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*445 RESTORING AMERICA'S COMMITMENT TO REFUGEES AND HUMANITARIAN PROTECTION

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***446** I. INTRODUCTION

The United States is a nation of immigrants with a long tradition of welcoming, in the words of Emma Lazarus, the "huddled masses yearning to breathe free." [FN1] The United States is also a leader among nations in offering protection to refugees who were forced to flee their countries as a result of persecution. As a party to the Protocol Relating to the Status of Refugees, the United States has committed to treat refugees in accordance with the substantive provisions of the 1951 Convention Relating to the Status of Refugees (the "Refugee Protocol" and "Refugee Convention," respectively). [FN2] As a result of these commitments, the United States offers protection to those who have fled their countries of origin because of a well-founded fear of persecution when that fear is based on one or more Convention grounds: race, religion, nationality, political opinion, or membership in a particular social group. The United States is also obligated to refrain from returning a refugee to a nation where his life or freedom would be threatened on account of the same Convention grounds. [FN3]

Since the enactment of the Refugee Act of 1980, more than 3 million refugees have been resettled in the United States, and the United States has granted asylum to over 500,000 other refugees. [FN4] The U.S. protection regime ***447** is, in many ways, a model for other nations, providing life-saving protection to vulnerable refugees who have fled from political, religious, and other forms of persecution. At the same time, the U.S. asylum system is a complex labyrinth, flawed in ways that can deny permanent shelter to genuine refugees.

Over the years, amendments to the Refugee Act, modifications to agency policy, and judicial decisions have eroded core elements of the U.S. protection regime. A multitude of agencies are now involved in asylum and resettlement matters, contributing to bureaucratic gridlock and multi-year delays in addressing or resolving legal and policy issues. As a result, thousands of refugees who sought the protection of the United States have had their requests for asylum denied,

or their requests for family reunification, legal resident status, or other relief delayed for years. The politics of the broader immigration reform debate have limited opportunities to address these challenges through legislation. The renewed desire of Congress to consider immigration legislation in the 113th Congress provides an important opportunity to improve the American refugee system as a component of broader immigration reform. It is important that Congress enact improvements to the refugee system before flaws in the current law affect thousands more genuine refugees, further damaging the United States' global leadership in protecting persecuted and displaced people.

This Article addresses a number of the flaws in current immigration law that deny refugees access to protection in the United States. It discusses some of the ways in which current law and policy are eroding the role of the United States as a global leader in refugee protection and offers legislative (and, in some cases, regulatory) solutions to those issues. This piece also describes modifications to law that would improve the fair and efficient adjudication of applications for asylum in the United States. Such modifications would decrease the cost to the government by improving efficiency and reducing the time spent by federal agencies and courts in addressing technicalities and flawed policies. Part II provides an overview of many of the roadblocks asylum applicants face when applying for refugee status. Part III discusses policies that undermine the United States' commitment to refugee protection. Part IV addresses some of the inefficiencies and shortcomings in the adjudication system for asylum petitions. Finally, Part V describes legislation that would protect stateless persons in the United States, individuals who face some of the same vulnerabilities as refugees, yet currently lack access to a form of immigration relief that would regularize their status.

As Congress debates comprehensive immigration reform, it should reaffirm this country's commitment to refugee protection and take steps to ensure ***448** that the United States fulfills its obligations under the Refugee Protocol and Convention. By enacting several measures to correct shortfalls in the law, Congress can enable refugees to build new lives in the United States, free from persecution and harm.

II. ACCESS TO ASYLUM AND PROTECTION

Several provisions in U.S. law prevent asylum seekers who have a well-founded fear of persecution from gaining access to the nation's protection regime. This section will describe four impediments to protection and offer solutions for each. Part A describes the harm created by the deadline asylum seekers must meet in order to apply for protection. Part B details bars to protection that were written into the law to prevent terrorists and their supporters from gaining asylum or refugee status in the United States. Unfortunately, these immigration law provisions were drafted so broadly, and have been applied so expansively, that they have led to denials and delays in protection for thousands of innocent refugees and their families. Part C discusses a lack of clarity in some elements of the “refugee” definition that has led to confusion in assessing gender-based asylum claims. Finally, Part D describes how the law could be adjusted to better protect vulnerable groups abroad of humanitarian concern to the United States in a more efficient manner than the traditional individual assessment has allowed.

A. *Asylum Filing Deadline*

In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Congress enacted a one-year filing deadline on asylum applications. [FN5] This provision, contained in section 208(a) of the Immigration and Nationality Act (“INA”), bars an individual from seeking asylum if the applicant cannot demonstrate that the application was filed within one year of arrival in the United States. This bar applies even if the individual is a refugee who has a well-founded fear of persecution in his or her home country. If the applicant misses the filing deadline, the applicant may be able to receive an exception from the bar; however, such exceptions are limited to two

circumstances: (1) “changed circumstances which materially affect the applicant's eligibility for asylum,” or (2) “extraordinary circumstances relating to the delay in filing.” [FN6] The applicant must also establish that he or she filed the application within a reasonable time after the ***449** changed or extraordinary circumstance. [FN7]

In the years since it was implemented, the filing deadline has led many refugees with legitimate claims to be denied asylum in the United States. An independent academic analysis of Department of Homeland Security (“DHS”) data, titled “Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum,” concluded that between 1998 and 2009, the one-year bar prevented DHS from granting 15,000 asylum applications, representing over 21,000 refugees. [FN8] These cases otherwise would not have required any further litigation in immigration courts. [FN9]

In its 2010 report, “The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency,” [FN10] Human Rights First documented how the filing deadline has barred refugees who face religious, political, and other forms of persecution from receiving asylum in the United States. [FN11] Some examples of these refugees included an Eritrean woman who was tortured due to her Christian religion, a Burmese student jailed for his pro-democracy activities, a gay man who was attacked and tortured in Peru, and a Chinese woman who faced persecution due to her assistance to North Korean refugees. [FN12] As recognized in these and other reports, legitimate refugees have been denied asylum despite the inclusion of exceptions for changed or extraordinary circumstances. [FN13]

Ironically, while some proponents of the deadline in 1996 argued that it would help curb fraud, the deadline has prevented legitimate refugees from receiving asylum. The U.S. asylum and immigration systems have a number of other mechanisms to identify fraud. [FN14] For example, asylum applications and testimony are provided under penalty of perjury. Applicants who provide false information can be prosecuted and permanently barred from receiving any immigration benefits. [FN15] DHS also subjects asylum applicants (and all ***450** potential immigrants to the United States) to extensive security procedures, including FBI biometric testing and identity checks through multiple intelligence databases. [FN16] In addition, individuals who file fraudulent asylum or immigration applications can be investigated and criminally prosecuted. Such investigations and prosecutions may also be mounted against attorneys and preparers who are complicit in fraud. For example, in late 2012 federal prosecutors in New York City charged a number of attorneys and preparers with fraud in connection with the filing of allegedly fraudulent asylum applications on behalf of individuals from China. [FN17]

There are many reasons why an individual with a *bona fide* asylum claim might file an application for protection more than one year after arriving in the United States. Many asylum seekers do not speak English and struggle after their arrival simply to meet their basic needs. Many have little or no understanding of the complexities of U.S. asylum law and procedures, while others are not aware that their fear of persecution could make them eligible for asylum. Many refugees have suffered torture or physical or emotional trauma. [FN18] Others may face great challenges in retaining legal representation. Many asylum seekers do not have the resources to afford private counsel, and free legal counsel is very difficult to obtain given the lack of government-funded representation and the limited availability of *pro bono* representation. [FN19]

In addition to barring refugees who face persecution from receiving asylum in the United States, the filing deadline also undermines the efficiency of the asylum and immigration court systems. As detailed in the Georgetown-Temple Report and the 2010 Human Rights First Report, the filing deadline has delayed the resolution of asylum cases, diverted time and resources that could be more efficiently allocated to assessing the actual merits of cases, and shifted thousands of cases to the increasingly backlogged and delayed immigration court system when they could have been resolved at the

Asylum Office level. [FN20] In testimony before the U.S. Senate Committee on ***451** the Judiciary, Karen Grisez, then the Chair of the American Bar Association's Commission on Immigration, stated that "eliminating the one-year deadline will restore fairness to and increase the efficiency of the process, preserving the limited resources available for evaluating asylum cases on the merits." [FN21]

A filing deadline that prevents asylum cases from being adjudicated on their merits is inconsistent with U.S. commitments under the Refugee Convention and Protocol. Article 33 of the Refugee Convention prohibits the return of refugees to areas where they will face persecution, and Article 34 requires the United States to facilitate the assimilation and naturalization of refugees. [FN22] The United Nations High Commission for Refugees (UNHCR) Executive Committee, of which the United States is a member, has specified that failure to comply with technical requirements, such as a filing deadline, "should not lead to an asylum request being excluded from consideration." [FN23]

A provision eliminating the filing deadline for asylum applications could create paths for those who were denied asylum solely because they failed to meet the filing deadline. One option is to allow such individuals to adjust their status to lawful permanent residence and petition for their spouse and children to be afforded that same status. A second option would be to allow this same population to file a motion to reopen their case and apply for asylum again, under current circumstances. [FN24]

Bipartisan support for eliminating the filing deadline already exists, and past attempts have created a framework for drafting future proposals. In August 2001, a bipartisan bill, entitled The Refugee Protection Act of 2001, [FN25] was introduced in the U.S. Senate by Democratic Senator Patrick Leahy, and co-sponsored by an array of Republicans and Democrats. [FN26] That bill included a section that would have eliminated the asylum filing deadline. Subsequent bills in the House [FN27] and Senate eliminated the filing deadline, including successive versions of The Refugee Protection Act [FN28] and the bipartisan ***452** comprehensive immigration reform bill that passed the Senate on June 27, 2013. [FN29] While Congress has not yet enacted legislation to repeal the filing deadline, the bipartisan support for a legislative repeal provides a basis for a workable solution in the future.

Elimination of the filing deadline has found support in the executive as well as the legislative branch. In 2011, DHS publicly confirmed its support for repeal of the filing deadline. [FN30] It concluded that the filing deadline results in the denial of asylum to genuine refugees, expends resources at the Asylum Office and immigration courts, does little to uncover or deter fraud, and makes the overall adjudication process more difficult. [FN31] President Barack Obama's administration had previously communicated its support for eliminating the filing deadline to Congress in response to Congress's request for reviews on the Refugee Protection Act of 2010. [FN32] In December 2011, in connection with the 60th anniversary of the 1951 Refugee Convention, the Obama administration pledged to work with Congress to eliminate the filing deadline. [FN33] A repeal of the filing deadline is also endorsed in President Obama's blueprint for comprehensive immigration reform, which was released on January 29, 2013. [FN34]

The administration now has the opportunity to work with Congress in the context of comprehensive immigration reform to eliminate the filing deadline. This reform would help ensure that the United States does not deny asylum to genuine refugees. It would also free up immigration court and Asylum Office resources to focus on other cases, thereby decreasing costs, improving efficiency, and reducing case wait times and backlogs. A simple repeal of the filing deadline, and a policy shift that allows petitioners who have failed to meet the filing deadline to either adjust their status to lawful permanent resident or to reopen their case and apply for asylum again would go far to restore protection for genuine refugees.

