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REFUGEE PROTECTION IN THE UNITED STATES POST-SEPTEMBER 11

Andrew I. Schoenholtz*

*To My Teacher and Colleague, Arthur Helton, Whose
Leadership and Example Inspires the Displaced And
All Those Who Work to Protect Them.*

The plane full of Afghan refugees landed at John F. Kennedy Airport (JFK) like many had prior to September 2001. The State Department's Bureau of Population, Refugees, and Migration had selected these particular refugees for entry into the United States, after each had been interviewed and approved by the Immigration and Naturalization Service. The International Organization for Migration had arranged transportation to the United States, where these refugees would be resettled in a multitude of communities throughout the country. Local church groups and community organizations were prepared to receive them.¹

Unfortunately, these Afghan refugees arrived at JFK just two weeks after terrorist attacks killed thousands in New York and

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1. Interview with U.S. government official in Washington, D.C. (Oct. 17, 2001).

toppled the Twin Towers of the World Trade Center. Airport officials alerted Mayor Giuliani's office that hundreds of Afghans had just arrived by plane at JFK. Alarmed, the Mayor called Vice President Cheney. Within days, the premier refugee resettlement program in the world that had brought some 2.5 million refugees to the United States since 1975 was shut down.² Almost three years later, this program is still running at only about two-thirds of its previous capacity; more than 100,000 refugees have lost opportunities to build new lives in the United States during this period.³

The U.S. refugee resettlement program, which David Martin writes about in this issue, was the first refugee protection casualty of the terrorist attacks. American officials perceived resettlement as being particularly vulnerable to security problems.⁴ That was not the case with the other major U.S. refugee protection program, the asylum system. That system was effectively revamped in 1995 to address a variety of abuses, in part connected to individuals involved in the 1993 World Trade Center bombing.⁵ Yet, even though official attention did not focus on asylum⁶, subtle, significant changes have occurred. This article delineates and assesses these changes by closely examining data and developments at all levels of the asylum

2. Bureau of Population, Refugees, and Migration, U.S. Dep't of State, Cumulative Summary of Refugee Admissions FY 1975–2004 (2004).

3. The United States planned to resettle up to 70,000 refugees in each of FY 2002, 2003, and 2004. Of those 210,000, about 108,000 refugees were actually admitted. Bureau of Population, Refugees, and Migration, U.S. Dep't of State, Proposed Refugee Admissions for FY 2004—Report to Congress (2003), available at <http://www.state.gov/g/prm/asst/rl/rpts/25691.htm> (last visited January 20, 2005).

4. U.S. Comm. for Refugees, *In the Aftermath of September 11: U.S. Refugee Resettlement on Hold*, 22 Refugee Reports 1 (2001), available at http://refugees.org/world/articles/aftermath_rr01_9-10.htm; *Refugee Resettlement in the United States Blocked, Stranding 22,000 Refugees*, Asylum Protection News 2, (Human Rights First, New York, N.Y.) Nov. 14, 2001, at http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_2.htm.

5. See U.S. Immigration and Naturalization Serv., Dep't of Justice, Asylum Reform: 5 Years Later 7–8 (2000), available at http://uscis.gov/graphics/services/asylum/asylum_brochure.pdf.

6. Only three years after the September 11th Attacks did Congress focus some attention on asylum. See, H.R. 10, 108th Cong. Title III (2004). No law changing the asylum system has yet been enacted, nor has the Executive branch deemed it necessary to once again reform that system.

system. These more subtle changes cumulatively call into question how robust the system truly is today. Finally, this study calls for major changes to improve the protection of those refugees who manage to reach the United States without government assistance.

I. REFUGEES SEEKING ASYLUM AT PORTS OF ENTRY OR NEAR THE BORDER: EXPEDITED REMOVAL

European nations were the first to create rapid asylum procedures, which were practiced in the major countries there by 1994.⁷ These procedures are aimed particularly at identifying “manifestly unfounded” applications at the airports and other ports of entry. Applicants arriving from “safe states” are screened out of the regular asylum process and into an accelerated determination system.⁸ In Germany, for example, the asylum seeker in this situation has forty-eight hours to apply.⁹ Rejected asylum seekers are given three days to file an appeal with an administrative court. In the United Kingdom, asylum seekers from “safe” countries are returned within twenty-four hours.¹⁰

In the United States, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 created an expedited removal procedure upon entry for those with fraudulent documentation or without documentation.¹¹ Under this procedure, Department of Homeland Security (DHS) Secondary Immigration Inspectors are tasked with discerning whether an individual fears return to the country he came from. If no legitimate fear is ascertained and the individual is determined to have no other legal right to enter the United States, he is deported. If fear is found, the Secondary

7. Susan Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 Geo. Immigr. L.J. 589, 602 (2000).

8. *Id.*

9. U.S. Comm. for Refugees, *Worldwide Refugee Information, Country Report: Germany* (1997), <http://www.refugees.org/world/countryrpt/europe/1997/germany.htm>.

10. U.S. Comm. for Refugees, *Worldwide Refugee Information, Country Report: United Kingdom* (2002), http://www.refugees.org/world/countryrpt/europe/united_kingdom.htm.

11. Immigration and Nationality Act (INA) § 235(b), 8 U.S.C. § 1225(b) (2004); see Martin & Schoenholtz, *supra* note 7, at 602.

Inspector refers the individual to a DHS Asylum Officer. At that point, the asylum seeker must demonstrate that he has a credible fear of persecution in order to continue with an asylum application. The law mandates that the “credible fear” determination be made swiftly and further requires reviewability of that determination by an immigration judge, if requested, within one week. Detention is mandated during this period of time, and generally attorneys play no role in these proceedings.¹² Authorities began applying expedited removal to those entering land and air ports of entry at the start of the program in April 1997. In November 2002, authorities expanded expedited removal to cover sea arrivals in response to two boats of Haitians that reached Florida.¹³ In 2004, DHS expanded expedited removal to cover areas within one hundred miles of the land borders between ports of entry.¹⁴

Since September 11th, the number of asylum seekers interviewed for credible fear determinations has dropped considerably. As Chart 1 shows, the numbers dropped by twenty-five percent in fiscal year (FY) 2002 from a high of 13,000 in FY 2001, and then again by thirty-eight percent in FY 2003 to 6,000.¹⁵ In FY 2004, about 7,000 asylum seekers are expected to have credible fear interviews,¹⁶ down almost half from FY 2001.¹⁷

12. Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

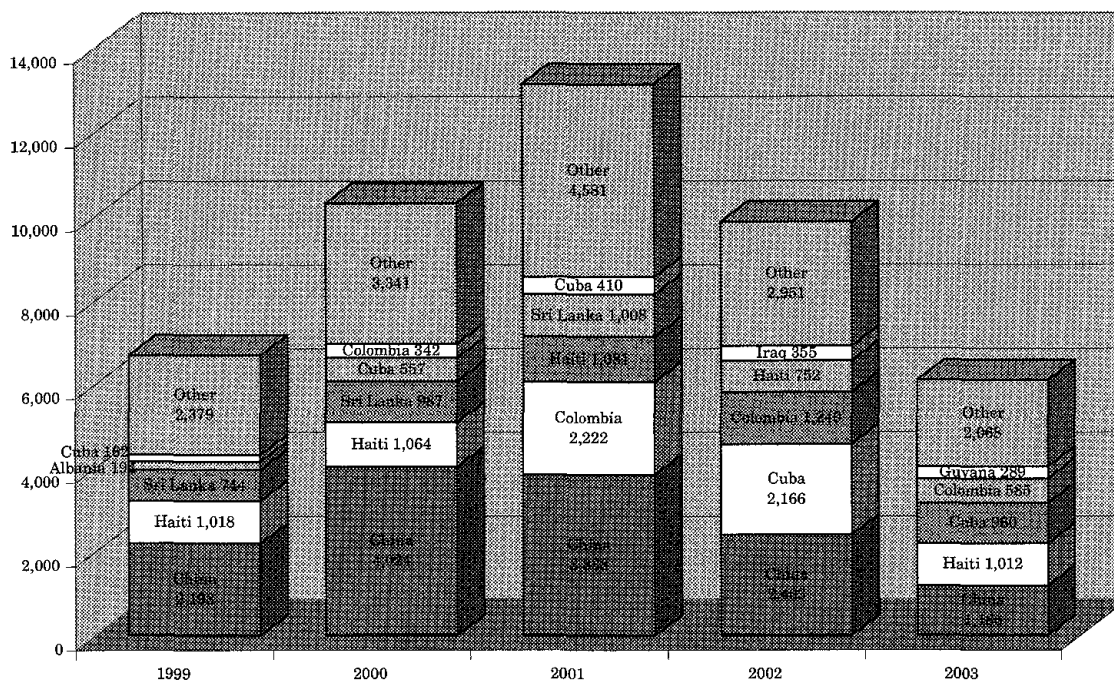
13. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924, 68925 (effective Nov. 13, 2002).

14. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01 (effective Aug. 11, 2004).

15. U.S. Headquarters Asylum Div., Dep’t of Homeland Security, Credible Fear Determinations FY 1997–2003 (2004) [hereinafter Credible Fear Determinations FY 1997–2003] (on file with author). The fiscal year runs from October 1 through September 29. See Bureau of Public Affairs, U.S. Dep’t of State, Frequently Asked Questions (May 2004), at <http://www.state.gov/r/pa/pil/pc/32868.htm#f> (last visited Jan. 26, 2005).

16. U.S. Headquarters Asylum Div., Dep’t of Homeland Security, Credible Fear Determinations FY 2004 (2004) [hereinafter Credible Fear Determinations FY 2004] (on file with author).

17. Credible Fear Determinations FY 1997–2003, *supra* note 15.

Chart 1. Credible Fear Referrals by DHS Asylum Office to Immigration Court, 1999-2003

Source: Headquarters Asylum Division, Office of Refugee, Asylum, and International Operations, USCIS, DHS

Significant changes have occurred in the pool of asylum seekers interviewed for credible fear. The two largest nationalities in FY 2001, Chinese and Colombians, decreased about fifty percent in each of FY 2002 and 2003.¹⁸ Through June 2004, the number of Chinese asylum seekers has not changed from FY 2003, but the number of Colombians continues to decline.¹⁹ Sri Lankans significantly decreased from over 1,000 to about sixty from FY 2001 to FY 2003 and remains small.²⁰ Cubans increased fivefold in FY2002, then decreased more than fifty percent in FY 2003,²¹ but have again increased substantially in the second and third quarters

18. *Id.*

19. Credible Fear Determinations FY 2004, *supra* note 16.

20. Credible Fear Determinations FY 1997–2003,” *supra* note 15.

21. *Id.*

of FY 2004.²² Haitians decreased twenty-five percent in FY 2002, returned to around 1,000 in FY 2003,²³ but have decreased significantly in FY 2004.²⁴

A. Assessing the Drop in Numbers of Those Seeking Asylum at U.S. Borders

Why has the number of asylum seekers interviewed for a credible fear determination dropped so significantly since September 11th? In some instances, much depends on the specific circumstances of the refugees' country of origin and its relationship with the United States. For example, the number of Colombian asylum seekers was seriously affected by new laws prohibiting transit through the United States on the way to an international destination. In 2001, but prior to September 11th, the United States stopped that practice because of the number of asylum seekers from Colombia using a stopover to claim asylum. According to a March 29, 2001 announcement by the U.S. Embassy in Bogota:

These measures have been taken because of the great increase in the number of Colombian citizens who travel to the United States without a visa and who use the stop there to claim asylum during their 'transit...'

