9-1-1982

Comments and Recommendations on Proposed Reforms to United States Immigration Policy

Michael H. Posner

Comments and Recommendations on Proposed Reforms to United States Immigration Policy*

MICHAEL H. POSNER**

The author discusses the legal status of the "refugee" under two decades of American and international law. After reviewing the implications of the United States accession to the 1967 Protocol Relating to the Status of Refugees, the Refugee Act of 1980, and current proposals for reform in the refugee/asylum area, he concludes that the Simpson-Mazzoli bill, with several major modifications, would be the most equitable approach to dealing with the present refugee and asylum problems.

This discussion will consider some of the current legislative proposals concerning refugee and asylum problems. Before dealing with these issues, however, I want to address some of the points raised earlier and describe how far we have come and where we are going.

It is important not to minimize the developments that have occurred within the last two decades. Mr. Kurzban[1] and Professor Scanlan[2] both described in some detail the events preceding the passage of the Refugee Act of 1980.[3] It is also important to emphasize that after the 1957 amendments[4] to the McCarran-Walter Act,[5] the United States took the official position that only people fleeing from a communist or communist-dominated country or from a country in the Middle East were entitled to admission to

---

* This article is an adaptation of remarks delivered by Mr. Posner at the Seventh Annual Baron de Hirsch Meyer Lecture Series, University of Miami, April 16, 1982. With Mr. Posner's cooperation, members of the *University of Miami Law Review* edited his remarks and added citations.

** Executive Director, Lawyers Committee for International Human Rights, New York; B.A., University of Michigan; J.D., University of California, Berkeley (Boalt Hall).

1. *See* Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865 (1982).

2. *See* Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819 (1982).

3. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

4. Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639.

5. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

this country as refugees. The "seventh preference,"[6] added to the immigration laws in 1965, allowed each year an additional 17,000 persons from communist or communist-dominated countries to enter the United States as refugees if they could show that they would be subjected to persecution. Because each refugee admitted under this criterion had to be from a communist country, the definition of a refugee was ideologically and geographically biased. This was the law of the land.

The United States began to drift away from this standard in 1968, when it acceded to the United Nations Protocol Relating to the Status of Refugees.[7] The protocol incorporated another treaty, the Convention Relating to the Status of Refugees,[8] into United States law. Together, these treaties establish a global definition of a refugee: A refugee is anyone from any country who has a well-founded fear of persecution based on race, religion, nationality, membership in a social class, or political opinion.[9] Under this definition, whether the person claiming refugee status is from the Soviet Union or El Salvador does not matter, so long as he meets this independent and objective legal test.

It took years for the United States to realize the effect of this new definition. Between 1968 and 1980, the immigration laws were in disarray. For example, in the early 1970's a Lithuanian seaman named Simar Kudirka jumped off a Soviet trawler and was plucked from the sea by either the United States Coast Guard or Navy.[10] Not knowing what to do with him, the rescuers informed Washington that Mr. Kudirka was saying something about asylum. They must have contacted someone at the Immigration and Naturalization Service (INS) which, at that time, had neither procedures nor forms for asylum requests. Nobody knew how to deal with Mr. Kudirka's asylum request, so the United States sent him back to the Soviet Union. The Soviets, in turn, sent Mr. Kudirka to Siberia.

Members of Congress were disturbed about this incident and

---

6. 8 U.S.C. § 1153(a)(7) (1976).

7. January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

8. July 28, 1951, 189 U.N.T.S. 150.

9. *Id.* art. I, § A(2).