***453** B. *Terrorism Bars*

U.S. immigration law bars asylum or refugee status to people who pose a danger to U.S. communities or threaten national security, even if those individuals have a well-founded fear of persecution and otherwise qualify for protection under the Refugee Act. [FN35] Bars to refugee protection under U.S. immigration law also penalize people who have engaged in or supported acts of violence that are inherently wrongful and condemned under U.S. and international law. [FN36] These goals are consistent with U.S. commitments under the Refugee Convention and Protocol. The Refugee Convention and Protocol exclude perpetrators of heinous acts and serious crimes from their protection. These international instruments also provide that refugees who threaten the safety of the community in their host countries may be removed. [FN37] However, the provisions of U.S. immigration law relating to "terrorism," as that term is defined in the INA, have been expanded significantly through legislation. [FN38] These statutory amendments also drew greater attention to other overly-broad provisions included in the INA's definition of "terrorist activity." [FN39] These definitions include the use of any "weapon or dangerous device (other than for mere personal monetary gain) with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." [FN40] While the provisions were intended to target individuals who threaten U.S. national security and those who have engaged in or supported acts of wrongful violence, Congress drafted several of these legislative provisions very broadly. Moreover, these broadly drafted provisions have been interpreted expansively by U.S. immigration authorities. As a result, thousands of refugees who pose no danger to the United States and who have not committed any acts that should bar them from protection under the Refugee Convention have had their applications for asylum, permanent residence, and family reunification denied or delayed in recent years. [FN41]

The definition of "terrorist organization" under the INA includes "foreign terrorist organizations" (referred to a "Tier I" groups) that have been designated as such by the Department of State under pre-existing provisions of law, [FN42] as well as a second tier of organizations (referred to as "Tier II" ***454** groups) that are publicly listed by the Secretary of State. [FN43] The definition of so-called "Tier III" groups labels as a "terrorist organization"--for purposes of the immigration law only--"a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" acts that the immigration law defines as "terrorist activity"--essentially, any unlawful use of a weapon for purposes other than financial gain. [FN44] The groups that have been labeled as "terrorist organizations" under this "Tier III" definition include: Iraqi groups that rose up against Saddam Hussein in the 1990s, Iraqi groups that fought against Saddam Hussein in conjunction with the coalition forces that overthrew his regime in 2003, two of the largest democratic opposition parties in Sudan, and groups that fought the ruling military junta in Burma (Myanmar). [FN45] Ironically, many of the refugees affected by the overly broad "Tier III" definition were involved only in peaceful political activity in connection with groups that are now deemed to be terrorist organizations under this overly-broad immigration law definition. [FN46]

The "terrorism"-related provisions in the INA are now far more expansive than the grounds for exclusion or the exceptions to the *non-refoulement* obligation contemplated by the Refugee Convention. [FN47] These INA provisions include the definition of "terrorist activity" at INA § 212(a)(3)(B), the definition of a "Tier III" or "non-designated" "terrorist organization" under INA § 212(a)(3)(B)(vi)(III), and the other statutory provisions that reference those definitions. These definitions are being used overwhelmingly against people who were not Congress's intended targets. The term "terrorist activity" is defined to include any unlawful use of a weapon against persons or property, for any purpose other than financial gain. This definition is so broad that it sweeps in people who do not present a threat to the United States and are not guilty of criminal conduct. Moreover, defining any military action against a dictatorial regime as "terrorism" goes well beyond the kind of criminal wrongdoing the term "terrorism" generally describes, and, practically speaking, will mislabel as "terrorist" those that the United States government fully supports. For example, this approach to terrorism could be read to apply to individuals such as George Washington and the survivors of the Warsaw Ghetto uprising.

According to a 2009 Human Rights First report, thousands of refugees who were victimized by armed groups--including by groups the United States has officially designated as "terrorist organizations"--have been ***455** treated as "supporters of terrorism." [FN48] Any refugee who ever fought against the military forces of an established government is deemed a "terrorist." [FN49] Refugees who voluntarily helped any group that used armed force are suffering the same fate, regardless of who or what the group's targets were, and regardless of whether the assistance the refugee provided had any logical connection to violence. These provisions are being applied to refugees who were associated with political parties and other groups that the U.S. government does not consider to be terrorist organizations in any other context. [FN50] Thus, under these provisions, refugees who pose no threat to the United States and would not otherwise be guilty of any conduct for which the U.S. government would legitimately wish to exclude them are denied protection. [FN51] Many are unable to obtain permanent residence or reunite with their spouses or children.

Moreover, the U.S. Departments of Homeland Security, Justice, and State have taken an expansive approach as they interpret and apply these legislative provisions. For instance, the requirement that a person who provided "material support" to a "terrorist organization," within the meaning of the immigration law, be barred from admissibility is frequently applied to persons who made only minimal contributions to individuals associated with these groups. These persons include people who were forced to pay ransom to these groups, doctors who provided medical care to the wounded in accordance with their medical obligations, and persons who engaged in other forms of lawful activity. [FN52]

In 2008, Congress, in a bipartisan effort led by Democratic Senator Patrick Leahy and Republican Senator Jon Kyl, amended the INA to authorize the administration to exempt persons with no actual connection to terrorism from the effects of these statutory definitions. [FN53] However, the Departments of Homeland Security, Justice, and State have neither developed nor implemented workable procedures to effectively utilize this "exemption" or ***456** "waiver" authority. Various experts and commentators have concluded that the exclusive use of unreviewable discretionary waivers is not a manageable, effective, or efficient long-term solution to the underlying problem of the overly-broad statutory definitions of terrorism. [FN54]

Comprehensive immigration reform and other legislative initiatives may offer opportunities to address these challenges effectively. For example, the definitions of "terrorist activity" and "terrorist organization" in INA § 212(a)(3)(B) could be amended so that they target actual terrorism. Currently, these definitions are being applied to anyone who at any time used armed force as a non-state actor or gave support to those who did. [FN55] Activities that would constitute a legitimate reason for excluding a person from protection are already covered by other provisions of the immigration law that do not rely on the overly-broad "Tier III" definition. The statutory definitions are also being applied to persons who supported armed groups under duress, and to individuals who were kidnapped or conscripted as child soldiers. [FN56] Specifically, the very expansive subsection of the ""terrorist activity" definition at INA § 212(a)(3)(B)(V)(b) should be limited to the use of armed force against civilians and non-combatants, and the definition of a "Tier III" organization at INA § 212(a)(3)(B)(vi)(III) should be eliminated or modified to exclude groups that have no intent to harm the United States.

As legislation is debated by Congress, the Departments of Homeland Security, Justice and State can take a number of administrative steps to address aspects of this problem. The Secretary of Homeland Security should allow Asylum Officers to re-examine and provide relief to individuals--on a case-by-case basis--who had voluntary associations with so-called "Tier III" groups. "Tier III" groups are not formally designated as terrorist groups. [FN57] In many cases, the groups are long defunct. [FN58] Some are even groups with which the U.S. government sympathizes or supports. [FN59] An exemption that was issued in August 2012 to allow case-by-case adjudication of many cases in this category (applying to applicants or their spouses who were previously granted protection in this country) should be implemented

in a timely manner. [FN60] Moreover, the Secretary of Homeland Security could sign additional exemptions to allow the prompt adjudication of cases for persons who ***457** do not bear responsibility for serious human rights abuses or crimes, and who pose no threat to the security of the United States.

In addition, the Obama administration could work with the Departments of Homeland Security, Justice, and State to reconsider the legal interpretations of some of the immigration law terms that were inherited from prior administrations. For example, the administration could alter current legal interpretations through policy guidance, in opinions in individual cases, in formal exemptions such as those described above, and otherwise. Such reinterpretations could (1) clarify that "routine commercial transactions"-- such as the sale of flowers at a flower shop--do not constitute "material support;" (2) revise the interpretation of the term "material support" to specify that it applies only to support that is quantitatively significant and qualitatively of a nature to further terrorist activity (rather than, for example, to the distribution of pro-democracy pamphlets); and (3) determine that the material support bar and other terrorism-related bars under the INA should not be applied to children, to persons acting under coercion, or in other circumstances where criminal law would recognize a defense to prosecution. Revising these legal interpretations would bring these interpretations into line with the purpose of the law, which was to exclude and deny relief to persons responsible for or supportive of terrorist acts or groups, and those who may pose a terrorist threat to the United States.

C. *Clarifying Terms Affecting Gender-Based Asylum Requests*

In order to be eligible for asylum under U.S. law, applicants must show that they have suffered persecution, or have a well-founded fear of future persecution, "on account of" one or more of the protected characteristics in the refugee definition, one of which is "membership in a particular social group." [FN61] The interpretation of the "on account of" (or "nexus") and particular social group" elements of the "refugee" definition have posed particular challenges for refugees fleeing from gender-based harm, such as rape, forced marriage, honor killings, domestic violence, and female genital mutilation. Refugees fleeing these and other forms of harm, whose persecutors often do not articulate the reasons for their actions, can face difficulties in obtaining direct evidence that their persecutors harmed them "on account of" their gender or other protected grounds. [FN62] Gender-based asylum claims have also borne the brunt of misunderstandings relating to the concept of ""social group," such as misplaced concerns that defining large groups of people within a society as a "particular social group" may lead to a "flood" ***458** of asylum seekers who are members of that group. [FN63] While the United States has played a leading role in advancing protection for victims of sexual and gender-based persecution around the world, [FN64] a number of challenges continue to undermine the ability of refugees who face these harms to access asylum in the United States.

In 2000, the former Immigration and Naturalization Service ("INS") issued a proposed rule that sought to clarify these aspects of the refugee definition, particularly as they relate to gender-based harms. The proposed rule sought to codify the leading Board of Immigration Appeals ("BIA") decision in *Matter of Acosta*, [FN65] which requires that members of a "social group" share a "common, immutable" trait, such as sex, color, or kinship ties, confirming that gender is a trait which may form the basis of a "social group." The proposed rule also, among other provisions, confirmed that either direct or circumstantial evidence is sufficient to fulfill the "on account of" requirement, and that it was not required to show that the persecutor targeted other individuals who share the same trait. [FN66] The proposed rule was never finalized.

More than a dozen years after the INS issued its proposed "social group" rule, the Departments of Homeland Security and Justice have not yet promulgated regulations addressing the definition of "social group" and other terms impacting gender-based asylum cases, even though a December 2009 announcement in the Federal Register indicated that they

intended to relaunch the rulemaking process. [FN67] Since that time, without clear regulatory guidance, Immigration Judges ("IJs") and the BIA have issued inconsistent and, in some cases, confusing decisions, further convoluting interpretation of the law and making it more difficult for asylum applicants with gender-based claims to prove that they meet the refugee definition. [FN68] Under decisions issued by the BIA in 2007 and 2008, applicants who base their asylum claim on membership in a particular social group must, in addition to providing evidence that the members of the group share a common immutable characteristic, also show that the group is both "discrete" and "visible" to society at large such that they can be distinguished from others in the eyes of the persecutor. [FN69]

***459** Meanwhile, DHS has filed several legal briefs in key gender-based asylum cases, first in *Matter of R-A-* and later in the case of *L-R-*. [FN70] These briefs affirm the *Acosta* approach to social group, making clear that gender can form the basis of a "social group;" they also confirm that in demonstrating that persecution is "on account of" the applicant's membership in a social group, proof of the persecutor's motive can include direct or circumstantial evidence, including that patterns of violence are supported by a country's legal system or social norms. [FN71] While the arguments contained in those DHS briefs have proven useful to subsequent gender-based asylum applicants, and are important as they reflect the government's position in these cases, the briefs are not sufficient to clarify the law. Only a modification to the statute or the promulgation of regulations could fill this gap.

Two basic fixes could ameliorate many of these problems. First, the regulations could be amended to make clear that, as the U.S. Supreme Court articulated in *INS v. Elias-Zacarias*, [FN72] direct or circumstantial evidence is sufficient to fulfill the nexus "on account of" requirement, including evidence that legal or social norms in the home country tolerate persecution of individuals like the applicant. This regulatory approach would ensure that the law is consistent with Supreme Court precedent, and provide some clarity for gender-based and other asylum cases.

In addition, regulatory language could be adjusted to make clear that the definition of the term "particular social group" should be guided by the "fundamental and immutable characteristics" standard, as articulated in the BIA's precedential decision *Matter of Acosta*, [FN73] without additional requirements. The *Acosta* standard requires that members of a particular social group demonstrate that they share a common characteristic they either cannot change, or should not be required to change, because the characteristic is fundamental to their identity or conscience. [FN74] Application of the BIA's long-established and well-regarded *Acosta* standard would eliminate the demand that a particular social group be "socially visible." Various legal experts have noted that the "social visibility" requirement presents a significant***460** obstacle for a broad range of meritorious asylum claims. [FN75] The approach has also received criticism from federal court judges such as Judge Richard Posner of the Court of Appeals for the Seventh Circuit, who observed in a 2009 decision that "if you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible." [FN76]

If no regulations are promulgated, adjustments to the law can be achieved through the enactment of legislation. These adjustments could enact into law the two basic fixes outlined above. The proposed Refugee Protection Act of 2013 included several provisions that would have addressed key aspects of this problem. [FN77] In connection with the definition of the term "refugee" in INA § 101(a) (42), section 5(a) of the proposed bill sought to add a provision codifying the *Acosta* standard. [FN78] Section 5(a) specified that "any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person's human rights such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirements." [FN79] Section 5(b) addressed the "on account of" or "nexus" issue. It specified that "[d]irect or circumstantial evidence, including evidence that the State is unable to protect the applicant or that State legal or social norms tolerate such persecution against persons like the applicant, may establish that persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion." [FN80] The Sectional Analysis of an

earlier version of the bill explained the need for clarification of the "on account of" or nexus requirement as follows:

> Some genuine asylum seekers have been denied asylum because of a lack of clear guidance on how the nexus requirement may be established when the persecutor is a non-state actor. The Department of Justice issued draft regulations in 2000 that made clear that an asylum seeker can demonstrate nexus through either "direct or circumstantial" evidence. This draft regulation was consistent with the U.S. Supreme Court's decision in *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). This paragraph would codify the draft regulation by making clear that ***461** either direct or circumstantial evidence may establish that persecution is on account of one of the five grounds. [FN81]

Given the failure over many years to address this issue administratively through regulations, legislation may be the most effective avenue for ensuring that the United States meets its obligations under the Refugee Convention. That legislation should enact the basic fixes outlined above, amending the law to clarify that: (1) the definition of "particular social group" should be guided by the "fundamental and immutable characteristics" standard, without additional requirements; and (2) direct or circumstantial evidence is sufficient to fulfill the "on account of" requirement, including evidence that legal or social norms in the home country tolerate persecution of individuals like the applicant. [FN82]

Until the government acts through regulation or legislation, the consequences of inaction will continue to harm asylum seekers. Current interpretation of law has led to inconsistent and confusing decision making at all levels of the immigration adjudication system. [FN83] It has also had direct consequences on the lives of refugees. Asylum applicants have been denied protection and returned to the hands of their persecutors; others have remained in legal limbo, postponing their ability to reunite with and bring their children out of harm's way. [FN84] Such denials of asylum to refugees have undermined U.S. leadership on the protection of refugees globally, as well as U.S. compliance with the Refugee Convention and Protocol. [FN85]

D. *Presidential Designation for Vulnerable Groups Overseas and Resettlement Reform*

The nations that ratify the Refugee Convention obligate themselves to extend a minimum level of protection to eligible displaced persons. A nation may offer more generous protection than the Convention stipulates, or extend protection to vulnerable individuals who do not technically meet the refugee definition. As members of the U.S. Congress debate a comprehensive ***462** immigration reform package they should consider adding additional protections for vulnerable individuals seeking U.S. protection from persecution or harm in their countries of origin.