Since January 1, 2001, more than 1,000 Colombian citizens have applied for political asylum upon arrival at Miami International Airport while in transit status. The U.S. Immigration and Naturalization Service office in Miami is currently receiving about 30 requests for political asylum daily from Colombians in transit status. Last week, as many as 120 Colombians requested asylum in Miami in just one day. All of the claimants have entered the United States on the premise of transiting through the U.S. to a third country without a visa.²⁵

In contrast to this denial of access, the extraordinary decrease in the number of Sri Lankan asylum seekers may be due to

22. Credible Fear Determinations FY 2004, *supra* note 16.

23. Credible Fear Determinations FY 1997–2003, *supra* note 15.

24. Credible Fear Determinations FY 2004," *supra* note 16.

25. U.S. Embassy, Bogotá, Colombia, *New Visa Requirement for Colombians Transiting the U.S. Enroute to Third Countries*, at <http://bogota.usembassy.gov/wwwsvt1e.shtml> (last modified Mar. 29, 2001).

important progress made in peace negotiations aimed at solving the lengthy civil conflict. In February 2002, a ceasefire entered into force between the Government of Sri Lanka and the Liberation Tamil Tigers of Ealam (LTTE).²⁶ By the end of 2002, the parties agreed "to explore a political solution founded on internal self-determination based on a federal structure within a united Sri Lanka."²⁷ While the road to such a political solution remains a rocky one, it is likely that these political developments affected the number of Sri Lankans who had credible fear interviews after FY 2001.

The movement of Cubans into the United States through the southern border has resulted in Cubans becoming an important part of the credible fear process. Following serious enforcement measures targeting speedboat entries in the late 1990s, Cubans appear to have developed legal ways to travel to Mexico and perhaps Central American countries.²⁸ Smuggling operations may also have played a role in this development. In any event, once in Mexico, Cubans have found their way to the land ports of entry and requested admission to the United States. As of June 2004, Cubans were the largest group to receive credible fear interviews in FY 2004, more than twice as large as the number two nationality (China) and more than six times as large as the number three nationality (Haiti).²⁹ Haitians have been heavily discouraged from coming to the United States by the Bush Administration and may not have the option of reaching U.S. land ports of entry as do some Cubans.

Several additional factors explain why numbers have decreased so significantly post-September 11, after having steadily and significantly increased until that point. Since the terrorist attacks, the American government has more actively controlled admission at the air ports of entry, where asylum seekers have often

26. Press Release, Norwegian Ministry of Foreign Affairs, Announcement of Sri Lanka ceasefire (Feb. 22, 2002), at <http://odin.dep.no/ud/engelsk/aktuelt/pressem/032171-070011/dok-bn.html> (statement of Jan Petersen, Foreign Minister of Norway) (last visited Jan. 26, 2005).

27. Press Release, Norwegian Ministry of Foreign Affairs, Breakthrough in Sri Lanka Peace Negotiations (Dec. 5, 2002), at <http://odin.dep.no/ud/engelsk/aktuelt/pressem/032171-990029/dok-bu.html> (last visited Jan. 26, 2005).

28. Telephone Interview with U.S. official at the Dep't of Homeland Security (Sept. 1, 2004).

29. Credible Fear Determinations FY 2004, *supra* note 16.

sought entry.³⁰ The international public is aware of this, and potential asylum seekers may have become increasingly afraid to travel with fraudulent documentation or without documents altogether as compared to before September 11th. Furthermore, the American government has increased its pre-screening activities at airports abroad. U.S. immigration officials examine airline passengers and their documents while they are waiting to board their flights. In addition, fewer people may have considered the United States a haven for refugees in light of the public efforts to tighten access to domestic borders.

The enforcement focus has been pervasive. In March 2003, DHS announced Operation Liberty Shield, an initiative targeted at increasing security for Americans through various measures, including increased border security.³¹ With regard to asylum seekers, the initiative required the detention of applicants from nations where al-Qaeda, or other terrorist groups, are known to have operated, for the duration of their processing period.³² Previously, asylum seekers were only held beyond an initial screening period on a case-by-case basis. In April 2003, Attorney General John Ashcroft issued a precedent decision ordering that a Haitian asylum seeker who arrived in the United States by boat despite interdiction efforts by the Coast Guard be held without bond. Citing national security concerns, Ashcroft reversed the BIA ruling calling for his release on a \$2,500 bond while his asylum claim was pending.³³ Similarly, in 2003, federal prosecutors in South Florida began cracking down on asylum seekers by criminally charging those who entered the United

30. See, e.g., Press Release, U.S. Customs and Border Protection, U.S. Dep't of Homeland Security, Fact Sheet: U.S. Customs and Border Protection Actions Taken Since 9/11 (Sept. 17, 2004), at http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/09172004.xml (last visited Jan. 26, 2005).

31. Secretary Tom Ridge, U.S. Dep't of Homeland Security, Press Briefing on Operation Liberty Shield, (Mar. 18, 2003), at <http://www.dhs.gov/dhspublic/display?content=525> (last visited Jan. 26, 2005).

32. Operation Liberty Shield was announced and then cancelled within a short time. Press Release, Department of Homeland Security, Remarks by Secretary of Homeland Security Tom Ridge to the National Press Club (April 29, 2003) available at <http://www.dhs.gov/dhspublic/display?content=582> (last visited Apr. 2, 2005).

33. *In re D-J*, 23 I. & N. Dec. 572, 574 (A.G. 2003).

States with false documents.³⁴ This marks a reversal of previous U.S. policy deferring to the U.N. Refugee Convention, which states that member countries cannot impose penalties on asylum seekers who present themselves without delay and show good cause for their illegal entry. The Convention policy is based on concerns that false documentation might be the only means of escape for many asylum seekers.³⁵

In 2004, DHS instituted the US-VISIT program, which is intended to verify the identity of visitors to the United States through a biometric digital fingerscan and photograph system.³⁶ Visitors' fingerprints are collected overseas at consular visa posts and checked against a database of known criminals and suspected terrorists. These fingerprints are then verified upon arrival at a port of entry in the United States.³⁷ Currently, US-VISIT requires fingerprinting of most non-U.S. citizens traveling to the United States on a visa, including most students, business travelers, and tourists. By September 30, 2004, the requirement will be extended to include visitors traveling under the Visa Waiver Program.³⁸

Furthermore, the DHS budget for FY 2005 significantly increases funding for screening procedures and detention, removal,

34. Stanley Mailman & Stephen Yale-Loehr, *Detaining and Criminalizing Asylum Seekers*, 8 *Bender's Immigr. Bull.* 764 (May 1, 2003).

35. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, art. 31, 19 U.S.T. 6259, 6275, 189 U.N.T.S. 137, 174 (entered into force Apr. 22, 1954). The Ninth Circuit agreed with the longstanding U.S. position, pointing out that the BIA has clearly distinguished between the use of fraudulent documents to establish an asylum claim and the use of such documents for the purpose of escaping immediate danger from an alien's country of origin. The second purpose does not destroy an asylum claim. *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999) (quoting *In re O-D-*, Interim Decision 3334, 1998 WL 24904 (BIA Jan. 20, 2003)).

36. U. S. Dep't of Homeland Security, US-VISIT, at http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml (last visited Jan. 26, 2005).

37. *Id.*

38. *See id.* The visa waiver program (VWP) allows foreign nationals of twenty-seven enumerated countries to be admitted to the United States for tourism or business for up to ninety days without a visa. U.S. Dep't of State, Visa Waiver Program, at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0527.xml (Jan. 26, 2005).

and enforcement proceedings. The new budget calls for \$411 million in new funding to maintain and enhance border security activities.³⁹ This includes an increase of \$12 million over the FY 2004 funding to continue expansion of the US-VISIT system and an increase of \$20.6 million to support the CBP Targeting Systems, which aid in identifying high-risk cargo and passengers.⁴⁰ The budget also provides for an increase of \$186 million to fund improvements in immigration enforcement, including a \$108 million increase for the detention and removal of illegal aliens and an increase of \$78 million for detecting and locating individuals in the United States who are in violation of immigration laws.⁴¹ Overall, the U.S. Immigration and Customs Enforcement (ICE) budget increases by almost ten percent over FY 2004.⁴²

In light of the significant decrease in the number of asylum seekers identified in the expedited removal process, it is critical to know whether Immigration Inspectors are recognizing all those who legitimately fear return to their home countries. Both the Clinton and Bush administrations made it impossible for an independent, non-governmental observer to answer that question, as neither allowed any independent expert study of the expedited removal system. Only three agencies have been permitted to examine certain aspects of the inspection process in the expedited removal system. Examining the first seven months of the new expedited removal system, the United States General Accounting Office performed random documentation checks and found "mixed results as to whether inspectors and supervisors were consistently documenting that they followed various steps in INS' expedited removal process."⁴³

39. Press Release, U.S. Dep't of Homeland Security, Department of Homeland Security Announces FY 2005 Budget in Brief (Feb. 2, 2004), at <http://www.dhs.gov/dhspublic/display?content=3133> (last visited Jan. 26, 2005).

40. *Id.*

41. *Id.*

42. *Id.*

43. U.S. Gen. Accounting Office, Report to Cong. Comms., *Illegal Aliens: Changes in the Process of Denying Aliens Entry Into the United States*, GAO/GGD-98-81, at 38 (1998), available at <http://www.gao.gov/archive/1998/gg98081.pdf>.

More recently, the United Nations High Commissioner for Refugees (UNHCR) conducted a limited, confidential study on expedited removal for DHS, which was completed in October 2003.⁴⁴ The New York Times obtained a copy of UNHCR's report from a non-UN official concerned about the expansion of expedited removal powers to the Border Patrol announced in August 2004. According to the New York Times,⁴⁵ UNHCR found that most airport inspectors properly identified asylum seekers and correctly referred them for credible fear interviews, but important problems existed. Many inspectors held negative views of asylum seekers, considering them to be frauds. The report concluded that this attitude resulted in instances where inspectors intimidated asylum seekers or treated them with derision. At John F. Kennedy International Airport in New York, inspectors routinely handcuffed asylum seekers and restrained them with belly chains and leg restraints. In one instance there, inspectors ordered a Liberian asylum seeker to remove his clothes to determine whether he had scars consistent with torture and then allegedly ridiculed him with racial and sexual taunts. The report described two instances in which inspectors encouraged asylum seekers not to pursue asylum claims. UNHCR also reported that inspectors often failed to provide certified translators for those who did not speak English, improperly notified consulates about the identity and detention of asylum seekers, and in fourteen cases mistakenly concluded that individuals who expressed a credible fear of persecution were not entitled to apply for asylum.⁴⁶

The return of refugees to serious harm is very troubling, even in isolated occurrences. UNHCR's study, as reported by the New York Times, is a limited examination of the inspection process. As DHS proceeds to expand expedited removal, however, it is critical that this part of the process becomes transparent. DHS officials say that they have responded to the problems UNHCR identified and that Border Patrol officials will be better trained to protect asylum

44. The author requested a copy of that report from DHS, but was informed that it is not for public release. Telephone Interview with DHS official at ICE (Sept. 1, 2004).

45. Rachel L. Swarns, *U.N. Report Cites Harassment at American Airports of Asylum Seekers*, N.Y. Times, Aug. 13, 2004, at A11.

46. *Id.*

seekers. Yet, the public must have confidence that these problems have been addressed and that the training is effective.

Currently, the U.S. Commission on International Religious Freedom is completing an extensive study of the impact of expedited removal on asylum seekers.⁴⁷ Monitors observed the secondary inspection process at several key expedited removal sites on a full-time basis over a few weeks. The final report is expected to be released in January 2005.⁴⁸ That study should shed light on the inspection of asylum seekers in expedited removal and provide for ways to address any identified problems.

