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Policy Analysis

NEW ASYLUM LAWS
Undermining an American Ideal

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Executive Summary

Human lives are being put in danger by the 1996 Immigration Reform and Immigrant Responsibility Act. The new law contradicts America's tradition of offering a safe haven to people fleeing persecution by failing to accommodate the unique and often tragic circumstances that confront those seeking asylum.

The most damaging portion of the 1996 law is the one-year filing deadline. Many genuine asylum seekers will not be able to meet the deadline because of the circumstances they face, including the trauma of torture, the threat of death, and fear for family members who remain in their home country.

The 1996 changes were based on a sensationalized and misleading portrayal of U.S. asylum law. Only about 17,000 people are granted asylum in the United States each year. Administrative reforms by the Immigration and Naturalization Service in 1995 closed the major loopholes that existed at the time, making the 1996 legislative changes at best unnecessary.

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Introduction

Throughout its history, the United States has been a refuge for oppressed peoples from around the world. The Pilgrims, the Quakers, the Amish, and countless others came to these shores in centuries past, while in the more recent past immigrants have been Cubans, Jews, Southeast Asians, and others. What those diverse people shared was a belief that America could offer them refuge from government oppression.

Many people worldwide today face similar oppression; they live under governments that forbid them to freely exercise rights that Americans hold dear as fundamental freedoms and persecute them when they try. We grant political asylum to such persons: as a nation, we believe that government oppression because of one's race, religion, political opinion, nationality, or social group is wrong. Oppression undermines our fundamental values. Thus, we traditionally have granted sanctuary to victims of human rights abuses from around the world.

Through its refugee and asylum protection policies, the United States has always been at the forefront of protection issues, serving as a leader in garnering international attention and responses to refugee and humanitarian emergencies around the world. America's example has great influence on how other countries respond to refugees.

Notwithstanding this grand tradition of leadership in refugee protection, portions of a law passed by Congress, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[1] impose procedural hurdles that in many cases may prevent genuine victims of persecution from attaining asylum. The intention of the law was to reduce abuses, both real and perceived, in the asylum system, even though key reforms had already been made by the Immigration and Naturalization Service. If the new law does curb abuse, it does so only at the price of cutting down on all claims for asylum--without distinguishing between the valid and the fraudulent. It could damage one of America's noblest ideals, being a safe haven for those fleeing repressive governments.

The Nature of Governments

Americans know and are concerned that governments around the world oppress their citizens. We condemn the persecution of Christians and other religious minorities in Sudan, Cuba, China, Pakistan, North Korea, and countries that were part of the Soviet Union. We criticize the People's Republic of China's systematic repression of religious practices and study by the Tibetan and Uigher peoples. We cringe when we see the suffering of women and children refugees in Somalia and Rwanda, the mass graves in Bosnia, and the persecution of the Kurds in Iraq. We are outraged by the Chinese government's silencing of the student democracy movement in Tiananmen Square and the forced abortion and sterilization of Chinese people who want more than one child. And we denounce the practice of genital mutilation of young girls in Africa and the Middle East. We see images of human suffering on the evening news, read about the horrors of human rights abuses daily in newspapers, and wonder how all that could be happening and what we could do to help.

Yet, despite our commitment to encouraging basic freedoms of speech, political opinion, and religion, IIRIRA has imposed restrictions on the ability of victims of such human rights abuses to escape government-sanctioned oppression and persecution and to seek refuge in the United States.

Refugee Protection and Asylum Law

The U.S. government offers protection to those fleeing persecution under two basic sets of laws--refugee law and asylum law. Modern protection policies were incorporated into international treaties following the Nazi persecution of Jews during World War II. Current U.S. asylum law derives from two of those treaties, the 1951 United Nations Convention Relating to the Status of Refugees and the convention's 1967 protocol. The convention and the protocol recognize states' obligation to provide protection to refugees--individuals who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion," are outside the country of their nationality and are "unable or, owing to such fear, unwilling to avail themselves of the protection of their home countries.[2] The treaties' most basic requirement is commonly referred to as nonrefoulment, the duty not to return a refugee to a country in which his or her life will be threatened.

The United States ratified the protocol in l968,[3] and the nonrefoulment and asylum obligations were made U.S law by the Refugee Act of l980.[4] That act authorizes the attorney general to grant asylum to refugees present in the United States. Those who are not present in the United States, who are, for instance, in a third country or a refugee camp, can apply for protection through the overseas refugee program. Under U.S. refugee law the president, in consultation with Congress, which controls refugee funding, sets a ceiling on the number of refugees America will accept in a given fiscal year.[5] The president can increase that number in an emergency.

Each year, the United States accepts only a small fraction of the number of refugees and asylum seekers worldwide. It is estimated that in 1997 there are 14.5 million refugees worldwide.[6] Under the Clinton administration, the number of refugee applications approved by the United States declined 35 percent from 115,330 in fiscal year 1992 to 74,491 in FY96.[7] A much smaller number were granted asylum protection; in FY96, the United States granted asylum to 18,556 people.[8]

Though the numbers of asylum seekers granted protection each year are small, the range of beliefs protected is broad. Among recent asylum seekers have been Kurds from Iraq and Turkey who were persecuted because of their nationality; Christians from China and the Middle East who were prohibited from practicing their religion; Bosnian women who, endangered by their ethnicity, escaped being raped and killed by the Serbs; Somalis who fled because their families were being annihilated by members of rival clans; journalists who escaped persecution for criticizing government actions; Chinese families who protested forced abortion and sterilization; and Cubans who protested Castro's dictatorship.

Asylum Procedures

Asylum claims are decided in two different procedural contexts: (1) affirmative applications, whereby the person takes the initiative and applies for asylum after arriving in the United States and before the INS begins any proceedings, and (2) defensive applications, whereby the application for asylum is made only after the INS has begun proceedings to remove the person from the United States.

Affirmative claims are the more common. People who have entered the United States, regardless of immigration status, can affirmatively apply for asylum by submitting an asylum application to the INS.[9] The application form is nine pages,[10] but successful applications typically contain hundreds of pages of supporting documentation, including affidavits from the applicant and from the applicant's family, colleagues, or friends; newspaper articles; statements by country experts; and reports from human rights organizations supporting the asylum claim.

