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POLITICAL ASYLUM IN THE FEDERAL REPUBLIC OF GERMANY AND THE REPUBLIC OF FRANCE: LESSONS FOR THE UNITED STATES

T. Alexander Aleinikoff*

For three decades following the end of World War II, American refugee "policy" was a collage of ad hoc programs responding to the compelling needs of displaced, homeless, or politically oppressed persons. The Refugee Act of 1980 was enacted to create order out of the legislative chaos. The Act established a systematic procedure for determining the number of refugees to be admitted each year, and brought United States law into conformity with the Geneva Convention and Protocol relating to the Status of Refugees. Drafted from the

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perspective of the United States as a country of "second asylum," the Act contemplated the orderly selection of persons overseas.\(^7\)

Almost as an afterthought, the legislators added a section to the Act that, for the first time, established a statutory basis for the granting of asylum to aliens in the United States.\(^8\) Under the new provision, section 208 of the Immigration and Nationality Act (INA), the Attorney General may grant asylum to an alien "physically present in the United States or at a land border or port of entry" if the Attorney General determines that the alien meets the statute's definition of "refugee" — that is, a person who has a well-founded fear that, if returned home, he or she will be persecuted on account of race, religion, nationality, membership in a social group, or political opinion.\(^9\)

It was not anticipated that a great number of aliens would apply for asylum under the new section. Only a few thousand aliens a year had sought asylum in previous years under procedures established by Immigration and Naturalization Service (INS) regulations.\(^11\) In the few years since passage of the Refugee Act, however, more than 120,000 asylum applications have been filed; and the vast majority are still pending before administrative authorities.\(^12\) Asylum has thus ap-

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8. Prior to the enactment of the Refugee Act, asylum was governed by regulations promulgated pursuant to the Attorney General's authority under INA § 103, 8 U.S.C. § 1103 (1982), to administer laws relating to immigration. H.R. REP. No. 608, 96th Cong., 1st Sess. 17 (1979); see 8 C.F.R. §§ 108, 236.3 (1980). The creation of a statutory asylum process received scant attention during consideration of the Refugee Act. The primary focus of both the House and Senate reports on the Act was provisions of the bill dealing with refugee admissions, resettlement, and assistance. See H.R. REP. No. 608, 96th Cong., 1st Sess. 1, 5 (1979); S. REP. No. 256, 96th Cong., 1st Sess. 1 (1979); see also IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 6 (June 1982) [hereinafter cited as INS ADJUDICATIONS].
11. In 1978, 3,702 aliens filed asylum applications with the Immigration and Naturalization Service (INS). In 1979, 5,801 applications were filed. See infra note 16 and accompanying text. The Refugee Act itself evidences that Congress did not expect a great number of asylees each year; it provides that no more than 5,000 aliens granted asylum may be granted permanent resident status each year. INA § 209(b), 8 U.S.C. § 1159(b) (1982). See Scanlon, Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980, 56 NOTRE DAME LAW. 618, 627 (1981).
12. Unfortunately, there are no reliable data regarding the precise number of claims filed, adjudicated and pending. The numbers cited in this Article are based on reports from the INS and the Executive Office for Immigration Review (EOIR), but even these sources concede the softness and incompleteness of their data. See infra notes 16 & 28.
appropriately been described as the "wild card in the immigration deck."13

This extraordinary increase in the number of pending asylum claims is cause for concern. First, such an increase may seriously tax procedures established for a far smaller flow. The overburdening of the process may result in substantial delays and proceedings that threaten the accuracy of the determinations.

Second, the dramatic increase may indicate that the process is being used (or abused) by aliens who file frivolous claims to forestall return to their home countries. The high rate of denials, asserts the government, substantiates the view that many applicants are "economic migrants," not refugees.14 Adjudicating frivolous claims takes time and money and causes delays which actually may spark the filing of additional claims.

Advocates of asylum applicants contest the government's view. Their criticisms represent a third concern about the present system: the accuracy and fairness of the decision-making process. The critics maintain that the government, by labeling certain classes of aliens "economic migrants," has essentially prejudged the validity of their applications, and that the prejudgment is a product of political considerations that look more to the foreign policy objectives of the United States than to the merits of the particular application. They further object to proposals to reduce procedural protections for asylum applicants.