B. Recommendations for Reforming Expedited Removal As Applied to Asylum Seekers

DHS should take three steps to ensure that the inspection system is identifying those who fear return. First, the agency should conduct its own systematic review of secondary inspection in the context of expedited removal. Second, DHS should videotape the process for quality control purposes. This is already being done in at least one site, but should be expanded nationally. Finally, the U.S. Commission on International Religious Freedom did not use actual testers to determine how well the process is working. *DHS should allow for independent testing of the secondary inspection process in expedited removal.* By taking these steps, DHS will be able to build public confidence in its capacity to protect refugees.

With regard to those individuals referred by inspectors to Asylum Officers, almost all who have received a credible fear determination have met the credible fear requirements and participate in full hearing proceedings before an Immigration Judge, as discussed below.⁴⁹ This has not changed since September 11, 2001. Of those cases where credible fear was decided, ninety-eight percent of asylum seekers met the requirements in FY 2000, and ninety-nine

47. U.S. Comm'n on Int'l Religious Freedom, Annual Report of the U.S. Commission on International Religious Freedom (2004), *available at* <http://www.uscirf.gov/reports/12May04/2004annualRpt.pdf> (last visited Jan. 26, 2005).

48. Interview with official at the U.S. Comm'n on Int'l Religious Freedom (Sept. 28, 2004).

49. Credible Fear Determinations FY 1997–2003, *supra* note 15.

percent in FY 2001, FY 2002, and FY 2003.⁵⁰ Through three quarters of FY 2004, only seventeen of some 4500 asylum seekers have been found not to have a credible fear.⁵¹

While those concerned that the credible fear requirements are too lax argue that they should be tightened, such a change risks returning refugees to countries of persecution in violation of U.S. international obligations and domestic law. Since U.S. officials are placing almost all of these individuals into immigration court proceedings in order to ensure that the United States lives up to its protection commitments, the government should return to the pre-expedited removal policy and place individuals seeking asylum directly into Immigration Court proceedings without spending the valuable time of Asylum Officers and Immigration Judges on credible fear determinations. This is particularly called for given that the United States has implemented a reasonably efficient and effective asylum system, as more fully detailed below.

II. REFUGEES SEEKING ASYLUM THROUGH ASYLUM OFFICER INTERVIEWS

Asylum determinations are decisions made by sovereign states as to whether an individual's claim for refugee status is valid. Generally, a grant of asylum enables a refugee to remain in the host country, often permanently. To qualify for asylum, an asylum seeker must meet the requirements of the refugee definition set forth in the 1951 UN Refugee Convention and its 1967 Protocol as implemented by domestic laws.⁵² Procedures governing these individualized

50. *Id.*

51. Credible Fear Determinations FY 2004, *supra* note 16.

52. Immigration and Nationality Act §§ (101)(a)(42) and 208, 8 U.S.C. §§ 1101(a)(42) and 1158, respectively. As the Supreme Court stated in *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987), “[i]f one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 [Refugee] Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968.” *See also* U.S. Citizenship and Immigration Services, *History of the United States Asylum Officer Corps*, § I(b), at <http://uscis.gov/graphics/services/asylum/history.htm> (last modified Sept. 9, 2003).

determinations vary among states and include both adversarial and non-adversarial proceedings and appeals. The substantive and procedural law of asylum is complex, making the process a very challenging one for those asylum seekers who do not have legal representation, experience the proceedings through translation, generally fear interactions with government officials, and may be held in detention. The challenges to decision-makers are also considerable. Decision-makers must understand the human rights conditions in the countries from which asylum seekers flee. They also need detailed information on the persecution feared or experienced by the asylum seeker. Many states have faced significant problems in operating fair and efficient asylum systems particularly when they receive very large numbers of applications. However, reforms have enabled certain states to develop systems that reasonably balance the refugee's interest in protection and the state's interest in minimizing abuse.

In assessing whether an individual has a well-founded fear of persecution on account of race, nationality, religion, social group, or political opinion, decision-makers examine both objective conditions in the country of origin and the individual's particular situation. Decision-makers need access to current human rights information to understand country conditions. They also must ascertain information from the asylum seeker about their fear of persecution. This can be challenging since refugees often have to leave their countries precipitously and thus rarely bring with them documentation of their plight. If applicants do produce documentation, it is often difficult for the decision maker to ascertain its authenticity. As discussed below, the credibility of the asylum seeker often becomes the critical issue in determining eligibility for refugee status.

Proof of the claimant's fear of persecution is one of the major challenges in asylum determinations. Unless the asylum seeker is a high profile dissident, newspaper accounts concerning her political activities likely do not exist. Women raped as part of a policy of ethnic cleansing are unlikely to have medical records of any post-traumatic hospitalization. The claimant's testimony is most often the major evidence available to the decision-maker in determining eligibility for refugee status. Decision-makers are faced with assessing the credibility of that testimony. They often look for sufficient and plausible details that support the claim and make sense in relation to the human rights situation in a particular country. But what does it mean if the claimant provides different

dates (days or months) for certain important events described? What if the claimant relates his or her history in a halting manner? Or does not look the decision-maker in the eye when providing testimony? Are these indicators of untruthfulness? Some decision-makers interpret these actions as such; others do not. Considerable cultural knowledge is needed to interpret the behavior of asylum applicants who come from all over the world. Difficulties in remembering dates are a common problem for victims of persecution.

Given these challenges, we now examine the first stage of actual asylum determinations, where asylum seekers voluntarily come forward to the DHS and file a claim, knowing that they will be placed into removal proceedings if they are not successful and have no pre-existing legal immigration status in the United States.⁵³ The vast majority of asylum seekers enter the U.S. asylum system in this "affirmative" manner.⁵⁴

A. The State of the Affirmative Asylum System in the United States

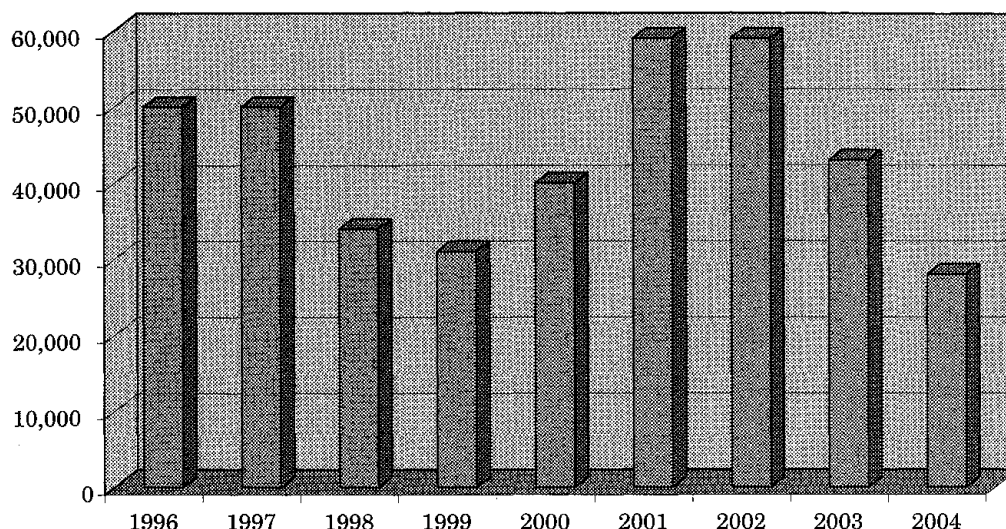
In evaluating the state of the affirmative asylum system in the United States, some important overview questions must be addressed. First, how many individuals voluntarily come forward and identify themselves to the government in the hopes that they will obtain asylum? Following the major reforms implemented in January 1995, the numbers declined, then rose, and are now declining again. New affirmative asylum claims⁵⁵ numbered somewhat under 50,000 in FY 1996 and 1997 (see Chart 2).⁵⁶ The

53. Most asylum claimants who come forward have no legal immigration status in the United States. U.S. Headquarters Asylum Div., Dep't of Homeland Security, *Asylum by Nationality and Deadline FY 1999–2003* (2004) [hereinafter *Asylum by Nationality and Deadline FY 1999–2003*] (on file with author).

54. See generally U.S. Citizenship and Immigration Services, *Obtaining Asylum in the United States: Two Paths to Asylum*, at <http://uscis.gov/graphics/services/asylum/paths.htm> (last modified Nov. 29, 2004).

55. U.S. officials maintain data based on the number of claims. One claim represents more than one individual where a spouse and children accompany the principal claimant.

56. *Asylum by Nationality and Deadline FY 1999–2003*, *supra* note 53.

Chart 2. Affirmative Asylum Claims, Asylum Office, 1996-2004

Source: Headquarters Asylum Division, Office of Refugee, Asylum, and International Operations, USCIS, DHS

number of claims dropped to 34,000 and 31,000 in FY 1998 and 1999, respectively.⁵⁷ Asylum seekers filed almost 40,000 claims in FY 2000 and then almost 59,000 claims in FY 2001.⁵⁸ Asylum seekers filed about the same number during the fiscal year following September 11th.⁵⁹ Some 43,000 asylum seekers filed affirmative claims in FY 2003, more than twenty-five percent less than the previous fiscal year.⁶⁰ In FY 2004, that number is on track to drop another thirty-five percent to about 28,000 cases.⁶¹ That will set a new record low.

Second, from what countries have asylum seekers come? China, Colombia, and Haiti have been the three largest groups by far prior to and after September 11th.⁶² However, the number of Chinese

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. U.S. Headquarters Asylum Div., Dep't of Homeland Security, Asylum 2004 QS Top 50 (2004) [hereinafter Asylum 2004 QS Top 50] (on file with author).

62. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53. Mexicans have voluntarily entered the affirmative asylum system in large

numbers during this period principally in order to be placed into Immigration Court proceedings where they can seek relief other than asylum. Since they are generally not seeking asylum, they are not included in the analysis articulated in this article. The USCIS Asylum Office explains this phenomenon as follows:

Evidence strongly suggests that most Mexican asylum applicants have been using the USCIS asylum program as a conduit to enter into removal proceedings. Once in removal proceedings, these individuals typically withdraw their respective asylum applications and file applications for another immigration benefit (cancellation of removal), which can only be filed in removal proceedings. Upon filing for cancellation of removal, they become eligible to receive employment authorization because, unlike the asylum process, the cancellation of removal process allows individuals to apply for and receive employment authorization immediately upon submission of an application for cancellation of removal while their applications are pending, without regard to how long the cancellation of removal application has been pending.

Moreover, by withdrawing their asylum applications, these individuals remove themselves from the court's fast-track calendar for asylum cases, which is based on the 180-day deadline by which asylum applications must be adjudicated before individuals receive employment authorization. The Department of Justice first instituted this fast-track system in 1995 as part of a comprehensive reform of the asylum system, creating a more efficient and effective process that denies non-meritorious claims quickly without discouraging legitimate refugees. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) later codified this 180-day deadline, requiring the Department to adjudicate asylum applications filed on or after April 1, 1997 within 180 days from the date of filing. See section 208(d)(5)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1158(d)(5)(A)(iii). To provide the Immigration Court with sufficient time to meet this statutory 180-day deadline for cases filed affirmatively with USCIS and later referred to Immigration Court, the USCIS's asylum program has established a policy aimed at completing the vast majority of its referrals within 60 days from the date of filing—making the affirmative asylum process a very quick access point to removal proceedings.