While the early years of refugee protection in the United States focused mainly on victims of persecution from communist governments, the characteristics of those more recently selected for resettlement through the U.S. program have become increasingly complex. Refugees who fled their homelands on account of the type of persecution contemplated by the Refugee Convention and subsequently spent years in camps waiting for resettlement may have a difficult time presenting a claim for protection based on current conditions. This could be true of Burundians who languished in refugee camps in Tanzania for decades, and of Rohingya pushed out of Burma (Myanmar) into Bangladesh. In an interview with a refugee officer, such an applicant might describe the bleak and often dangerous experience of living in a refugee camp, rather than the harm they previously suffered or the fear of persecution that prompted their original flight. This is understandable given the passage of time and the dire conditions of many camps, but it is not the nexus to a well-founded fear of persecution that would make the applicant eligible for refugee status. The concept of well-founded fear is generally analyzed in light of current conditions in the country of origin. Therefore, people who describe dangerous camp conditions, to the exclusion of the fears that forced them to flee in the first place, may not prove eligibility, even if they were eligible for refugee status under U.S. law at the time of their original flight.

These individual victims of persecution should not be denied protection because of inflexibility in the law.

A solution to this problem was included in legislation introduced in recent years, [FN86] and in the bipartisan comprehensive immigration reform bill that passed the Senate in June 2013. [FN87] It should be considered for inclusion in a comprehensive immigration reform bill. The language proposed in these bills would give the President authorization to designate certain groups for admission as refugees based on a finding that their resettlement in the United States is justified by humanitarian concerns. As defined in the bill language, the groups must "share common characteristics that identify them as targets of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion or of other serious harm," or "share a common need for resettlement due to a specific vulnerability." [FN88] An ***463** applicant who establishes membership in such a designated group would be considered to be a refugee under the INA and be eligible for resettlement in the United States. [FN89] To deter fraud, each individual applicant would have to pass traditional refugee screening, including national security and criminal background checks, and be otherwise admissible to the United States. [FN90]

There is ample precedent for protection in U.S. law beyond the limited requirements of the Refugee Convention. First, when Congress enacted the Refugee Act in 1980, it authorized the President to designate nations from which refugees may apply for protection without having crossed an international border, [FN91] despite the fact that the Refugee Convention defines refugees as persons who are outside their country of origin for reasons related to their fear of persecution. [FN92] In recent years, the President has designated in-country processing for refugee applicants in Cuba, Iraq, Post-Soviet states, and the Baltic states. [FN93] Second, since 1989, Congress has lowered the threshold for meeting Convention and statutory requirements of refugee protection for certain designated groups and religious minorities. [FN94] Under the Lautenberg Amendment (named for its original sponsor, the late Senator Frank Lautenberg), Congress included language in annual appropriations bills to enable certain applicants to seek protection from persecution by "asserting such a fear and asserting a credible basis for concern about the possibility of such persecution." [FN95] Not unlike the extension of protection in the legislation described above, the Lautenberg Amendment originally applied to a variety of applicants from the Soviet Union and Indochina. [FN96] It covered certain applicants from both regions whose claims were based upon religion or political opinion. It also explicitly covered certain religious minorities from the former Soviet Union, including Jews and Evangelical Christians. [FN97] The Lautenberg Amendment was later extended to include religious minorities from Iran. [FN98] The language contained in legislation in the 113th Congress would explicitly include those who currently enjoy protection under the ***464** Lautenberg Amendment. [FN99] In future years, those groups would require only a Presidential designation, rather than an act of Congress, to retain access to this protection. [FN100]

Such an authorization would give the U.S. State Department greater flexibility to address significant or urgent humanitarian situations involving vulnerable individuals who do not meet all the components of the U.S. immigration law's "refugee" definition. This authority would also give the United States a tool that could be activated in situations where resettlement of a refugee population is unexpectedly stalled. By promptly identifying another vulnerable group for immediate resettlement through a presidential designation, the President could ensure that the U.S. allocation of resettlement "slots" for the year is still met. With over 15 million refugees and millions of additional vulnerable displaced persons of concern to the UNHCR around the world, [FN101] this legislative initiative would address an extraordinary need felt by those whose situations may call for resettlement.

In addition to considering legislative amendments to current law, the administration should continue to take steps to improve its ability to expeditiously resettle refugees who are in imminent danger, and Congress should encourage and support these efforts. [FN102] In October 2011, the State Department's Bureau of Population, Refugees, and Migration ("PRM") spelled out its criteria for expediting cases due to "life-threatening protection scenarios," or other serious

concerns. [FN103] In October 2011, PRM stated that it required eight to ten weeks to expedite cases, even those with the greatest urgency, because of the need to conduct security clearances, health, and other background checks. [FN104] In its 2012 Report to Congress, however, the Obama administration stated that screening times had been greatly reduced due to improved inter-agency coordination. [FN105] Congress should applaud this progress while maintaining vigorous oversight of processing times in all cases, especially those in need of urgent attention. The administration should ***465** continue to take steps to improve its capacity to expedite resettlement. [FN106]

Such changes to the law, as well as those described in Parts A-C of this section, would enable genuine refugees and other vulnerable individuals to access the protection system under U.S. law. These modifications would enable the United States to fulfill its international commitment to refugees while still preventing terrorists and those with nefarious intentions to obtain lawful immigration status in the United States.

III. POLICIES THAT UNDERMINE U.S. LEADERSHIP ON REFUGEE PROTECTION

The United States holds some asylum seekers in custody and prevents others from reaching its shores. These steps are taken in the name of border control, immigration law enforcement, and national security, but have the effect of denying protection to many people with strong claims under the standards for asylum status. The following section describes how two U.S. policies, detention and interdiction at sea of asylum seekers, limit access to the United States protection regime and detract from the reputation of the United States as a global leader in the protection of human rights.

A. *Detention*

"Arriving" asylum seekers--specifically those who seek protection at U.S. airports and border entry points, as well as some who are detained in border areas within fourteen days of their arrival--are subject to "mandatory detention" under the "expedited removal" provisions of INA § 235. [FN107] In these cases, detention is not based on an individualized assessment, but is automatic for individuals who lack valid documents. Those who are subsequently determined to have a credible fear of persecution following an interview with an asylum officer or a subsequent IJ review will pass out of ***466** "mandatory detention" and may seek potential release from detention. [FN108]

While "arriving" asylum seekers can request that U.S. Immigrations and Customs Enforcement ("ICE") release them on parole, this form of release is a discretionary determination made by the detaining authority itself for which there is no appeal of a denial. These asylum seekers are not given access to custody hearings in immigration court, which are referred to as "bond hearings, in which an IJ--who is not employed by ICE--can assess issues relating to the level of bond and potential release from detention." [FN109] Experts on human rights law and advocates for refugees have recommended that the United States revise its regulations to provide arriving asylum seekers with access to immigration court bond hearings. [FN110] However, in March 2012, the U.S. Department of Justice ("DOJ") confirmed that it would not adjust these regulations. [FN111]

Article 9(4) of the International Covenant on Civil and Political Rights ("ICCPR") provides that: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." [FN112] In reports specifically focused on the United States, the Inter-American Commission on Human Rights and the Special Rapporteur on the Human Rights of Migrants both recommended that U.S. procedures be adjusted to provide access to immigration court bond hearings. [FN113] In a June 21, 2012 report on immigration detention, the recently appointed

Special Rapporteur on the human rights of migrants, Professor ***467** François Crépeau, stressed that detention for immigration purposes should never be mandatory or automatic, but "must be made on a case-by-case basis" and should be subject to "automatic, regular and judicial review of detention in each individual case." [FN114]

In September 2012, the UNHCR issued new *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* ("UNHCR Detention Guidelines"). These guidelines confirm that the detention of asylum-seekers should be avoided in principle, that the fundamental right to liberty and protections against arbitrary detention apply to all persons regardless of their immigration or other status, and that individuals who are detained should "be brought promptly before a judicial or other independent authority to have the detention decision reviewed" within twenty-four to forty-eight hours. [FN115]

ICE detains up to 33,400 immigrants and asylum seekers each day. [FN116] In fiscal year 2012 alone, U.S. immigration authorities detained an all-time high of over 429,247 immigrants. [FN117] ICE stated on February 28, 2013, that its average cost of detention is $119 per person, per day. [FN118] Non-governmental organizations calculate the average cost as high as $164 per person per day using governmental budget numbers of over $2 billion per year for the immigration detention system. [FN119] As detailed in a number of reports, "alternatives to detention" can save significant governmental resources currently expended on detention, which could lead to millions of dollars of reduced costs each year. [FN120] Alternatives to detention include a range of monitoring ***468** mechanisms, case-management, and in some cases, electronic monitoring. [FN121] In February 2013, an ICE official stated that alternatives cost from "17 cents to $17.78 per person, per day for alternate methods such as requiring scheduled visits with a caseworker or electronic monitoring." [FN122] ICE has expanded its use of alternatives to detention in recent years. [FN123] It has not, however, used alternatives to reduce unnecessary detention and detention costs, interpreting language in DHS appropriations legislation as mandating that it maintain a specific number of detention beds. [FN124]

International human rights authorities have repeatedly called for the use of alternatives to detention rather than traditional detention. In his 2012 report on immigration detention, the Special Rapporteur stated that governments have "an obligation to establish a presumption in favor of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure." The report stressed that "[a]lternatives to detention should have a human rights-based approach, be established by law, be non-discriminatory and be subject to judicial review and independent monitoring and evaluation." [FN125] The UNHCR's Detention Guidelines specifically affirm that alternatives to detention should be considered first, with detention used only as a measure of last resort. [FN126]

The legislation drafted by the White House that was leaked to the press in February 2013 contained text that would require the Secretary of Homeland Security to establish alternatives to the detention system. [FN127] With the White House calling for broader availability of alternatives, and Congress already endorsing their use for young adults, Congress should seriously consider establishing a secure alternatives program in comprehensive reform legislation.

Asylum seekers and other immigration detainees are held in over 250 jails and jail-like facilities nationwide. [FN128] In these facilities, they wear prison ***469** uniforms and are typically locked in one large room for up to twenty-three hours a day. [FN129] Immigration detainees have strictly limited access to the outdoors, and are typically required to visit with their families through barriers. The bipartisan U.S. Commission on International Religious Freedom ("USCIRF") concluded that these kinds of facilities "are structured and operated much like standardized correctional facilities" and are inappropriate for asylum seekers. [FN130] A 2009 report prepared for DHS and ICE by Dr. Dora Schriro, an expert on prison systems appointed by DHS Secretary Janet Napolitano to review the immigration detention system, confirmed that "all but a few of the facilities that ICE uses to detain aliens were built as jails and prisons,"

[FN131] and that the detention standards used by ICE-- which are based on criminal incarceration standards--"impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population." [FN132]

In 2009, DHS and ICE committed to shift the immigration detention system away from its longtime reliance on jails and jail-like facilities to facilities with conditions more appropriate for civil detainees. [FN133] As Secretary Napolitano noted in 2009, "[t]he paradigm was wrong." [FN134] In a statement of objectives for new facilities, ICE described "less penal" conditions that would include increased outdoor access, contact visitation with families, and ""non-institutional" clothing for some detainees. [FN135] DHS and ICE have opened two facilities with less penal conditions and made progress on some other aspects of detention reform. [FN136] However, ICE continues to hold the overwhelming majority of its daily detention population in jail-like facilities, with a full 50% of detainees held in actual jails. [FN137] These facilities are often ***470** in remote locations, far from already limited *pro bono* legal resources, immigration courts, or U.S. Citizenship and Immigration Services (USCIS) Asylum Offices, which conduct credible fear and reasonable fear interviews at the facilities. [FN138]