The recent flood of asylum claims, and the concerns it engenders, are not peculiar to the United States. Western European nations have witnessed similar increases in asylum applications over the past decade, and institutions charged with adjudicating claims have become severely overburdened. This Article will describe the experience of the Federal Republic of Germany and the Republic of France in coping with the explosion of asylum claims. A comparative analysis may provide perspective on the American situation and perhaps suggest — or rule out — proposals for change currently under consideration in the United States.15 To appreciate the saliency of the German and French

13. Martin, supra note 1, at 112.
15. The proposal currently receiving the most attention is The Immigration Reform and Control Act of 1983, S. 529, 98th Cong., 1st Sess., 129 Cong. Rec. S6970 (daily ed. May 18, 1983) [hereinafter cited as Simpson-Mazzoli]. The legislation would require that asylum claims be heard by specially trained immigration judges. § 124(a)(2). The immigration judge's decision would be appealable to a newly created United States Immigration Board, § 124(a)(3)(D), which could overturn a decision only if it were not supported by substantial evidence. § 107(b)(4).

Judicial review of the Immigration Board's decisions would be limited to questions of jurisdic-
experiences, it is first necessary to review in greater detail the asylum process in this country.

I. ASYLUM IN THE UNITED STATES

A. The Numbers

The number of asylum claims filed in INS district offices, as reported by the INS, is indicated in table 1.\textsuperscript{16}

\textsuperscript{16} Although these are the official numbers provided by the INS, there is little reason to believe that they reflect the precise number of claims filed. First, the INS only counts those claims filed with INS district offices. This means that claims initially filed before immigration judges in exclusion or deportation hearings are not included. Although the EOIR, since its creation in early 1983, has recorded the number of claims filed before immigration judges, it does not break down the data into those claims filed previously with the INS and those claims first filed with an immigration judge (and thus never seen by the INS). Accordingly, one cannot simply add the number of cases filed with the INS and filed before immigration judges to obtain an accurate count.

Second, over the past several years the INS has used different means to count claims, at times counting "cases" and at other times counting "persons." Because a "case" may include several persons or family members, figures for years when "cases" were counted cannot accurately be compared with figures for years when "persons" were counted.

Third, and most troubling, is the high probability that the INS's "count" is carried out in
TABLE 1
ASYLUM CLAIMS FILED IN INS DISTRICT OFFICES, 1978-1984

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>3,702</td>
</tr>
<tr>
<td>1979</td>
<td>5,801</td>
</tr>
<tr>
<td>1980</td>
<td>15,955</td>
</tr>
<tr>
<td>1981</td>
<td>61,568</td>
</tr>
<tr>
<td>1982</td>
<td>33,246</td>
</tr>
<tr>
<td>1983</td>
<td>26,091</td>
</tr>
</tbody>
</table>

Each year, case filings have substantially exceeded case closings; and there are presently pending before the INS probably about 160,000 cases.17 To some extent this is a misleading figure, because it includes approximately 120,000 cases that the government does not intend to adjudicate — primarily undocumented Cubans and Haitians who are likely to be given lawful status under legislation presently pending before Congress.18 Although this fact undercuts the dire picture usually painted

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a haphazard fashion. See INS ADJUDICATIONS, supra note 8, at 25 n.*. No centralized record of filings exists. Given the low priority that asylum claims have been assigned during the last decade, many remain ignored or buried in district offices. That the INS may overlook large numbers of claims is graphically illustrated by the recent “recount” of Cuban claims. On October 1, 1982, the INS reported the number of pending asylum cases filed by Cubans as 51,026. Between October and May 1983, 636 new claims were filed, 5,181 claims were reported “transferred in,” 1,495 were “transferred out,” see infra for a discussion of these terms, and 184 were adjudicated or closed. These data would lead one to expect that in May 1983 the number of pending Cuban claims would be around 60,000. Yet, the INS reported a total of 116,442 claims pending. This huge leap resulted from a special recount requested by the INS central office. The INS has not, however, explained how more than 50,000 claims could have originally gone uncounted; the error is simply indicated in INS records as an “adjustment.”