When the INS accepts an affirmative application for filing, the applicant's local INS asylum office schedules an interview for the asylum applicant with an asylum officer, typically within 45 days of receiving the application.[11] During the nonadversarial interview, the applicant is questioned about his or her asylum claim. An applicant who does not speak English can bring a friend, relative, or interpreter to translate. The applicant can also be represented by counsel. At the conclusion, the applicant is typically asked to return to the asylum office on a certain date, usually within three weeks, to obtain the decision in the case.

If asylum is granted, the applicant is then authorized to apply for a work permit, and one year after receiving asylum, to apply for permanent residency. After being granted asylum, he or she can apply for asylum for a spouse and children.[12]

If asylum is not granted, the applicant is then required to acknowledge receipt of a notice to appear at proceedings to remove[13] him or her from the United States.[14] Such proceedings to return an applicant to the country of nationality begin immediately. Immigration judges in the Executive Office of Immigration Review (within the U.S. Department of Justice) preside over the proceedings. In the proceedings, refugees can renew their application for asylum as a defense to removal, and the application is reviewed again. The proceedings, before an immigration judge, are adversarial; the asylum applicants can be represented by counsel and can present and cross-examine witnesses.

Asylum seekers apprehended by the INS, whether at a U.S. border, a port of entry, or within the United States, cannot affirmatively apply for asylum with the INS asylum office. Rather, they are typically detained and removal

proceedings are begun immediately after their arrival or apprehension. Those individuals can apply for asylum only as a defense against removal during proceedings to deport them to their country of nationality.

Asylum in Perspective

Contrary to popular belief, it is not easy to get political asylum. Approximately four of five affirmative asylum applications are rejected by the U.S. government.[15] That fortunate one does not swell the population; only 18,556 people were granted asylum in FY96 by INS and immigration judges combined,[16] a small number compared with a U.S. population of more than 260 million.

However, taking a sober look at statistics is not often on policymakers' minds, given some sensationalistic news accounts. A 1993 portrayal of U.S. asylum law broadcast on 60 Minutes typifies such accounts. That report created the impression that few, if any, claims of asylum in the United States are legitimate.

The 60 Minutes story emphasized the fact that Sheik Omar Abdel-Rahman, who was suspected of being connected to the World Trade Center bombing, had applied for political asylum in the United States. The story spotlighted the asylum system. Such stories are what many lawmakers think of first when they think about political asylum.

But the tone of the story was inaccurate and misleading. That tone was set at the beginning of the program, when the preview quoted a representative from the Federation for American Immigration Reform (FAIR): "Every single person on the planet Earth, if he gets into this country, can stay indefinitely by saying two magic words: political asylum."[17] That preview made it seem that asylum seekers can effortlessly create a new life: whether they are persecuted or not, all they need to do is say the two magic words and--abracadabra--they get political asylum. That impression was reinforced throughout the program by continual references to the "two magic words" even though the program ultimately recognized that asylum seekers can stay in the United States only until the INS gets around to hearing their claims.

That tone is not surprising because the only independent organization quoted is FAIR, an organization widely

known to oppose the political asylum system. The program did not include the opinion of anybody who works with political asylum applicants to get the opposite perspective.

Not only did the tone mislead, but the story outright misrepresented facts. For example, the story claimed that of the 100,000 asylum applications filed each year only "1, 2 percent" of those people were legitimately fleeing persecution.[18] Reality was quite different. Immigration courts approved 19 percent of asylum applications in 1992, the year before the report was aired and the same year the INS approved 35 percent of affirmative applications.[19] Moreover, many of those who do not receive asylum may actually be fleeing persecution but either do not meet the threshold imposed by U.S. law or do not possess adequate legal counsel to convince the INS or an immigration judge of the merits of their claims.

Though inaccurate and misleading, the 60 Minutes report has framed the asylum debate in Congress and the administration. Soon after the report was first aired, lawmakers examined the asylum process and declared that the system needed to be changed. That diagnosis occurred in the context of broader immigration reform legislation, which was motivated by strong concern in many parts of the country about the influx of undocumented immigrants into the United States--a concern that immigrants were changing the culture for the worse and taking jobs away from native-born Americans.

Debate ensued and often grew heated. The charge was made that the asylum system was out of control. Detractors of the system argued that asylum is a growth industry and that many asylum seekers were using the system as a shortcut to permanent residency. Detractors used the stories of the World Trade Center bombers to illustrate that asylum seekers generally cannot be trusted and are not worthy of protection; they also asserted that other refugees are economic migrants, rather than victims of human rights abuses, and therefore do not qualify for protection. Responding to such issues, lawmakers began to craft legislation to fix the perceived problems with the asylum process that 60 Minutes had highlighted.

But before the legislation could make its way through Congress, the INS itself responded to the concerns and in January 1995 overhauled its asylum procedures. New regula-

tions in 1995 established procedures permitting the speedy identification and granting of meritorious claims, the referral of all other claims to immigration court for proceedings to remove people from the United States, and the streamlining of asylum procedures to help asylum officers keep current with incoming applications.[20] The INS increased its asylum officer corps and the Department of Justice hired more immigration judges to adjudicate asylum applications more quickly. The 1995 regulations also eliminated the automatic grant of a work permit when an application for asylum is filed. Instead, a procedure was established whereby most work permits are not granted until after a person receives asylum or the application has been on file with the INS for 180 days.[21] Consequently, the prospect of receiving work authorization, long perceived as a magnet for frivolous asylum claims, was eliminated.

Those reforms worked. New asylum applications declined by more than 60 percent, yet existing claims are currently being heard in record numbers.[22] In 1994, before the reforms took effect, more than 123,500 affirmative asylum applications were filed with the INS. In contrast, in 1996, the year after the regulations took effect, there were fewer than 50,000 affirmative applications. The approval rate also increased from 15 percent in 1994 to 26 percent in 1996 for applications filed after the 1995 reforms took effect.[23] Equally significant, since implementing the 1995 regulations, the INS has been adjudicating new claims for asylum within 60 days of their receipt, a dramatic reduction from the months (and sometimes years) the INS needed to adjudicate claims before reform.[24] Because there are now more asylum officers and immigration judges, the number of asylum cases completed in a year has more than doubled. Besides keeping current with newly filed applications, the INS is working through its backlogged cases in record numbers. Thus did the 1995 regulatory reforms respond to and solve many of the perceived problems with the asylum system.