In recent years, international human rights authorities have repeatedly confirmed that the use of immigration detention facilities that are penal in nature is inconsistent with human rights and refugee protection law and standards. In its 2012 Detention Guidelines, UNHCR stressed that the "use of prison, jails, and facilities designed or operated as prison or jails, should be avoided," and that "[c]riminal standards (such as wearing prisoner uniforms or shackling) are not appropriate." [FN139] In reports specifically focused on the United States, the Inter-American Commission on Human Rights and the former U.N. Special Rapporteur on the Human Rights of Migrants both expressed concern about the punitive and prison-like conditions used by the U.S. government in its immigration detention system, with the latter noting that "freedom of movement is restricted and detainees wear prison uniforms and are kept in a punitive setting." [FN140] The current U.N. Special Rapporteur on the Human Rights of Migrants, in his 2012 report on immigration detention, confirmed that immigration detainees "should not be subject to prison-like conditions and environments, such as prison uniforms, highly restricted movement, lack of outdoor recreation and lack of contact visitation" and that states should "allow[] administrative detainees to wear their own clothing." [FN141]

The American Bar Association ("ABA"), at its annual meeting in August 2012, adopted civil immigration detention standards. [FN142] The ABA standards are meant to provide DHS with a guide for developing civil detention standards and transforming the immigration detention system to a system that befits its civil detention authority. The ABA standards explain that:

> Residents should not be held in jails or jail-like settings. DHS/ICE should normalize living conditions in all detention facilities to the greatest extent possible. Civil detention facilities might be closely analogized to " "secure" nursing homes, residential treatment facilities, domestic violence shelters, or in-patient psychiatric treatment facilities. Such facilities should have ample common space, freedom to move within the facility, extended access to indoor and outdoor recreation, ***471** and abundant opportunities to relate to other residents and to persons outside the facility. [FN143]

The ABA standards outline a series of requirements including that: (1) facilities should be located near adequate non-profit, *pro bono*, or low cost legal services; (2) residents should be allowed to wear their own clothing and should not be subjected to clothing restrictions apart from those deemed strictly necessary for security; (3) residents should have free access to outdoor recreation throughout the day; and (4) facilities should permit contact visitation, with non-contact visits required only following an individualized determination that an in-person visit would pose a danger. [FN144]

DHS, ICE and the DOJ can implement many reforms to the U.S. immigration detention system administratively. For

example, DOJ and DHS could revise regulatory language to provide arriving asylum seekers with access to immigration court custody hearings. [FN145] ICE could also use alternatives *in place of* detention (rather than as a supplement to existing levels of detention) and reinterpret its position that it is mandated to detain on a daily basis the number of individuals that corresponds to the number of beds funded by Congress. [FN146] ICE could also phase out the use of prisons, jails, and jail-like facilities and develop new standards guided by the ABA's Civil Immigration Detention Standards.

As part of comprehensive immigration reform, a range of reforms could be implemented that would protect asylum seekers and others from detention that is inconsistent with international human rights standards. These reforms could: (1) provide arriving asylum seekers and other immigration detainees with the chance to have their custody reviewed in a "bond" hearing before an Immigration Court; (2) require individualized detention determinations in place of ""mandatory detention" under INA § 235(b); (3) require that alternatives to detention--with case management, community referrals and immigration court review--be assessed before detention is utilized; and (4) direct the issuance of regulations ensuring safe, humane and non-penal conditions in detention facilities, modeled on the ABA's Civil Immigration Detention Standards.

The bipartisan comprehensive immigration bill passed by the Senate in June 2013 included sections to establish a "secure alternatives to detention" program, improve oversight of detention facilities, establish procedures for bond hearings, and to improve reporting and record-keeping related to immigration detention. [FN147] In coordination with these reforms Congress could ***472** also advance other reforms relating to appropriations. The administration could, for example, realize cost savings by urging Congress, in connection with DHS appropriations legislation, to (1) exclude language referencing a specific number of detention beds, and (2) recognize ICE flexibility in its allocation of the enforcement and removal budget to shift funds from detention to more cost-effective alternatives to detention. [FN148]

DOJ, DHS, ICE, and the White House could also work with Congress to ensure that the widely-praised and efficient Legal Orientation Programs [FN149] are funded and in place at all facilities detaining asylum seekers and other immigration detainees. The administration could also support funding for legal counsel in immigration proceedings and in particular for vulnerable groups such as children, those with mental health issues, and those held in immigration detention.

B. *U.S. Maritime Interdiction*

The United States has a long history of interdicting asylum seekers and migrants at sea. [FN150] However, U.S. interdiction policies and practices have been met with criticism. In 1993, the U.S. Supreme Court's decision in *Sale v. Haitian Centers Council* upheld the U.S. government's policy of denying refugee screening to those interdicted on the high seas. [FN151] U.S. interdiction policies, such as that upheld in *Sale*, have sparked international concern and criticism and have set poor examples for other states. [FN152]

Current U.S. interdiction policies are flawed for all asylum seekers who attempt to come to the United States by sea, whether Haitians, Cubans, Chinese, or other nationalities. But they are particularly flawed for Haitians. Haitians who are interdicted are not informed, either in writing or orally, that they can express any fear or concern about repatriation. [FN153] By contrast, ***473** Cubans are at least told that they can raise any concerns with a U.S. officer. [FN154] The United States also does not require that Creole-speaking officers or translators be present during interactions with Haitians. [FN155] As a result, if a Haitian should wish to advise a Coast Guard officer of a fear of return he or she may have great difficulty communicating verbally with the officer. [FN156] This non-process is known as the "shout test," because the only way for an interdicted Haitian to communicate a fear of return--which might lead a U.S. officer to refer

the Haitian for a screening interview with an Asylum Officer--is to shout or wave his or her hands or somehow make a fear of return known through physical action. [FN157] Without effective communication, there can be no assurance that an asylum seeker would be able to express his or her fear of return to U.S. officials conducting interdiction or rescue operations. In January 2013, UNHCR reported that "[l]ess than four weeks into the year, more than 180 Haitians have been found in [the] Caribbean, almost all of whom were sent back. [FN158] UNHCR added that "it knew of no Haitian granted asylum in any Caribbean country after being intercepted at sea over the last two years. That fact is striking because when Haitians reach U.S. soil and petition for asylum roughly half are granted it." [FN159]

The UNHCR Executive Committee, of which the United States is a member, confirmed in 2003 that "interception measures should not result in asylum seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their lives or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law." [FN160]

U.S. interdiction policies and practices can be reformed through administrative action; however, given the lack of meaningful administrative reforms in this area, legislative action could offer opportunities to encourage or require DHS to implement overdue reforms. For example, Congress could require the administration to revise the U.S. approach to interdiction to allow individuals interdicted in U.S. or international waters potential access to U.S. asylum procedures through INA § 235, or at least to require that each interdicted person be asked, in a language they understand, whether they have any fear or concern about return.

Legislation could also direct DHS to develop transparent, non-discriminatory, written standards governing interdiction and rescue operations. These ***474** standards should require interpreters, individual screening interviews, and additional safeguards so that those with protection concerns are referred for protection screening interviews. Not only would individual screening interviews help identify anyone who may require a full protection interview, but they are also essential to identifying urgent medical concerns, victims of trafficking, and whether children are unaccompanied or at risk of harm. A model can be found in the set of very basic protection questions and language included on the forms used by border officials during expedited removal. [FN161] Reliance on such a template during individual maritime interdiction screening interviews would assist in identifying individuals who should be referred for protection screening interviews.

Legislative reforms should specifically require that the U.S. Coast Guard or other U.S. vessels use interpreters in any interdiction operations. Interpreters are essential to ensure that individuals can effectively communicate any fear, concern, or need for a protection interview. Without interpreters, interdicted Haitians who do not speak English are somehow expected to indicate their fear of return by shouting, waving their arms, or otherwise conveying their distress.

The Coast Guard and other U.S. representatives engaged in interdiction efforts should be trained on implementation of U.S. protection commitments. Regulations should also direct the Coast Guard and other U.S. authorities engaged in interdiction operations to hold regular and repeated protection trainings. Finally, the United States should fulfill the pledge made, in connection with the 60th anniversary of the Refugee Convention, to conduct updated training to U.S. Coast Guard personnel to focus on identifying manifestations of fear by interdicted migrants. [FN162]

Section 24 of the Refugee Protection Act of 2013 included a provision that would prohibit return of an asylum seeker interdicted in international waters or U.S. waters who has expressed a fear of return, unless that individual was provided with an interview by an asylum officer to determine if he or she had a "well-founded fear of persecution," or would be subjected to torture if returned. [FN163] That proposed bill also included a provision requiring DHS to issue regulations

establishing a uniform standard procedure, applicable to all individuals interdicted in international or U.S. waters, that provides a meaningful opportunity to express a fear of return, ensures that each individual can communicate through the use of a translator, and an opportunity to seek protection in a country in which the individual has family or other ties that will facilitate resettlement for those who are determined to ***475** have a well-founded fear of persecution. [FN164] Congress should consider such approaches as it debates immigration reform.

By modifying its policies on detention and interdiction at sea, the United States would reassert its traditional role as a world leader in humanitarian protection. Such changes could be made without leaving the nation vulnerable to fraud and threats to national security. In addition, providing all genuine asylum seekers with access to its legal protection system would help to re-establish the role of the United States as a world-recognized leader in the defense of human rights.

IV. IMPROVEMENTS TO THE ADJUDICATION SYSTEM WOULD ENSURE FAIR AND EFFICIENTASYLUM DETERMINATIONS

Many asylum applications are adjudicated in the immigration court system. Some are “referred” into immigration court removal proceedings by the USCIS Asylum Office after an applicant is denied asylum. Many others are placed in removal proceedings initially, either after passing an expedited removal credible fear interview, or upon being encountered by U.S. immigration authorities.

The immigration court system, which is within the DOJ's Executive Office for Immigration Review (EOIR), is widely recognized to be overstretched, backlogged, and underfunded. [FN165] In recent years, resources for immigration enforcement have escalated or remained high, [FN166] leading many more cases to be placed into immigration court removal proceedings. At the same time, the resources for the immigration court system have lagged behind, leaving the courts under-staffed. The immigration court backlog, as of September 30, 2013, was at 344,230 cases, with pending cases already waiting an average of 562 days. [FN167] Efforts to address the immigration court's capacity have also been affected by the budgetary gridlock in Washington D.C.

In June 2012, the Administrative Conference of the United States (ACUS) concluded that the immigration court backlog and “the limited resources to deal with the caseload” present significant challenges. [FN168] In 2010, the ABA's Commission on Immigration produced a comprehensive report on immigration adjudication reform. The report concluded that the “EOIR is underfunded***476** and this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the caseload of the immigration courts.” [FN169]

The delays and burden on the immigration courts can be exacerbated when cases that could or should be granted at the Asylum Office level are put into the immigration court system. As documented by the Georgetown-Temple Report on the asylum application filing deadline, thousands of asylum cases have been placed into the immigration court system unnecessarily due to the filing deadline. [FN170] Other categories of asylum cases could also be more efficiently resolved if they were referred initially to the USCIS Asylum Office, as noted earlier in this report and detailed by the ACUS study. [FN171] Immigration court resources are also diverted in other ways, including by adjudicating the amount of time that an asylum seeker has accrued toward eligibility for work authorization, commonly referred to as the asylum ““clock.” Calculating time accrued on the asylum clock has been reported to take at least 20% of court administrators' time. [FN172]

In 2005, fulfilling a congressional authorization, USCIRF released a report on the treatment of asylum seekers in expedited removal proceedings. [FN173] USCIRF documented a number of deficiencies in the implementation of expedited removal by U.S. immigration authorities. It recommended, among other measures, that asylum officers be

authorized to review claims for asylum in the expedited review process in the first instance, and to grant relief where appropriate. [FN174] Where the asylum officer could not reach a determination, the claim would be referred to immigration court proceedings, mirroring the current system for affirmative asylum applications.

An asylum claim heard in removal proceedings in immigration court is adversarial in structure, with an IJ and a government attorney both able to question and cross-examine the applicant. This process is both time and resource-intensive, with hearings often lasting several hours. This period of time does not include the additional hours typically devoted by an IJ to consider and write a decision in an asylum case.

The immigration courts suffer from a crushing caseload and persistent backlogs. As noted above, the overall backlog in the immigration courts (meaning all cases, not merely asylum claims) is more than 340,000 cases. [FN175] ***477** The average waiting time for case closure is more than 560 days. [FN176] These factors argue in favor of streamlining cases in a manner that does not erode due process for immigrants and those seeking protection under U.S. law.

Court backlogs and extended processing times also have a significant impact on asylum seekers themselves. While some asylum applicants wait for up to three years to have their claims heard by the immigration courts, many remain separated from spouses and children who may be in grave danger in their home countries. Because most are not eligible to work during at least part of this time, many asylum seekers are unable to support themselves and their families. Some become homeless or destitute. Lengthy court delays also increase the difficulty of recruiting *pro bono* counsel. [FN177]

Adjudication by the Asylum Office is preferable to adjudication in the immigration courts for a number of reasons. The Asylum Office process is non-adversarial, with asylum officers interviewing applicants in-depth about their claims, assessing credibility, and screening for fraud. Asylum officers undergo extensive training upon their initial hiring. They are provided with regular training on developments in law, country conditions, and other matters. [FN178] Supervisors review every case and additional headquarters staff monitor quality control. [FN179] In addition, the Asylum Office employs dedicated fraud-prevention coordinators to identify deception and assist asylum officers and supervisors with specialized training. [FN180] Cases that present novel legal questions or particularly complex cases may be referred to DHS. [FN181] If a fraudulent application is filed, the applicant and any attorney or preparer who participated in the fraud may be investigated and prosecuted.