Fourth, interpretation of the data categories seems to vary from district to district. For example, INS asylum records include categories labeled as “transferred in” and “transferred out.” In some district offices these terms are understood as applying to cases transferred from one INS office to another. In other offices, a case is deemed “transferred out” when an applicant requests his file back (either to withdraw the claim or add information).

These considerations force one to view skeptically any figures supplied by the government regarding asylum, and, derivatively, the United States data reported in this Article. The numbers should be seen as interesting primarily for the trends they display.

17. The astute reader may notice that the number of claims filed for the last six years as reported in Table One (totaling 159,782) is nearly equal to the present number pending, even though thousands of claims have been adjudicated. This “discrepancy” is due to the 50,000 Cuban claims discovered in the 1983 recount, see supra note 16, and the fact that thousands of claims were pending at the end of fiscal year 1977.

18. Under the Simpson-Mazzoli legislation, supra note 15, Cubans who entered during the Mariel boatlift and Haitians who had filed asylum claims or were involved in INS proceedings as of December 31, 1980 would be granted the status of “lawfully admitted for temporary residence.” INS records indicate that at the end of fiscal year 1983, 116,422 Cuban and 5,494 Haitian claimants would be eligible for this status.
by the executive and legislative branches of government, a backlog of over 40,000 cases before the INS cannot be dismissed as insignificant. Moreover, a substantial number of new claims arrive each month, and it is likely that thousands of additional claims could surface if INS enforcement activities inside the United States were stepped up.

B. The Procedures

The large increase in asylum claims would not necessarily be cause for alarm if adequate procedures existed to adjudicate them. Unfortunately, this is not the case.

Formally, asylum claims are filed either with an INS district office or, if the alien is subject to an exclusion or deportation hearing, with an immigration judge. In the district office, the alien is usually called in for an interview; if the claim is made to an immigration judge, the alien is entitled to a hearing. The alien's application is sent by the district office or the immigration judge to the State Department's Bureau of Human Rights and Humanitarian Affairs for an "advisory opinion" on the conditions in the alien's homeland. If the district office denies an application for asylum, there is no administrative review; the alien may, however, reassert the claim before an immigration judge in a subsequent exclusion or deportation hearing. A denial by an immigration judge may be appealed to the Board of Immigration Appeals (BIA) and to a federal court.

1. Delay—This structure raises obvious opportunities for delay, and administrative practices virtually ensure it. Claims filed with district

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19. See, e.g., Administration's Proposals on Immigration and Refugee Policy, Joint Hearing before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 6, 12 (1981) [hereinafter cited as Joint Hearings] (testimony of Attorney General William French Smith) ("[O]ur policy and procedures for dealing with asylum applicants, which have been generous and deliberate, have crumbled under the burden of overwhelming numbers."); S. REP. No. 62, 98th Cong., 1st Sess. 6 (1983) (report on the Simpson-Mazzoli legislation); see also INS Adjudications, supra note 8, at 61.

20. For example, the Congressional Research Service estimates that 60,000 to 500,000 Salvadorans currently live illegally in the United States. C. JONES, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, U.S. POLICY TOWARDS UNDOCUMENTED SALVADORANS (Mini Brief Number MB82223 July 20, 1982). Attempting to deport these individuals would cause many to file for asylum.

22. 8 C.F.R. § 208.7 (1983).
23. 8 C.F.R. § 208.9, 208.10 (1983).
24. 8 C.F.R. §§ 236.7, 242.21 (1983). Adverse decisions of the Board of Immigration Appeals (BIA) in deportation cases may be appealed directly to a United States Court of Appeals. If the asylum claim is made in an exclusion hearing, the BIA's decision may be reviewed only through a habeas corpus proceeding in a United States District Court. INA § 106, 8 U.S.C. § 1105(a) (1982).
offices are not handled in a uniform or centralized manner. Some offices have thousands of claims while others have only a few.25 Within the district offices, asylum claims are viewed as difficult, unrewarding cases and are often assigned to junior INS officers. Until recently, the bureaucracy put no special emphasis on processing asylum claims, and simply left thousands of claims at the bottom of the work pile. Aliens and their lawyers often put no pressure on officials to process claims, particularly where claims are filed primarily to forestall deportation. An INS study estimates that forty to eighty percent of the applicants do not appear for scheduled interviews. It attributes the high no-show rate to the alien's desire, in some cases, not to be located, and the INS's failure to process change of address forms.26