Facts Colliding with Congressional Acts

New facts and changed circumstances, one might think, would have led Congress to reexamine its proposed changes to asylum law. After all, the INS had already instituted the necessary reforms. Problems in the asylum system were largely solved. Yet such new information did not interfere with the desire to pass a law anyway: IIRIRA became law in

September 1996. The most onerous and potentially damaging of the asylum reforms enacted are (1) the imposition of a deadline for the submission of all asylum applications and (2) the creation of expedited procedures to remove and send back to their countries of nationality people without the required documents who are seeking entry to the United States. Beginning April 2, 1998, people who want to apply for asylum (either affirmatively or as a defense to removal) must file an application with the INS within one year of arriving in the United States, subject to changed and extraordinary circumstances.[25] The expedited removal provisions took effect on April 1, 1997.

The expedited procedures are designed to remove aliens who arrive in the United States without proper travel documents[26] or who are suspected of carrying documents that were procured by fraud[27] and who might not be fleeing persecution. A single immigration officer at an airport or other port of entry will screen each member of that class of arriving aliens to determine whether someone intends to apply for asylum or fears persecution.[28] If the officer thinks that the person does not fear persecution, he or she will order the person summarily removed from the United States and bar him or her from reentering for five years, without any further hearing or judicial oversight.

Those people arriving who do express fear or want to apply for asylum will immediately be transferred to a detention center. There an asylum officer will conduct an interview to determine whether the person has a "credible fear" of persecution.

If the asylum officer determines that the person does not have a credible fear of persecution, then that person must affirmatively request a review by an immigration judge. There is no right to judicial review.[29] The review before the immigration judge is expedited and limited. That is, the review must be concluded no later than seven days after the credible fear determination and need not even be conducted in person; it can be conducted by telephone or video connection. Asylum seekers cannot be represented by legal counsel at the immigration judge review (although counsel may be present), may not present evidence, and may not call witnesses.[30] In many instances, they will not be released from detention until they are granted asylum by an immigration judge.

However, only if the asylum officer believes that the person being interviewed does have a credible fear of persecution will that person be permitted to present a claim for asylum. He or she will probably be in detention until asylum is granted.

Those procedures are also being used to bar ordinary business travelers and tourists with valid visas from entering the country. For example, if an immigration officer suspects that someone intends to enter the United States for reasons other than what he or she had explained to the U.S. Embassy abroad when applying for the visa, the officer can order the person removed. The officer need not prove to any judge or other tribunal that suspicions are well founded; the decision is the officer's, subject to a cursory paper review by the supervisor. Finally, the person who is removed, even an executive business traveler who is on a legitimate buying trip and has a valid multiuse visa, will be returned to his or her home country and barred from reentering the United States for five years.[31]

Problems with the New Law

At first glance, the amendments to the Immigration and Nationality Act may seem reasonable. Filing deadlines, for example, apply to many areas of the law, so why not to asylum applications? Furthermore, why should the United States not closely scrutinize people arriving at her door with no documents or with false documents? When the United States finds people here without permission, why not quickly ask them what they want and, if they cannot explain themselves, turn them away as the legislation demands?

The answer is threefold. First, the one-year filing deadline and expedited removal procedures will impede the progress made by the INS regulatory reforms. Indeed, the expedited removal provisions have already proved wasteful. In some regions of the United States, asylum officers, who customarily complete three affirmative asylum interviews and the accompanying paperwork in one day, can complete only one interview a day when they must travel to distant detention centers to conduct credible fear interviews.[32] Similarly, once the deadline becomes effective, the INS will have to divert resources from adjudicating the merits of asylum claims to adjudicating the timeliness of filing. That is why Doris Meissner, commissioner of the INS, vehemently opposed the imposition of a deadline, saying that it would

"frustrate and hamper [the INS' reform] efforts." She complained that the deadline was "an idea that is born of assumptions about a system in the past that wasn't working effectively."[33] Although a diagnosis that the asylum system needed surgery may have been accurate at the beginning of the Clinton administration, the surgery was effectively performed by the 1995 regulations. Indeed, the malady that precipitated the new regulations had been largely cured, even before the new law took effect,[34] making the surgical procedures called for by the new law redundant and thus wasteful of limited INS resources.[35]

Second, the new expedited removal procedures simply are not adequate for the task. The most fundamental reason we grant asylum protection to people fleeing government oppression is that, otherwise, innocent people will die. Under the new law, however, we have undermined that tradition by creating expedited procedures that increase the likelihood of returning people to probable danger or death, after minimal questioning. The expedited removal procedures essentially equal capital punishment in a procedural setting with fewer protections than we afford an ordinary traffic violator. Arriving asylum seekers are not given notice of their rights before the initial screening process in secondary inspections, the opportunity to contact family or friends or to be represented by counsel before the initial screening interview, the right to appeal a negative credible fear finding to a judge, or access to in-person interpretation at any stage of the process. Moreover, the INS conducts the entire process behind closed doors; it has prevented nongovernmental organizations from observing or monitoring the new procedures being implemented.

Third, the conditions and circumstances surrounding the flight of asylum seekers prevent them from being able to handle the types of matters we would commonly expect other arriving immigrants to be able to. Most asylum seekers are really quite different from the image we may have of them. One's first thoughts may be of famous asylum seekers--a Russian ballet dancer or an Iraqi Olympic weight lifter--and other people who decide to seek asylum in the United States before leaving their home countries and who are received by the United States with open arms. Such high-profile people may have little difficulty obtaining proper travel documents, establishing their claims for asylum immediately on departing an airplane, or filing their political asylum applications shortly after arriving in the United States.

Unfortunately, the famous cases are not typical. From the moment most asylum seekers begin their flight from persecution, they are focused on mere survival.[36] They are typically running away from personal danger and are primarily concerned with saving their lives.[37] When they arrive in the United States, they often cannot express their fears of persecution immediately or meet the application filing deadline necessary for asylum protection. Because many asylum seekers have been persecuted by their governments, they genuinely fear government officials and are unable or unwilling to tell the truth about their persecution to anyone they do not know and trust, let alone a uniformed official. Having been tortured or severely persecuted, many suffer from mental disorders that impede their ability to talk about what happened to them.