In addition, improvements in Asylum Office technology and internal operations facilitate the identification of fraud. As described by a senior official, “USCIS has undergone a multi-year transformation effort to create an electronic format for adjudications. The transformation will collect information and give officers analytical abilities to identify fraud in individual cases and across whole sets of cases around the country.” [FN182]

***478** Two specific proposals for restructuring the asylum adjudication system deserve consideration by Congress in the comprehensive immigration debate. The first is to move asylum claims from arriving aliens to the Asylum Office in DHS for an initial adjudication. [FN183] Under the current system, such claims are automatically sent to immigration courts and adjudicated in an adversarial, trial-like setting. The second proposal is to move initial adjudication of all asylum claims--including those arising in expedited removal and those arising as a defense to removal--from the immigration courts to the Asylum Office. Both proposals would draw upon the expertise of the Asylum Office and reduce the caseload of the heavily overburdened immigration courts.

In fiscal year 2012, the immigration courts decided 21,512 asylum cases. [FN184] Both proposals described here would relieve the immigration courts of a substantial portion of its asylum caseload. If the Asylum Office maintained its typical rate of granting asylum, at roughly 35% of claims, approximately 7,500 fewer cases might be decided by the immigration courts each year. [FN185] With a backlog of over 340,000 cases, [FN186] 7,500 may not appear to be a

significant number, but when one considers the staffing, resources, and number of hours devoted to each individual asylum case, the number carries weight.

Under both proposals for legislative reform, where the asylum officer believed the asylum seeker did not meet the requirements of asylum, or where the asylum officer doubted the credibility of the applicant, the case would be referred to immigration court removal proceedings, as is the case with affirmative claims under the current system. This backstop of review by the immigration courts would provide balance to the process--protecting the asylum seeker's right to fair process and the government's need to deter fraud and identify security threats--while improving overall efficiency.

Advocates for these changes recognize that restructuring would require careful planning. For example, the Asylum Office would likely have to hire additional staff to adjudicate a larger number of cases for initial review. This would be balanced, however, by the reduction in the caseload at the immigration courts, where a larger number of staff persons are required per individual adjudication. [FN187] The increase in the caseload of the Asylum Office might be alleviated in part if USCIS designed the system such that the same asylum officer screens for credible fear in arriving alien cases and reviews ***479** the full asylum application, thereby increasing efficiency as a single officer gains familiarity with the individual claim. [FN188]

In addition, some express concern that arriving alien asylum seekers who are subject to detention under the statute for expedited removal may spend a longer period of time in detention if they request time to prepare their claims. Whether such applicants would be released on parole or held in detention during the pendency of their claims would likely be determined on a case-by-case basis. It is worth noting, however, that under the current system, detention is the default in expedited removal cases referred to immigration court, and that such arriving asylum applicants are often detained through the disposition of their court cases.

The lack of legal counsel for asylum seekers and other immigrants also impacts the efficiency and fairness of the immigration court system. EOIR itself has explained that: “Non-represented cases are more difficult to conduct. They require far more effort on the part of the judge.” [FN189] The 2010 ABA study found that fewer than half of immigrants in immigration court had the benefit of representation and for those in detention about 84% were unrepresented. [FN190] The comprehensive academic statistical study *Refugee Roulette* found that asylum seekers with legal representation win their cases at a rate that is about three times higher than the rate for those who are unrepresented. [FN191]

The difficulties of securing counsel for detained asylum seekers and immigrants are acute: not only are *pro bono* resources very limited but detention facilities are often located far from the offices of already overstretched and underfunded legal providers. [FN192] In its 2005 study on asylum seekers in expedited removal, the USCIRF found that many of the facilities used to detain asylum seekers were “located in rural parts of the United States, where few lawyers visit and even fewer maintain a practice,” and the Commission concluded that “[t]he practical effect of detention in remote locations ... is to restrict asylum seekers' legally authorized right to counsel.” [FN193]

While not a substitute for actual legal representation, Legal Orientation Presentations are offered by non-governmental organizations at some detention facilities. EOIR's Legal Orientation Presentation (“LOP”) program has ***480** received widespread commendation from IJs for promoting the efficiency and effectiveness of the removal process. [FN194] Through the program, indigent immigration detainees are provided with legal information relating to their situation. LOP programs can also help refer immigrants to legal aid providers and potential *pro bono* counsel. [FN195]

LOP programs are not yet in place at many facilities that hold immigration detainees. During fiscal year 2012, LOP programs were operating in twenty-five detention facilities and were expected to reach 65,000 of the more than 400,000 individuals held in immigration detention. The President's fiscal year 2013 DOJ budget request included an increase for

federal funding of LOP programs. [FN196]

Various experts have identified a number of steps that can be taken to address challenges related to legal representation for immigration cases. Over the longer term, many have pointed out the need for some kind of public defender system for those in immigration proceedings. [FN197] In November 2012, the New York Immigration Representation Study Group issued a report proposing a public defender model project that would provide legal representation to immigrants in detention in the New York and New Jersey area. [FN198] Vulnerable populations, including minors and individuals with mental health issues, face additional difficulties in attempting to navigate the system without legal representation. The question of legal representation for immigration detainees with mental disabilities is currently the subject of litigation in the federal courts. [FN199]

There is much that the administration and Congress can do to help address these shortcomings in the immigration adjudication system. [FN200] For example, with adequate appropriations and increased IJ and support staffing, the immigration court system would be able to conduct more timely proceedings and eliminate the backlogs. As ACUS recommended, EOIR should "make ***481** the case" to Congress that funding legal representation for respondents in removal proceedings, including those in detention, as well as children and those with mental health issues, will promote justice and produce efficiencies and net cost savings. [FN201]

A comprehensive immigration reform bill could include a spending authorization to meet the President's request for LOP funding. In addition, with sufficient support, EOIR could significantly expand LOP programs to additional detention facilities, which would help improve immigration court efficiency and access to counsel. DHS should also end the use of detention facilities in remote locations, which limits access to legal representation, medical care, and family visitation. As discussed earlier in this article, DHS and DOJ could also adopt a single non-adversarial interview process before the USCIS Asylum Office for all asylum seekers, including "arriving" asylum seekers and "defensive" asylum seekers. [FN202]

The bipartisan bill, passed by the Senate in June 2013 contains a subtitle addressing several of these issues, "Shortage of Immigration Court Resources for Removal Proceedings." [FN203] The subtitle contains sections that would increase the number of IJs, staff attorneys, and support staff. [FN204] It also requires the establishment of nationwide LOP programs such that all immigrants in detention receive a legal orientation within five days of being taken into custody. [FN205] The subtitle also contains a section that would give IJs the authority to appoint counsel to immigrants in removal proceedings at government expense. [FN206] The same section would mandate appointment of counsel to unaccompanied immigrant children, immigrants with serious mental disability, and others "considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings." [FN207] The latter language may be applied to asylum seekers where an IJ exercises his or her discretion. The Senate-passed bill would also resolve some long-standing problems with the 180-day "asylum clock" that measures asylum applicants' eligibility for work authorization to ensure that an asylum seeker receives work authorization 180 days after filing an asylum application. [FN208]

The administration could take a number of other practical steps to address ***482** some problems with the adjudication system. For example, DHS and DOJ could revise their regulations and procedures [FN209] to allow asylum and withholding applicants to qualify for work authorization provided that at least 150 days have passed since the filing of an asylum application. This adjustment would address multiple problems relating to the current operation of the work authorization "clock," thereby enabling many asylum seekers to avoid becoming destitute while waiting for their hearing dates. It would also improve immigration court efficiency as IJs would be spared complicated calculations over elapsed time.

In addition, EOIR should welcome, and IJs should grant, requests to schedule expedited immigration court hearing dates within several months, rather than for two or three years in the future. This modification would allow asylum seekers with family still at risk abroad to have their cases resolved expeditiously so that successful claimants could petition to bring family to the United States where they would be safe from persecution. A reliable system for requesting earlier hearing dates might also help individuals secure counsel, including *pro bono* counsel, because attorneys may be reluctant to represent an asylum seeker *pro bono* if the hearing is two or three years in the future.

The various measures outlined above--increasing immigration court staffing, expanding the efficient LOP program, shifting initial adjudication of some or all asylum requests to the Asylum Office, fully addressing the asylum work authorization "clock" inefficiencies, and facilitating appointment of counsel to promote efficiency and justice, such as for unaccompanied children and individuals with serious mental disabilities--would lead to a much more efficient and just asylum and immigration adjudication system. These reforms would not only reduce delays and backlogs in the immigration courts, but they would also ensure that asylum seekers whose cases are placed in the immigration court removal system will no longer wait years to have their asylum requests resolved.

V. PROTECTION FOR STATELESS PERSONS

Each nation-state has the authority to determine which individuals it recognizes as citizens. In the past, certain governments have acted to expel portions of their population for reasons of ethnicity, religion, or politics, stripping individuals of identity documents and rendering them effectively stateless as a result. Alternatively, as a state gains independence from exterior dominance, the newly independent government may act to deny citizenship to those who are linked to the departing leadership. Finally, as new states define citizenship, they sometimes set time limits for nationals to claim ***483** citizenship under the new government. The UNHCR estimates that there are 12 million stateless persons across the globe. [FN210] While the exact number is difficult to pinpoint, the number in the United States is approximated at 4,000. [FN211]

The United States extends protection to those who fear persecution on account of certain protected grounds, those who may face torture, and other victims of harm, including trafficking, certain crimes, and domestic violence. A stateless person may well have a legitimate need for protection, but fit none of the forms of relief offered by U.S. law. Many of the stateless persons in the United States are known to the federal government through previously filed applications for immigration status or claims for protection. If they prove ineligible for such relief and cannot be returned to their country of origin the federal government has little choice but to allow them to remain in the United States. Under these circumstances, stateless individuals are typically provided with permission to work and are required to report regularly to ICE. Because they have no lawful status, ICE retains the right to deport them if and when removal becomes possible.

DHS officials have publicly expressed frustration with the Department's inability to consider a more durable form of status to stateless persons, and have expressed the desire to work with Congress to enact a legislative solution for stateless persons in the United States. [FN212] One such solution was included in the Refugee Protection Act of 2013 and also passed the Senate in the bipartisan comprehensive immigration bill. [FN213] It should be considered in its current or modified form as Congress debates a comprehensive immigration reform package. The legislation would enable eligible stateless individuals to apply for conditional immigration status, and later seek lawful permanent residence in the United States. Applicants would have to pass all criminal background and security checks prior to obtaining conditional status. The relevant provisions were drafted to bar from eligibility a stateless person with a history of criminal activity and those who renounced their nationality solely to seek conditional status in the United States would be ineligible.

The legislation would solve what has been an insurmountable problem for ***484** the affected population without posing any risks to the United States. For these reasons, Congress should include protections for stateless individuals in comprehensive immigration reform.

VI. CONCLUSION

There is no question that the United States is a global leader in welcoming refugees and offering them the opportunity to build new lives, free from the persecution that forced them to flee from their home nations. Nonetheless, a great nation can always improve, and the United States is no exception.

This Article outlines a number of key improvements that should be included in comprehensive immigration legislation. These improvements would safeguard access to asylum, restore U.S. global leadership on refugee protection, and ensure a fair and efficient adjudication system for asylum and immigration cases. As detailed above, these specific measures include: eliminating the bar on asylum requests filed over one year after an asylum seeker's arrival in the United States, addressing the sweeping immigration law inadmissibility provisions that are mislabeling innocent refugees as supporters of “terrorist activity,” clarifying the “social group” basis for asylum, facilitating presidential designation of vulnerable groups for resettlement, transforming the U.S. approach to immigration detention and maritime interdiction, and implementing a series of measures to improve the adjudication of asylum cases in the immigration system. Many of these measures are included in the bipartisan Senate immigration reform bill, an important step forward and a reflection of this country's strong bipartisan support for protecting refugees from persecution. Should comprehensive immigration reform become further stalled, these measures could also be enacted through other legislative vehicles, and some could be achieved administratively through revised regulations, guidance and policies. These reforms however are central to American values, and should remain an important component of any immigration reform legislation.

The suggested modifications above would bring the United States much closer to full compliance with the Refugee Convention, and ensure that the U.S. system continues to welcome the most vulnerable among us. For an immigration reform law to be truly comprehensive it should include these key improvements to the nation's long-standing commitment to refugee protection.

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[FN1]. EMMA LAZARUS, THE NEW COLOSSUS (1883), *reprinted in* THE OXFORD BOOK OF AMERICAN POETRY, 184 (David Lehman, ed., 2006), *available at* http:// www.poets.org/viewmedia.php/prmMID/16111.