Recent efforts by the INS have made some headway in clearing the backlog out of district offices.27 But this has merely shifted some of the burden up the decision-making chain to the fifty-five immigration judges. New filings before immigration judges are averaging between 300 and 500 a month, and only one case is adjudicated for every two filed. The best estimate of the total number of asylum cases presently before immigration judges is between 8,000 and 10,000.28 When one

25. An INS survey dated October 13, 1983 reports the number of claims pending at the eight district offices with the greatest number of claims:

<table>
<thead>
<tr>
<th>Office</th>
<th>All Claims (Including Cubans/Haitians)</th>
<th>Non-Cuban/ Haitian Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Miami</td>
<td>112,749</td>
<td>13,205</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>11,582</td>
<td>10,895</td>
</tr>
<tr>
<td>San Francisco</td>
<td>9,098</td>
<td>8,240</td>
</tr>
<tr>
<td>Houston</td>
<td>5,263</td>
<td>4,718</td>
</tr>
<tr>
<td>New York</td>
<td>2,747</td>
<td>2,605</td>
</tr>
<tr>
<td>Washington, D.C.</td>
<td>1,298</td>
<td>1,201</td>
</tr>
<tr>
<td>Chicago</td>
<td>4,882</td>
<td>902</td>
</tr>
<tr>
<td>Newark</td>
<td>9,429</td>
<td>738</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>157,048</strong></td>
<td><strong>42,504</strong></td>
</tr>
</tbody>
</table>

The number of claims pending before these offices accounts for 92% of the 171,402 claims reported pending at the end of fiscal year 1983.

26. INS ADJUDICATIONS, supra note 8, at 40.

27. The State Department has also made progress in reducing delays in the issuance of its advisory opinions. Due to a commitment of additional resources, the Office of Asylum Affairs is now “current” with its asylum caseload. Letter from W. Scott Burke, Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs to author (Oct. 24, 1982).

28. Surprisingly, the government has no precise count of the number of cases presently pending before immigration judges. Following the creation of the EOIR, records have been maintained on the number of new filings before immigration judges. These indicate that between 300 and 600 asylum cases per month have been received since February 1983. Because filings outnumber adjudications by about two to one, the backlog is likely to grow each year by about 3,000 cases. The 8,000-10,000 estimate is arrived at by multiplying this annual accumulation by four — the number of years immigration judges have had jurisdiction over asylum cases — and discounting somewhat for a low level of filings in the first and second years.
adds to these cases the more than 100,000 deportation and exclusion cases filed before immigration judges in fiscal year 1983,\textsuperscript{29} it is apparent that many pending asylum claims will not be adjudicated for quite some time. Further delay, of course, will be occasioned by review of the immigration judges' decisions at the BIA and in the courts.

These cumbersome procedures and practices have been further complicated by several important judicial decisions that have imposed substantial limitations\textsuperscript{30} on immigration officials in response to overzealous governmental attempts to expedite the adjudication of claims\textsuperscript{31} or to deter the filing of claims.\textsuperscript{32} Unfortunately, the case records demonstrate disturbing government policies aimed at reducing the backlog of claims without ensuring accurate determinations.\textsuperscript{33} Thus the courts were correct to step in to enjoin conduct that violated the Constitution and federal statutes.\textsuperscript{34} But the result has clearly increased the adjudication time for asylum claims.

The current procedural and practical delays are troubling for several reasons. First, the delay caused by multiple levels of review is costly, and asylum proceedings take time and resources from other immigration and judicial work. We may be willing to bear this cost for humanitarian reasons; but it is clear that the total cost of the current process is not one that Congress consciously opted for when it passed the Refugee Act.