10. For a discussion of the events surrounding Mr. Kudirka's attempted defection, see *Attempted Defection by Lithuanian Seaman, Simar Kudirka: Hearings Before the Subcomm. on State Dep't Organization and Foreign Operations of the Comm. on Foreign Affairs*, 91st Cong., 2d Sess. (1970); H.R. REP. No. 4, 92d Cong., 1st Sess. (1971); *see also* Washburn, *Revelations of the Lithuanian Defector Episode of November 23, 1970*, 6 INT'L LAW. 1 (1972).

demanded that the United States create an asylum procedure. So the Immigration and Naturalization Service created a form, number I-589.[11] But between 1971, when Kudirka was sent back to the Soviet Union, and 1980, when the Refugee Act of 1980 was passed, no one quite knew what to do with the form. The INS promulgated some regulations,[12] but nothing in the immigration laws addressed asylum. In fact, the Refugee Act of 1980 incorporated into United States law a legal status for political asylum for the first time[13]—an important step in the right direction.

We are now entering a period when we are beginning to consider the implications of these changes in our immigration laws. The number of refugees entering the United States each year—people whom we admit through orderly immigration processes—still reflects old prejudices. Indeed, the numbers themselves indicate a prejudicial policy: In the three years since the Refugee Act of 1980 was passed, the United States has authorized the admission of approximately 400,000 refugees from Indo-China and more than 100,000 refugees from Eastern Europe, but only 7,000 refugees from all of Latin America.[14] Further, the immigration procedures are such that if a person fleeing from the Soviet Union goes to Austria or Rome, he will find INS processing centers and voluntary agencies well-equipped to deal with resettlement procedures—ready to resettle him in the United States, find him a sponsor, secure him a job, and even pay for his airline ticket. On the other hand, if a Haitian fleeing persecution in his home country wants to come legally to the United States—even if he somehow manages to slip out of Haiti and get to a United States embassy in the Dominican Republic, Mexico, or the Bahamas—neither the personnel nor the resources are available in those countries to help him resettle in the United States. Since the Refugee Act of 1980 was passed, the United States has not admitted a single Haitian as a "refugee." To say that the Haitians are entering the United States illegally is a trifle disingenuous; there is no way for them to come legally as refugees.

A related problem is that even when government officials try to administer the law properly and to separate those who meet the strict refugee definition from those who do not, politics intervene. For example, last year immigration officials stationed in Hong

11. 45 Fed. Reg. 37,394 (1980) (codified at 8 C.F.R. § 208.2 (1982)).
12. 8 C.F.R. §§ 208.1-.10 (1982).
13. 8 U.S.C. § 1158 (Supp. V 1981).
14. For the purposes of this article, "Latin America" excludes Cuba.

Kong started to review Indo-Chinese applications for refugee status. The applicants' reasons for desiring to enter the United States were, "I want to go to Orange County because my brother and sister are there and they're making a lot of money," or "I want to open a restaurant," or "I want to go to America—I can make more money." The officials started rejecting these applicants, and the State Department objected strenuously. Secretary of State Alexander Haig, quoted in the *New York Times*, said that in his opinion, anybody coming from Indo-China was a refugee.[15] Indeed, this became the United States policy.

On another front, the number of immigrants admitted to the United States from Africa still reflects the old communist/noncommunist bias. For example, rumors have surfaced that there are at least some people in the Africa Bureau of the State Department who would like eighty-six percent of the positions allocated for refugee admissions from Africa to be reserved for Ethiopians. Ethiopia is a Marxist state, opposed to the United States foreign policy. We must consider that fact, but we must consider it fairly, in the context of whether a refugee has a well-founded fear of persecution.

Old customs and perceptions die hard. It may take a decade, or even a generation, but I hope that we are moving toward a more balanced, even-handed immigration policy that focuses primarily on humanitarian concerns, rather than on the kind of political considerations that the foregoing examples illustrate. We also need to be fair and honest in determining refugee status. The current definition of a refugee is strict and specific, and must be applied strictly; the definition does not allow us to "backdoor" every immigrant into this country who wants to come for this reason or that—neither should we apply the definition politically, to admit to the United States all kinds of people whom we want to help. There may be other provisions in our laws to address those problems; if not, we should consider enacting them. But we should be true to the spirit of the refugee definition, which is an international definition based on recognized and internationally accepted United Nations treaties.[16] It has been used for thirty years and has proven to be a fair and sensible way to address the problem.