Moreover, those who travel without proper documents often do so out of necessity because their governments, which would normally grant them such documents, may also be their persecutors. It is unrealistic to expect those people to ask their government for travel documents so that they can flee the country or to require them to show their own passports to their persecutor at flight. Simply having such documents with them would endanger their lives. Such facts, discussed at greater length in the following paragraphs,reveal that IIRIRA's apparently innocuous reforms are quite harsh indeed.

Trauma of Persecution Is Overwhelming

Torture victims, commonly thought of as the most deserving asylum applicants, typically cannot speak about their persecution for some time after arriving in the United States. They may have great difficulty relating the details of their persecution to their counsel or to U.S. authorities until they have recovered from the trauma, sometimes months or years after arriving in the United States. Many suffer from severe memory loss, depression, unresponsiveness, mistrust, flashbacks, and physiological symptoms when recalling the traumatic events.[38] The symptoms are often so overwhelming that they cloud the sufferer's ability to seek asylum protection, primarily because he or she needs to suppress memories of the episodes to recover from the trauma.[39] Women who have been beaten and raped as a form of persecution may need months of therapy to enable them to speak about the episodes. They typically mistrust others,

particularly men, or feel responsible for or ashamed of what happened to them. Many also suffer from nightmares, depression, and extreme isolation.[40]

Given that asylum proceedings hinge on the applicant's credibility, consistency, and demeanor, and on the discussion of the details of persecution,[41] the filing deadline and expedited removal processes in the new law may preclude victims of torture and those who suffer from posttraumatic stress disorder (PTSD) from gaining asylum protection. Such victims rarely would be physically or psychologically able to establish their cases while suffering from the mental disorders that result from their persecution.

For example, Joseph,[42] a practicing Jehovah's Witness and journalist, was imprisoned and tortured in Zaire because of his religious beliefs and for articles he wrote criticizing his government's killing of students during a political demonstration. While Joseph was imprisoned, guards raped him, applied electrical shocks to his genitals, and repeatedly beat him. Fearing for his life, he fled to the United States. For several months after he arrived here, Joseph was unable to discuss the persecution and torture he suffered in Zaire. His representatives attribute such inability to a religious prohibition on the use of the words necessary to describe the methods used to torture him, and to the pain of reliving his persecution whenever he remembered it.[43]

Joshua P. Davis, a former advocacy fellow at Georgetown University Law Center, wrote,

> Joseph could not have hurried this process. He did not know enough to apply for political asylum promptly after his arrival in the United States. . . . Even if he had learned about the asylum system, he needed time to find the help necessary for him to put a proper application together. But most important, even with professional assistance, he needed many months to summon up enough of his ravaged strength to explain what had happened to him. The very helplessness that makes Joseph so clearly worthy of his political asylum also made it impossible for him to apply shortly after his arrival in the United States. Joseph applied for political asylum as quickly as he could. Even with the help of law school stu-

> dents, a luxury most applicants for political asylum do not have, it took him over a year to apply for asylum.[44]

Asylum Seekers Fear Retribution Back Home

Whereas few applicants for asylum are able to talk about their persecution soon after they arrive in the United States, those who are able to may have other valid reasons for not wanting to immediately request asylum. Many victims of persecution fear that the government in their home countries will learn about their efforts to seek asylum protection in the United States and retaliate against the family, friends, and colleagues they left behind.

After one of my clients fled his home country, in fear for his life (government officials beat and harassed him for participating in a demonstration denouncing the government's treatment of people from his ethnic group), the government repeatedly threatened his wife and two young children. He was forced to leave them at home because he had to flee so quickly. Government officials beat one of his sons and broke into and ransacked his family's home on numerous occasions. Then, when my client participated in demonstrations denouncing his home country's government while he was living in the United States, government officials again broke into his family's home in the middle of the night and interrogated his wife about her husband's activities. During the interrogation, they even mentioned that they knew about his participation in the demonstration in the United States. As a result, my client feared that his government was as aware of his every move while he was living in the United States as it had been when he lived at home. He is still so concerned about possible retaliation against his family and his own vulnerability that he asked that neither his name nor his country be identified here.

Asylum Is Viewed as a Last Resort

Many asylum seekers view asylum as a last resort. They would prefer to return to their home country if possible and therefore they often wait to see whether the conditions at home will improve. Only after acknowledging that the situation at home will not change do they apply, reluctantly, for asylum.

Often, a repressive government will use the fact that an individual received asylum protection to discredit the applicant's activities that led to his or her persecution in the home country. For instance, if a political activist decided to seek political asylum in a third country, the mere fact that he applied for political asylum could be used to discredit him among his followers back home. One democratically elected official who was ousted by a coup in his home country felt that the situation at home would improve shortly after he fled to the United States. Because he would have preferred to return home and assume his government position, he intentionally delayed applying for asylum for several years. Years later, when the situation still did not improve, he reluctantly applied for asylum. But time was required to get legal representation and prepare the asylum application. If the law had been in effect during that period, the one-year application deadline would have dashed any hope the elected official had of returning to his country.

Fear Often Immobilizes Asylum Seekers

The fear of not receiving asylum and thus having to return to their home country often inhibits genuine victims of human rights abuses from even trying to seek asylum protection. So overwhelming is that fear to some victims that it is not until months and sometimes years after they first arrive in the United States that they are comfortable enough to apply for asylum. The stories of Rita and Edward illustrate the insecurity such asylum seekers feel.

Rita fled Guatemala after men in military uniforms broke into her home and beat and kidnapped her husband, a Christian Democratic Party activist, accusing him of being a guerrilla. Rita was warned by her family and neighbors that the military also had been looking for her because they mistakenly suspected her of also being involved in the party's activities. She immediately fled with her children to the United States, but for several years she was unwilling and afraid to tell anyone about what had happened to her. In fact, her fear prompted her to cancel several appointments with a legal representative. She applied for asylum only after she was apprehended by the immigration service, and it was granted. She has not heard any news of her husband since she fled.

Similarly, Edward was arrested, along with his father (a Muslim preacher) and brother, by the Sudanese army after they organized a protest of an army attack on a Nuba Christian transport truck. They were taken to an army base, where Edward was held in solitary confinement and tortured for more than four months. A month after his son's release, Edward's father was executed at the El Fashcar prison. Edward immediately went into hiding and a few months later, in August 1986, fled to the United States. He did not apply for asylum until more than six years later. When asked about that delay, he explained that he did not understand the asylum process, did not have access to a representative, was afraid of being returned, and had been suffering from depression.