Second, the crush of applications and ensuing delay may lead administrative agencies to adopt programs that sacrifice fair adjudication for an expedited processing of claims. This in fact occurred in 1978 when the INS decided it was time to clear up a backlog of Haitian claims that had accumulated over several years. The result was disastrous. Haitians were run through a process that was grossly un-

\begin{footnotes}
\textsuperscript{31} See Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, \textit{modified}, 676 F.2d 1023 (5th Cir. 1982).
\textsuperscript{33} See, \textit{e.g.}, Haitian Refugee Center v. Smith, 676 F.2d 1023, 1040 (5th Cir. 1982) ("The speed alone with which the entire program was pursued undermined the probability that a record could be assembled to afford a basis for informed decisionmaking."); \textit{id.} at 1030-32.
\textsuperscript{34} For arguments that the courts went too far, see Martin, \textit{Due Process and Membership in the National Community: Political Asylum and Beyond}, 44 U. Pitt. L. Rev. 165, 169-71 (1983); Note, \textit{supra} note 30, at 908, 916, 929.
\end{footnotes}
fair and one that, ironically, left the government no better off than it had been before the program: a federal court appalled at the conduct ordered the government to adjudicate the claims again.  

Finally, the long delays now extant in the process may spark the filing of additional claims. Obvious incentives are created if aliens know that they will not be deported until all avenues of review are exhausted. This potential reward to an alien with a frivolous asylum claim may quickly lead to a vicious circle: the greater the number of frivolous claims, the greater the backlog; the greater the backlog, the greater the delay in adjudications; the greater the delay, the greater the incentive to file frivolous claims.

Whether such a vicious circle now exists is a matter of dispute. The government has asserted that much of the huge increase in filings is due to abuse of the system by "economic migrants" who take advantage of the current delays to further their stay in the United States. Without specific empirical evidence (which, to my knowledge, does not yet exist), it is difficult to evaluate this claim. However, several factors cast doubt upon the government's position.

First is the fact that the vast bulk of pending claims are filed by aliens from countries where persecution is a realistic possibility. Over ninety percent of the claims involve aliens from Cuba, Iran, El Salvador, Nicaragua, Poland, Afghanistan, the People's Republic of China, Ethiopia, Haiti, Iraq, and Lebanon. These, excepting El Salvador, are not the primary countries of origin of undocumented workers in the United States. If the asylum process were being overwhelmed by "economic migrants," one might expect the source countries of aliens filing claims to be quite different. Of course, these data do not disprove that many of those who have filed claims are "economic migrants." It is possible that aliens use the asylum process as a delaying tactic only if their home countries are within the category of those from which

35. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). The majority of these claims, however, will never be adjudicated. The Simpson-Mazzoli legislation, supra note 15, would authorize the Attorney General to adjust the status of Haitian immigrants who, as of December 31, 1980, were in the United States and had applied for asylum to that of "aliens lawfully admitted for temporary residence." S. 529, 98th Cong., 1st Sess. § 301(b); see S. REP. No. 62, 98th Cong., 1st Sess. 51 (1983) (emphasis in original). Expecting that this provision of Simpson-Mazzoli will ultimately be approved, the government has not reinstituted proceedings against the Haitians covered by the court's ruling in Haitian Refugee Center v. Smith.

36. See Immigration and Naturalization Service, Asylum Cases Filed with District Directors Pursuant to Section 208 INA (June-Sept. 1982) (data compiled quarterly by INS).

37. Perhaps half of the undocumented aliens in the United States come from Mexico. The remainder come mostly from other Latin American countries, the Caribbean, and parts of Asia, especially the Philippines. See SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, STAFF REPORT, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 483 (1981). Based on the average number of immigrants expelled from the United States between 1975 and 1977, the top countries of origin of illegal aliens are Mexico, Canada, El Salvador, Greece, The Dominican Republic, Peru, and Jamaica. M. MORRIS & A. MAYIO, CURBING ILLEGAL IMMIGRATION 12 (1982).
claims have been accepted in the past. It is not obvious, however, why aliens bent on holding off their departure would not take advantage of the general delay involved in processing all asylum claims. The United States has no procedure for a quick and final denial of even a patently frivolous application. A claim from Canada is entitled to the same procedures (and delays) as one from Kampuchea.

Rather than pointing to "economic migrants" as the primary source of increased asylum claims, these considerations suggest that the increase is due in part (perhaps even in large part) to aliens who have some reason to fear returning to their home countries. The cost to an alien of applying for asylum is negligible (indeed, the alien benefits in the short term by remaining in this country), and the long term gain is potentially enormous: lawful permanent residence in the United States. If this accurately describes some or many of the new claimants, should we conclude the system is being abused by frivolous claims or used by persons with potentially good claims that demand careful scrutiny?