[FN2]. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. *See* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 394 (Oxford: Clarendon Press, 1996). The Refugee Act, which codified key commitments of the Refugee Protocol and Convention in statute, was signed into law on March 17, 1980 with strong bipartisan support in both chambers of Congress. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

[FN3]. Refugee Convention, *supra* note 2, at art. 33(1). This provision is called the *non-refoulement* provision based on its text: "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 ..." *Id.* This article of the Convention is codified at INA § 241(b)(3).

[FN4]. *Yearbook of Immigration Statistics: 2011*, U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf (compiling statistics on individuals granted asylum affirmatively or defensively: fiscal years 1990 to 2011). *See also Annual Flow Report: Refugees and Asylees 2012*, U.S. Dep't of Homeland Security, (2013), *available at* https://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf (providing information on the number of persons admitted as refugees or granted asylum in 2012); U.N. Secretary-General, *Concise Report on the Monitoring of World Population Trends and Policies, With Special Emphasis on Refugees*, ¶ 27, U.N. Doc. E/CN.9/1994/2 (Feb. 2, 1994) (noting the number of U.S. asylum grants from 1980-1990); see also Refugee Council USA, Statistics, *available at* http://www.rcusa.org/index.php?page_history.

[FN5]. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 604, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 8 U.S.C. § 1158 (2012)).

[FN6]. The deadline bars an applicant from asylum if she cannot demonstrate by "clear and convincing evidence" that her application was filed within one year of her arrival in the United States, absent a finding of "changed" or ""extraordinary" circumstances that would excuse her delayed filing. *See* INA § 208(a)(2). Non-exhaustive lists of examples for each exception are included in the Code of Federal Regulations. *See* 8 C.F.R. § 208.4(a)(4)-(5).

[FN7]. *See* INA § 208(a)(2); 8 C.F.R. § 208.4(a)(4)-(5).

[FN8]. Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 753-54, 761 (2010) [hereinafter Schrag et al., *Georgetown-Temple Report*] *available at* http:// wmlawreview.org/files/Schrag.pdf.

[FN9]. As described in Section III.A, "Asylum Office Adjudication of Claims for Protection," some asylum claims are initially adjudicated in the Asylum Office of DHS, while others originate as defenses to removal, in the immigration courts.

[FN10]. *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency*, HUMAN RIGHTS FIRST 25 (Sept. 2010) [hereinafter *HRF Report Asylum Filing Deadline*] *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf.

[FN11]. *Id.*

[FN12]. *Id.* at 1-2, 9, 33, 35.

[FN13]. *Id.* at 6-12; Schrag et. al., *Georgetown-Temple Report*, *supra* note 8, at 676-680. Note that due to a lack of data, the report was unable to determine how many applicants denied for untimely filing were granted "withholding of removal." *See also* Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 698, 703 (2008).

[FN14]. Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum*

Adjudication, 60 STAN. L. REV. 295, 311 (2007) [hereinafter Ramji-Nogales et al., *Refugee Roulette*].

[FN15]. INA § 208(d)(6); 8 C.F.R. § 208.3(c)(4); 8 C.F.R. § 208.20. *See also HRF Report on Asylum Filing Deadline, supra* note 10, at 25-28.

[FN16]. *HRF Report on Asylum Filing Deadline, supra* note 10, at 25-28.

[FN17]. Press Release, *Twenty-Six Individuals, Including Six Lawyers, Charged In Manhattan Federal Court With Participating In Immigration Fraud Schemes Involving Hundreds Of Fraudulent Asylum Applications,* U.S. ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK (Dec. 18, 2012), *available at* http:// www.justice.gov/usao/nys/pressreleases/December12/AsylumFraudChargesPR.php.

[FN18]. *See HRF Report on Asylum Filing Deadline, supra* note 10, at 29-39; Musalo & Rice, *supra* note 13; Michele Pistone and Philip Schrag, *The New Asylum Rule: Improved but Still Unfair,* 16 GEO. IMMIGR. L. REV. 1, 49-51 (2001-2002).

[FN19]. Ramji-Nogales, et. al., *Refugee Roulette, supra* note 14, at 339-341, 384; s*ee Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, NEW YORK IMMIGRANT REPRESENTATION STUDY (Dec. 2011), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

[FN20]. Schrag et. al., *Georgetown-Temple Report, supra* note 8; *HRF Report Asylum Filing Deadline, supra* note 7, at 2, 13-25. *See also* Julia Preston, *Huge Amounts Spent on Immigration, Study Finds,* NYTIMES.COM (Jan. 7, 2013), http:// www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html?_r_1&.

[FN21]. *Improving Efficiency and Ensuring Justice in the Immigration Court System*: *Hearing Before the Subcomm. on the Judiciary*, 112th Cong. (May 18, 2011) (statement of Karen Grisez, Chair, ABA Commission on Immigration), *available at* http:// www.americanbar.org/content/dam/aba/uncategorized/2011/2011may18_grisezs_ t.authcheckdam.pdf.

[FN22]. Refugee Convention, *supra* note 2 at arts. 33-34.

[FN23]. U.N. High Comm'r for Refugees, Exec. Comm., *Refugees Without an Asylum Country*, ¶ i, U.N. Doc. A/ 34/12/Add. 1 (Oct. 16, 1979), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid_3ae68c960.

[FN24]. The Refugee Protection Act of 2011, S. 1202, 112th Cong. § 3 (2011).

[FN25]. The Refugee Protection Act of 2001, S. 1311, 107th Cong. (2001).

[FN26]. *S. 1311, Refugee Protection Act of 2001*, Library of Congress, http://beta.congress.gov/bill/107th-congress/senate-bill/1311/cosponsors (last visited Jan. 17, 2013).

[FN27]. The Refugee Protection Act of 2011, H.R. 2185, 112th Cong. (2011); Restoring Protection to Victims of Persecution Act, H.R. 4800, 111th Cong. (2010); Save America Comprehensive Immigration Act of 2009, H.R. 264, 111th Cong. (2009); Comprehensive Immigration Reform ASAP Act of 2009, H.R. 4321, 111th Cong. § 186 (2009).

[FN28]. The Refugee Protection Act of 2013, S. 645, 113th Cong. (2013); The Refugee Protection Act of 2011, S. 1202, 112th Cong. (2011); The Refugee Protection Act of 2010, S. 3113, 111th Cong. § 3 (2010).

[FN29]. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3401

(2013).

[FN30]. UNHCR Washington Office, *Reaffirming Protection: Strengthening Asylum in the United States, Commemorating the 60th Anniversary of the 1951 Refugee Convention*, summary report at 17-18 (2011), *available at* http:// www.unhcrwashington.org/atf/cf/%7BC07EDA5E-AC71-4340-8570-194D98BDC139% 7D/georgetown.pdf_[hereinafter UNHCR, *Reaffirming Protection*].

[FN31]. *Id.*

[FN32]. *Id.* at 18.

[FN33]. UNHCR ministerial meeting to commemorate the 60th anniversary of the 1951 Convention Relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness (Geneva, Palais des Nations, 7-8 December 2011) 127, *available at* http:// www.unhcr.org/commemorations/Pledges2011-preview-compilation-analysis.pdf. *See also* U.S. Dep't of State, Data Sheet: U.S. Commemorates Pledges (October 15, 2012), *available at* http:// www.state.gov/j/prm/releases/factsheets/2012/199145.htm.

[FN34]. Fact Sheet: Fixing Our Broken Immigration System So Everyone Plays by the Rules, White House Office of the Press Secretary (Jan. 29, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules.

[FN35]. Bars to asylum at INA § 208(b)(2)(A). More specifically, INA § 208(b)(2)(A)(ii) (convicted of a particularly serious crime and constituting a threat to the community) and INA § 208(b)(2)(A)(iv) (reasonable grounds for regarding alien as a danger to the security of the United States).

[FN36]. INA § 208(b)(2)(A)(i).

[FN37]. Refugee Convention, *supra* note 2, at arts. 1(F), 33; *see* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶¶ 147-48, U.N. Doc. HCR/IP/4/Eng/REV/1 (1992).

[FN38]. *See* DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES, 526 ff. (2d ed. 2012).

[FN39]. *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V); INA § 212(a)(3)(B).

[FN40]. *See id.*

[FN41]. *Denial and Delay--The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States*, HUMAN RIGHTS FIRST 1 (2009) [hereinafter *HRF Report Denial and Delay*], *available at:* http:// www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf.

[FN42]. INA § 212(a)(3)(B)(vi)(I).

[FN43]. INA § 212(a)(3)(B)(vi)(II).

[FN44]. INA § 212(a)(3)(B)(vi)(III).

[FN45]. *HRF Report Denial and Delay*, *supra* note 41, at 3-5.

[FN46]. *Id.* at 25-37. *See also* Darryl Fears, *Waiver Plan Would Aid Some Asylum-Seekers*, WASH. POST (Aug. 13, 2007) *available at* http:// www.washingtonpost.com/wp-dyn/content/article/2007/08/12/AR2007081201013.html.

[FN47]. Refugee Convention, *supra* note 2, at art. 33(1). *See also* text accompanying note 3.

[FN48]. *HRF Report Denial and Delay*, *supra* note 41, at 1, 32.

[FN49]. *See e.g.*, N.C. Aizenman, *US Anti-Terrorism Laws Causing Immigration Delays for Refugees*, WASH. POST (Nov. 12, 2009), *available at* http:// www.washingtonpost.com/wp-dyn/content/article/2009/11/11/AR2009111127506_pf.html.

[FN50]. *HRF Report Denial and Delay*, *supra* note 41, at 1.

[FN51]. *HRF Report Denial and Delay*, *supra* note 41, at 61-64.

[FN52]. *See The "Material Support" Bar: Denying Refuge to the Persecuted?: Hearing before the Senate Comm. on Human Rights and the Law*, 100th Cong., 1st Sess. 138 (September 19, 2007) (statement of Physicians for Human Rights). *See also HRF Report Denial and Delay*, *supra* note 41, at 23-40. While the Secretary of Homeland Security signed an exemption to allow U.S.C.I.S. to consider not applying the material support ground of inadmissibility to some individuals who provided medical care, see U.S.C.I.S., Policy Memo, Implementation of New Exemption Under INA 212(d)(3)(B)(i) for the Provision of Material Support in the Form of Medical Care (Nov. 20, 2011), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Voluntary-Medical-Care-PM-602-0052.pdf, the U.S. government has not clarified as a matter of legal interpretation that the provision of medical care to a sick or injured person is a neutral act and does not constitute "material support" to that patient or to any organizations or political goals with which that patient may be associated.

[FN53]. Consolidated Appropriations Act of 2008, H.R. 2764, 110th Cong. (2008) § 691, Div. J.

[FN54]. *HRF Report Denial and Delay*, *supra* note 41, at 7-10.

[FN55]. *Id.* at 12.

[FN56]. Regarding the issue of child soldiers see *Hearing of Child Soldiers, before the U.S. Sen. Comm. on the Judiciary Subcomm. on Human Rights and the Law*, 110th Cong. (2007) (testimony of Anwen Hughes, Senior Counsel Refugee Protection Program, Human Rights First), *available at:* http://www.humanrightsfirst.org/wp-content/uploads/pdf/07424-asy-child-hearing-test.pdf.

[FN57]. INA § 212(a)(3)(B)(vi)(II); INA § 212(a)(3)(B)(vi)(III).

[FN58]. *HRF Report Denial and Delay*, *supra* note 41, at 7.

[FN59]. *Id.* at 4-5.

[FN60]. USCIS, EXEMPTION FOR CERTAIN ALIENS PREVIOUSLY GRANTED ASYLEE AND REFUGEE STATUS (2012), *available at* http:// www.uscis.gov/USCIS/Laws/TRIG/Limited%20General%20Exemption.pdf.

[FN61]. INA § 208.

[FN62]. For an overview of the challenges faced in gender-based cases over the years, *see* Karen Musalo, *A Short*

History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women's Claims, REFUGEE SURVEY QUARTERLY 29(2) (UNHCR 2012) [hereinafter *History of Gender Asylum*].

[FN63]. *See* Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?* VA. J. SOC. POL'Y & L. 119 (2007); *see also* Musalo, *History of Gender Asylum, supra* note 62, at 48, n12, n13.

[FN64]. U.N. Human Rights Council, Working Grp. on the Universal Periodic Rev. 9th Sess. Geneva, Nov. 1-Nov. 12, 2010, U.N. Doc. A/HRC/WG.6/9/USA/1 *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_ WG.6_9_USA_1_United%20States-eng.pdf. *See also* U.S. Dep't of State, Office of Global Women's Issues, *available at* http://www.state.gov/s/gwi/index.htm.

[FN65]. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

[FN66]. Asylum and Withholding Definitions, 65 Fed. Reg. 76, 588 (Dec. 7, 2000).

[FN67]. Asylum and Withholding Definitions, 74 Fed. Reg. 64, 220 (Dec. 7, 2009).

[FN68]. *See* Musalo, *History of Gender Asylum, supra* note 62, at 60-61.