In the last several years, however, the USCIS asylum program has seen significant drops in asylum applications filed by Mexican nationals from 9,316 filed in FY 2002 to 4,111 filed in FY 2003. In FY 2004, the program anticipates receiving approximately 1,500 asylum applications. The exact reasons for this decline in receipts is currently unknown, although we believe the decline may be related to local law enforcement

and Colombian affirmative asylum seekers decreased precipitously in FY 2003.⁶³ Nothing has changed in these countries to suggest that fewer asylum seekers would make claims in the United States; however, the policies and practices instituted by the U.S. government have probably affected these numbers, as discussed further below. Other significant nationalities in the affirmative asylum system before September 11th include Somalia, El Salvador, Indonesia, Armenia, Ethiopia, and India.⁶⁴ In FY 2002, Somalia numbers decreased significantly and have remained small since.⁶⁵ Asylum seekers from Cameroon have applied in larger numbers beginning in FY 2002.⁶⁶ During the first three quarters of FY 2004, Venezuelan asylum seekers have applied in larger numbers.⁶⁷ These nationality changes may very well reflect shifts in home country instability, among other factors.

Why are the overall numbers down? Are asylum seekers more afraid to identify themselves voluntarily to U.S. government officials in a post-September 11th climate that emphasizes enforcement and removal rather than protection? Are fewer asylum seekers finding ways to come to the United States because of tighter controls? Are fewer considering the United States a haven for refugees? These are all serious possibilities and constitute the best hypothesis this author has so far developed to explain this major decrease.

Those who have come forward voluntarily have fared differently in their quest for protection. As Chart 3 shows, the Asylum Officer approval rates have decreased significantly since FY

actions in California that have resulted in the prosecution of several unscrupulous preparers who have advised Mexican nationals in the U.S. to manipulate the asylum program in the manner described above, as well as local publicity campaigns to inform the community of these illegal practices.

Email from U.S. Headquarters Asylum Division, Department of Homeland Security, to Andrew I. Schoenholtz (Aug. 26, 2004) (on file with author).

63. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53.

64. *Id.*

65. *Id.*

66. *Id.*

67. Asylum FY 2004 QS Top 50, *supra* note 61.

2002.⁶⁸ Approval rates are down from more than 50% in FY 2000 and 2001 to about 40% in FY 2003 and 2004 (through June 30).⁶⁹ In terms of the three largest nationalities, the Chinese approval rates have decreased significantly in FY 2003 and 2004, and the Colombian rates did so beginning in FY 2002.⁷⁰ The Chinese rates fell from above to below average rates—from 55%, 64%, and 60% approval rates in FY 2000, 2001, and 2002, respectively, to 45% and 36% in FY 2003 and 2004, respectively.⁷¹ Colombian rates fell significantly as well, though they remain above average—from 68% and 62% in FY 2000 and 2001, respectively, to 45%, 46%, and 48% in FY 2002, 2003, and 2004.⁷² Finally, the Haitian rates increased from 22% in 2000 to 36% in 2001 and have held in the 31–37% range since.⁷³ At one point well below average, the Haitians are now only somewhat below average. The significant drop in Chinese and Colombian approval rates certainly contributes in an important manner to the overall decline—these two nationalities accounted for 36% of the merits decisions in FY 2002, 29% in FY 2003, and 20% in FY 2004.⁷⁴

68. U.S. Headquarters Asylum Div., Dep't of Homeland Security, Asylum Approval Rates by Office FY 2000–2004 (2004) (on file with author).

69. In calculating the approval rates, the author only considers decisions on the substantive merits of the asylum case: did an Asylum Officer determine that an individual did or did not have a bona fide asylum claim? Accordingly, the calculation divides the number of grants by the number of grants, denials, and referrals to Immigration Court based on an interview. Individuals referred to the Immigration Court on procedural grounds for not having met the one-year application deadline are not considered as decisions on the merits of the refugee claim itself. The USCIS Asylum Office does include the one-year referrals in their approval rate calculations as it is an eligibility requirement.

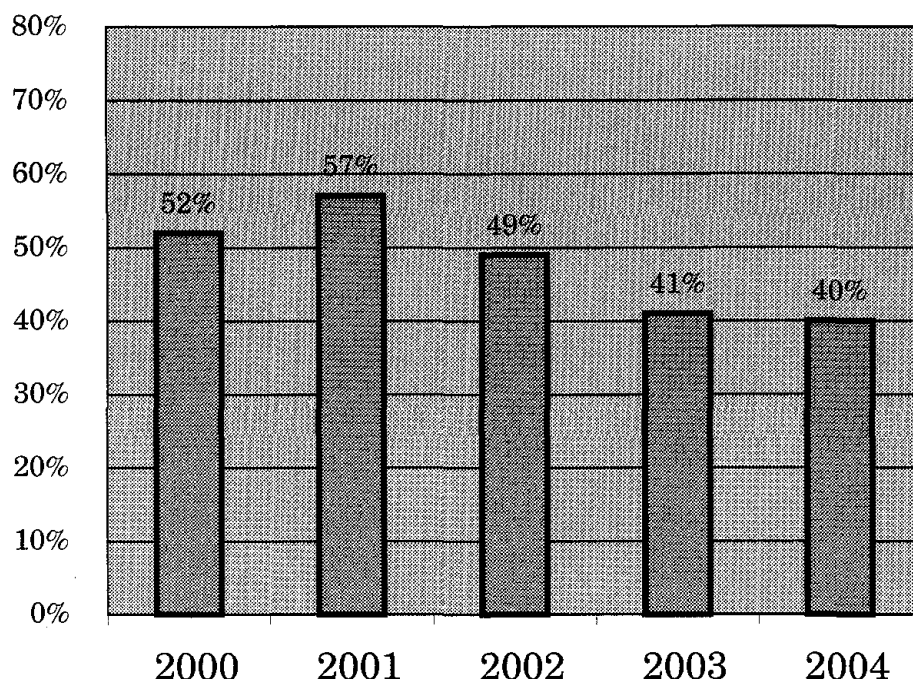
70. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53; Asylum FY 2004 QS Top 50, *supra* note 61.

71. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53; Asylum FY 2004 QS Top 50, *supra* note 61.

72. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53; Asylum FY 2004 QS Top 50, *supra* note 61.

73. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53; Asylum FY 2004 QS Top 50, *supra* note 61.

74. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53; Asylum FY 2004 QS Top 50, *supra* note 61.

Chart 3. Asylum Office Approval Rates, 2000-2004

Source: Headquarters Asylum Division, Office of Refugee, Asylum, and International Operations, USCIS, DHS

What accounts for these major declines in the approval rates of Chinese and Colombian asylum seekers? Again, nothing significant has changed regarding the human rights and conflict context in these countries. With regard to those seeking asylum based on coercive population control, for example, are Asylum Officers finding applicants less credible than in the past? With regard to Colombians, did more of the earlier arrivals flee persecution as opposed to civil conflict? The data do not answer these questions, and no information clearly suggests that such possibilities are true. However, one of the weaknesses in the U.S. protection system is that there is no fair and effective mechanism to provide individuals with temporary protection during civil conflict. This protection gap may be significant and is discussed further below.

The decline in Chinese and Colombian approval rates does not completely account for the more than 20% decline in the overall asylum approval rate. Statistics regarding nationalities also do not

reveal any major changes in terms of the types of countries from which asylum seekers originate. They are generally countries where conflict, instability, and/or human rights violations force many to flee from persecution and other serious forms of harm. It is possible that some Asylum Officers became less generous in their decision-making post September 11th, particularly with regard to the most difficult decisions involving asylum seekers fleeing states in the midst of terrible civil wars. The 1951 Refugee Convention and 1967 Protocol, of course, do not protect those fleeing civil conflict, and the United States does not yet practice the system common in Europe whereby those denied asylum are provided with a temporary form of protection if they are fleeing conflict.

With regard to other possible factors, gender does not appear to account for the overall decline.⁷⁵ The percentage of women applying for asylum did not change significantly from FY 1999–2003.⁷⁶ About 38% of applicants have been female in each of these recent fiscal years. Neither does representation account for this decline—or more precisely the lack of representation, since 65–70% of asylum seekers in the first instance have not been represented during FY 1999–2003.⁷⁷

The data do reveal that the approval rates at two of the eight Asylum Offices decreased significantly more than other offices. As Chart 4 shows, Los Angeles declined from a high of 67% in FY 2001 to a low of 31% in FY 2004. Houston decreased from a 44% approval rate in FY 2001 to an 18% rate in 2003, and reached a 23% rate in 2004.⁷⁸ It is not clear what factors influenced those major declines, but such significant changes should be fully investigated.

Even with the decline in approval rates, the affirmative asylum system remains robust: 40% of those whose full claims are

75. U.S. Headquarters Asylum Div., Dep't of Homeland Security, *Affirmative Asylum Applications by Gender FY 1998–2003* (2004) (on file with author).

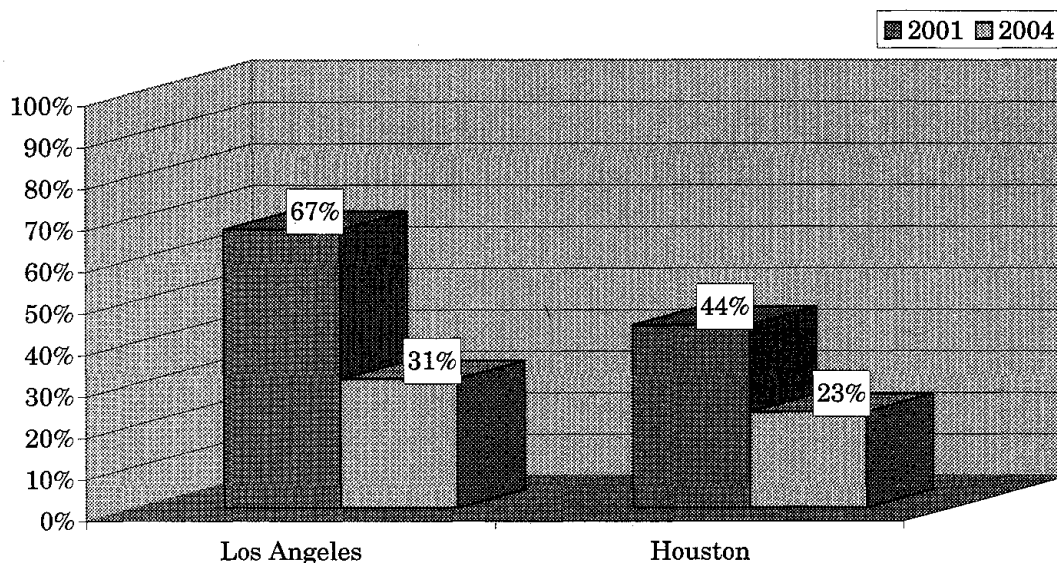
76. *Id.*

77. U.S. Headquarters Asylum Division, Dep't of Homeland Security, *All Offices Summary, Reform, By Representation, FY 1999–2003* (2004) (on file with author).

78. U.S. Headquarters Asylum Division, Dep't of Homeland Security, *Asylum Approval Rates by Office FY 2000–2004* (2004) (on file with author).

heard in the first instance receive asylum.⁷⁹ Compared to pre-reform, the system continues to provide protection to a significant number of refugees at this first stage.