Other factors also undercut the government's claim that the increase in applicants is primarily a product of abuse of the system. First, a large number of claims in the current backlog were filed by aliens advised to do so by the INS.38 Second, several lawsuits have halted the adjudication of claims.39 This in turn has inflated the number of pending claims and has contributed to the perception that the system is being overwhelmed by frivolous claims. Finally, increased worldwide concern with human rights issues and the passage of the Refugee Act may have made aliens (and their lawyers) more aware of the possibility of being granted asylum. Interestingly, the great leap in filings coincided with the passage of the Refugee Act and the Mariel boatlift. Perhaps the Refugee Act accomplished no more than what it intended: to transform ad hoc refugee policies into general statutory procedures and to remove geographical and ideological limits on the deportation of refugees. Thus aliens who in earlier years might have been granted other forms of discretionary relief or been ineligible for refugee status now avail themselves of the new asylum process of section 208 of the INA.40

In sum, we simply have too little data to be able to say with any

38. Many of these claims were filed by Cubans arriving during the Mariel boatlift, Iranians stranded by the fall of the Shah, and anti-Sandinista Nicaraguans who filed asylum claims at the urging of the INS when "extended voluntary departure" status was withdrawn in September 1980. See Aleinikoff, supra note 14, at 254-55; INS ADJUDICATIONS, supra note 8, at 20-23.
39. See supra notes 30-35 and accompanying text.
40. These forms of relief include parole under INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1982), discussed in Helton, supra note 1, at 245-46, 248-49, and "extended voluntary departure," discussed infra at notes 178-81 and accompanying text. Cf. INS ADJUDICATIONS, supra note 8, at 71 (asylum applications inevitably increase when an extended voluntary departure program for a particular nationality is terminated).
degree of certainty what has caused the explosion of asylum claims in the United States. There is little reason to doubt that some percentage of aliens filing asylum claims are doing so simply to extend their stays in the United States. To deny this would be to deny too much of what we know about human nature. But there is no evidence that most, or even a significant number, of aliens are “abusing” the system. Of course, resolution of the “abuse” debate will not dissolve concern with the current asylum adjudication process. Even if every claim filed had an even chance of succeeding, the present system would still be lengthy, redundant, and costly and could still stimulate the filing of less-than-certain claims.

2. The appearance of political intervention—As noted above, INS district offices or immigration judges forward asylum claims to the State Department’s Bureau on Human Rights and Humanitarian Affairs (BHRHA) for an “advisory” opinion on the merits of the claim. Most INS district officials and immigration judges have neither the information, experience nor training to evaluate allegations regarding political conditions in the alien’s home country. A study of the asylum process in New York found “a certain discomfort with asylum cases” among the immigration judges:

They understand they will be making possible life-or-death decisions on the basis of subjective impressions and with minimum evidence. Several noted the presence of political factors and pressures in asylum cases, especially with regard to the larger, more controversial groups, e.g. Salvadors, Haitians, and Poles. None would elaborate on the nature of these political factors and all asserted their independence of judgment, but some did express that they were being obliged to make judicial decisions which were more properly made in the political arena, and on political grounds. For the immigration judges, as for the examinations officers, judgments are seen as the domain of the Department of State, and they do not acknowledge responsibility for countering State Department country expertise, even if they may differ with advisory opinion letters on specific cases.41

It is thus not surprising that in almost every case the State Department’s advice is deemed conclusive.42

42. See id. at 12-13, 34. Although Weiss-Fagen found a few cases where asylum status was denied despite a favorable recommendation from the State Department, see id. at 13, she concludes that “there are few, if any, instances in which immigration judges in New York have granted asylum applications when advisory opinions have recommended denials.” Id.; see also
This situation is disturbing. First, the alien is not able to make her case to the State Department nor is she able to question State Department sources. In effect, the main event in an asylum proceeding occurs wholly outside the hearing. Equally troubling is the internal procedure of the State Department. Assistant Secretary for Human Rights and Humanitarian Affairs, Elliot Abrams, has described it as follows:

