United States—a finding which begins the expedited removal process.¹²⁷

3. Expedited Removal Procedures during Secondary Inspection

Following a determination of inadmissibility, the Immigration Inspector is required to create an INS file containing the record of the expedited removal process.¹²⁸ The record contains an alien’s “Record of Sworn Statement in Proceedings Under Section 235(b)(1) of The Act,” together with a record of case facts, case evidence, and reasons for the officer’s inadmissibility determination.¹²⁹ A statement of rights, purpose, and consequences of expedited removal is provided to the alien and a copy is kept in the INS file.¹³⁰ This statement, INS Form I-867AB, includes a section which asks the alien whether he or she has any fear or concern of being sent home.¹³¹ If such a fear or concern is indicated, the alien is provided with a detailed written explanation of the credible fear screening process, during which an alien may qualify for an asylum hearing based on his or her credible fear of persecution.¹³² A “credible fear of persecution” is defined as a demonstration of a “significant possibility” that the alien could establish the criteria for a grant of asylum set forth in Immigration and Nationality Act, section 208.¹³³ Finally, each expedited removal case will be reviewed by a Supervisory Immigration Inspector before an alien is removed from the United States.¹³⁴ The supervisor must review additional

123. *See id.*

124. *See id.*

125. *See id.* *See also* 62 Fed. Reg. 10,312, 10,318 (1997) (preamble).

126. *See id.*

127. *See id.*

128. *See* 8 C.F.R. § 235.3(b)(2)(i). *See also* 62 Fed. Reg. 10,312, 10,318, 10,355 (1997) (preamble).

129. *See* 62 Fed. Reg. 10,312, 10,318 (1997) (preamble).

130. *See id.*

131. *See* 62 Fed. Reg. 10,312, 10,318-19 (1997) (preamble). *See also infra* notes 26-27 and accompanying text.

132. *See* 62 Fed. Reg. 10,312, 10,318-19 (1997) (preamble).

133. *See* INA § 235(b)(1)(B)(v), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-582 (1996) (amending 8 U.S.C. § 1225(b)). *See supra* note 117.

134. *See* 62 Fed. Reg. 10,312, 10,319 (1997) (preamble).

evidence, any claims the alien may make of lawful admission, and may request additional information and/or a further interview of the alien.¹³⁵

Aliens who demonstrate either intent to apply for asylum, or express fear or concern of returning to their home country are to be referred by the Immigration Inspector for a credible fear interview.¹³⁶ The 1996 Act calls for detention of aliens during this interview process, which may take place at either the port of entry or any other place designated by the attorney general.¹³⁷ The "other place" will in most cases be an INS detention facility or local county jail, to which an asylum officer would travel to conduct the interview.¹³⁸

In preparation for the credible fear interview, the INS provides the alien with a written disclosure indicating: 1) the purpose of the referral and the credible fear interview process, 2) the alien's right to talk with other persons (including a legal representative) before the interview, at no expense to the government, 3) the alien's right to request that an Immigration Judge review the decision of the asylum officer, and 4) the consequences of failing to establish a credible fear of persecution.¹³⁹ The representative described may or may not be an attorney.¹⁴⁰ Such a representative may consult with the alien either before or after the interview, and in any subsequent proceeding before the Immigration Judge.¹⁴¹ However, no representation will be allowed during the interview itself, and such consultations must not "unreasonably delay" the process.¹⁴²

135. See 62 Fed. Reg. 10,357, 10,357 (1997) (interim regulation to be codified at 8 C.F.R. § 235.3(b)(7)).

136. See INA § 235(b)(1)(A)(ii), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-580 (1996) (amending 8 U.S.C. § 1225(b)). Asylum interviews are conducted by Asylum Officers, who are specially trained in the area of asylum and country conditions. See *id.*

137. See INA § 235(b)(1)(B)(i), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)). Although this detention was initially thought to be mandatory, there are indications that District Directors may have authority to parole such aliens as a matter of discretion. See *INS Reports on First Three Months of Implementation of Expedited Removal*, 74 INTERPRETER RELEASES 1101, 1102 (1997) [hereinafter *INS Reports*].

138. See 62 Fed. Reg. 10,312, 10,319 (1997) (preamble).

139. See 62 Fed. Reg. 10,355, 10,356 (1997) (interim regulation to be codified at 8 CFR § 235.3(b)(4)(i)(A)-(D)).

140. See *id.*

141. See INA § 235(b)(1)(B)(iv), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 to 3009-582 (1996) (amending 8 U.S.C. § 1225(b)). However, Chief Immigration Judge Michael J. Creppy, by memorandum dated March 27, 1997, advised the Immigration Judges that there is no right to counsel or representation during the Immigration Judge's review of an Asylum Officer's adverse credible fear determination. See *INS Reports*, *supra* note 137, at 1103. Sen. Edward Kennedy (D-Mass.) urged the INS to amend the regulation in this regard. See *id.*

142. See INA § 235(b)(1)(B)(iv), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 to 3009-582 (1996) (amending 8 U.S.C. § 1225(b)). See also 62 Fed. Reg. 10,312, 10,319 (1997) (preamble) (providing the circumstances where alien rep-

4. The Credible Fear Interview

The purpose of the credible fear interview is not to determine whether the alien should be granted asylum, but whether the alien is eligible to receive an asylum hearing before an Immigration Judge.¹⁴³ As stated earlier, an alien who establishes a "credible fear of persecution" is detained for a hearing in which an Immigration Judge reviews the merits of the asylum application.¹⁴⁴

A "credible fear of persecution" is defined as a demonstration of a "significant possibility" that the alien could establish the criteria for a grant of asylum set forth in Immigration and Nationality Act, section 208.¹⁴⁵ Although "significant possibility" is not clearly defined by the 1996 Act nor the interim regulations, immigration practitioners assert the phrase should not be interpreted as more stringent than the "1 in 10 chance" test for a well-founded fear of persecution as adopted by the U.S. Supreme Court in *INS v. Cardoza-Fonseca*.¹⁴⁶ In *INS v. Cardoza-Fonseca*, the Supreme Court plainly illustrated its interpretation of a "well-founded fear" of persecution, giving a specific example of an asylum applicant having a one in ten chance of being killed or sent to a labor camp.¹⁴⁷

If, after an asylum interview, the Asylum Officer determines the arriving alien has not established a credible fear of persecution, the officer is to inquire whether the alien wishes a review of the negative decision by an Immigration Judge.¹⁴⁸ If the alien does not seek review, the officer is to

resentation is warranted).

143. See INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii). "Referral for Certain Aliens.- If the officer determines at the time of the interview that the alien has a credible fear of persecution within the meaning of clause (v), the alien shall be detained for further consideration of the application for asylum." *Id.*

144. See INA § 235(b)(1)(B)(ii), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)).

145. See INA § 235(b)(1)(B)(v), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-582 (1996) (amending 8 U.S.C. § 1225(b)). See generally INA § 208(b), 8 U.S.C. § 1158(b) (outlining the requirements and exceptions of an asylum grant, including meeting the definition of a refugee within the meaning of INA § 101(a)(4)(A), 8 U.S.C. § 1101(a)(4)(A)). See also *supra* Part II.A.