Many asylum seekers are unaware of asylum protection. Douglas, a student at Nigeria's Ahmadu Bello University, was arrested and imprisoned by the State Security Service after he participated in a nationwide protest denouncing a government economic program. He was interrogated and beaten for two days in prison. Following his release, Douglas participated in another demonstration. After that, the SSS started arresting all of the participants. Members of the SSS beat his father, demanding information about Douglas's whereabouts, and ransacked his father's house. Afraid that he would again be arrested and tortured, Douglas fled to the United States in 1990. He did not know about the asylum procedures when he arrived, and once he did learn about asylum protection, he did not apply, for fear of not being granted asylum and thus being returned to torture and persecution. It was not until five years later, when the INS apprehended him, that he applied for asylum.

Asylum Representation Is Scarce

Once an asylum seeker has decided to apply for asylum, it takes time to establish the claim.[45] The person often must rely on pro bono representation, which, like most free services, is scarce. For example, it takes the average client of the Lawyers Committee for Human Rights[46] 14 months after arriving in the United States to seek professional assistance, and another 2 months for the case to be assigned to an attorney.[47] Such time lines are typical.

Even after a pro bono attorney has been retained, the preparation process is lengthy. Asylum adjudicators often do not have access to witnesses or written accounts of the

applicant's persecution, which are typically used in other legal proceedings for independent verification.[48] As a result, judgments on whether an asylum applicant has satisfied the standard for a grant of asylum often hinge on the testimony of the asylum applicant--particularly his or her credibility and demeanor, the level of detail of the account, and whether the account of persecution is inherently consistent.[49] Supporting documentation, although not mandatory, is also especially helpful to adjudicators.[50] Indeed, experience shows that supporting documents are usually vital to the success of an asylum claim.[51]

Successful applications, affirmative and defensive, typically feature hundreds of pages of supporting documentation. As mentioned earlier, the contents include affidavits from the applicant and from the applicant's family, colleagues, or friends; newspaper articles; statements by country experts; and reports from human rights organizations supporting the asylum claim. Unlike other legal briefs or applications, much of the supporting documentation for an asylum application is not readily available in the United States and therefore may need to be obtained from sources in the applicant's home country--a process that often takes months.

Applicant affidavits also take time to prepare, particularly if the client does not speak English fluently. For instance, if the client's native language is not widely spoken, it is difficult to find translators. When a translator is finally located, it often requires numerous meetings before the client can understand the complicated process and the attorney can gather sufficient information for the affidavit.

Given that the system relies heavily on the applicant's ability to communicate coherently regarding the claim of persecution, any barrier to that ability, either because the applicant suffers from PTSD, is not properly represented, or is not prepared to discuss the details of his or her case, is counterproductive.

Criticism of the Scope of Asylum

Contributing to the perception that the asylum system is out of control are misguided arguments regarding the scope of asylum protection. Arguments have been made that

the definition of asylum has been expanded unreasonably, potentially opening the asylum floodgates to large classes of undeserving applicants. Those arguments are particularly directed at decisions concerning gender-based and sexual orientation claims.[52]

For example, gender-based claims such as that of Fauziya Kasinga have been criticized because of their potential impact on and significance to all African women. Fauziya fled her home country of Togo after being forced to become the fourth wife of a much older man, and a few days before she was to be forced to have her genitals mutilated in accordance with a tribal custom.[53] Fearing female genital mutilation, which she knew had killed or severely injured many African women, she fled to the United States. She later said that she did not even know about asylum protection until after she fled Togo.[54] She was ultimately granted asylum.[55]

Criticism of asylum claims based on female genital mutilation is due to the fear that the law will lure more gender-based claims than the country could support. Yet the argument is not supported by fact. Canada promulgated guidelines concerning gender-based asylum claims in 1993. From 1993 and 1995, only approximately 1 percent of all grants of asylum in Canada were based on gender.[56] Why so few? Gender-based persecution prevails in paternalistic societies where women have limited freedoms and rights. Women's traditional roles in those societies leave them with limited power or resources to escape their situations. Notwithstanding the level of their persecution, few can make it to the United States or to Canada.

Similar criticism has also been directed at decisions granting asylum on the basis of sexual orientation. The argument is made that the grant of such claims will spur additional claims and that the decisions go beyond the original intent of asylum.[57] Again the assertions are not supported by fact.

Obviously, if all that was necessary to gain asylum in the United States was a simple assertion that a person was gay, there would already have been perhaps millions of claims annually. In fact, fewer than 50 individuals have been granted asylum in the United States on the basis of sexual orientation.[58] All of those cases involved people who were persecuted by a government entity because of their

sexual orientation. That finding conforms with the original intent of asylum--to grant refuge to people who are persecuted by their government or a group the government is unable or unwilling to control because of (among other things) their membership in a social group. The assumption behind the criticism is that the grant of asylum in those cases was based solely on the applicant's assertion on sexual orientation. But that assumption is wholly misguided. People who have been granted asylum on the grounds of sexual orientation include those who were tortured, sexually abused, or otherwise persecuted either because of their sexual orientation or activism for homosexual rights.

One Brazilian man who was granted asylum on the basis of sexual orientation explained during his immigration hearing that he and friends had been conversing in a public square when the police arrested them for no apparent reason.[59] They were then forced into a jail cell with six criminals who were told by the commanding officer, "Here come your girlfriends. Rape them and do what you want with them." The criminals then descended on the men, forcing them to perform oral sex and raping them. On another occasion, the applicant was forced at gunpoint to perform oral sex on two uniformed police officers. He explained at his immigration hearing that "the police had allowed if not encouraged the criminals to sexually abuse [him and his friends] as punishment for [their] actual and suspected homosexuality."[60] Because the police were his persecutors, fear of reprisal made him feel helpless to seek redress. If those asylum seekers and colleagues have been persecuted or tortured because of their sexual orientation, then their claims fit into the scope of persecution, as defined by international and domestic law.

How the Problems Can Be Solved

Throughout this paper the legislative changes in U.S. asylum law have been likened to unnecessary surgery following an outdated diagnosis and performed with an ax rather than a scalpel. To review, the legislative changes were redundant and therefore unnecessary: The 1995 INS regulatory reforms mended many of the perceived problems with the system. The changes were designed on a diagnosis made before the effect of the 1995 regulations could be evaluated, and by the time the changes were made the diagnosis was outdated. Thus, when the surgery was finally performed, it

was done with little regard for the real-life consequences to genuine refugees.