Chart 4. Asylum Approval Rates, Los Angeles and Houston Offices, 2001 v. 2004



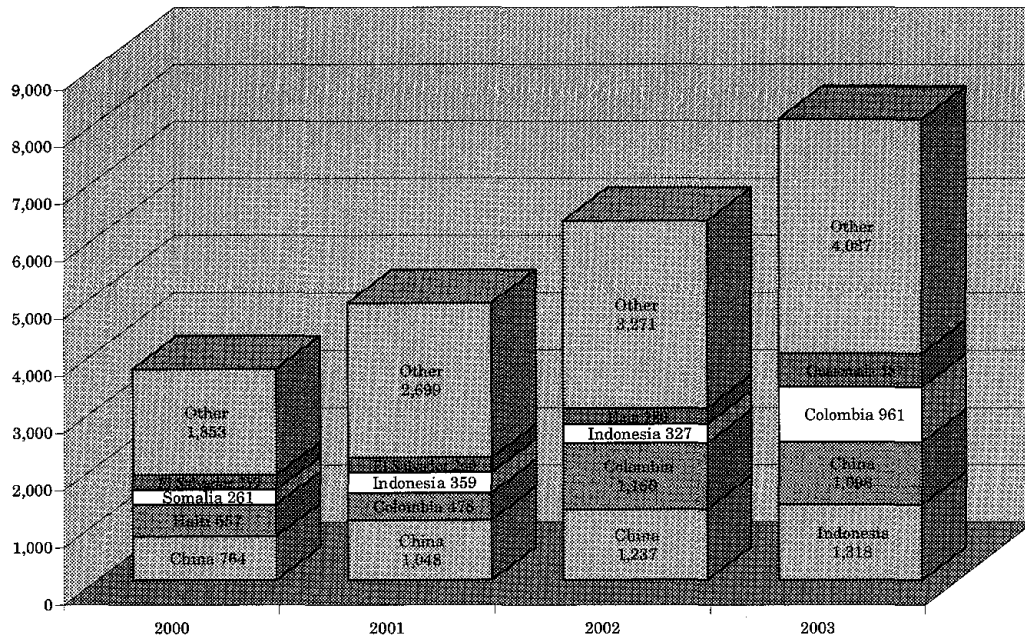
Source: Headquarters Asylum Division, Office of Refugee, Asylum, and International Operations, USCIS, DHS

B. Recommendations to Improve Affirmative Asylum

The robust asylum rate does not mean that the system is as good as it should be. The one-year deadline requirement was a major problem for many applicants prior the terrorist attacks and remains a major challenge. Pursuant to a 1996 law, the United States requires applicants to file for asylum within one year of the claimant's arrival in the country.⁸⁰ The only exceptions to this rule are changed circumstances that materially affect the applicant's

79. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53.

80. Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.4 (a)(2)(B)(ii) (1996).

Chart 5. One-Year Deadline Referrals by Asylum Office to Immigration Court, 2000-2003

Source: Headquarters Asylum Division, Office of Refugee, Asylum, and International Operations, USCIS, DHS

eligibility for asylum⁸¹ or extraordinary circumstances relating to the delay in filing.⁸² The data shows that this procedural requirement has disqualified large numbers of persecution claims from consideration by decision-makers. As Chart 5 shows, since 2000 the DHS Asylum Office has referred more than 25,000 asylum seekers to Immigration Court because they did not meet the one-year application deadline.⁸³ Clearly, very high numbers of people do not have their substantive claims heard in the first instance. While this problem pre-dates the terrorist attacks, the situation has only worsened since September 11th.

Those who object to such time limits argue that genuine refugees often have good reasons for failing to file their claims

81. Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.4 (a)(4) (1996).

82. Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.4 (a)(5) (1996).

83. U.S. Headquarters Div., Dep't of Homeland Security, 1 Year Deadline Rejections by Asylum Office 1998-2004 (2004) (on file with author). These numbers do not include Mexicans who entered the affirmative asylum system to be placed into removal proceedings in order to apply for other forms of relief.

immediately or soon after arrival. Many refugees are traumatized. Unless they are in countries that provide them with food and shelter, their first priority is survival—finding relatives, friends, or others of all, filing an asylum application that survives referral is extraordinarily difficult without help from a lawyer or other who will help them. Language barriers, as well as ignorance of the law, hinder compliance with such deadlines. Perhaps most important professional who specializes in asylum law. There is no evidence that the imposition of time limits decreases abusive claims. As discussed above, it is clear, however, that such restrictions limit the access of bona fide claimants to a decision on the merits. The 1996 U.S. law has now limited the rights of tens of thousands of individuals to seek asylum.⁸⁴

If an asylum system is effective, the imposition of time limits and expedited processes is not needed to control abuse. If viewed in sum, the U.S. asylum system is generally an effective one. Decisions are made in a timely fashion: two separate decisions, by Asylum Officers and Immigration Judges, are made in most affirmative cases within six months of the application's receipt at the Asylum Office.⁸⁵ Furthermore, approval rates are significant and those denied asylum often come from countries in civil conflict. This indicates that significant abuse is not the problem it was prior to the 1995 reforms. Accordingly, the United States should eliminate the time deadline or, in the very least, impose a very generous one, such as five years.

The U.S. government and all other stakeholders in the affirmative asylum system should be troubled by the significant decreases in both the absolute number of applicants and the grant rate. By and large, the circumstances that propelled forced migrants to the United States have not changed. While the overall grant rate

84. See Asylum By Nationality and Deadline FY 1999–2003, *supra* note 53; 1 Year Deadline Rejections by Asylum Office FY 1998–2004, *supra* note 83. As discussed above, the Asylum Office has rejected more than 25,000 claims based on this artificial deadline. While some of these asylum seekers may find relief under withholding of removal or the Convention Against Torture, these alternative forms of relief require significantly greater proof to demonstrate eligibility. In any event, unless an Immigration Judge overturns the Asylum Officer rejection based on the deadline, asylum is not available.

85. U.S. Citizenship and Immigration Services, *Frequently Asked Questions About Asylum*, at <http://uscis.gov/graphics/services/asylum/faq.htm#how9> (last visited Nov. 20, 2004).

is still relatively high, access and protection problems are of considerable concern. American immigration officials need to understand this decline more thoroughly to be able to address the problems of access and protection.

III. REFUGEES SEEKING ASYLUM IN REGULAR IMMIGRATION COURT HEARINGS

Asylum claims are also decided in Immigration Court, which has been part of the Justice Department's Executive Office for Immigration Review (EOIR) since 1983.⁸⁶ Most of the claims are referred by USCIS Asylum Officers.⁸⁷ On average, from 1999 to 2003, about seventy-two percent of asylum claims filed in Immigration Court came from this "affirmative" system.⁸⁸ Asylum seekers who have not voluntarily come forward to request protection may also raise a claim after they are placed in removal proceedings. Such "defensive" claims accounted for the other asylum cases in Immigration Court.⁸⁹

In the last five years, the number of asylum claims first decreased slightly, then increased significantly, and finally decreased. The number of asylum cases increased twenty percent in FY 2002 to about 74,000, and then decreased twelve percent in FY 2003 to some 65,000.⁹⁰ Given the decline in the number of affirmative asylum cases, the number of Immigration Court asylum claims will continue to decrease.

In contrast to the declining grant rates in Asylum Officer decisions, Immigration Judge grant rates have held relatively steady

86. U.S. Dep't of Justice, Mission, and Functions Manual: Executive Office for Immigration Review (March 2004), available at <http://www.usdoj.gov/jmd/mps/manual/eoir.htm>.

87. EOIR Office of Planning and Analysis, Dep't of Justice, FY 2003 Statistical Yearbook, at I1 (2004) available at <http://www.usdoj.gov/eoir/statspub/fy03syb.pdf> (last visited Nov. 20, 2004) [hereinafter FY 2003 Statistical Yearbook].

88. *Id.*

89. U.S. Citizenship and Immigration Services, *supra* note 54.

90. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53.

from 2000 to 2003.⁹¹ The approval rate has increased significantly since the 1995 asylum reforms.⁹² Almost four out of every ten decisions (grants and denials) are grants.⁹³ In fact, the approval rate of the affirmative (Asylum Officer) cases referred to Immigration Court was forty-four percent during FY 2001–2003, considerably higher than the defensive grant rate—even including one-year deadline referrals from the Asylum Office (see Chart 6).⁹⁴

Thus, when merits determinations are made in the first two instances, the U.S. asylum system continues to be quite robust. The Asylum Officer approval rate in FY 2003 was around forty-one percent,⁹⁵ and the Immigration Court about thirty-seven percent.⁹⁶ With regard to decision making since the terrorist attacks, the Immigration Judges continue to grant the same proportion of referred cases as they did previously.⁹⁷ Unfortunately, without longitudinal data, analysts cannot draw any conclusions about how Immigration Judges evaluate the merits of first instance decisions. Since such feedback to Asylum Officers would be very useful, EOIR

91. FY 2003 Statistical Yearbook, *supra* note 87, at K1.

92. See EOIR Office of Planning and Analysis, Dep't of Justice, Immigration Courts FY 1997 Asylum Statistics, *available at* <http://www.usdoj.gov/eoir/efoia/FY97AsyStats.pdf> (last visited Nov. 20, 2004); Immigration Courts FY 1998 Asylum Statistics, *available at* <http://www.usdoj.gov/eoir/efoia/FY98AsyStats.pdf> (last visited Nov. 20, 2004); Immigration Courts FY 1999 Asylum Statistics, *available at* <http://www.usdoj.gov/eoir/efoia/FY99AsyStats.pdf> (last visited Nov. 20, 2004); Immigration Courts FY 2000 Asylum Statistics, *available at* <http://www.usdoj.gov/eoir/efoia/FY00AsyStats.pdf> (last visited Nov. 20, 2004); Immigration Courts FY 2001 Asylum Statistics, *available at* <http://www.usdoj.gov/eoir/efoia/FY01AsyStats.pdf> (last visited Nov. 20, 2004); Immigration Courts FY 2002 Asylum Statistics, *available at* <http://www.usdoj.gov/eoir/efoia/FY02AsyStats.pdf> (last visited Nov. 20, 2004); Immigration Courts FY 2003 Asylum Statistics, *available at* <http://www.usdoj.gov/eoir/efoia/FY03AsyStats.pdf> (last visited Nov. 20, 2004).

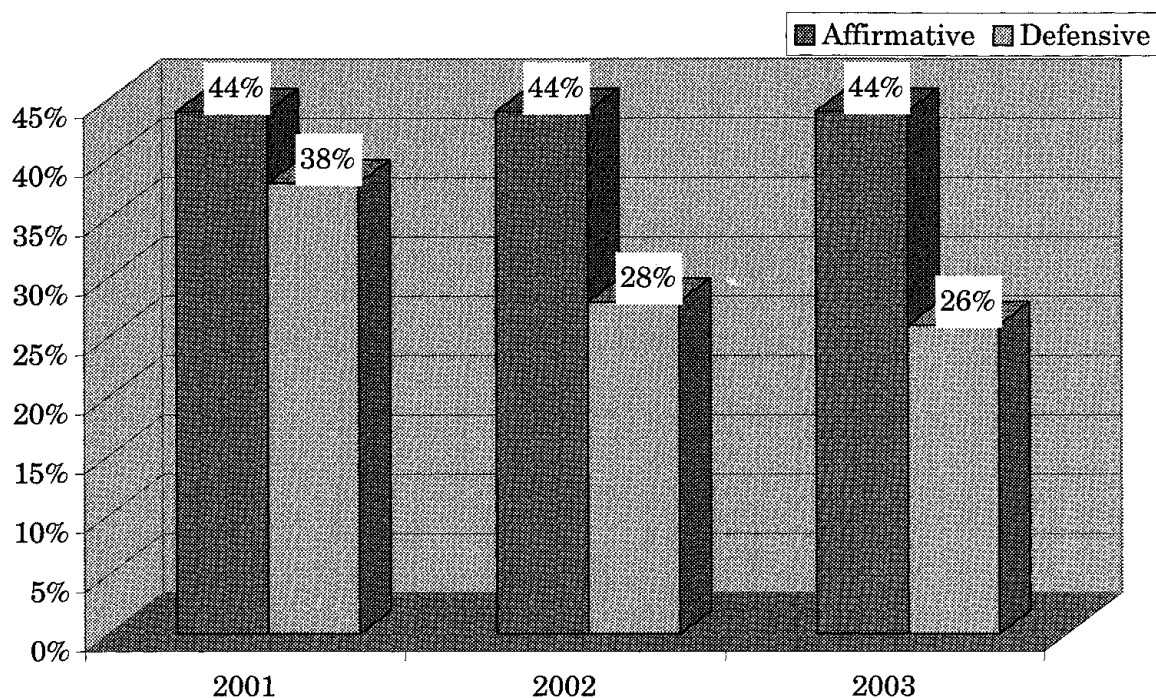
93. FY 2003 Statistical Yearbook, *supra* note 87, at K1.