Against this background, we should examine the current proposals for reform in the refugee and asylum area with four consid-

15. N.Y. Times, May 31, 1981, at A1, col. 4.

16. *See supra* notes 7-9 and accompanying text.

erations in mind. First, we must consider the problem of the political nature of the immigration process. Despite the objective legal standard of a "well-founded fear of persecution," one of the most troubling problems with the current immigration system is the State Department's involvement in the decisionmaking process. Currently, if an immigrant comes to this country and applies for political asylum, his application is first sent to an INS district office. The INS officials examine the application without seriously reviewing its merits and eventually send it to the State Department for an "advisory opinion." As a practical matter, Immigration Service personnel in the district offices tell lawyers and others that they do not make asylum decisions, because they do not know what is going on in El Salvador, Zaire, the Philippines, or wherever. That decision is for the State Department, they say, and they wait for the Department's advisory opinion to decide what will happen. This attitude allows political and foreign policy objectives to be injected into the decisionmaking process.

Both the Reagan administration's bill[17] and the Simpson-Mazzoli bill[18] address the problem of State Department involvement by omitting from the immigration laws any reference to the State Department's role in the admission process. But as a practical matter, we must implement a system in which an immigration judge, who has before him objective and balanced information from a wide variety of sources, makes decisions on individual asylum applications. As long as only the State Department has the opportunity to evaluate claims, on either an individual or a group basis, we will have the same kind of skewed decisionmaking that has caused problems in the past.

The Haitian litigation in Miami and elsewhere is a good example of a response to the political prejudgment of cases. It is certainly in the United States self-interest to support its allies, including Haiti. The State Department believes, however, that we should not upset foreign policy judgments by embarrassing our allies, that is, by admitting that people are fleeing from persecution in their countries. In another example, it would be extremely difficult for the United States to admit 30,000 Salvadoran refugees, and thus acknowledge political persecution by the government of

17. Proposed Omnibus Immigration Control Act of 1982 (Reagan administration bill), S. 1765, 97th Cong., 1st Sess., 127 CONG. REC. S11,992 (daily ed. Oct. 22, 1981).

18. Proposed Immigration Reform and Control Act of 1982 (Simpson-Mazzoli bill), S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S10,619 (daily ed. Aug. 17, 1982), H.R. 7357, 97th Cong., 2d Sess., 128 CONG. REC. H10,320 (daily ed. Dec. 18, 1982).

El Salvador, and yet ask Congress to certify more military assistance to that country based on the significant human rights improvements of the refugees' government. Institutionally, it just cannot be done. The only way to avoid this dilemma is to limit the State Department's role in the process as much as possible. This would be a major step in correcting the problem of political influence on the current asylum process.

The second concern is the general malaise that exists within the Immigration and Naturalization Service—a more difficult area to address. With all due respect to the Reagan administration, the handling of asylum cases within the INS is still severely flawed. The INS is underfunded, and its personnel are overworked. At the same time that the INS tries to handle literally hundreds of thousands of cases, it operates as an enforcement agency that attempts to keep everybody out, not allowing even its most conscientious people to carefully examine particular cases to distinguish valid claims. There is one type of enforcement—at the border—where thousands of economic migrants enter the United States daily. Here, INS officials stop these migrants, throw them back on a bus or airplane, only to have them attempt to cross the border again the next day. There has never been an institutional effort to separate the enforcement functions of the INS from the decisionmaking process and the administrative review of asylum claims. One of the effects of this is that cases are not adequately examined, and people eventually decide to work around the system. These individuals join the millions of people who already live in the country's underground society of illegal aliens. The long-term implications of this process are not very encouraging.