To take the surgery analogy further, the prognosis for genuine victims of human rights abuses is bleak. To be blunt, because of the legislation, many people will die. Some people with valid claims for asylum will be prevented from applying within the required one year: technical deficiencies in their applications may delay them. Others, such as torture and rape victims whose persecution was the most traumatic, will be removed from the United States even before they can present an asylum claim: they will have been afraid or unable to explain their fear of persecution to a uniformed immigration officer at the airport shortly after their stressful flight from persecution, or they will have been too ashamed to talk about their persecution at all.

We have heard more and more horror stories of mistakes the INS has made in the expedited removal process. Some involved business travelers removed from the United States and barred from reentering for five years because a single immigration officer suspected that they had fraudulently procured their travel documents. Other mistakes involved asylum seekers who were returned to their home countries to face continued persecution. Those are the stories we know about. Because the INS has prevented independent monitoring or observation, one can only imagine how many other people have been returned unnoticed to continued persecution or death. Yet the mistakes made under the expedited removal provisions represent only one type of problem. The one-year filing deadline, which has not even taken effect yet, will aggravate the problems.

Can the "patients" in the circumstances we have examined be saved? Yes. In the short term, the INS should include fundamental protections for asylum seekers in its final implementing regulations and practices, due to be released in early 1998. Such protections should be designed to reduce the likelihood that genuine victims of persecution will be sent back to their home countries before they are able to present a thorough claim for asylum and that those who enter the United States will not be prevented from applying because of a technical defect in their applications. Indeed, Sen. Orrin G. Hatch (R-Utah) expressed his nonrefoulment concerns by committing "to ensuring that those with legitimate claims for asylum are not returned to persecution, particularly for technical deficiencies."[61]

The INS can include protections in the implementing regulations and practice of the expedited removal process to enhance self-identification by those who have valid asylum claims. Those protections would include

- information about the asylum process and asylum seekers' right to seek asylum protection before the expedited removal process is begun in secondary inspections;

- allowing access to counsel, family members, and friends--beginning in secondary inspections--who would be able to assist arriving aliens by explaining the right to asylum protections and the importance of revealing the truth about any fears of persecution or claims for asylum; and

- humanitarian treatment of people on arrival at our borders, including freedom from strip searches and handcuffing; and the provision of food, drink, and the opportunity to rest from their flight before they are asked questions about their persecution.

In the long term, the best remedy would be to eliminate, through legislation, the filing deadline and expedited removal provisions. The Freedom from Religious Persecution Act introduced in Congress in 1997 seems to implicitly recognize the problems IIRIRA created. That act would relax the procedures for admitting asylum seekers who have suffered persecution for their beliefs--a provision that is a welcome acknowledgment that the new rules do not protect refugees and asylum seekers.[62] Those laws, which are unnecessary as well as broad and arbitrary as currently drafted, serve no real policy purpose. They should be deleted entirely from the statute.

Short of eliminating the new rules, the filing deadline and expedited removal provisions should be amended to lessen the likelihood that genuine asylum seekers will be mistakenly returned. Two simple amendments to the asylum laws could accomplish that. One would involve imposing the deadline only on applications filed as a defense to removal, so that those who file for asylum by affirmatively presenting themselves to the INS are not subject to the deadline.[63] That way those who have valid claims and are willing to take the chance of being identified by the INS, and removed if their application is unsuccessful, will have the ability,

indeed the incentive, to identify themselves to the INS. Moreover, valid asylum claimants would not be denied access to protection simply because they failed to meet an arbitrary filing deadline.

A second amendment would pertain to the expedited removal procedures. Those procedures would be limited to emergency situations in which the number of arriving aliens increases dramatically within a brief period, thereby overwhelming the regular asylum adjudication processes. In such emergency situations, the attorney general could use an expedited removal procedure to screen clearly frivolous and unfounded claimants. That limitation would be consistent with the policy objective of eliminating fraud, by subjecting arriving aliens with manifestly unfounded claims to the expedited removal process. Yet it would also more effectively safeguard against the removal of claimants who have legitimate claims but who are unable to articulate the claim in detail shortly after arriving. That method is also preferable to the ad hoc responses of the United States to recent mass migrations.

Conclusion

The current anti-immigrant trend should not be permitted to diminish the valued role of the United States as a haven for democracy and fundamental freedom. Since before America's founding, people have fled to this land to escape persecution by their governments at home. Whether from England, Germany, Russia, or Africa, refugees recognize that the U.S. government acknowledges and respects their right to believe what they believe and to be who they are, free from oppression.

In keeping with America's tradition, every effort should be made to lessen the random impact of the new laws on genuine victims of human rights abuses. That can be achieved in the short term by including safeguards to protect genuine asylum seekers in the asylum and expedited removal processes. The safeguards would be designed to prevent the return of genuine victims of human rights abuses to countries where they would face persecution, torture, or death. In the long term, the utility of the provisions should be revisited. Let us not end America's ideal of offering a haven to the world's oppressed.

Notes

1. Public Law 104-208, Division C, 104th Cong., 2d. sess. The text of the IIRIRA can be found in Congressional Record 142, daily ed. (September, 28 1996): H. 11644, H. 11787; or in Interpreter Releases 73 (October 7, 1996): 1360.

2. Guy S. Goodwin-Gill, The Refugee in International Law (Oxford: Clarendon Press, 1996), Annex 4, p. 394.

3. Ibid., Annex 5, pp. 409-12.

4. Immigration and Nationality Act (hereafter INA), sec. 101 et seq. See also 8 U.S.C., sec. 1101 et seq.

5. INA, sec. 207; 8 U.S.C., sec. 1157.

6. U.S. Committee for Refugees, World Refugee Survey 1997 (Washington: U.S. Committee for Refugees), pp. 4-5.

7. U.S. Department of Justice, 1996 Statistical Yearbook of the Immigration and Naturalization Service (Washington: Government Printing Office, October 1997), Table 22, p. 82.

8. Ibid., Table 29, p. 90.

9. Their right to do so ends if they are apprehended by the INS and either deportation or exclusion proceedings are begun.

10. INS Form 1-589 is currently being revised by the INS. Before IIRIRA, the form was seven pages in length, but the latest version, revised in response to public comment, is nine pages. See Federal Register 62 (July 14, 1997): 37604.