94. *Id.* at K2.

95. U.S. Headquarters Asylum Div., Dep't of Homeland Security, Asylum Office FY 2003 (2004) (on file with author).

96. FY 2003 Statistical Yearbook, *supra* note 87, at K1.

97. *Id.*

Chart 6. Affirmative and Defensive Grant Rates, Immigration Court, 2001-2003

Source: Dept. of Justice, Executive Office of Immigration Review, Office of Planning and Analysis

and the Asylum Office should develop a system to track individuals through all the administrative decisions.

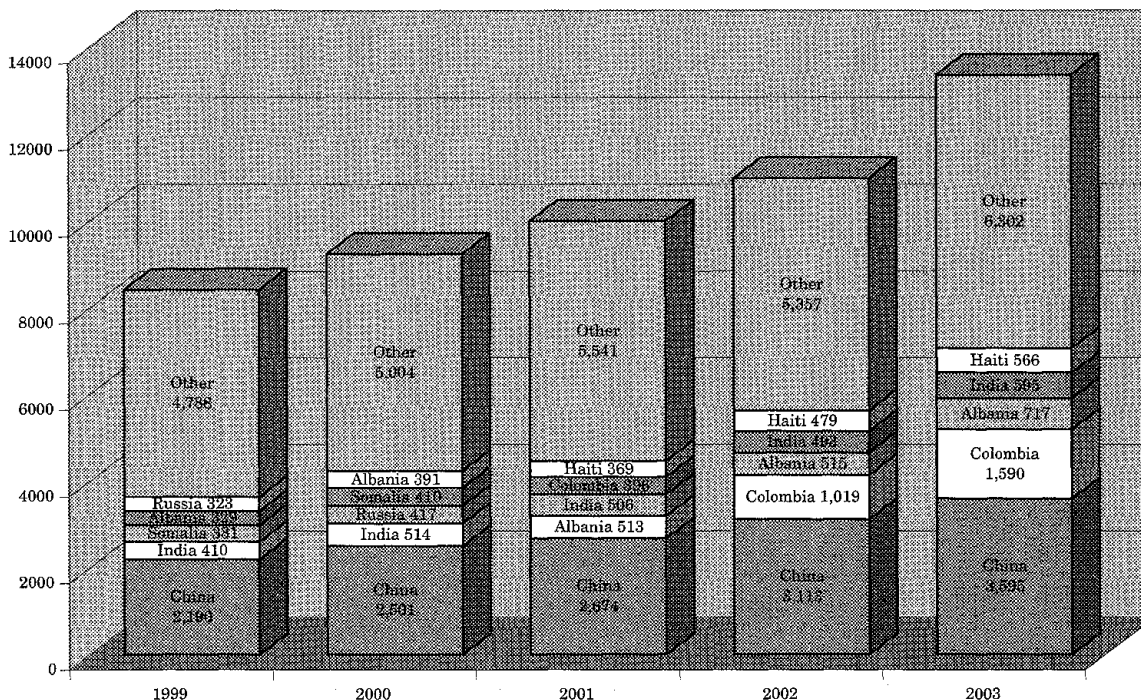
With respect to other nationality trends, five countries consistently topped the list in absolute number of grants in FY 2001, 2002, and 2003: China, Colombia, Albania, India and Haiti (see Chart 7).⁹⁸ In FY 2002 and 2003, refugees from these five countries accounted for more than fifty percent of all grants.⁹⁹ Since September 11th, most of the top fifteen nationalities granted asylum have remained in that top grouping. Only Sri Lankans and Somalis declined in number, as the number of asylum applicants from those countries decreased.¹⁰⁰ As suggested previously, these changes may reflect, among other factors, relative improvements in the stability of

98. Asylum by Nationality and Deadline FY 1999–2003, *supra* note 53. Several of these countries also ranked among the top five in absolute number of denials in FY 2001, 2002, and 2003 (see Chart 8).

99. *Id.*

100. *Id.*

Chart 7. Asylum Applications Granted by Immigration Court, 1999-2003



Source: DOJ, Executive Office for Immigration Review, Asylum Statistics, 1999-2003
 Note: Grants include conditional grants of Chinese asylum seekers.

these two countries, but they may also reflect greater scrutiny of visa applications and efforts at border control.

With respect to nationality, China has been at the very top in grants and applications for a number of years.¹⁰¹ Due to the Congressional limit of 1,000 grants per year to those fleeing coercive population control, even just halfway through FY 2004 there was a substantial and growing backlog of nearly 9,000 conditionally approved Chinese refugees awaiting a permanent grant.¹⁰² Because of the backlog, these individuals cannot become permanent residents and eventually citizens for significant periods of time. A Chinese refugee granted conditional asylum today will wait more than nine years before the grant becomes permanent. On top of that, these

101. Asylum by Nationality and Deadline FY 1999-2003, *supra* note 53.

102. The fiscal year runs from October through September. *See supra* note 15. As of March 2004, EOIR reported to DHS that 8,954 Chinese with conditional grants of asylum awaited their permanent grant. Email from EOIR, Office of Planning, Analysis and Technology, Sept. 9, 2004 (on file with author).

refugees must then wait another decade or more on the asylum backlog for permanent resident status.¹⁰³

The lack of representation for asylum seekers in the adversarial proceedings of Immigration Court is also problematic. Representation matters in terms of outcomes. As this author found in a previous study, asylum seekers referred to Immigration Court by the Asylum Office are six times more likely to be granted asylum if they are represented.¹⁰⁴ During FY 1999–2003, only forty-two to forty-eight percent of non-citizens had representation.¹⁰⁵ Experts assert that represented cases generally make for a more efficient Immigration Court.¹⁰⁶ Congress has so far failed to mandate representation, even for children in Immigration Court. In the very

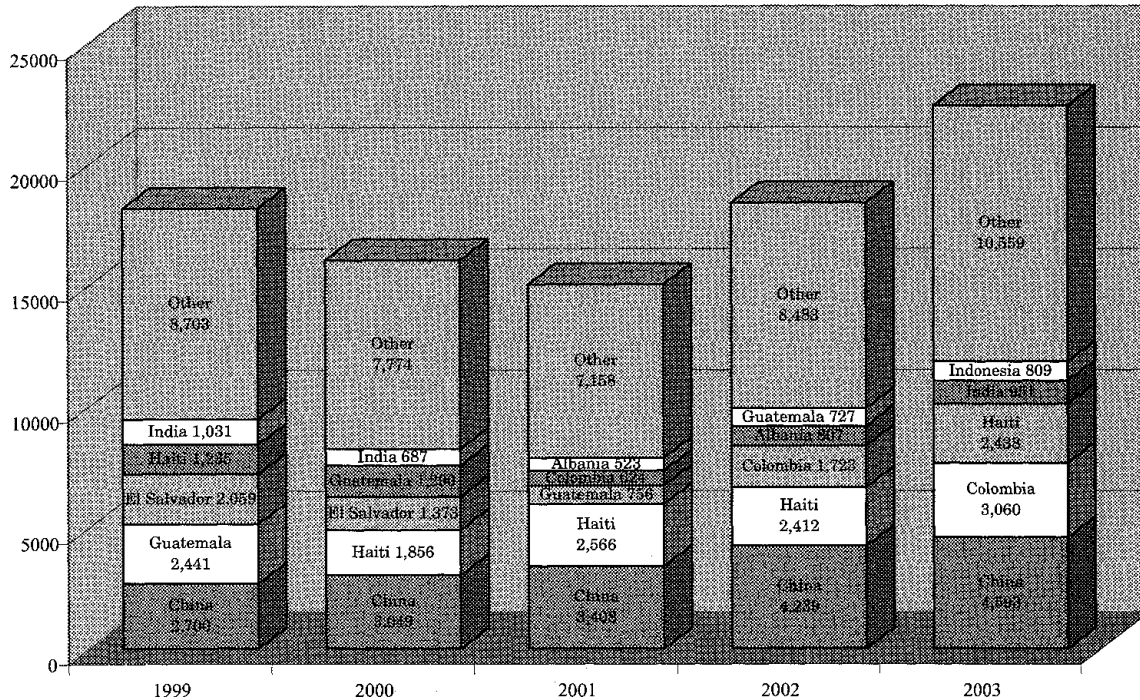
103. Current law enables those granted asylum to apply for permanent resident status one year after the grant, but limits the number of such adjustments to 10,000 per year. When Congress set that number in 1990 by doubling the initial ceiling established in the Refugee Act of 1980, it sufficiently addressed the needs at that time. Congress has yet to update the 1990 ceiling, even though U.S. society fully expects that those granted asylum are not returning to their home countries and will remain permanently in the United States. As of March 1, 2004, there were some 160,000 asylees awaiting adjustment. U.S. Citizenship and Immigration Services, Dep't of Homeland Security, Adjustment of Status for Asylees, at <http://uscis.gov/graphics/fieldoffices/nebraska/asyleeadj.htm> (last visited Dec. 5, 2004). USCIS estimated that the applications received in late 2003 would be processed in FY 2015. To help integrate these refugees into U.S. society and protect their rights, then, Congress should eliminate both of these artificial limitations on the number of asylum grants and status adjustments. In addition and to the same end, Congress should admit these and all other asylees as legal permanent residents upon the grant of asylum, as recommended by the Jordan Commission in 1997. The Jordan Commission recommended immediate adjustment for asylees and resettled refugees. U.S. Comm'n on Immigration Reform, U.S. Refugee Policy: Taking Leadership, 34, 35 (1997), <http://www.utexas.edu/lbj/uscir/refugee/full-report.pdf> (last visited Jan. 26, 2004).

104. Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 Geo. Immigr. L.J. 739, 766 tbl.1 (2002).

105. FY 2003 Statistical Yearbook, *supra* note 87, at G-1. This data is not broken down with respect to types of cases, such as asylum. In FY 1999, sixty-four percent of affirmative asylum seekers were represented in Immigration Court. Schoenholtz & Jacobs, *supra* note 103, at 742.

106. See Executive Office for Immigration Review, U.S. Dep't of Justice, BIA Pro Bono Project, at <http://www.usdoj.gov/eoir/probono/MajorInitiatives.htm> (last visited Jan. 26, 2005).

Chart 8. Asylum Applications Denied by Immigration Court, 1999-2003



Source: DOJ, Executive Office for Immigration Review, Asylum Statistics 1999-2003

least, Congress should fund a pilot study of mandated representation in several Immigration Courts to understand fully the benefits of such a system to the government and those it has committed to protect.

In sum, the approval rates in Immigration Court have continued to be significant and consistent since September 11th. Major problems—such as artificial limits on the number of asylum grants and adjustments; and the lack of representation for asylum seekers—should be addressed by legislation.