146. See Horne & Weitzhandler, *supra* note 78, at 15 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)).

147. 480 U.S. 421, 431 (1987). The Court quoted a refugee reference:

Let us . . . presume that it is known that in the [asylum] applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have a "well-founded fear of being persecuted" upon his eventual return.

See *id.* The court concluded that, "This ordinary and obvious meaning of the phrase is not to be lightly discounted." See *id.*

148. See 62 Fed. Reg. 10,312, 10,346 (1997) (interim regulations to be codified at 8 C.F.R. § 208.30(e)).

order the alien removed from the United States without further hearing or review.¹⁴⁹ Like the Immigration Inspector, the Asylum Officer is required to prepare a record of the proceeding which includes the material facts and statements relied upon, together with the basis of the Asylum Officer's negative determination.¹⁵⁰ If the alien seeks review of the adverse decision, the case is forwarded for the further review by the Immigration Judge.

5. Immigration Judge Review

When an alien has requested review of an Asylum Officer's adverse decision, review is limited to whether the alien has demonstrated the credible fear necessary to warrant a full asylum hearing.¹⁵¹ The review must be conducted within seven days of the Asylum Officer's decision.¹⁵² the 1996 Act also mandates that the review must allow the alien to be heard and questioned by the Immigration Judge in person, by telephone, or through video conferencing.¹⁵³

If the Immigration Judge affirms the Asylum Officer's decision, finding that no credible fear exists, the case is returned to the INS and the

149. See INA § 235(b)(1)(B)(iii)(I), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)). "[I]f the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review." See *id.*

150. See INA § 235(b)(1)(B)(iii)(II), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)).

Record of Determination: The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

See *id.*

151. See INA § 235(b)(1)(B)(iii)(III), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)).

152. See INA § 235(b)(1)(B)(iii)(III), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)).

Review of Determination - The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by an immigration judge, either in person or by telephonic video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than seven days after the date of the determination in subclause (I).

See *id.*

153. See *id.*

alien may be removed from the United States.¹⁵⁴ However, if the Immigration Judge determines the alien has demonstrated a credible fear of persecution, the Asylum Officer's order of removal will be vacated, and the case will be placed in Immigration Court proceedings.¹⁵⁵ At this point, the alien may formally apply for asylum.¹⁵⁶

The decisions made by the Immigration Inspectors, Asylum Officers, and Immigration Judges during the expedited removal process are generally not subject to any judicial review.¹⁵⁷ Such review is reserved only by habeas corpus, and limited to whether the petitioner is an alien, whether the petitioner was ordered removed under the expedited removal process, and whether the petitioner can prove he or she is a lawful permanent resident or previously admitted as a refugee or asylee.¹⁵⁸ Immediate concerns of constitutional due process and unfair denial of habeas relief emerged.¹⁵⁹ These questionable limitations and others almost immediately earned the expedited removal process its reputation as "the most radical . . . change the 1996 Act made to asylum law."¹⁶⁰

B. Criticism and Critique

The use of expedited removal in asylum cases has given rise to a maelstrom of criticism and commentary. Virtually no stage of expedited removal processing has been spared from immigrant advocate protest and condemnation.¹⁶¹ In what appears to be a disproportionate application of

154. See 62 Fed. Reg. 10,312, 10,346 (1997) (interim regulation to be codified at 8 C.F.R. § 208.3(f)(1)).

155. See 62 Fed. Reg. 10,312, 10,346 (1997) (interim regulation to be codified at 8 C.F.R. § 208.3(f)(3)).

156. See *id.* A single class of aliens - stowaways - are granted the right to appeal an Immigration Judge's adverse credible fear determination to the Board of Immigration Appeals. See *id.*

157. See INA § 242(e)(2), 8 U.S.C. § 1252(e)(2).

Habeas Corpus Proceedings: Judicial review of any determination made under Section 235(b)(1) is available in habeas corpus proceedings, but shall be limited to determinations of

(A) whether the petitioner is an alien

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under Section 270, or has been granted asylum under Section 208, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to Section 235(b)(1)(C).

See *id.*

158. See *id.*

159. See discussion *infra* Parts III.B.4.a and III.B.4.b.

160. Horne & Weitzhandler, *supra* note 78, at 2.

161. See discussion *infra* Parts III.B.1-5.

resources, the Immigration and Naturalization Service has scrambled to justify expedited removal in asylum cases by reinforcing areas of weakness.¹⁶²

This section critiques both the advocates' demands and the corresponding INS reaction in the most troublesome areas of expedited removal's asylum processing scheme. Part one treats the area of immigration inspection, followed by Part two, a review of interview conditions. Part three addresses the standards used in credible fear determinations. Part four of the Comment sketches the limitations on judicial review. The Comment concludes with a summary of the analysis and a proposal for reform.

As a preliminary matter, it is helpful to understand the relative number of persons affected by expedited removal. The INS reports approximately 1,200 persons arriving at ports of entry are processed under the expedited removal provisions of the 1996 Act each week.¹⁶³ Of those, about sixty (or five percent) are being referred to an asylum officer for a "credible fear" interview.¹⁶⁴ This fraction is very small in contrast with the nearly 500 million persons inspected each year at U.S. ports of entry.¹⁶⁵ It bears remembering that the procedures discussed in the remainder of this Comment will affect approximately 3,000 persons annually.¹⁶⁶

1. *The Inspections Process*

The power of an Immigration Inspector to effect the expedited removal of an alien without valid travel documents is troubling to immigrant advocates.¹⁶⁷ One complaint is that the inspections process does not provide adequate counseling and disclosure regarding asylum to arriving aliens.¹⁶⁸ A second is that the interview conditions are fundamentally unfair.¹⁶⁹ Third, the quality of interpretation during secondary inspection is called into question.¹⁷⁰ Each concern will be treated in turn.