Each application is reviewed individually by an officer in the Office of Asylum Affairs of [BHRHA] and then is sent to the appropriate country desk officer in the Department. If appropriate, [BHRHA] may request an opinion from the Office of the Legal Adviser or information from the U.S. Embassy in the applicant’s country of nationality, or, if appropriate, in a third country. *After agreement is reached between the asylum officer in [BHRHA] and the desk officer on the proposed recommendation to INS,* the draft advisory opinion and application file are reviewed by the Director of the Office of Asylum Affairs in [BHRHA], and in some cases by the geographic officer in [BHRHA] or by the Deputy Assistant Secretary for Asylum and Humanitarian Affairs. It is rare for individual cases to rise to more senior levels. The proposed recommendation then is signed by the Director of the Office of Asylum Affairs and sent to INS.43

The presentation of every asylum case to the country desk allows the intrusion of political factors into asylum decisions since country desk officers may have strong views about the effect that recognizing or not recognizing claims could have on the achievement of American foreign policy objectives. Again, there has been no empirical test of this proposition, but the data seem to create at least an appearance of political distortion of the asylum process. This can be seen by INS recognition rates for fiscal years 1982 and 1983.44

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44. *These figures are claims adjudicated by INS district offices. No data yet exist reporting the number of claims denied by the district office that are subsequently granted by an immigration judge or the BIA. The EOIR reports that immigration judges, since February 1983, have granted approximately 40-50% of the claims they have adjudicated. Unfortunately it is not known how many of these cases were previously denied by INS district offices. Nor have these data been broken down on a country-by-country basis. Thus, the high approval rate is susceptible to diverse interpretations, such as: (1) immigration judges are far more lenient in the adjudica-
TABLE 2

INS ASYLUM ADJUDICATIONS FOR SELECTED COUNTRIES, 1982 AND 1983

<table>
<thead>
<tr>
<th>Country</th>
<th>Fiscal Year 1982</th>
<th>Fiscal Year 1983</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Granted (%)</td>
<td>Denied (%)</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>303 (63.7)</td>
<td>173 (36.3)</td>
</tr>
<tr>
<td>Chile</td>
<td>0 (0.0)</td>
<td>40 (100)</td>
</tr>
<tr>
<td>China</td>
<td>1 (0.4)</td>
<td>238 (99.6)</td>
</tr>
<tr>
<td>Cuba</td>
<td>8 (7.5)</td>
<td>94 (92.2)</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>13 (31.7)</td>
<td>28 (68.3)</td>
</tr>
<tr>
<td>El Salvador</td>
<td>69 (6.4)</td>
<td>1012 (93.6)</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>249 (44.1)</td>
<td>316 (55.9)</td>
</tr>
<tr>
<td>Haiti</td>
<td>7 (5.4)</td>
<td>122 (94.6)</td>
</tr>
<tr>
<td>Hungary</td>
<td>25 (18.4)</td>
<td>111 (81.6)</td>
</tr>
<tr>
<td>Iran</td>
<td>2610 (60.1)</td>
<td>1731 (39.9)</td>
</tr>
<tr>
<td>Libya</td>
<td>5 (15.6)</td>
<td>27 (84.4)</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>336 (25.9)</td>
<td>962 (74.1)</td>
</tr>
<tr>
<td>Poland</td>
<td>112 (9.0)</td>
<td>1128 (90.5)</td>
</tr>
<tr>
<td>USSR</td>
<td>14 (42.4)</td>
<td>19 (57.6)</td>
</tr>
</tbody>
</table>

These data are generally consistent with the view — with obvious exceptions45 — that aliens seeking asylum from countries friendly to the United States are less likely to be granted asylum than those from countries unfriendly to the United States. Of course other explanations may also be consistent with these figures;46 yet the appearance of disparate treatment lingers and is supported by other circumstantial evidence.47

45. Two exceptions are Cuba and Poland. The low approval rates here may be explained by other factors. The claims of most of the 125,000 Cubans who entered during the Mariel boatlift are not being adjudicated. The government is, however, adjudicating claims of persons it would like to return to Cuba, such as persons who have committed serious crimes in Cuba or the United States. As for claimants from Poland, the approval rate is quite low when compared to the traditional treatment of Eastern European asylum seekers. See Helton, supra note 1, at 253. Yet none of the Poles denied asylum is being returned. All have been granted “extended voluntary departure,” a status which permits them to remain indefinitely in the United States.