IV. THE SUPREME COURT OF IMMIGRATION: IMPACT OF ATTORNEY GENERAL REFORMS AND PERSONNEL CHANGES AT THE BOARD OF IMMIGRATION APPEALS

Asylum claimants, non-citizens seeking other forms of relief, and DHS Trial Attorneys may appeal an adverse Immigration Judge decision to the Board of Immigration Appeals (BIA).¹⁰⁷ Historically,

107. Executive Office for Immigration Review, U.S. Dep't of Justice, Board of Immigration Appeals (biographical information on the BIA), at <http://www.usdoj.gov/eoir/biainfo.htm> (last visited Jan. 26, 2004).

the BIA has been the single most important decision-maker in the immigration system. It reviews cases nationwide and sets precedents that Immigration Judges and Asylum Officers must follow.¹⁰⁸ Given that the Supreme Court issues very few decisions concerning asylum law, the BIA essentially interprets immigration law for the nation. While a United States Court of Appeals may disagree with a Board interpretation, the BIA only has to follow that Court's interpretation within its limited jurisdiction.

The Attorney General, however, established the BIA by regulation and has the power to overrule its decisions.¹⁰⁹ Prior to the 1990s, the Attorney General generally did not exercise that power. That changed with both Janet Reno and John Ashcroft. In addition, the Attorney General has complete discretion to appoint and remove Board members. After September 11th, Attorney General John Ashcroft completely revamped the powers and composition of the BIA based on plans developed well before the terrorist attacks.¹¹⁰

During the 1990s, Attorney General Janet Reno increased the size of the Board to address an increasing caseload.¹¹¹ In doing so, she added members from academia, private practice, and advocacy in order to balance somewhat the predominant government experience of existing members.¹¹² As the caseload continued to grow over the decade, a backlog developed despite the increased number of BIA members. In the most significant development of her governance of the BIA, the Attorney General authorized major changes in the

108. *Id.*

109. Executive Office for Immigration Review, U.S. Dep't of Justice, Board of Immigration Appeals Practice Manual 10 (2004), *available at* <http://www.usdoj.gov/eoir/bia/qapracmanual/apptmtn4.htm>.

110. Press Release, Executive Office for Immigration Review, U.S. Dep't of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), <http://www.usdoj.gov/eoir/press/02/BIARestruct.pdf> (last visited Jan. 26, 2005).

111. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878–54,879 (Aug. 26, 2002) [hereinafter Final Rule].

112. Press Release, Executive Office for Immigration Review, U.S. Dep't of Justice, Executive Office for Immigration Review Announces New Appointments at the Board of Immigration Appeals (July 31, 2000), *at* <http://www.usdoj.gov/eoir/press/00/biaappts2000.htm> (last visited Jan. 26, 2005).

BIA review process to address this growing backlog. In October 1999, she gave BIA members the authority in certain circumstances to issue summary affirmances, that is, decisions without any analysis.¹¹³ Instead of having every appeal decided by a three-member panel, the BIA issued individual member summary affirmances in certain categories of cases designated by the BIA Chairman if the BIA member determined:

that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel fact situation; or (B) the factual and legal issues raised on appeal are not so insubstantial that the case warrants the issuance of a written opinion in the case.¹¹⁴

Andersen LLP performed an independent audit to evaluate the effectiveness of the new streamlining as it was implemented between September 2000 and August 2001.¹¹⁵ In FY 2001, for the first time in a number of years, the BIA completed about 4,000 more cases than it received. The auditor reported a fifty-three percent increase in the overall number of cases completed during the implementation period.¹¹⁶ The auditor also reported that the available data did not indicate an adverse effect on non-citizens. The Andersen report concluded that the new streamlining rules resulted in an unqualified success.¹¹⁷

113. Final Rule, *supra* note 111, at 54,879.

114. Executive Office for Immigration Review, General Provisions, 8 C.F.R. § 1003.1 (2004).

115. Anderson LLP, Board of Immigration Appeals Streamlining Pilot Project Assessment Report (2001) (independent study conducted for the Executive Office for Immigration Review, U.S. Dep't of Justice), *reprinted in* Dorsey & Whitney, LLP, Board of Immigration Appeals: Procedural Reforms to Improve Case Management app. 21, at 138 (2003) (study conducted for the American Bar Association Commission on Immigration Policy, Practice and Pro Bono) [hereinafter Dorsey & Whitney Study], http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf (last visited Jan. 26, 2005).

116. *Id.* at 5–8.

117. *Id.*

The independent auditor reported this in December 2001. Despite the positive findings and conclusions, just two months later Attorney General John Ashcroft authorized new policies in the name of streamlining that fundamentally changed the nature of the BIA's review function. In addition, he radically changed the composition of the Board.

The February 2002 proposed rule, which became final in August 2002,¹¹⁸ resulted in three major changes. First, single member became "the dominant method of adjudication for the large majority of cases",¹¹⁹ and single member summary affirmances became commonplace.¹²⁰ Second, the Ashcroft streamlining effectively eliminated the BIA's de novo review of factual issues that had existed for almost half a century.¹²¹ The new rule accomplished this by establishing "the primacy of the immigration judges as factfinders" and requiring the Board to defer to the Immigration Judge unless a decision is "clearly erroneous."¹²² To understand the far reaching nature of this change, it is necessary to understand why the Board exercised this power throughout the second half of the twentieth century. Former BIA Chairman Paul Schmidt articulated the rationale for the Board's de novo powers in his dissent in *Matter of A.S.*:

In many cases, the expertise, independence, and sound judgment of this Board is all that stands between an asylum applicant and return to a place where he or she will face persecution or death. It is quite possible that we review more asylum adjudications than any other tribunal in the world. Certainly, each Board Member adjudicates many more asylum cases, from a wider variety of nationalities, than any individual Immigration Judge. We also have a nationwide jurisdiction and a perspective that is not present in the Immigration Courts.

118. Final Rule, *supra* note 113.

119. *Id.* at 54,879.

120. Letter from Larry Levine, Counsel for Legislative and Public Affairs, EOIR Office of Management Programs, to Stuart Drown, City Editor of The Sacramento Bee (Sept. 21, 2004), <http://www.usdoj.gov/eoir/press/LtrtoEditorSacBee.pdf> (last visited Jan. 26, 2005).

121. See, e.g., *In Re B-*, 7 I. & N. Dec. 1 (BIA 1955, A.G. 1956).

122. Final Rule, *supra* note 113, at 54,881.

While we may lack the advantage of a face-to-face observation of the witness, we have the very substantial, and much underrated, advantage of being able to review a written transcript. We also have a talented professional staff to assist us in reviewing the record. In addition, the absence of personal interaction with the parties and their counsel in the trial courtroom insulates us from the almost inevitable, and often distracting, frustrations and extraneous factors that could accompany such personal interaction, particularly in a 'high-volume' trial system like the Immigration Court. Moreover, we have the opportunity for collegial discussion and the application of shared expertise to difficult appellate issues.

Therefore, it is not clear to me why our vantage point is necessarily less revealing than that of the Immigration Judge and why we want to give such great deference to the Immigration Judge, rather than relying on our own expertise and sound, independent judgment after review of the written record on appeal.¹²³

As noted by David Martin, former INS General Counsel and professor of law at the University of Virginia, Immigration Judges adjudicate very large caseloads and "are under 'real pressure to conclude their cases and move forward'... which is why they tend to dictate their opinions at the end of the proceedings, unlike federal judges who may take weeks to consider and write an opinion."¹²⁴ In such a demanding system, serious mistakes are made regarding both factual and legal findings.

Third, in addition to soundly rejecting this historical power of the BIA, the new rule reduced the membership of the Board from twenty-three to eleven authorized positions.¹²⁵ According to the Federal Register, the Attorney General based this determination "on judgments made about the historic capacity of appellate courts and administrative appellate bodies to adjudicate the law, the ability of individuals to reach consensus on legal issues, and the requirements of the existing and projected caseload."¹²⁶ In the actual downsizing,

123. *In re A-S-*, 21 I.& N. Dec. 1106, 1114 (BIA Feb. 19, 1998).

124. Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a 'Purge'*, L.A. Times, Mar. 12, 2003, at A16.

125. Final Rule, *supra* note 113, at 54,881.

126. *Id.* at 54,893.

the Attorney General targeted the newer members who came from the practice of asylum and immigration law, advocacy, and academia. In endorsing the removal of these members, the Executive Director of the Center for Immigration Studies, which advocates significant restrictions on immigration, observed that "Board members should clearly represent the attorney general's views, since they are carrying out his responsibility."¹²⁷ Finally, during the downsizing transition, the Attorney General required BIA members to clear their current backlog of about 55,000 cases within 180 days.¹²⁸ According to Human Rights First (formerly Lawyers' Committee for Human Rights), each Board member essentially had to decide thirty-two cases every work day, or one every fifteen minutes.¹²⁹

Not surprisingly, the Ashcroft changes were controversial. A July 2003 study conducted for the American Bar Association Commission on Immigration Policy, Practice and Pro Bono by the law firm of Dorsey & Whitney found that while the number of appeals granted or remanded remained steady between June 2000 and October 2002, the number of denials doubled.¹³⁰ The grant rate declined from twenty-five percent before the spring of 2002 to ten percent afterwards. Lori Scialabba, appointed Chair of the BIA by Attorney General Ashcroft,¹³¹ responded that the study relied on

127. Alonso-Zaldivar & Peterson, *supra* note 124, at A16.

128. Media Alert, Human Rights First, New Regulations Threaten to Turn Board of Immigration Appeals into Rubber Stamp (Aug. 28, 2002), at http://www.humanrightsfirst.org/media/2002_alerts/0828.htm (last visited Jan. 26, 2005).

129. Human Rights First, *supra* note 126. See also Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. Times, Jan. 5, 2003, at A1 (asserting that Ashcroft's overhaul of the system led to Board members having to decide cases in "minutes").

130. Dorsey & Whitney Study, *supra* note 115, app. 24 at 235.

131. Press Release, U.S. Dep't of Justice, Attorney General Ashcroft Appoints Lori Scialabba as Chairman of the Board of Immigration Appeals (Aug. 23, 2002), at http://www.usdoj.gov/opa/pr/2002/August/02_eoir_490.htm:

Ms. Scialabba began her career with the DOJ in October 1985 through the Attorney General's Honor Program and served as a trial attorney for the INS in Chicago, where she litigated deportation cases. From 1986 to 1989, she served as Assistant General Counsel for INS Headquarters in Washington, D.C. In 1989, she joined the Office of Immigration Litigation, Civil

“outdated and unsubstantiated data from a Los Angeles Times article published in January 2003.”¹³²

The impact of the new rules on the federal judiciary has been very serious. The Dorsey & Whitney study showed that the new rules have resulted in more than an 800% increase in appeals from BIA decisions to the federal circuit courts.¹³³ Overwhelmed with this surge, the federal circuit courts of appeal have developed their own backlog of BIA decisions.

These changes are extreme, and no evidence suggests that dramatic changes to the procedures and membership of this very important administrative appeals agency were necessary. Before the Attorney General instituted these reforms, the BIA had already demonstrated its capacity to address the size of the annual caseloads. As noted in the Federal Register, the Board received over 27,000 cases in FY 2001 and decided over 31,000.¹³⁴ In fact, the Department of Justice reported in the Federal Register that it agreed “with the fundamental assessment that the Board’s [initial] use of the streamlining process has been successful.”¹³⁵ If the Attorney General were truly concerned with addressing the backlog in a fair way, he could have required the Board to follow the very successful approach implemented by the 1995 asylum reforms: last in, first out. This allowed the Asylum Office to discourage abuse and ensure that refugees did not have to wait long periods of time for decisions. The Asylum Office quickly demonstrated its ability to handle the incoming caseload and then proceeded to decide backlogged cases in a fair manner.