[FN69]. See Matter of C-A-, 23 I. & N. Dec. 951 (BIA 2006) (mentioning social visibility and particularity as relevant factors for consideration in social group analysis, but not as requirements); Matter of A-M-E- & J-G-U, 24 I. & N. Dec. 69 (BIA 2007) (rejecting proposed social group because it ""fails the 'social visibility' test."); Matter of S-E-G-, 24 I. & N. Dec. 579 (BIA 2008) (requiring that social group members, in addition to sharing an immutable or fundamental characteristic, also be "socially visible" and defined with "particularity").

[FN70]. U.S. Dep't of Justice, *Department of Homeland Security's Position on Respondent's Eligibility for Relief* (Feb. 19, 2004), *available at* http:// cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf [hereinafter DHS R-A-Brief]; U.S. Dep't of Justice, *Department of Homeland Security's Supplemental Brief* (Apr. 13, 2009), *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%C20brief%C20on%P SG.pdf (redacted version) [hereinafter DHS L-R- Brief]. For a discussion of these legal briefs, see Musalo, *History Gender Asylum, supra* note 62 at 59-62.

[FN71]. *See, e.g.*, DHS R-A- Brief, *supra* note 70, at 19-21, 31-36; DHS L-R-Brief, *supra* note 70, at 17-19; Musalo, *History of Gender Asylum, supra* note 62 at 59-62.

[FN72]. 502 U.S. 478, 483 (1992).

[FN73]. 19 I. & N. Dec. 211 (BIA 1985).

[FN74]. *Id.* at 232-234.

[FN75]. Musalo, *History of Gender Asylum, supra* note 62 at 60-62; Deborah Anker and Sabrineh Ardalan, *Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 529, 550-552 (2012); Brief of U.N. High Commissioner for Refugees as Amicus Curiae Supporting Petitioner, Valdiviezo-Galdamez v. Att'y Gen. of U.S., 502 F.3d 285 (3d Cir. 2007). (No. 08-4564), *available at* http:// www.unhcr.org/refworld/docid/49ef25102.html.

[FN76]. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (Posner, J.).

[FN77]. The Refugee Protection Act of 2013, S. 645, 113th Cong. (2013).

[FN78]. *Id.*; *Matter of Acosta*, 19 I. & N. Dec. at 232-234.

[FN79]. The Refugee Protection Act of 2013, S. 645, at § 5(a).

[FN80]. *Id.* at § 5(b).

[FN81]. *The Leahy-Levin-Akaka-Durbin Refugee Protection Act of 2011 Sectional Analysis*, Patrick Leahy United States Senator for Vermont (2011), http://www.leahy.senate.gov/imo/media/doc/SectionBySection-RefugeeProtectionAct.pdf.

[FN82]. Statutory changes (or regulatory adjustments) should also make clear that where an asylum applicant fears persecution at the hands of nongovernmental actors, the applicant may qualify for protection by showing that the country of origin is unable or unwilling to protect the applicant, and that this requirement is satisfied where the government fails to provide effective protection. *See* Musalo, *History of Gender Asylum*, *supra* note 62, at 62; UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 7, 2002) HCR/GIP/02/01 [21], *available at* http://www.unhcr.org/refworld/docid/3d36f1c64.html.

[FN83]. Asylum and Withholding Definitions, 74 Fed. Reg. 64, 220 (Dec. 7, 2009).

[FN84]. Musalo, *Protecting Victims of Gendered Persecution*, *supra* note 63, at 123-130. *See also The Leahy-Levin-Akaka-Durbin Refugee Protection Act of 2011 Sectional Analysis*, *supra* note 81, at 3.

[FN85]. See Musalo, *History of Gender Asylum*, *supra* note 62, at 49-52 (outlining international standards and guidance relating to gender-based asylum).

[FN86]. The Refugee Protection Act of 2013, S. 645, 113th Cong. § 18 (2013) ("Authority to designate certain groups of refugees for consideration"). Similar text was included in earlier versions of the bill. *See* The Refugee Protection Act of 2011, S. 1202, 112th Cong. § 18 (2011); The Refugee Protection Act of 2011, H.R. 2185, 112th Cong. § 18 (2011); The Refugee Protection Act of 2010, S. 3113, 111th Cong. § 20 (2010).

[FN87]. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3403 (2013).

[FN88]. The Refugee Protection Act of 2013, S. 645; Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744.

[FN89]. *Id.*

[FN90]. *Id.*

[FN91]. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102 (1980) (codified at 8 U.S.C. § 1101(a)(42)(B)).

[FN92]. *Id.*

[FN93]. Presidential Memorandum, Annual Refugee Admissions Numbers for FY 2013 (Sept. 28, (2012), *available at*

http://www.whitehouse.gov/the-press-office/2012/09/28/presidential-memorandum-annual-refugee-admissions-numbers. The use of in-county processing, which can be used to undermine asylum, should be carefully assessed, but in some cases it can be a critical life-saving tool.

[FN94]. Foreign Operations, Export Financing, and Related Programs Appropriations Act for Fiscal Year 1990, P.L. No. 101-167, Title V, § 599D, 103 Stat. 1195 (1989), 8 U.S.C. § 1157 Note (2000). This provision has been repeatedly amended, generally to extend the expiration date.

[FN95]. *Id.*

[FN96]. *Id.*

[FN97]. *Id.*

[FN98]. Consolidated Appropriations Act of 2004, P.L. No. 108-199 § 213, 118 Stat. 253 (2004).

[FN99]. The Refugee Protection Act of 2013, S.645, 113th Cong. § 18 (2011); Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. § 3403 (2013).

[FN100]. *Id.*

[FN101]. UNHCR, *Global Trends 2011* (Jun. 18, 2012), *available at* http:// www.unhcr.org/4fd9e6266.html.

[FN102]. The bipartisan comprehensive immigration bill passed by the Senate in June 2013 included sections to expedite protection for Iraqi and Afghans who assisted the U.S. government and were later threatened with harm for service to the United States, to expand protections for children and spouses of refugees, and to allow overseas refugees access to representation in their applications for resettlement. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S.744 §§ 2318-19, 3402, 3408.

[FN103]. U.S. Department of State, *Expedited Protection and Resettlement of Refugees, Fact Sheet of the Bureau of Population, Migration, and Refugees*, October 24, 2011, *available at* http:// www.state.gov/j/prm/releases/factsheets/2011/181021.htm (emphasis in original).

[FN104]. *Id.*

[FN105]. Departments of State, Homeland Security, and Health and Human Services, *Proposed Refugee Admissions for Fiscal Year 2013: Report to Congress*, August 30, 2012, at iv, 15, *available at* http:// www.state.gov/documents/organization/198157.pdf.

[FN106]. Refugee Council USA, Human Rights First, other groups have identified additional steps that PRM and DHS can take to improve the U.S. capacity to expedite cases of individuals facing imminent harm or other urgent risks. *See, e.g.*, Refugee Council USA, *Policy Framework: Recommendations and Action for the Obama Administration the 113th Congress*, 10-11 (March 2013), *available at* http://www.rcusa.org/uploads/pdfs/RCUSA_2013_FINAL.pdf; *How to Repair the U.S. Asylum and Resettlement Systems*, HUMAN RIGHTS FIRST 16-18 (December 2012), http://www.humanrightsfirst.org/wp-content/uploads/pdf/asylum_ blueprint.pdf.

[FN107]. INA § 235; Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004); Press Release, Department of Homeland Security, DHS streamlines removal process along entire U.S. border (Jan. 30, 2006), *available*

at http://www.rcusa.org/uploads/pdfs/dhs1.pdf. The expedited removal system has been criticized for lacking sufficient safeguards to ensure that genuine refugees are not deported to persecution. *See* Michele R. Pistone and John J. Hoeffner Esq., *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 49 Villanova University School of Law School of Law Working Paper Series (2006); PHILIP SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA (Rout-ledge, 1999). While the former INS designed a series of measures to minimize the chance that a refugee in the expedited system would be denied the chance to access asylum, the U.S. Commission on International Religious Freedom documented, in a comprehensive report, that those measures were often not utilized by U.S. immigration officers. *See* U.S.C.I.R.F., *Study on Asylum Seekers in Expedited Removal* (Feb. 8, 2005), *available at* http://www.humanrightsfirst.org/wp-content/uploads/Craig-Haney-report-2005.pdf.

[FN108]. *See* U.S. Immigration and Customs Enforcement (ICE), *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, Dec. 8, 2009, *available at* http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

[FN109]. 8 C.F.R. § 1003.19(h)(2)(i) (2013); INA §§ 212.5, 208.30, 235.3.

[FN110]. National Immigration Justice Center, *Petition for Rulemaking to Promulgate Regulations Governing Custody Determinations for Arriving Alien Asylum Seekers*, submitted to the U.S. Dep't of Justice (Mar. 15, 2010), *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Petition%C20for%C20Rulemaking%C20DOJ%C20%C20FINAL2%C202010%C2003%1 5.pdf; Human Rights First, *Submission to the Office of the High Commissioner for Human Rights in connection with the Universal Periodic Review for the United States* (Nov. 26, 2010), *available at* http:// lib.ohchr.org/HRBodies/UPR/Documents/session9/US/HRF_HumanRightsFirst.pdf; InterAmerican Commission Report, *Report on Immigration in the United States: Detention and Due Process* (Dec. 30, 2010) at 81, *available at* http:// cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf; Jorge Bustamante, Spec. Rapporteur on the Human Rights of Migrants, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development--Mission to the United States of America*, A/HRC/7/12/Add.2 (Mar. 5, 2008), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/112/81/PDF/G0811281.pdf?OpenElement.

[FN111]. Letter from General Counsel, Department of Justice Executive Office for Immigration Review to Mary Meg McCarthy, National Immigrant Justice Center (Mar. 19, 2012), *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Letter%20to%C20Mary%C20Meg%C20McCarthy%C20dated%C203%C2019%C2012%C20regarding%C20Petition%C20for%% 20Rulemaking.pdf.

[FN112]. International Covenant on Civil and Political Rights, art. 9(4), Dec. 16, 1966, 999 U.N.T.S 171. The United States is a party to the ICCPR, however the Senate, upon ratification, did not recognize arts. 1-27 as self-executing.

[FN113]. Inter-American Commission Report, *supra* note 110; Bustamante, *supra* note 110.

[FN114]. François Crépeau, Report of the Special Rapporteur on the Human Rights of Migrants, A/HRC/20/24 (Apr. 2, 2012), *available at* http:// www.humanrightsfirst.org/wp-content/uploads/pdf/Special_Rapp_Migrants_Detention_April_2012.pdf.

[FN115]. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Sept. 2012), *available at* http://www.unhcr.org/505b10ee9.html.

[FN116]. Mickey McCarter, *Public Safety FY 2013 Budget Request for ICE Promotes Detention Alternatives, Secure Communities*, HSTODAY.US (Mar. 12, 2012), *available at* http://www.hstoday.us/focused-topics/public-safety/single-article-page/fy-2013-budget-request-for-ice-promotes-detentionalternatives-secure-communities/128edc7b3ac66fee1f The President's budget request for fiscal year 2014 recommended a reduction in the number of detention beds to 31,800. DHS BUDGET IN BRIEF, FISCAL YEAR 2014, at 130, *available at* https:// www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%C20BIB%20-%20FINAL%20-508%20Formatted%C20%C284%29.pdf.

[FN117]. *See* U.S. Dep't of Homeland Security, *Annual Report: Immigration Enforcement Actions 2011* (2012), at 4, *available at* http:// www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

[FN118]. Tabassum Zakaria, *U.S. Agency Says Average Cost of Immigrant Detention $119 per Day*, REUTERS (Feb. 28, 2013), *available at* http:// news.yahoo.com/u-agency-says-average-cost-immigrant-detention-119-004433431--business.html.

[FN119]. Human Rights First, *Oversight Hearing Immigration Enforcement* (Mar. 14, 2013), *available at* http://www.humanrightsfirst.org/wp-content/uploads/HRF-Statement-House-Hearing-on-ICE-Enforcement-03.14.13-FINAL-copy.pdf; National Immigration Forum, *Math of Immigration Detention* (Aug. 2012), *available at* http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.

[FN120]. National Immigration Forum, *supra* note 119.

[FN121]. International Detention Coalition, *There Are Alternatives--A Handbook for Preventing Unnecessary Immigration Detention* (2011), http:// massivefishball.com/IDC_Handbook.pdf; Lutheran Immigration and Refugee Service, *Unlocking Liberty--A Way Forward for U.S. Immigration Detention Policy* (Oct. 5, 2011), *available at* http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf.

[FN122]. Zakaria, *supra* note 118.

[FN123]. ICE Fact Sheet, *Alternatives to Detention* (Oct. 23, 2009), *available at* http://www.aila.org/content/default.aspx?bc_1016%7C6715%C7C12053%C7C26286%C7C31038%@30487.

[FN124]. McCarter, *supra* note 116.

[FN125]. Crépeau, *supra* note 114.