11. The new deadlines for review of asylum cases were implemented as part of the 1995 regulatory reform. As a result of those changes, asylum officers now typically conduct interviews within 45 days of receiving the asylum application. Hearings before immigration judges are typically scheduled for no more than 60 days after the initial hearing.

12. 8 C.F.R., sec. 208.21.

13. For purposes of this paper, the term "removal" encompasses exclusion, deportation, and removal as such terms are defined in IIRIRA.

14. 8 C.F.R., secs. 208.9(d), 208.17.

15. U.S. Department of Justice, 1996 Statistical Yearbook of the Immigration and Naturalization Service, Table 27, p. 87.

16. U.S. Committee for Refugees, Refugee Reports (Washington: U.S. Committee for Refugees, December 31, 1996), pp. 12-13. The INS granted asylum to 13,368 individuals, whereas immigration judges, to whom INS asylum officers refer asylum claims not granted, granted asylum to 4,001 people in FY96.

17. CBS News, 60 Minutes, January 14, 1993, transcript, p. 1.

18. Ibid.

19. Since the program aired in early 1993, the figures for 1992 would have been the most accurate at the time. See Sarah Ignatius, An Assessment of the Asylum Process of the Immigration and Naturalization Service (Boston: Political Asylum Representation Project, September 1993), p. 31. This statistic includes grants of both affirmative and defensive claims for asylum.

20. See, for example, 8 C.F.R., sec. 208.7 (Employment Authorization), sec. 208.9 (Interview and Procedure), sec. 208.10 (Failure to Appear), and sec. 208.14 (Approval, Denial, or Referral of Application).

21. The rules permit the INS to grant a work permit in the rare cases in which someone has had an application on file with the INS for 180 days and that application has not yet been acted on. 8 C.F.R., sec. 208.7.

22. William Branigin, "INS Chief Highlights Reform in Political Asylum System; Year-Long Campaign Slashes New Claims by 57%," Washington Post, January 5, 1996, p. A2.

23. The rate is based on statistics from INS, Office of International Affairs, for the 12-month period beginning December 1995 and ending November 1996. The statistics do not include applications filed as a result of the 1990 settlement of American Baptist Church (ABC) v. Thornburg, 760 F. Supp. 796 (N.D. Cal. 1991), which provides for different procedures for certain Salvadoran and Guatemalan applicants for asylum.

24. Branigin, "INS Chief Highlights Reform in Political Asylum System."

25. IIRIRA, sec. 604, amending 8 U.S.C., sec. 1158. The amendments also prohibit the grant of asylum to any applicant who can be returned, pursuant to a bilateral or multilateral agreement, to a country (other than the country of nationality) in which the alien's life or freedom would not be threatened and in which that person would have access to asylum or equivalent temporary protection, unless it is in the public interest for him or her to receive asylum in the United States. Although that provision is currently inapplicable because the United States presently has no such agreements with other countries, for several months in 1996 the U.S. government had been negotiating with Canada regarding an agreement about the treatment of aliens who travel through one country to another. The grant of asylum after a previous asylum application has been denied has also been prohibited, subject to changed and extraordinary circumstances.

26. The required documents are a valid visa or other specified document authorizing entry and a valid passport or other suitable travel document. See INA, secs. 212(a) (7), 235(b) (1) (A) (I), as amended.

27. See INA, secs. 212(a) (6) (C), 235(b) (1) (A) (I), as amended. The attorney general also has discretion (but has chosen for the time being not to exercise it) to apply the expedited removal procedures to "any and all" people already in the United States who are accused of having entered the United States without inspection and who cannot prove that they have been physically present in the United States continuously for two years immediately before the determination of inadmissibility. See INA, sec. 235(b) (1) (A) (3), as amended.

28. See INA, sec. 235(b) (1) (A) (ii), as amended.

29. Judicial review of this process is extremely limited. In most cases, the courts are barred from reviewing the individual determinations of asylum officers or of the immigration judges who review their credible fear determinations. In addition, IIRIRA expressly prohibits courts from granting any injunction, declaratory or other equitable relief, or from certifying a class for a class action law suit. See INA, secs. 242(a) (2) (A), 242(e), as amended. Judicial review is limited to only three issues: whether the

petitioner is an alien; whether the petitioner was ordered removed pursuant to the summary removal procedures; and whether the petitioner can prove by a preponderance of the evidence that he or she has become a lawful permanent resident, has been admitted as a refugee, or has been granted asylum. Limitations are also imposed on actions associated with the implementation of the expedited removal procedures. Those cases must be filed within 60 days of the first implementation of the disputed regulation, policy, or guideline only in the United States District Court for the District of Columbia, and review is limited to whether the section of the act or the implementing regulation is constitutional or whether a regulation or a written policy, guideline, or procedure to implement the act violates the law.

30. See U.S. Department of Justice, Office of the Chief Immigration Judge, "Interim Operating Policy and Procedures, Procedures for Credible Fear and Claimed Status Reviews," Memorandum 97:3, March 23, 1997, p. 8, n. 10.

31. This example is based on the true story of Meng Li, a woman traveling to the United States on a buying trip for her company. She had a business visa, which she had used to enter the country twice before, that had been issued by the U.S. Embassy in Beijing. The immigration officer at the Anchorage airport suspected the visa was procured by fraud. She was "strip searched, handcuffed, put in an Anchorage jail and told she was barred from the United States for five years." See Anthony Lewis, "It Can Happen Here," New York Times, September 8, 1997, p. A23.

32. Presentation by David Lewis, INS supervisory asylum officer, Arlington, Virginia, Asylum Office, at Georgetown University Law Center, September 12, 1997. In addition, the INS has to rent cars for the asylum officers to use to travel to the detention centers. Sometimes the asylum officer travels to the detention facility only to learn that the asylum seeker is not prepared to proceed with her case on that particular day, because, for example, her rights have not previously been explained to her. In such cases the asylum officer has to travel back to her office, having spent her entire day traveling and not having interviewed any asylum applicants. She will then have to return a few days later to conduct the credible fear interview. Interview by Michele Pistone and Pat Rengel of Wally Bird, Katrin Lea, and James Fitzpatrick, INS asylum officers, New Jersey Asylum Office, July 21, 1997.