First, the primary and secondary inspection process is said to subject arriving aliens to "summary" removal.¹⁷¹ To avoid erroneous removal of eligible asylum claimants, say critics, the INS should provide full disclosure of the inspection process, interview process, asylum eligibility criteria and

162. See discussion *infra* Parts III.B. 1-5 and IV.

163. See *INS Reports, supra* note 137, at 1101.

164. See *id.* The INS statistics were gathered during April, May and June of 1997 from 25 of the largest ports of entry and the INS' eight asylum offices. See *id.*

165. See *id.*

166. See *id.* Sixty persons per week equals 3,120 persons annually. See *id.*

167. See Horne & Weitzhandler, *supra* note 78, at 12; Schrag & Pistone, *supra* note 108, at 279-80.

168. See Schrag & Pistone, *supra* note 108, at 279-280.

169. See *id.* at 288.

170. See *id.*

171. See *id.* at 280.

secondary inspection.¹⁷² It has been recommended that these disclosures be provided to all aliens prior to secondary inspection in the form of 1) written material in the six United Nations official languages, 2) signs posted near or in the interview areas, 3) a videotape available in the waiting area, and 4) verbal advisals given by the Immigration Inspector prior to the interview.¹⁷³

As a specific example, critics point to the INS Form I-867A, "Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act", which contains a disclosure statement which must be read by the Secondary Immigration Inspector to the alien.¹⁷⁴ There is a concern that the statement is too complex to be understood by weary and less-educated travelers.¹⁷⁵ Because the language of the disclosure statement does not use the word "asylum" and does not spell out the United States' human rights obligations, it is said to disadvantage those true refugees who have not been coached to mention asylum at this phase of inspection.¹⁷⁶

But the INS has precautionary measures in place to ensure fairness in the expedited removal process.¹⁷⁷ First, each expedited removal decision made by an Immigration Inspector is reviewed by a Supervisory Immigra-

172. See *id.* at 283-84.

173. See *id.* at 285.

174. See INS Form I-867AB, *Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act*, reprinted in Horne & Weitzhandler, *supra* note 78, at 23. The language of the disclosure requires the identification of the Immigration Inspector, and includes an explanation of the alien's rights and the purpose and consequence of the interview. See *id.* The document also contains an explanation of hearing and review, U.S. policy toward those persons fearing persecution, and detention information. See *id.*

175. See Schrag & Pistone, *supra* note 108, at 285-86. The statement reads, in part:

[Y]ou do not appear to be admissible or have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing . . . This may be your only opportunity to present information to me and the Immigration and Naturalization Service to make a decision. U.S. law provides protection to certain persons who face persecution, harm, or torture upon return to their home country. If you fear or have concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear. . . . If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from re-entry for a period of five years or longer.

See INS Form I-867AB, reprinted in Horne & Weitzhandler, *supra* note 78, at 23.

176. See Schrag & Pistone, *supra* note 108, at 285-86.

177. See 74 INTERPRETER RELEASES 1101, 1102 (1997).

tion Inspector, eliminating any "summary" removal danger.¹⁷⁸ Second, the INS provides aliens in secondary inspection additional information about the credible fear process and a list of local pro-bono services.¹⁷⁹ Third, all officers who conduct expedited removal proceedings have been specially trained to understand and implement the regulations, and are made aware of the ramifications of an erroneous removal.¹⁸⁰ Finally, the INS is exploring the possibility of having a United Nations High Commissioner for Refugees (UNCHCR) official present during secondary inspections.¹⁸¹

Moreover, in light of the relatively small proportion of arriving aliens potentially subject to expedited removal (less than one percent of all inspections), the demands for primary inspection, six-language disclosures, waiting area videotapes, and posted signs are excessive.¹⁸² Were INS to expend its resources this way in answer to concerns of each one percent or larger special interest group of arriving aliens (minors and returning resident aliens are examples of two such groups), the inspections area of each port would soon become a public model of misguided bureaucracy. Such calamity is clearly against the wishes of Congress, which in 1994, 1995, and 1996 sought to reform immigration laws with a view towards streamlining its processes and avoiding waste.¹⁸³

Furthermore, the language in the Form I-867A may be interpreted to omit the word "asylum" in order to properly counsel arriving aliens. The form discloses an alien need only express a "fear or concern" of returning to their home countries to qualify for a second interview. Use of the word "asylum" may have effects which would prejudice the alien. For example, a statement mentioning "asylum" may lead an alien who experienced persecution based on membership in a social group to suppress her fear or concern if she erroneously believes U.S. asylum to only be granted on the basis of political opinion.¹⁸⁴ Also, a full explanation of asylum standards

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See generally* 62 Fed. Reg. 10,312, 10,318 (1997) (preamble). The INS explains that nearly 10 million people were forwarded to secondary inspection in 1996, ninety percent of whom are ultimately admitted after a brief interview. *See id.* According to the INS, the advocates' disclosure requirements are not only excessive but lack feasibility. *See id.*

183. *See generally* 74 INTERPRETER RELEASES 1317 (1996) (reporting on and reproducing the 1996 Act); Butterfield, *supra* note 54 (explaining the new asylum structure); Legomsky, *supra* note 76, at 704 (concluding that the new regulations eliminate the quality control mechanism built into the previous asylum system in the name of streamlining to promote efficiency.)

184. *See* INA § 101(a)(42), Pub. L. No. 104-208, § 1(c), 110 Stat. 3009, 3009-546 (1996) (amending 8 U.S.C. § 1101 (a)(42)). A grant of asylum is possible on five grounds: The alien must demonstrate a well founded fear past or future persecution based on the alien's race, religion, nationality, membership in a particu-

may be easily confused with the lower "credible fear" standard. In short, the proper standard of review and the proper disclosure to the arriving alien is now articulated in the Form I-867A. It states, "If you fear or have concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance."

Certainly, just treatment of persons fearing return to a persecuting country is of paramount concern. However, the INS has made comparatively generous efforts to this end by acting beyond the statutory disclosure requirements and soliciting advice on improving its procedures from United Nations Representatives.¹⁸⁵

2. Interview Conditions

An alien claiming persecution after traveling for many hours or even days requires special immigration interview conditions, according to immigration law practitioners.¹⁸⁶ One concern is that arriving aliens be allowed to eat, rest, and see family and friends before being referred to secondary inspection.¹⁸⁷ Additionally, arriving aliens may be reluctant to reveal fears of persecution to uniformed immigration officers in a public airport setting.¹⁸⁸ Another concern is that such aliens are not allowed to adequately prepare their claims, and practitioners worry interviews may not be conducted by experienced asylum officers.¹⁸⁹ Practitioners also point out that a misunderstanding due to faulty interpretation may cause an alien's erroneous expulsion from the United States.¹⁹⁰ The INS has addressed each of these concerns.

The INS has developed measures to ensure fair treatment of interviewed aliens.¹⁹¹ First, aliens subject to expedited removal are permitted 48 hours to rest and consult with others, including friends, family, or a representative prior to the credible fear interview.¹⁹² Immigrant advocates argue this rest and consultation period should take place *before* secondary inspection.¹⁹³

This concern is misplaced. Secondary immigration inspection is a point in the expedited removal process at which an alien must *express* a

lar social group, or political opinion. *See id.*

185. *See generally INS Reports, supra* note 137, at 1103 (explaining the INS's secondary inspection proceedings).

186. *See Schrag & Pistone, supra* note 108, at 286-87.

187. *See id.*

188. *See id.* at 287.

189. *See id.* at 288.

190. *See id.*

191. *See INS Reports, supra* note 137, at 1102.