A third and related problem in formulating future policy is the popular notion that the asylum process is out of control, and that with our country's economic problems we cannot afford to keep allowing untold numbers of people to enter the country. The Haitian situation in particular has become a symbol of the necessity of closing the flood gates and regaining control of our borders. Nonetheless, the biggest manifestation of this problem is the flow of illegal aliens across the Mexican border, a virtually impossible problem to resolve. It is much easier, therefore, to make another group the symbol of our attempts to control the problem. Not only the Reagan administration, but the Carter administration before it, and the Ford and Nixon administrations before them, have used the Haitians as that kind of symbol. The Haitians come from one small country on boats that are easily discoverable. Haitians too

are easily identifiable: They look different and speak a different language. Clearly, the United States has effectively stopped the Haitian migration. In another sense, however, the Haitians are captives of a much broader set of problems.

There is a fourth consideration. We are above all else, regardless of political or economic concerns, a nation of laws, a Constitution, and legal process. There is still much latitude, even under the current law, for us to enforce our asylum laws. Whatever our concerns about efficiency and about somehow making the system look operable, we still must recognize that there is something called due process of law and equal protection under our Constitution. We must devise procedures, therefore, that recognize these constitutional concerns and take them into account.

Within this general background, I want to look specifically at the treatment of the Haitians over the past six months. It is an apt illustration of these four considerations in action. When the Reagan administration took office, it discovered a difficult problem: the Haitians. The Reagan administration wanted to react differently and more decisively than the Carter people had, so they implemented a three-point plan of interdiction, detention, and the streamlining of administrative procedures. The interdiction program is illegal, unwise, and totally inconsistent with our nation's basic traditions. It flies in the face of our country's strenuous objections to the "interception" practices of the Malaysians and others in Southeast Asia who did exactly the same thing with the Vietnamese. To make the interception of Haitians sound different, we call it "interdiction."

The program also contravenes our country's Helsinki commitments. At Helsinki, Belgrade, and Madrid, the United States took the lead in criticizing the governments of the Soviet Union and other Eastern European countries for their exit-visa requirements. Furthermore, the United States has vigorously advocated at Madrid, Belgrade, and elsewhere that there is a fundamental right to travel and to leave one's country. In 1982, not only are we allowing and endorsing a Haitian government proposal that employs exit-visa restrictions very similar to those in the Soviet Union, but we are also enforcing these restrictions for them.

Our international obligations under the United Nations Convention Relating to the Status of Refugees prohibit the "refoulement" of refugees,[19] that is, the forceable return of a refugee to

19. Convention Relating to the Status of Refugees, *supra* note 8, art. 33.

persecution in his homeland. Thus, although the Haitians are not in Miami, but rather are being stopped in their boats and taken into Coast Guard custody, the United States has an obligation under international law not to return them forcibly to persecution. Independent of whether we grant the Haitians asylum, we should not be returning them to persecution. There is absolutely no way that, in the middle of the night, on boats floating in the Caribbean, this type of determination is ever going to be made intelligently.

Our current detention policy is discriminatory both on its face and in its application. Since May 1982, every Haitian that has entered the United States has been detained. People of other nationalities, on the other hand, have been detained selectively. In the long term, this policy is not going to deter people from coming to the United States. It may, however, have a short-term effect, but we do not want to become a nation that sets up permanent concentration camps for people fleeing persecution in their homeland. When the first boatload of Poles is stopped off the shores of New York, there will be no hue and cry to send them to the Krome Avenue Detention Center.

Consider the proposals to streamline existing administrative procedures: Mr. Giuliani contends somewhat optimistically, that the Reagan administration bill and the Simpson-Mazzoli bill are really the same thing. They are not the same thing. In contrast to the administration's bill, the Simpson-Mazzoli bill allows for formal judicial review of asylum claims by a newly created group of administrative law judges.[20] It also allows for an appeal from an adverse decision to a newly created United States Immigration Board.[21] These are two steps in the right direction. Yet neither bill provides any relief from summary exclusion. In other words, if a Haitian lands off Biscayne Bay and does not immediately tell an immigration officer, "I want political asylum. Give me an I-589 form," he is going to be turned around and sent back to Haiti. It is unfair to expect a Haitian to know immediately what asylum is when most people already living in this country do not know what it is.