33. Federal Document Clearing House, Political Transcripts, "INS Holds News Conference on the Asylum Reform Efforts," Washington, January 4, 1996.

34. A Boston Globe editorial also calls the filing deadline un-American. See "Un-American Activities," editorial, Boston Globe, March 14, 1996.

35. For a more detailed analysis of the problems with the regulations implementing the new asylum filing deadline and the expedited removal provisions, see Philip G. Schrag and Michele R. Pistone, "The New Asylum Rule: Not Yet a Model of Fair Procedure," Georgetown Immigration Law Journal 11 (1997): 385-418.

36. Douglas Shenson, "30 Days or Else," New York Times, February 15, 1996, p. A27.

37. See Philip Schrag, "Don't Gut Political Asylum," Washington Post, November 12, 1995, p. C7, reprinted in Georgetown Immigration Law Journal 10 (1996): 93-94.

38. Other symptoms of posttraumatic stress disorder include depression, insomnia, extreme isolation, and mistrust of authority figures. See American Psychiatric Association, Diagnosis and Statistical Manual of Mental Disorders (Washington: American Psychiatric Association, 1994), sec. 309.81.

39. Physicians for Human Rights, Defending the Right to Asylum: Opposition to 30-Day Time Limit for Asylum Seekers in the United States (Boston: Physicians for Human Rights, January 1996), Attachment 10, p. 3.

40. Ibid., p. 9.

41. Board of Immigration Appeals, "In re Mogharrabi," Interim Decision no. 3028, Falls Church, Virginia, Board of Immigration Appeals, June 12, 1987. The Board of Immigration Appeals recognized that applicants for asylum may have difficulty obtaining corroborative evidence. It held that the applicant's testimony, standing alone, may be enough to meet the burden of proof, as long as the testimony is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the fear" (p. 7).

42. Throughout this paper I refer to the cases of asylum seekers who have been represented by me or my colleagues. The names and home countries have been changed to preserve the asylum seekers' identities. But the operative facts have not. They come from accounts by dozens of people who have been granted asylum in the United States and who for various reasons would have been precluded from applying for asylum if the 1996 legislation had been in effect when they arrived in the United States.

43. See Clyde Haberman, "Helping Hand in the Quest for Refuge," New York Times, March 1, 1996, p. Bl. The article quoted Dr. Allen Keller, who runs a clinic at Bellevue Hospital and New York University Medical Center for torture victims: "I have one patient, every time a car backfires, he hits the ground."

44. Joshua P. Davis, Georgetown University Law Center, Center for Applied Legal Studies, letter to Rep. Henry Hyde (R-Ill.), May 21, 1996.

45. Roy Petty, "Attack on Asylum," letter to the editor, Chicago Tribune, February 29, 1996, p. 22. Petty is director of the Midwest Immigration Rights Center.

46. The Lawyers Committee for Human Rights works with law firms in New York and Washington, D.C., to provide pro bono legal representation for asylum seekers.

47. Lawyers Committee for Human Rights, Asylum Project: Summary of Statistical Review of 200 Randomly Selected Files of Asylum Clients (New York: Lawyers Committee for Human Rights, February 1996).

48. See Physicians for Human Rights, Medical Testimony on Victims of Torture: A Physician's Guide to Political Asylum Cases (Boston: Physicians for Human Rights, 1991), p. 13. The guide concludes, "Because of the events under which they fled their home countries, many asylum seekers arrive in the United States without direct evidence of their torture, mistreatment or persecution." As a result, doctors may have to be called on to demonstrate "that the applicant's physical and/or psychological symptoms are consistent with events of torture or other persecution as described by the applicant."

49. In Board of Immigration Appeals, "In re Mogharrabi," Interim Decision no. 3028, December 12, 1987, the board

concluded that "the applicant's uncorroborated testimony will be insufficient to meet the evidentiary burden unless it is credible. . . . Credibility is enhanced when the applicants describe events with specificity, coherence, internal consistency, and clarity. Credibility is undercut by generalities, avoidance of eye contact, evasiveness and apparent uncooperation in answering questions (some of which) may be the consequence of the experiences that caused the applicant to seek asylum." In addition, physicians have found that asylum seekers' "shame and humiliation, anxiety, memory impairments and lack of trust often lead to confusing and apparently contradictory statements." Therefore, asylum applicants may need to undergo extensive treatment and prepare thoroughly before they are able to communicate coherently about their persecution. Physicians for Human Rights, Medical Testimony on Victims of Torture, p. 13.

50. See Rose Collantes Peters, "Applying for Asylum," American University Journal of International Law and Politics 9 (1994): 245.

51. Moreover, the lawyer must meet with the client to ascertain the details of the claim (which often takes numerous meetings), and the applicant must be rehearsed and prepared for the interview. All of that may take longer than one might initially expect, given that many asylum applicants do not speak English fluently and suffer from the side effects of PTSD.

52. Mark Krikorian, "Who Deserves Asylum?" Commentary, June 1996, pp. 52-54.

53. Pamela Constable, "Togolese Teen Criticizes Detainment," Washington Post, April 30, 1996, p. A3.

54. Interview of Fauziya Kasinga on ABC's Nightline, May 3, 1996.

55. Board of Immigration Appeals, "In re Kasinga," Interim Decision no. 3278, Falls Church, Virginia, 1996. See Musalo, "In re Kasinga: A Big Step Forward for Gender-Based Asylum Claims," Interpreter Releases 73 (July 1, 1996): 853.

56. Pamela Goldberg, "U.S. Law and Women Asylum Seekers: Where Are They and Where Are They Going?" Interpreter Releases 73 (July 8, 1996): 889, 896-97. Over the two years ending December 31, 1995, 40,000 refugee claims were filed, 483 of which were granted on the basis of gender claims.

Those are the most recent statistics available.

57. William Branigin, "Gays' Cases Help Expand Immigration Rights," Washington Post, December 17, 1996, p. A1.

58. "INS Grants Asylum to Gay Brazilian with HIV," Interpreter Releases 73 (August 26, 1996): 1141.

59. Ibid., p. 1140.

60. Ibid., p. 1141.

61. Congressional Record 142, 104th Cong., 2d sess., daily ed. (September 30, 1996): S. 11840.

62. Editorial, New York Times, September 17, 1997, p. A34.

63. This version of the deadline was adopted by the Senate on May 1, 1996, having passed the Senate Judiciary Committee by unanimous consent.