Division at DOJ as a trial attorney until 1991. She held the position of Associate General Counsel at the INS from 1991 to 1994 when she was appointed Deputy General Counsel for the INS. She held that position until her appointment to the BIA.

Attorney General Reno appointed Ms. Scialabba to the Board in 1998. *Id.*

132. Letter from Lori Scialabba, Chairman, Board of Immigration Appeals, to Charles Carter, Editor-in-Chief, National Law Journal (Dec. 8, 2003), <http://www.usdoj.gov/eoir/press/03/BIANLJresponse120803.pdf> (last visited Jan. 26, 2005).

133. Dorsey & Whitney Study, *supra* note 115, app. 26 at 237.

134. Final Rule, *supra* note 113, at 54,878.

135. *Id.* at 54,879.

Furthermore, no evidence has come to light suggesting that the Board's *de novo* review powers interfered with its ability to address a large caseload. Moreover, by ordering the BIA to issue very large numbers of decisions without any analysis and by removing *de novo* review, the Attorney General has stripped the Board of its capacity to ensure the accuracy of Immigration Judge decisions. The Attorney General also diminished the fairness of the review function by removing members for ideological reasons.

Accuracy, consistency, and public acceptance are among the most important goals of any adjudicative system.¹³⁶ The mere prospect of independent review encourages more thoughtful deliberation at the initial hearing stage, according to experts.¹³⁷ In FY 2003, some 33,500 of 198,000 Immigration Judge decisions (seventeen percent) were appealed to the Board of Immigration Appeals by either non-citizens or the government.¹³⁸ Subsequent to the limited review procedures established by the Attorney General, most decisions by Immigration Judges are summarily affirmed without explanation by a single member of the Board of Immigration Appeals.¹³⁹ Since such decisions do not provide any analysis, they cannot ensure consistent legal standards. Moreover, no one can know whether such decisions are accurate unless they are appealed to the United States Courts of Appeal.

To ensure accurate and consistent legal standards and address the sweeping changes described above, Congress must intervene to establish an immigration review system independent of the chief law enforcement officer of the land. The Jordan Commission called for this change in 1997.¹⁴⁰ It is ever more pressing today.

136. See Stephen H. Legomsky, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 Geo. Immigr. L.J. 619, 622 (2000).

137. *Id.* at 641.

138. FY 2003 Statistical Year Book, *supra* note 87, at Y1.

139. *Id.*

140. U.S. Comm'n on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy*, 175-183 (1997), available at <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf>.

V. ENSURING THAT REFUGEES CAN SEEK ASYLUM AND FIND
PROTECTION IN THE UNITED STATES AND IN THE REGION: THE
TREATMENT OF HAITIAN ASYLUM SEEKERS

Since the terrorist attacks, the U.S. government has treated Haitian asylum seekers with extremely harsh policies. First, in order to discourage Haitians from trying to reach U.S. shores by boat, U.S. immigration officials detained hundreds who had arrived on two separate boats about a year apart and expedited their asylum cases.¹⁴¹ When some 170 Haitian asylum seekers arrived by boat in Florida in December 2001, the INS instituted the new detention policy.¹⁴² In October 2002, more than 200 Haitians reached the U.S. coast by boat and swam ashore near Key Biscayne, Florida. Nineteen Haitians from this boat were picked up by the Coast Guard before they reached dry land and were reportedly returned to Haiti.¹⁴³ In support of the new detention policy, the INS reportedly invoked a controversial regulation that had been established after the terrorist attacks and essentially gave INS Trial Attorneys the power to overturn an Immigration Judge's decision to release a detainee on bond. That regulation enabled the United States to detain Arab and Muslim non-citizens for prolonged periods without charging them with any terrorist or other criminal activity.¹⁴⁴

According to the Department of Justice, these policies were aimed at discouraging a mass exodus from a destabilizing Haiti in order to preserve U.S. Coast Guard and Naval resources to guard against terrorist attacks.¹⁴⁵ The Department did not provide any evidence that such policies could deter a mass exodus in times of civil conflict or crisis. Lawyers for one Haitian detainee challenged the

141. See Human Rights First, *Haitian Refugees and the U.S. Asylum System*, at http://www.humanrightsfirst.org/asylum/asylum_04.htm (last visited Jan. 26, 2005); Women's Commission on Refugee Women and Children, *Refugee Policy Adrift: The United States and Dominican Republic Deny Haitians Protection* 20–32 (2003), available at <http://www.womenscommission.org/pdf/ht.pdf>.

142. Women's Commission on Refugee Women and Children, *supra* note 141, at 29.

143. *Id.* at 30.

144. *Id.* at 32.

145. *Id.* at 31–32.

policy and successfully convinced the Immigration Court and the BIA that U.S. law requires an individualized determination of release and that this particular Haitian asylum seeker merited release on bond to the custody of his family.¹⁴⁶ The newly established Department of Homeland Security immediately asked the Attorney General to block the release of Haitian asylum seekers. This move evoked a storm of criticism from refugee advocates who argued that the U.S. government was dangerously exploiting the very real national security problems faced by the American people after the September 11th attacks.¹⁴⁷ Within a month of the DHS request, the Attorney General issued a precedent decision overturning the BIA, resulting in the detention of the Haitian asylum seekers until their asylum claims were final.¹⁴⁸

Those Haitian asylum seekers who did not reach U.S. shores received extremely harsh treatment from the President himself. During the instability at the time of the ouster of President Aristide in March 2004, thousands of Haitians tried to escape the island. In response, President George W. Bush himself declared that the United States would return all refugees to Haiti: "I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore. And that message needs to be very clear, as well, to the Haitian people."¹⁴⁹ The Coast Guard interdicted and returned almost 2,000 Haitian asylum seekers between February and April 2004, after which the number of interdictions decreased.¹⁵⁰

146. See *In re D-J-*, 23 I & N Dec. 572, 573 (A.G. 2003).

147. Media Alert, Human Rights First, Recent Victory for Haitian Refugees Thwarted by Department of Homeland Security; Major Refugee Rights Organizations Decry Decision (Mar. 21, 2003), at http://www.humanrightsfirst.org/media/2003_alerts/0321.htm (last visited Jan. 26, 2005).

148. *In re D-J-*, 23 I & N Dec. 572, 574 (A.G. 2003).

149. President George W. Bush, Remarks by the President in Photo Opportunity with Georgian President Saakashvili (Feb. 25, 2004), at <http://www.whitehouse.gov/news/releases/2004/02/20040225-1.html> (last visited Jan. 26, 2005).

150. U.S. Coast Guard, Alien Migrant Interdiction, FY 2004 Flow Statistics, at http://www.uscg.mil/hq/g-o/g-opl/amio/flowstats/fy2004_migrant_flow.xls (last visited on Jan. 26, 2004).

This is not the first time that the United States has directly returned Haitian asylum seekers. The first President Bush established the direct return policy in May 1992, and President Clinton kept it in place until 1994.¹⁵¹ These three Administrations have asserted that direct return does not violate the core international protection obligation agreed to by the United States as stated in Article 33 of the 1951 Refugee Convention:¹⁵² “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁵³ The Reagan Administration read this straightforward language to mean that the United States must first determine whether a Haitian interdicted on the high seas is a refugee before taking any action to return him, and recorded that understanding in an agreement with Baby Doc Duvalier’s regime.¹⁵⁴ Nonetheless, the United States Supreme Court cleared the legal way for Presidents to mistreat Haitians by holding that direct return without any screening after interdiction on the high seas does not violate the U.S. obligation not to return refugees to countries of persecution.¹⁵⁵ No President had previously referred to Haitian asylum seekers as “refugees” and then determined that such refugees will be returned directly to Haiti. While the second President Bush may be more honest about who is being returned, he flouts the core principle of protection found in this international treaty by doing so.

151. Exec. Order No. 12,807, 57 Fed. Reg. 23133 (May 24, 1992). President Clinton decided not to modify that order after he assumed office. *See Sale v. Haitian Centers Council*, 509 U.S. 155, 164–65 (1993). For a full discussion of the non-refoulement obligation, *see* Andrew I. Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 Geo. Immigr. L.J. 67 (1993).

152. *See Sale v. Haitian Centers Council*, 509 U.S. at 164–65.

153. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, art. 33, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 137, 176 (entered into force Apr. 22, 1954).

154. *See* Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559.

155. *Sale v. Haitian Centers Council*, 509 U.S. at 164–65.

The United States government can and should find better ways to balance the responsibility to protect its own citizens and residents from terrorism and the responsibility to protect those fleeing persecution and serious harm. Certainly the United States must ensure that those who come to the United States do not threaten our security. But the President should never tell refugees that they should not try to flee persecution or harm. Nor should the United States pretend that detaining asylum seekers in the United States will prevent a mass exodus, since no evidence supporting such a claim exists. The United States can and must protect both refugees and its own citizens and residents.

The answer to the immediate flow of Haitian asylum seekers is regional protection.¹⁵⁶ That means protection for some in the United States and for others elsewhere in the region. While the challenges to developing such shared responsibility are significant, the President's solution both harms people who deserve protection and diminishes the international leadership role that the United States needs to perform in encouraging other states to protect refugees. Given that most refugees seek asylum in developing states¹⁵⁷, this leadership role is critical to an effective international protection system.

The United States can also show leadership by protecting refugees fleeing conflict. Most of the asylum seekers who seek protection in the United States come from such countries. While the United States protects those with a well-founded fear of persecution, U.S. laws do not provide any humanitarian status on an individual basis to those who have a well founded fear of death. A limited group protection is provided at the discretion of the Secretary of Homeland Security, but even that highly political determination does not protect people fleeing an ongoing civil conflict.¹⁵⁸ While the United

156. For a full discussion of temporary protection, see Susan Martin, et al., *Temporary Protection: Towards A New Regional and Domestic Framework*, 12 Geo. Immigr. L.J. 543 (1998).

157. See UNHCR, 2003 Global Refugee Trends 11 tbl. 1 (June 15, 2004), available at www.unhcr.ch/statistics.

158. See Immigration and Nationality Act, Ch. 477, Sec. 244(b)(1), 66 Stat. 163, 216 (1952) amended by Immigration Act of 1990, Pub. L. No. 101-649, Sec. 302(a), 104 Stat. 4978 (1990) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Temporary Protection Status provides protection only to those already in the

States generally does not deport such refugees, the laws leave them without rights to stay in the United States and pursue livelihoods. Rather than leave such individuals without rights, the United States should establish an individual humanitarian status to protect those fleeing civil conflict.¹⁵⁹

VI. CONCLUSION

The overall U.S. protection picture for asylum seekers since September 11th is disturbing. Fewer asylum seekers are reaching the United States. Approval rates in the first instance have seriously declined. The Attorney General has politicized and severely restricted the review function. The rights of many asylum seekers are disrespected, whether they make it to the United States or are intercepted on the high seas.

Since September 11th, the United States has focused on fighting terrorism at a serious cost to our humanitarian programs. This article has analyzed the problems and achievements of the U.S. asylum system during this period and recommended ways to address those problems. The United States has a responsibility to protect its citizens and refugees in a more balanced way. By adopting these recommendations, the government will better be able to accomplish this goal.

United States when it is authorized by the Secretary of Homeland Security.

159. See Martin et al., *supra* note 156, at 566–80.