192. *See id.*

193. *See Schrag & Pistone, supra* note 108, at 286-87.

fear or concern of return to his home country, not *establish* it. There is no right,¹⁹⁴ nor need, for assistance at this stage. No legitimate purpose would be served by allowing family or representatives to craft, coach, or solicit an arriving alien's answer to the inspector's statement "if you are afraid or concerned of being sent home, you must tell me now because you may not have another chance."

That an alien who has experienced persecution at the hands of government officials may be reluctant to express concerns to an uniformed secondary airport inspector is understandable. However, this reluctance should not be so great as to eclipse the inspector's basic warning: that this is the time and place to express a fear or concern if the alien wishes to avoid immediate return to the alien's home country. The alien, who is seeking permanent entry to the United States, should minimally be expected to articulate the very existence of his or her honest fear or concern without assistance. The INS has correctly structured the expedited removal process to allow rest and consultations prior to the more substantive credible fear interview.

In preparation for the credible fear interview, refugee advocates claim the INS should afford the alien an opportunity to prepare for the credible fear interview by providing the detained aliens and their representatives with private work space, a library containing human rights information, and a computer with Internet, CD-ROM, and WestLaw database access.¹⁹⁵

These demands are both brazenly excessive and unnecessary. The INS has no obligation to fund a representative's research, inasmuch as the INA provides that consultations with a representative must be "at no expense to the government."¹⁹⁶ Moreover, unrepresented, non-English

194. See *INS Reports*, *supra* note 137, at 1103. See also 63 Fed. Reg. 10,312, 10,319 (1997) (preamble).

Section 292 of the Act provides that in any removal proceedings before an immigration judge, the person concerned shall have the privilege of being represented by counsel, at no expense to the government. Congress did not amend this section to include proceedings before an immigration officer. In addition, while Congress specifically provided for consultation prior to the credible fear interview, it did not provide for consultation prior to immigration inspection and issuance of the order. Therefore, the Department [of Justice] will retain its interpretation that an alien in primary or secondary inspection is not entitled to representation, except where the person has become the focus of a criminal investigation.

See *id.*

195. See Schrag & Pistone, *supra* note 108, at 293.

196. See INA § 235(b)(1)(B)(iv), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)). "Mandatory Detention—Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if not found to have such fear, until removed." See *id.*

speaking, or computer illiterate aliens could not even benefit from such arrangements. Aliens forwarded to a credible fear interview inherently possess the primary resource necessary to prepare: their factual experiences. Additionally, the aliens are afforded access to family, friends, and a representative.

Immigrant advocates also question the credentials of the asylum officers who conduct the credible fear interviews.¹⁹⁷ Envisioned scenarios include a brand new asylum officer, on her first day at work, erroneously ordering an alien removed.¹⁹⁸ Advocates also suggest that even experienced asylum officers, merely relying on press reports or country conditions, may render erroneous decisions; those advocates recommend that the Department of State immediately notify all asylum officers of "significant" human rights developments.¹⁹⁹

The INS has responded by designating a team of forty-five asylum officers to conduct all credible fear interviews.²⁰⁰ All officers who conduct expedited removal proceedings have received special training in credible fear and expedited removal procedures.²⁰¹ Additionally, INS Headquarters conducts weekly quality assurance reviews of the officers' work.²⁰² These measures are entirely reasonable. However, the INS has not established a requisite one year of asylum officer experience for those officers conducting credible fear interviews, as requested by some advocates.²⁰³ Perhaps this is because no similar requirement exists for officers conducting non-expedited asylum reviews, during which the evidentiary burden is higher.

Another problem during interviews is securing adequate interpretation. The INS reports that the vast majority of aliens placed in removal proceedings are citizens of Mexico.²⁰⁴ However, nationals of at least sixty countries have been referred for credible fear interviews.²⁰⁵ If the asylum officer is not fluent in the alien's native language, the INS uses an interpreter provided by AT&T, which offers a telephonic interpretive service known as "Language Line."²⁰⁶ In addition to the problems of using telephonic interpreters for longer, determinative credible fear interviews, the

197. See Schrag & Pistone, *supra* note 108, at 294-95.

198. See *id.* at 295.

199. See *id.* at 296. "Significant," however, is notably undefined.

200. See *INS Reports, supra* note 137, at 1103.

201. See *id.* at 1102-03.

202. See *id.* at 1103.

203. See Schrag & Pistone, *supra* note 108, at 295. "We would be more confident of accurate adjudication if the INS were to state that at least for the first year of proceeding with expedited removal, only asylum officers who have interviewed affirmative applicants for at least a year would conduct the interviews for expedited removal cases." See *id.*

204. See *INS Reports, supra* note 137, at 1102.

205. See *id.*

206. See *id.* See also Schrag & Pistone, *supra* note 108, at 293-94.

use of the older speaker phone equipment at some detention facilities interferes with accurate translation.²⁰⁷ Naturally, in-person interpretation is the ideal, but may not be possible in many cases. For example, Sri Lankans now comprise fifteen percent of arriving aliens forwarded to credible fear interviews.²⁰⁸ Providing an in-person interpreter fluent in Sinhala, the official language of Sri Lanka,²⁰⁹ may not be possible at smaller ports of entry and remote detention centers without significant expense.

The INS is ill-positioned to ensure in-person interpretation due to the diversity of arriving aliens, the number of possible ports of entry, and the use of non-INS detention sites (such as county jails). In choosing AT&T, a single, high quality provider of telephonic interpretive services, the INS has at least furnished competent, universally available translation. However, telephonic equipment difficulties remain. Where the INS can upgrade its own equipment at airports, land ports, and Service Processing Centers, the agency has little control over the equipment at non-INS facilities, such as the local county jails, where many arriving aliens are detained and interviewed. One solution may be to transport all aliens referred to credible fear interviews to selected sites specially equipped for interviewing and translation. However, this may deprive the alien of family and friends, and hamper the alien's efforts to obtain legal representation. Moreover, such changes could not be made without significant INS expense. With no simple solution, the feasibility of adequate interpretation during credible fear interviews calls into question the use of expedited removal in asylum cases.

On the whole, the interview conditions of the expedited removal process provide arriving aliens with a non-threatening environment in which they may express their concerns, if any. An alien is advised, through an interpreter if necessary, the need to voice any fear or concern about removal. The alien is allowed forty-eight hours to rest, eat, and see others before a credible fear interview with a specially trained asylum officer. This process is reasonable and makes the most efficient use of INS resources. Advocates are unrealistic when they insist on perfect translation, access to friends and relatives prior to secondary inspection, and computer-equipped research libraries. The credible fear interview, the gateway to an asylum hearing, does not demand an effort equivalent to a full evidentiary hearing. Rather, the alien is required to discuss with a specially trained asylum officer facts based on the alien's own experiences—a resource available to all aliens—and to demonstrate a “credible fear.” The question then becomes, what constitutes a “credible fear?”

