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Beyond the Supreme Court: A Modest Plea to Improve Our Asylum System

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BEYOND THE SUPREME COURT: A MODEST PLEA TO IMPROVE OUR ASYLUM SYSTEM

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Moderating a session at the Workshop on the Supreme Court and Immigration and Refugee Law at the Georgetown University Law Center, Peter Spiro asked just how important the Supreme Court really is to refugee and immigration law. Unfortunately, the Supreme Court has actively interpreted the Refugee Convention[1] and Protocol,[2] and its decisions have had an adverse affect on important protection issues. James Hathaway knows this well. Yet his article focuses on the two Supreme Court decisions that most practitioners and scholars agree have not translated into serious protection problems in the United States or abroad.

Hathaway discusses two 1980s Supreme Court decisions—*Stevic*[3] and *Cardoza-Fonseca*[4]—that established the standards of proof for two different kinds of relief: asylum and *nonrefoulement* (or the U.S. law version, withholding of removal). Withholding, or non-return, is mandatory, and the Court held that to show that one's "life or freedom would be threatened" due to persecution, an asylum applicant must demonstrate that such persecution is more likely than not to occur.[5] Asylum, however, is discretionary. With regards to asylum, the Court interpreted "well-founded fear of persecution" to mean a reasonable possibility of that persecution taking place.[6] In these decisions, Hathaway reads an implicit denial of rights to refugees, and he concludes that the discretionary nature of the asylum powers undermines the rights guaranteed by the Refugee Convention and Protocol.

While many of us recognize the anomalous nature of this pair of Supreme Court decisions in international refugee law, the bottom line is that they have had few, if any, adverse effects so far on the protection needs and other rights of refugees. This is so both within the U.S. asylum system and abroad, where, as Hathaway points out, no other jurisdiction has adopted this bifurcated framework. The main reason that these decisions have not had an adverse

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1. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention].
2. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
3. INS v. Stevic, 467 U.S. 407 (1984).
4. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
5. *Id.* at 423 (quoting *Stevic*, 467 U.S. at 429-30).
6. *Id.* at 440 (quoting *Stevic*, 467 U.S. at 425).

effect in the United States is that those who meet the well-founded fear standard are almost always granted asylum. The cases are rare where the asylum seeker meets the refugee definition, does not meet the requirements for withholding of removal, and is denied asylum. In other words, discretion has seldom been used to deny asylum to a refugee.

In my view, the damage done to the protection of refugees internationally and domestically by the Supreme Court came about in the 1990s and specifically in cases perceived by the Court to implicate foreign affairs or the sovereign's right to control borders. In the most onerous decision, *Sale v. Haitian Centers Council*,[7] the Court held that the Bush Administration could interdict Haitians on the high seas and return them directly to Haiti—into government hands—without violating the *nonrefoulement* obligations of the United States under the Refugee Protocol and Convention. This opinion has had a profound and very harmful effect worldwide on refugee protection. Governments in Africa and Asia have cited decisions such as this to the United Nations High Commissioner for Refugees in support of policies to turn away boats of people fleeing persecution and harm's way.[8]

There is no reason to believe that the Supreme Court will change this fundamental approach to refugee law. After *Sale,* it is hard to imagine just what set of unconscionable facts would meet the Court's threshold for impermissible Executive branch behavior. If we are to develop refugee law with a protection orientation, we need to address this problem, rather than focus on the slim possibility that discretion will be used to deny refugee protection. I would propose five strategies that do so.

First, to the extent certiorari petitions are in the hands of asylum seekers, the Supreme Court should be avoided. Political solutions should be pressed to the hilt, as they finally were in *Sale.* Unfortunately, this came eleven months after the Court decided that the single, most important right guaranteed by article 33 of the Refugee Convention[9]—not to be returned to persecutors—does not exist if the refugee is seized on the high seas.[10]

Second, the Department of Justice's administrative and judicial appellate decisionmaking should be made transparent, and to the extent that appropriate standards are not in place, they should be established. For example, how does the Immigration and Naturalization Service ("INS") decide which asylum grants should be appealed? If there are standards in place, who set them, and are they consonant with the spirit of the Convention and Protocol? What role should the INS Asylum Office have in the appeals determination process? At the highest end of the appellate system, how does the Solicitor General determine whether to appeal a Circuit Court of Appeals grant of

7. 509 U.S. 155 (1993).

8. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), THE STATE OF THE WORLD'S REFUGEES 1997-98: A HUMANITARIAN AGENDA 69 (1997).

9. *See* Convention, *supra* note 1, at 176 (art. 33(1)).

10. *Sale,* 509 U.S. at 158.

asylum? What role does the Administration play in that decisionmaking? What about the Office of Immigration Litigation?

Third, the United States needs to develop more fully a regional protection system so that future administrations responding to emergencies are not limited in choice between admission (which they can refuse pursuant to *Sale*) and return to life threatening situations in home countries. Susan Martin, Deborah Meyers and I have proposed a way to avoid this stark choice and provide immediate protection where large numbers are involved.[11] Under the system we propose, countries in the relevant region, including the United States, would provide the type of protection needed by Convention refugees as well as by those fleeing civil war or other serious civil disorders.

Fourth, particularly in light of our role as educators training the next generation for this field, we should be encouraging our students to become decisionmakers in the government. The most important decisions made daily on protection issues are those made by Asylum Officers, Immigration Judges, and members of the Board of Immigration Appeals ("BIA"). We need to ensure that a fair portion of the decisionmakers are practitioners who come with protection experience or training.

Finally, representation makes a significant difference from a protection as well as a government efficiency point of view. Represented asylum claimants are much more likely to be granted asylum than those without representation. In fiscal year 1998, for example, the Immigration Court granted asylum claims more than eight times as often where claimants were represented than where they were not.[12] The vast majority of claimants do not have representation at the Asylum Office stage, and the problem is still significant before the Immigration Court. Certainly there are challenges in ensuring that asylum seekers have qualified representatives. But the integrity of a system that pretends to be adversarial needs to be addressed, and we should be identifying or designing model approaches to overcome these challenges.

The administrative determination system, then, is where we can develop a more protection-oriented body of refugee law. The Supreme Court's recent decision in *INS v. Aguirre-Aguirre*[13] to rely on the administrative expertise of the BIA to flesh out the meaning of the Refugee Act provides an opportunity to make this strategy work. The Court pointed to the expert agency as the decisionmaker responsible for developing the full meaning of the terms of the statute on a case-by-case basis: "The BIA's formulation does not purport to provide a comprehensive definition of [serious nonpolitical crime], and the

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11. *See* Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543 (1998).

12. *See* U.S. DEP'T OF JUSTICE, FY 98 IMMIGRATION COURT ASYLUM DECISIONS BY NATIONALITY (1999) (on file with author).

13. 119 S. Ct. 1439 (1999). In that case, the Court held that the Ninth Circuit failed to accord the required level of deference to the BIA's interpretation of a statute it administers. The Court thus affirmed its central doctrine of administrative law: the courts should yield to the expert agency when Congress does not explicitly spell out what it means.

full elaboration of that standard should await further cases, consistent with the instruction our legal system always takes from considering discrete factual circumstances over time."[14] In short, the Supreme Court reminded the Ninth Circuit about well-established principles of administrative law, ensuring that our administrative law system will be responsible for the substantive development of refugee law in future cases.

Our strategies should be geared in particular, then, to making the administrative determination system work as best as it can in administering the Refugee Act and the Refugee Convention and Protocol. We can do so by training professionals to represent asylum seekers and to make status determinations. Our system would also benefit from a clear and reasonable government policy on which asylum grants merit the government's limited time and resources on appeal. While we cannot change the Supreme Court, there is much we can do to improve the heart of our asylum system.

14. *Id.* at 1441.