[FN126]. UNHCR, *Detention Guidelines*: *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 6 (2012), *available at* http:// www.unhcr.org/refworld/docid/503489533b8.html [hereinafter UNHCR, *Detention Guidelines*].

[FN127]. "Secure Alternatives Program," Sec. 160 of Title I of White House draft bill, *available at* http://www.aila.org/content/default.aspx?docid_43314 at 72.

[FN128]. Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System--A Two-Year Review* (New York: Human Rights First, 2011) [hereinafter *Jails and Jumpsuits*], at iv, *available at* http:// www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

[FN129]. *Id.* at i.

[FN130]. United States Commission on International Religious Freedom, *supra* note 107; U.S.C.I.R.F., *Expedited Removal Study Report Card* 5 (Feb. 6, 2007), http://www.uscirf.gov/news-room/press-releases/284-february-6-2007-uscirf-expedited-removal-study-report-card-two-years-later.html.

[FN131]. Dora Schriro, *Immigration Detention Overview and Recommendations*, DHS, ICE, Oct. 6, 2009, at 21, *available at* http:// www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

[FN132]. *Id.* at 2-3.

[FN133]. *Jails and Jumpsuits*, *supra* note 128, at 4-6 (citing U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement, *Fact Sheet: 2009 Immigration Detention Reforms* (2009), *available at* http:// www.ice.gov/news/library/factsheets/reform-2009reform.htm; U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement, *ICE Strategic Plan FY 2010-2014* 7 (2010), *available at* http:// www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf; Press Release, U.S. Dep't of Homeland Sec., Fact Sheet: ICE Detention Reform Principles and Next Steps (Oct. 6, 2009), *available at* http:// www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf; News Conference: Dep't of Homeland Sec., Immigration Detention Reforms (C-SPAN 2 broadcast Oct. 7, 2009), *available at* http://www.c-spanvideo.org/program/289313-1; Schriro, *supra* note 131 at 2-3).

[FN134]. Nina Bernstein, *Ideas for Immigrant Detention Include Converting Hotels and Building Models*, N.Y. TIMES (Oct. 5, 2009), http:// www.nytimes.com/2009/10/06/us/politics/06detain.html?_r_0.

[FN135]. *See Jails and Jumpsuits*, *supra* note 128, at 48-51.

[FN136]. *Jails and Jumpsuits*, *supra* note 128, at 18.

[FN137]. *Id.* at iii.

[FN138]. *Id.* at 7-13, 18-25.

[FN139]. UNHCR, *Detention Guidelines*, *supra* note 126, at 26.

[FN140]. Inter-American Commission Report, *supra* note 110; Bustamante, *supra* note 110, at 11.

[FN141]. Crépeau, *supra* note 114, at 19.

[FN142]. American Bar Association, ABA CIVIL IMMIGRATION DETENTION STANDARDS (2012), *available at* http:// www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf.

[FN143]. *Id.* § II(d).

[FN144]. *Id.* §§ V(a)(6), D, X(a)(4).

[FN145]. See 8 C.F.R. §§ 1003.18(h)(2)(i), 212.5, 208.30, 235.3 (2013), for some examples of potential regulatory language.

[FN146]. *Jails and Jumpsuits*, *supra* note 128, at vi, 13.

[FN147]. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. §§ 3715-17, 3720 (2013).

[FN148]. Council on Foreign Relations, *Independent Task Force Report No. 63 U.S. Immigration Policy* 106-09 (2009), *available at* http:// www.C.F.R.org/immigration/us-immigration-policy/p20030; U.S. Dep't of Homeland Sec., *Budget-in-Brief, Fiscal Year 2013* (2013), *available at* http:// www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf.

[FN149]. Described in Section III.B. of this article.

[FN150]. For the history of U.S. interdiction policy, *see* Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT'L J. OF REFUGEE L. 677, 679-93 (2006); 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); *see also* Tara Magner, *A Less than 'Pacific' Solution for Asylum Seekers in Australia*, 16 INT'L J. OF REFUGEE L. 53, 71-74 (2004).

[FN151]. 509 U.S. 155 (1993).

[FN152]. *See, e.g.*, The Haitian Center for Human Rights v. United States, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. at 550 (1997). The UNHCR stated that, "UNHCR considers the Court's decision a setback to modern international refugee law which has been developing for more than forty years, since the end of World War II. It renders the work of the Office of the High Commissioner in its global refugee protection role more difficult and sets a very unfortunate example." Legomsky, *supra* note 150, at 692 (quoting UN High Commissioner for Refugees Respond to US Supreme Court Decision in Sale v. Haitian Centers Council 32 ILM 1215 (1993)).

[FN153]. Legomsky, *supra* note 150, at 682.

[FN154]. *Id.* at 683-84.

[FN155]. *Id.* at 682-83.

[FN156]. *Id.* at 682-83.

[FN157]. *Id.*

[FN158]. Emily Alpert, *Haitians Found at Sea Not Screened for Asylum, U.N. Agency Says*, L.A. TIMES (Jan. 25, 2013), http:// www.latimes.com/news/world/worldnow/la-fg-wn-haitians-asylum-20130125,0,6800934.story.

[FN159]. *Id.*

[FN160]. *Id.*

[FN161]. This immigration form, the I-867A&B, includes several questions designed to identify an individual who may have a fear or concern of return so they can be referred for credible fear interviews. *See* U.S.C.IRF, *Study on Asylum Seekers in Expedited Removal, supra* note 107, at 13.

[FN162]. *See* U.S. Dep't of State, *Data Sheet: U.S Commemorates Pledges* (Oct. 15, 2012), *available at* http:// www.state.gov/j/prm/releases/factsheets/2012/199145.html.

[FN163]. The Refugee Protection Act of 2013, S.645, 113th Cong. § 24 (2013).

[FN164]. *Id.*

[FN165]. *See* Admin. Conf. of the U.S., *Administrative Conference Recommendation 2012-3, Immigration Removal Adjudication* 1 (2012), *available at* http://www.acus.gov/recommendation/immigration-removal-adjudication [hereinafter ACUS report]; Immigration Court Backlog Tool, (through September 2013), Transactional Records Access Clearinghouse, Syracuse Univ., *available at* http://trac.syr.edu/phptools/immigration/court_backlog/.

[FN166]. DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF THE FORMIDABLE MACHINERY (Migration Policy Institute, 2013); Julia Preston, *Huge Amounts Spent on Immigration, Study Finds*, N.Y. TIMES (Jan. 7, 2013), http:// www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html?_r_0.

[FN167]. Immigration Court Backlog Tool, *supra* note 165.

[FN168]. ACUS report, *supra* note 165, at 1.

[FN169]. American Bar Association Commission on Immigration, *Reforming the Immigration System*, 2-16 (2010), *available at* http:// www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

[FN170]. Schrag et. al., *Georgetown-Temple Report, supra* note 8, at 669-72; *HRF Report Asylum Filing Deadline, supra* note 10.

[FN171]. Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication Interim Draft*, 40-41, *available at* http://acus.granicus.com/MetaViewer.php?view_id_2&clip_id_27&meta_id_390.

[FN172]. *Id.*

[FN173]. International Religious Freedom Act of 1998, § 605, 22 U.S.C. § 6474 (2012).

[FN174]. U.S.C.IRF, *Asylum Seekers in Expedited Removal, supra* note 107.

[FN175]. Immigration Court Backlog Tool, *supra* note 165.

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[FN177]. *How to Repair the U.S. Asylum and Resettlement Systems, supra* note 106, at 16-18; *Improving Efficiency and Ensuring Justice in the Immigration Court System*: *Hearing Before the S. Comm. On the Judiciary*, 112th Cong. 3 (2011) (statement of Jeanne Smoot, Director of Public Policy, Tahirih Justice Center); *see also* Sharon Cohen, *'Massive Crisis' Snarls Immigration Courts*, NBCNEWS.COM (Apr. 10, 2011, 4:01 PM), *available at* http:// www.nbcnews.com/id/42521399/ns/us_news-crime_and_courts/t/massive-crisis-snarls-immigration-courts/.

[FN178]. JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 17 (NYU Press 2009).

[FN179]. *Id.*; *See also* UNHCR Washington Office, *Reaffirming Protection, supra* note 30, at 30.

[FN180]. RAMJI-NOGALES, *supra* note 178, at 17.

[FN181]. *Id.*

[FN182]. UNHCR Washington Office, *Reaffirming Protection*, *supra* note 30, at 31.

[FN183]. *See* The Refugee Protection Act of 2013, S. 645, 113th Cong. § 8 (2013); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3404 (2013).

[FN184]. *FY 2012 A Record Year for Asylum Cases*, *supra* note 175.

[FN185]. REFUGEE ROULETTE, *supra* note 178, at 12.

[FN186]. *FY 2012 A Record Year for Asylum Cases*, *supra* note 175.

[FN187]. American Bar Association Commission on Immigration, *Reforming the Immigration Detention System*, *supra* note 169, at 1-63.

[FN188]. *Id.* at 1-62.

[FN189]. Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices* (Dec. 2004), *available at* http:// www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf.

[FN190]. American Bar Association Commission on Immigration, *Reforming the Immigration Detention System*, *supra* note 169, at 5-7.

[FN191]. Ramji-Nogales, et al., *Refugee Roulette*, *supra* note 14, at 339-341, 384.

[FN192]. National Immigrant Justice Center, *Isolated in Detention: Limited Access to Counsel in Immigration Detention Facilities Jeopardizes Day in Court* 7 (2010), *available at* www.immigrantjustice.org/isolatedindetention.

[FN193]. U.S.C.IRF, *Asylum Seekers in Expedited Removal Volume II*, 240, *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_ RptVolII.pdf.

[FN194]. Vera Institute of Justice, *Legal Orientation Program: Evaluation, Performance and Outcome Measurement Report, Phase III: The role of LOP in Affecting Case Processing Times* (June 2009).

[FN195]. *Id.*; Vera Institute of Justice, *Legal Orientation Report-- Evaluation and Performance and Outcome Measurement Report, Phase II* (May 2008), *available at* http://www.vera.org/sites/default/files/resources/downloads/LOP_ evaluation_updated_5-20-08.pdf.

[FN196]. *How to Repair the U.S. Immigration Detention System*, *supra* note 106, at 12.

[FN197]. Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings* (pt. 1), 33 CARDOZO L. REV. 357 (2011); Don Kerwin, *Revisiting the Need for Appointed Counsel*, 13 (MPF, April 2005), *available at* www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

[FN198]. Study Group on Immigrant Representation, *Assessing Justice II: Model for Providing Counsel to New York Immigrants in Removal Proceedings* (December 2012), *available at* http://

www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf. See also Kirk Semple, *Plan Would Add Lawyers to Fight Deportation Cases*, N.Y. TIMES, November 27, 2012, *available at* http://www.nytimes.com/2012/11/28/nyregion/plan-would-add-lawyers-to-contest-deportation-cases.html.

[FN199]. Franco-Gonzales v. Holder, 767 F.Supp. 2d 1034 (C.D. Cal. 2010).

[FN200]. The bipartisan comprehensive immigration bill passed by the Senate in June 2013 included a subtitle to address several of these issues. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. §§ 3501-07 (2013).

[FN201]. ACUS Report, *supra* note 165.

[FN202]. Matt A. Mayer, *Administrative Reforms Insufficient to Address Flawed White House Immigration and Border Security Policies*, THE HERITAGE FOUNDATION (Jan. 10, 2012), http:// www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies.

[FN203]. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. §§ 3501-3507 (2013).

[FN204]. *Id.* § 3501.

[FN205]. *Id.* § 3503.

[FN206]. *Id.* § 3502.

[FN207]. *Id.*

[FN208]. *Id.* § 3402.

[FN209]. INA § 208(d)(2); 8 C.F.R. §§ 208.7(a), 274a.12(c)(8), 1208.7(a) (2013). Additionally, The authority under INA § 208(d)(2) to promulgate a regulation allowing for employment authorization for asylum applicants rests with the Secretary under INA § 103(a), 8 U.S.C. § 1103(a) (2012).

[FN210]. UNCHR, *Stateless People*, http:// www.unhcr.org/pages/49c3646c155.html.

[FN211]. *Renewing America's Commitment to the* Refugee *Convention: The* Refugee *Protection Act of 2010: Hearing Before the Sen. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Dan Glickman, President, Refugees International), *available at* http:// www.judiciary.senate.gov/hearings/hearing.cfm?id_ e655f9e2809e5476862f735da15dabae.

[FN212]. UNHCR and Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the United States* 3 (2012), *available at* http:// www.unhcr.org/refworld/docid/50c620f62.html; Gabriela Hecht, *RI on Capitol Hill: Speaking Out in Support of the Stateless*, REFUGEES INTERNATIONAL (June 16, 2010) (summarizing comments of Deputy Assistant Secretary Esther Olavarria at a congressional briefing), http://refugeesinternational.org/blog/ri-capitol-hill-speaking-out-support-stateless.

[FN213]. The Refugee Protection Act of 2013, S. 645, 113th Cong. § 17 (2013); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3405 (2013).

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