The *Handbook on Procedures and Criteria for Determining Refugee Status,*[22] prepared by the United Nations High Commissioner for Refugees, addresses this issue. The United Nations has

20. Proposed Immigration Reform and Control Act of 1982 §§ 121-123.

21. *Id.*

22. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979).

been deciding refugee issues for a long time, and probably has a better sense of what people are most likely to do or not do when they reach a foreign border. The handbook describes the difficulties experienced by aliens in pursuing asylum at the border:

> [A]n applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of the applicant's particular difficulties and needs.[23]

The summary exclusion procedures envisioned by both the Reagan administration and Simpson-Mazzoli bills fail to address this problem. This deficiency is perhaps the most serious problem for both legislative proposals.

Another critical point is that both the administration and the Simpson-Mazzoli bills seek to curb judicial review. In large part, this effort is in response to the Haitian litigation in Miami. Both proposals would prevent the federal courts from hearing refugee cases, except when a habeas corpus petition is brought challenging a statutory, rather than a constitutional violation.

This is where asylum law and practice stands today. For the future, I would make the following recommendations: First, we need to end our detention policy immediately. There is no way that there can be sensible, rational, objective, or fair treatment of people while they are being detained. Detention limits the effectiveness of the right to counsel—it is expensive, impractical, and inhumane. Furthermore, our detention policy is certainly being applied in a discriminatory manner. If we are going to be realistic and decide these refugee issues in good faith, the detention policy stands in the way. Second, we must stop the interdiction program. As I noted earlier, it is both illegal and wrong. Finally, we must adopt a statutory scheme for adjudicating asylum cases.

Of the current proposals, I favor the Simpson-Mazzoli bill, with several important modifications. I think we need to develop a better approach to mass asylum situations than the proposed summary exclusion provisions. As people arrive on the shores or at the borders of the United States, they certainly should be told that

---

23. *Id.* ¶ 190.

they have a right to counsel and a right to apply for asylum in this country. This information ought to be in writing. We should also train our border patrol so that they are looking out for people, rather than only trying to keep them out. With regard to judicial review, we must maintain habeas corpus proceedings not only in constitutional cases, but also in statutory cases. Full judicial review should always be available when there is a pattern or practice of procedural violations. In these cases, class action suits should be allowed, much in the same manner as the Haitian litigation in Miami, or the Salvadoran litigation in the Southwest. Both the administration's bill and the Simpson-Mazzoli bill make independent, effective review of these types of violations impossible.

We must make a serious effort to train a new body of administrative law judges. They will need to be instructed on international law, human rights, and other aspects of the asylum process. Under the Simpson-Mazzoli bill, the administrative judges and the United States Immigration Board are both within the Justice Department, but outside the Immigration and Naturalization Service. This is a step in the right direction.

Finally, the government should create a Refugee and Asylum Advisory Board, consisting of both governmental and nongovernmental people. The nongovernmental people could be chosen from the voluntary agencies, human rights organizations, and from the office of the United Nations High Commissioner for Refugees. This advisory board would oversee immigration, asylum, and refugee practices; make general recommendations; and compile information documenting human rights conditions in other countries so that the administrative judges could have a pool of information from which they could analyze asylum claims.

All of our discussion today depends on a great leap of faith. For new plans to succeed we must believe that in the era we are now entering, decisions will be made objectively and fairly. The Haitian and Salvadoran litigation has sensitized the country to the inadequacies of present immigration law. What remains to be seen is whether Congress can find a solution that is equitable to both would-be refugees and the American public.