207. See Schrag & Pistone, *supra* note 108, at 294.

208. See *INS Reports*, *supra* note 137, at 1102.

209. See BARNES & NOBLE ENCYCLOPEDIA 1147 (David Crystal, ed., 1990).

3. The Credible Fear Standard

Having expressed a fear or concern of returning to their home country, aliens referred to a credible fear interview must meet a second, slightly higher standard: to avoid expedited removal- they must demonstrate a credible fear of persecution.²¹⁰ Immigrant advocates propose that this standard should be construed as a "non-frivolousness" test rather than a strict evidentiary burden.²¹¹

The 1996 Act defines a "credible fear of persecution" by statute. The alien must demonstrate a "significant possibility that [he or she] could establish eligibility for asylum under Immigration and Nationality Act, section 208."²¹² Immigration and Nationality Act, section 208, in turn, requires that an alien must show a well founded fear of persecution based on one of the five enumerated grounds (race, religion, nationality, membership in a social group, or political opinion) to establish eligibility for asylum.²¹³ In *INS v. Cardoza-Fonseca*, the Supreme Court held that a ten percent chance of persecution was sufficient to establish a well-founded fear.²¹⁴

Unfortunately, the 1996 Act does not define "significant possibility," subjecting the credible fear standard to all manner of interpretation. Immigrant advocates argue that the intent of Congress was to create a low screening standard for admission into the full asylum process.²¹⁵ This argument is supported by the Senate's rejection of the House bill, which contained the requirement that it be "more probable than not that the statements made by the alien in support of the alien's claim are true."²¹⁶ The requirement is, according to the approved Senate bill, that the alien show his or her claim would not be manifestly unfounded.²¹⁷ The advocates propose that this "low screening standard" adopted by the Senate be interpreted to require only that the alien demonstrate a one percent

210. See INA § 235(b)(1)(B)(ii), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)).

211. See Schrag & Pistone, *supra* note 108, at 296-97 (providing a summary explanation of the provision's legislative history).

212. See INA § 235(b)(1)(B)(v), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-582 (1996) (amending 8 U.S.C. § 1225(b)). A "credible fear of persecution" means that there is a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." *Id.*

213. See INA § 208(b)(1), Pub. L. No. 104-208, § 604, 110 Stat. 3009, 3009-691 (1996) (amending 8 U.S.C. § 1158(b)(1)) (stating that asylum may be granted to an alien who fits the definition of a refugee as provided in INA § 101(a)(42)(A)).

214. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). See also *supra* note 196.

215. See Schrag & Pistone, *supra* note 108, at 296-97.

216. See *id.*

217. See *id.*

chance of being persecuted (this percentage is arrived at by multiplying the ten percent chance of establishing the *Cardoza-Fonseca* by the ten percent chance of persecution).²¹⁸

If applied as suggested, the “credible fear” test indeed is one of non-ivolousness, in that the alien need only establish that there is as little as a one percent chance that the alien could face persecution if removed from the United States. This is not a test in which the alien must show there is the statutory *significant possibility* of establishing asylum. Rather, the test as proposed is one of *insignificant possibility*. The alien need only demonstrate a peppercorn (a one percent chance) of possible asylum eligibility. That Congress did not define “significant possibility” is problematic, but surely the term was not meant to be disregarded. If Congress intended such a low standard, one must question the very necessity of a credible fear interview process. A logical interpretation of “significant possibility” would be the preponderance test proposed by the House: the alien must show that it is more likely than not that there is at least a ten percent chance that the alien will face persecution if removed from the United States.

The INS reports that during the first three months of expedited removal, eighty percent of the 400-500 cases referred have met the credible fear standard.²¹⁹ This seems to suggest the INS is also interpreting the credible fear standard generously.²²⁰ Yet what standard is in actuality applied remains a mystery. Practitioners report varying degrees of success in credible fear interviews, which they attribute to variance among asylum officers.²²¹

218. See Schrag & Pistone, *supra* note 108, at 297. “We believe it would be entirely appropriate, given how hard it will be for a newly arrived refugee to develop real evidence at the screening interview, to require that he or she demonstrate, at this preliminary stage, a one percent chance of being persecuted if summarily removed (that is, a ten percent chance of proving, in a full asylum hearing, the ten percent chance referred to by the Supreme Court [in *INS v. Cardoza-Fonseca*]).” *Id.*

219. See *INS Reports*, *supra* note 137, at 1102.

220. See *id.* However, advocates complain that aliens represented by counsel have a much better chance of receiving a favorable determination at a credible fear interview. See *id.* at 1103.

221. See *id.* According to Charles Wheeler, an attorney with Catholic Legal Immigration Network Inc., “advocates still report a wide range of experiences and different degrees of success in securing favorable findings during the credible fear interview, based mainly on the particular asylum officers conducting the . . . interviews.” *Id.* For example, it has been reported that some Asylum Officers allow the alien to tell his or her story by narrative, while others ask as series of questions. See Juan P. Osuna & Patricia Mariani, *Expedited Removal: Authorities, Implementation, and Ongoing Policy and Practice Issues*, IMMIGR. BRIEFINGS, 10, 11 (1997). Data collected in an ongoing study based at Santa Clara University in California suggests that “gender, language, education and socioeconomic status may be factors used in determining who is permitted entry into the asylum screening process under

Whether this variance is merely in methodology or in applying the credible fear standard is as yet undetermined. Given the basically undefined credible fear standard, variance in its application would hardly be surprising. The credible fear standard cries out for clarification, or in the alternative, justification.

4. *Limited Judicial Review*

Shadowing every decision of the expedited removal process is the specter of the 1996 Act's significant limitation on judicial review.²²² Administrative appeal from an adverse credible fear determination is available only to an alien who claims, under oath,²²³ to be a returning lawful permanent resident, refugee or asylee.²²⁴ Thus, any administrative determination unrelated to the alien's entry status is essentially denied any judicial oversight.

By way of background, aliens who illegally enter the United States have no right to be at liberty in the United States.²²⁵ However, authority exists for the proposition that legal and illegal aliens are entitled to the constitutional protections of due process and equal protection.²²⁶ Courts have held that an "illegal alien" is within the scope of the word "person" guaranteed due process under the Fifth and Fourteenth Amendments.²²⁷

expedited removal". See Karen Musalo, Deborah Anker, & J. Edward Taylor, *The Expedited Removal Study: report on the First Year of Implementation*, 75 INTERPRETER RELEASES 973, 974 (1998).

222. While a thorough treatment of these complex changes is deserving of its own Comment, an overview is given here to illustrate the problems which surround the finality of expedited removal orders.

223. See 28 U.S.C. § 1746 (providing also for claims under penalty of perjury).

224. See INA § 242(e)(2), Pub. L. No. 104-208, § 306, 110 Stat. 3009, 3009-610 (1996) (amending 8 U.S.C. § 1252(e)(2)); INA § 235(b)(1)(C), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-582 (1996) (amending 8 U.S.C. § 1225(b)). See also 62 Fed. Reg. 10,312, 10,346 (1997) (interim regulation to be codified at 8 CFR § 208.30(f)(3) (providing appeal rights for aliens classified as stowaways)).

225. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (explaining that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments, [and] largely immune from judicial control"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 (1952) (advising that remaining in the United States is not an alien's right "but is a matter of permission and tolerance"); *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996) (stating that "aliens have no constitutional right to judicial review of deportation orders").

226. See generally *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (finding that both legal and illegal aliens are entitled to due process protection); *Plyler v. Doe*, 457 U.S. 202, 208 (1982) (providing that illegal aliens are entitled to Fourteenth Amendment protection); *Caballero v. Caplinger*, 914 F. Supp. 1374, 1376 (E.D. La. 1996) (stating that both legal and illegal aliens "are entitled to the constitutional protections of due process, equal protection and reasonable bail").

227. See *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986) (finding that an illegal alien is part of the class of persons entitled to due process protec-

Critics of the new judicial review restrictions premise their arguments on issues of statutory construction and constitutional rights.²²⁸ It is first argued that the 1996 Act provisions cannot repeal statutory habeas corpus authority previously granted to the federal courts.²²⁹ Second, critics maintain the Constitution limits, pursuant to the Writ of Habeas Corpus and the Due Process Clause, congressional power to insulate Executive Branch administrative decisions from judicial review.²³⁰

a. Statutory Availability of Judicial Review

District courts generally exercise habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241.²³¹ The statute grants courts jurisdiction to grant writs of habeas corpus for persons "in custody in violation of the constitution . . . or laws . . . of the United States," and for persons "in custody under or by color of the authority of the United States."²³² It is argued that because the 1996 Act does not repeal 28 U.S.C. § 2241, the courts' pre-existing jurisdiction to review final orders in habeas corpus remains intact.²³³

There is ample support to the contrary. 8 U.S.C. § 1105a(a)(10), repealed by the 1996 Act, formerly provided that "any alien held in custody pursuant to any order of deportation may obtain judicial review thereof by habeas corpus proceedings."²³⁴ In accordance with the broad powers of Congress in matters of immigration, the 1996 Act now limits the power of judicial review of deportation orders.²³⁵ The Eleventh Circuit held the 1996 Act's new section 306 "completely restructured judicial review of deportation orders, which were renamed orders of removal" in *August v. Reno*.²³⁶ Section 306 of the 1996 Act repealed section 106 of the Immigra-

tion); accord *In re Class Action*, 612 F. Supp. 940, 944 (W.D. Tex. 1985) (stating that even those unlawfully in the country are "persons" afforded due process protection); see also *Doherty v. Thornburgh*, 943 F.2d 204, 207 (2d Cir. 1991) (ruling that procedural due process protections extend even to illegal aliens).

228. See Guttentag, *supra* note 111, at 255-56 (arguing that the "court-stripping" provision of the 1996 Act should be limited).

229. See *id.*

230. See *id.* at 256. See also U.S. CONST., art. I, § 9, cl. 2 (generally referred to as the "Suspension Clause"). The Writ of Habeas Corpus is guaranteed by the Constitution and cannot be suspended except where in cases of rebellion or invasion of the public safety may require it. See *id.*

231. See 28 U.S.C.A. § 2241 (1994).

232. See *id.* § 2241(c)(1), (3).

233. See Guttentag, *supra* note 111, at 257.

234. See 8 U.S.C. § 1105a(a)(10) (repealed 1996).

235. See *United States v. Igbonwa*, 120 F.3d 437, 439 (3d Cir. 1997) (stating that "Congress, in accordance with its broad powers in matters of immigration, limited the right of judicial review of deportation orders by passing the Illegal Immigration Reform and Immigration Responsibility Act"), *pet. for cert. filed*, (Oct. 23, 1997).

236. 118 F.3d 723, 725 (11th Cir. 1997).

tion and Nationality Act, which governed federal court jurisdiction over final orders of deportation.²³⁷ In its place, section 306 introduced a new governing provision: section 242.²³⁸

Section 242(g) of the Immigration and Nationality Act, as amended by the 1996 Act, divests the district courts of jurisdiction.²³⁹ Section 242(g) was enacted in order to preserve the Courts of Appeals' "exclusive jurisdiction" by precluding aliens from bringing any deportation-related claim outside the streamlined judicial review scheme established by Congress in the Immigration and Nationality Act.²⁴⁰ *Yang v. INS* squarely addresses the present reality: "[E]ffective April 1, 1997, § 306(a) of the [1996 Act] abolishes even review under 28 U.S.C. § 2241, leaving only the constitutional writ, unaided by statute."²⁴¹ In sum, when Congress limited habeas corpus review via statute, it had the power to do so.²⁴²

b. Constitutional Grounds for Judicial Review

At least two constitutional grounds have been identified as potentially providing judicial review to aliens subject to final expedited removal orders. They are the habeas petition and due process doctrine. Commentators claim a first constitutional ground for judicial review of expedited removal orders may be found in a petition for habeas corpus.²⁴³ An immigration habeas petition, unlike a criminal petition, seeks an initial

237. See 8 U.S.C. § 1105a, the codification of INA section 106. When the 1996 Act refers to INA section 106, it means section 106 as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. See Pub. L. No. 104-132, 110 Stat. 1214, 1276 (1996). Section 401(e) of the AEDPA repealed former Immigration and Nationality Act, section 106(a)(10), which had provided for habeas corpus review of final deportation orders issued against aliens in INS custody. See INA § 106(a)(10). See also *Garaviz-Medina v. Wooten*, 27 F.3d 487, 494 (10th Cir. 1994) (providing judicial review by habeas corpus proceedings).

238. See INA § 306(a)-(b); INA § 242 (codified at 8 U.S.C. § 1252); see also *Benzaine v. United States*, 960 F. Supp. 238, 240 (D. Colo. 1997).

239. INA § 242(g) provides:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

See *id.*

240. See *Fedossov v. Perryman*, 969 F. Supp. 26, 28 (N.D. Ill. 1997) (stating that "[t]he amended section 1252(g) makes clear that no court may hear any claim arising from the Attorney General's decision or action to commence proceedings, adjudicate cases, and execute deportation orders, with the limited exception that 'final orders of removal' may be reviewed only by the courts of appeals pursuant to 28 U.S.C. § 158"). *Id.*

241. 109 F.3d 1185, 1195 (7th Cir.), *cert. denied sub. nom.*, *Katsoulis v. I.N.S.*, 118 S. Ct. 624 (1997); *accord Auguste*, 118 F.3d at 725.

242. See *Felker v. Turpin*, 116 S. Ct. 2333, 2338-4040 (1996).

243. See *Guttentag*, *supra* note 111, at 255-56.

review of an administrative decision.²⁴⁴ In *Heikkila v. Barber*,²⁴⁵ the U.S. Supreme Court found that aliens facing deportation or exclusion were constitutionally entitled to judicial review, by habeas corpus, of that order.²⁴⁶ The *Heikkila* court reasoned that the Supreme and lower courts had routinely reviewed the legality of deportation and exclusion orders, exercising the power of review required by the Constitution, despite Congressional efforts through the 1891 and 1917 Immigration Acts to limit such review.²⁴⁷

Additionally, the justification for preserving judicial review was summarized by the Fifth Circuit in *Lisotta v. United States*.²⁴⁸ *Lisotta* stated, "The contention that [an order of deportation is] not open to inquiry by the District Court or judge . . . cannot be sound, for the law controlling the administrative authorities does not, and indeed could not, confer such autocratic power."²⁴⁹

Second, commentators note that Due Process doctrine may offer another independent ground for judicial review.²⁵⁰ *Bridges v. Wixon*²⁵¹ holds that deportation necessarily involves an individual's fundamental liberty interest, and due process requires recourse to a judicial forum.²⁵² Additionally, due process requires that the procedures authorizing the deprivation of liberty be constitutionally sufficient, and that the process include a procedure for judicial review.²⁵³

In regard to these issues, the commentators' assertions have merit. Expedited removal orders, while stripped of statutory right to review, may remain protected by the Constitution's habeas and due process guarantees. While the 1996 Act specifically allows for judicial review of the expe-

244. See *id.* at 259. A criminal petition for habeas corpus seeks additional review of a judicial proceeding after all other review has been exhausted. See *id.*

245. 345 U.S. 229, 237 (1953).

246. See *Heikkila v. Barber*, 345 U.S. 229, 234-235 (1953).

247. See *id.*

248. See *Lisotta v. United States*, 3 F.2d 108, 111 (5th Cir. 1924).

249. See *id.*

[T]he decision [of the Executive Branch to deport] is not conclusive upon the courts, if it be shown that the proceedings were manifestly unfair, or such as to prevent a fair investigation of the case of the alien, or there was an abuse of the discretion committed to the administrative officer, or that his authority was not fairly exercised consistently with the principles of justice embraced within the conception of due process of law.

Id.

250. See Guttentag, *supra* note 111, at 259-60.

251. 326 U.S. 135 (1945).

252. See *id.* at 154.

253. See *Crowell v. Benson*, 285 U.S. 22, 61 (1932) (stating that "when fundamental rights are in question, this Court has repeatedly emphasized the difference in security over administrative action"). See *id.*

dited removal *process*,²⁵⁴ two unsuccessful challenges were launched in the U.S. District Court of the District of Columbia. The first, *Liberians United v. Reno*,²⁵⁵ challenged the application of expedited removal procedures to asylum seekers.²⁵⁶ The second, *Wood v. Reno*,²⁵⁷ challenged the use of expedited removal to eight named classes of individuals.²⁵⁸ Clearly, the constitutional concerns raised thus far cloud the future of expedited removal. These concerns may be magnified in the asylum context, where advocates will remind the judiciary that the consequence of administrative error is not merely a deprivation of liberty, but a possible return to persecution.

5. Detention

The expedited removal provisions of the 1996 Act call for detention of asylum seekers placed in expedited removal proceedings.²⁵⁹ Advocates have reported a variety of disturbing difficulties encountered by detained asylum applicants processed under the expedited removal provisions.²⁶⁰ One practitioner advances that there is no meaningful opportunity for such aliens to place phone calls, few or no accommodations are made for visitation by counsel, and aliens are not receiving copies of vital legal

254. See 1996 Act § 306, enacting INA § 242(e)(3)(A) & (B). INA § 242(e)(3) states that judicial review of the implementation of expedited removal is available in the U.S. District Court for the District of Columbia, and must be filed within 60 days after the date that a challenged section, regulation, directive, guideline, or procedure is first implemented.

255. No. 97 CV 001237 (D.C.D.C. Aug. 20, 1998) (dismissing with prejudice all claims of the plaintiffs).

256. See *id.*

257. No. 97 CV 001229 (D.C.D.C. Aug. 20, 1998) (dismissing with prejudice all claims of the plaintiffs).

258. See *id.* The categories of individuals are 1) United States citizens; 2) lawful permanent residents; 3) nonimmigrant visa holders with facially valid visas; 4) parolees; 5) unaccompanied minors; 6) returning refugees and asylees; 7) persons for whom documentary requirements are waived; and 8) those persons potentially eligible for adjustment of status or other benefits under the INA. See Anna Gallagher, *Immigration News and Views*, 16 AILA MONTHLY 1019, 1019 (1997).

259. See INA § 235(b)(1)(B)(ii), Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009-581 (1996) (amending 8 U.S.C. § 1225(b)). "If the officer determines at the time of the interview that an alien has a credible fear of persecution. . .the alien shall be detained for further consideration of the application for asylum." See also 8 C.F.R. §235.3(b)(5)(i) (1997). The INS provides by regulation for the detention of aliens pending review of an expedited removal order, authorizing parole only for the limited purposes of medical emergencies or the furtherance of a legitimate law enforcement objective. See *id.*

260. See generally Osuna & Mariani, *supra* note 221, at 9; Daniel C. Horne, *Asylum Update: Credible Fear Screening for Individuals in Expedited Removal*, 16 AILA MONTHLY 1027, 1027-28 (1997); *INS Releases Uniform Detention Guidelines*, 75 INTERPRETER RELEASES 199, 199 (1998) [hereinafter *Detention Guidelines*].

documentation from INS officers.²⁶¹

Consequently, advocates have asked for revitalization of a dormant 1992 program called Asylum Prescreening Officer (APSO).²⁶² The 1992 program was established to identify aliens with potentially valid asylum claims for possible release from custody. The APSO program was an informal one, and as such, was never fully implemented. Advocates now urge the INS to adopt the APSO program's theme: a presumption that aliens establishing a credible fear of persecution should not be detained unless there are factors suggesting otherwise, such as an alien who is a security or a flight risk.²⁶³ The Commission on Immigration Reform endorsed this proposition in June of 1997, noting that keeping aliens found to have a credible fear of persecution in INS custody makes poor use of scarce INS detention resources.²⁶⁴

The INS has answered with new detention guidelines aimed at improving aliens' access to legal representation and legal rights materials.²⁶⁵ The guidelines address visitation hours, "reasonable and equitable" access to telephones (including special access calls to courts and consular officials), and availability of law library materials and document production equipment, such as typewriters and photocopiers.²⁶⁶ Significantly, the guidelines do not extend to state and county jails where the majority of INS detainees are held.²⁶⁷

Ironically, the 1996 Act contained a proposed rule for the release of certain criminal aliens, entitled the Transition Period Custody Rules (TPCR).²⁶⁸ Now implemented, the TPCR were developed with the expectation that INS detention space would be scarce, and provides a screening mechanism to determine which aliens may be released from custody.²⁶⁹ It seems most incongruous that non-criminal asylum seekers do not have the benefit of a similar screening process, and remain in INS custody while select criminals are released.

261. See Horne, *supra* note 260, at 1027.

262. See Osuna & Mariani, *supra* note 221, at 9.

263. See Margaret H. Taylor, *Detention and Related Issues*, in UNDERSTANDING THE 1996 IMMIGRATION ACT 5-4 (Juan P. Osuna ed. 1997).

264. See *Immigration Reform Commission Issue Refugee and Asylum Recommendations*, 74 INTERPRETER RELEASES 957, 957-58 (1997) (discussing the U.S. Commission on Immigration Reform released on June 6, 1997).

265. See *Detention Guidelines*, *supra* note 260, at 199-200.

266. See *id.* at 199-200.

267. See *id.*

268. See 62 Fed. Reg. 4,183, 4,183-87 (1997) (proposed Sept. 15, 1996).

269. See *id.*

IV. SUMMARY AND PROPOSAL

A. Summary

Congress created expedited removal as a challenge to illegal immigration, attempting to swing the political pendulum in an enforcement direction. However, when faced with the prospect of applying this system to asylum-seeking victims of persecution, Congress conceded special protections were warranted.²⁷⁰ The resulting "credible fear" adjudication process was designed as a filter, allowing aliens with legitimate claims to seek asylum, while returning undeserving aliens quickly and efficiently.

Congress, in essence impatient and unhappy with the results of the old, cumbersome asylum machinery, simply created a newer, smaller asylum processing mechanism by grafting asylum adjudication onto the expedited removal provisions. Although enhancements to the original asylum process had been made during 1994, Congress failed to wait for results before again changing the laws.

However, those who criticize use of expedited removal in asylum cases must understand the reason for its being. Aliens were plainly abusing the traditional, glutted asylum system, flooding it with thousands of meritless applications to gain time and employment illegitimately in the United States. It should come as no surprise that the answer to such fraud came in the form of seemingly harsh asylum provisions.

That said, while expedited removal may be effective in many immigration situations, it is unnecessarily redundant and high-maintenance in the asylum context. There are now *three* methods of seeking asylum: an affirmative application filed with the INS, a defensive application filed with the Immigration Judge, and now, the credible fear screening process for undocumented arriving aliens. Moreover, the expedited removal procedures so hotly debated affect relatively few asylum-seeking aliens.²⁷¹ Nevertheless, the INS finds itself giving special attention and resources to quell fears of unfairness in all stages of the inspection and credible fear interview process.²⁷² Additionally, the issue of judicial review of adverse decisions is far from settled, particularly in the realm of constitutional pro-

270. See 142 CONG. REC. 11,901 (1996). Senator Leahy spoke at length on the unconscionability of returning legitimate asylum applicants to persecution and particularly identified the danger of giving summary exclusion power to low-level immigration inspectors. See *id.*

271. See *supra* note 166 and accompanying text.

272. See generally *INS Reports, supra* note 137. (detailing the extra measures taken by the INS in response to advocates' concerns). See also 62 Fed Reg. 10,319, 10,319-20 (1997) (addressing concerns of fairness and response measures taken by the INS in secondary inspection and the credible fear interview process).

tections.²⁷³ Finally, there does exist a sensible alternative.

B. Proposal

In 1990, 1994, and 1995, the INS developed a sophisticated asylum processing system, which is presently in place and used for all non-arriving alien asylum cases. The system is staffed by trained asylum officers, who refer complex cases to the Immigration Judges.²⁷⁴ The applicants receive an in-person, evidentiary hearing, with the court providing a court-certified interpreter.²⁷⁵ Further, the decisions of the Immigration Judges are subject to the further review of the Board of Immigration Appeals and the federal courts.²⁷⁶

Most problems of the expedited removal asylum process are nonexistent in the present, non-expedited system. The non-expedited system is weak merely because it is slow and inefficient. The answer, then, is not to create yet another method by which to pursue asylum, but to repair the existing asylum process. The INS may consider the following measures.

First, arriving aliens who indicate a fear or concern of removal could be paroled into the United States, detained, and placed into removal proceedings before an Immigration Judge. This would afford the alien the opportunity to apply for asylum and receive an evidentiary hearing. Aliens who do not appear to be flight risks could be released at the discretion of the INS District Directors on bond into the custody of friends or family. Thousands of aliens "found" in the United States, having arrived illegally without inspection, are already processed in this way.²⁷⁷

Second, the INS should adequately staff its Asylum Offices, Immigration Courts, District Counsel offices and Detention units to allow asylum cases to be completed within several months, rather than the present one-to-two-year time. The 1994 changes to the asylum system attempted to do this by setting a series of deadlines by which adjudication was to be completed, in order to discourage fraudulent claims.²⁷⁸ This has proven to be unrealistic and even impossible where staffing resources are scarce and dockets overcrowded.²⁷⁹

273. See *supra* Part II.B.4..

274. See *supra* note 93 and accompanying text.

275. See *id.*

276. See *id.*

277. See Horne & Weitzhandler, *supra* note 78, at 2 (explaining the INS has not yet implemented expedited removal procedures against aliens found in the United States within two years after entry, that entry having been made without inspection).

278. See *supra* Part II.E.

279. See generally *INS Finalizes Asylum Reform Regulations*, 71 INTERPRETER RELEASES 1577, 1577 (1994) (describing the many time deadlines implemented in the 1995 revision of the asylum process).

Finally, the Board of Immigration Appeals should be similarly streamlined and enhanced. Historically, appeals have languished several years *after* an Immigration Judge's decision.²⁸⁰ Is it any wonder that aliens, waiting several years to receive the benefit of asylum disappear, never to be found? The INS seems willing to make tremendous efforts towards improving and refining the expedited removal system to accommodate asylum cases. These same efforts, if applied to the existing non-expedited asylum system, may yield more effective, and more just, results while retaining the "teeth" of expedited removal through prudent use of detention.

The time has come for a rational, non-polarized approach to asylum adjudication. Immigrant advocates must accept heightened enforcement as a consequence of asylum fraud. The INS must accept the notion that the price of justice is often high, but that constitutional protections must be preserved, and are especially justifiable in bona fide asylum cases. Perhaps, in this manner, the storms may subside and asylum can enjoy a peaceful place in U.S. immigration law.

Andrea Rogers

280. See *INS Proposes Asylum Reform Regulations*, 71 INTERPRETER RELEASES 445, 446 (1994). In 1994, it was reported that the BIA received about 13,000 cases annually, with asylum appeals making up 30 percent of that total. It takes the BIA over two years on average to decide most asylum cases. See *id.*