46. For example, the figures might be explained under a view that the United States has friendly relations only with countries that are relatively free of persecution and serious human rights violations. This hypothesis, however, is belied by the State Department’s own evaluation of some friendly nations. See DEPARTMENT OF STATE, 98TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1982, at 432-44 (Jt. Comm. Print 1983) (Chile); id. at 490-506 (El Salvador); id. at 544-53 (Haiti).

47. The disparate treatment accorded deportable Salvadorans and Poles in the United States is a graphic example. Poles, although denied asylum in large numbers, have regularly been granted “extended voluntary departure.” The government, however, has refused to accord such treatment to Salvadorans despite a congressional recommendation that review of claims for such status
C. Summary

The preceding discussion has identified a number of problems confronting the current asylum system in the United States. These include a higher than expected rate of filings, significant delays in the adjudication of claims, the possibility that delays stimulate the filing of additional marginal claims, the presence of inadequately trained administrative decision makers, and the appearance that political factors influence asylum decisions. These problems are not unique to the United States. In both France and Germany the number of asylum applications has increased dramatically in recent years and institutions charged with deciding claims have become intolerably overburdened. Government officials in both countries believe that aliens with "frivolous" claims of political persecution are "abusing" the asylum process in order to circumvent strict restrictions on immigration of workers. West Germany has recently enacted major changes in its asylum procedures and has adopted far tougher policies regarding benefits available to applicants. France may be on the brink of doing so. The next two parts of this Article will detail these developments.

II. The Federal Republic of Germany

A. The Problem

West Germany began to experience a large increase in asylum applications in the mid-1970's. For the years 1970 to 1973, the number of claims ranged between approximately 5200 and 8600 per year. From 1974 to 1980, filings grew geometrically, as table 3 demonstrates:


At the outset, it is crucial to distinguish among reasons why an alien chooses to leave his home country and why he decides to go to Germany. In some cases these may be the same: to join family or to work for higher wages. But aliens may also decide to emigrate to escape persecution or an oppressive political system. These aliens may choose Germany as a country of resettlement for economic reasons, but it would be a mistake to say that they left their home countries for economic reasons or to label them "economic refugees." Thus, although it is clear that aliens choose to file asylum claims in Germany largely for economic considerations, this, by itself, may say little about the merit of most asylum claims.

Foremost among the causes contributing to the increase in asylum claims are restrictions on the immigration of foreign laborers. The rise in asylum applications coincides with the ending of the German guest worker program in 1973, which had brought several million foreigners to Germany since the early 1960's. The closing of the program forced aliens seeking employment to find other avenues for entering and remaining in Germany. The asylum process became one such route.

The interrelationship between termination of the guest worker program and the subsequent rise in asylum claims is best seen in the case

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50. See Hoenekopp & Ullman, The status of immigrant workers in the Federal Republic of Germany, in IMMIGRANT WORKERS IN EUROPE: THEIR LEGAL STATUS (E. Thomas ed. 1982). Between 1961 and 1979, the foreign population in Germany increased by more than 600%, from 686,000 (1.2% of the total population) to 4.14 million (6.8%). Id. at 127.
More than a million Turkish citizens entered Germany under the guest worker system. Economic opportunities in Germany, combined with the high level of civil violence in Turkey in the 1970's, contributed to the labor flow. The ending of lawful immigration placed a roadblock on a well-trodden thoroughfare. Accordingly, thousands of Turks turned to the asylum process: in 1980 Turks filed over half of the almost 108,000 applications. 51

Political upheaval in sending countries has been a cause of the rise in filings. Although the number of Turks requesting asylum has dropped since 1980, 52 applications from aliens from Afghanistan, Ethiopia, and Poland have increased. 53 Each of these nations has witnessed serious political turmoil in the past few years.

West German policies regarding work and social benefits also contributed to the increased filings. Until recent dramatic changes, asylum applicants were given permission to work during the pendency of their claims. 54 Those unable to find work were eligible for welfare payments. 55 Applicants were also entitled to medical benefits and were permitted to travel freely in Germany and settle where they chose. Obviously, so long as aliens viewed West Germany as a place to find better work than they could find at home, the treatment afforded asylum applicants served as a strong magnet to attract them.

If these policies virtually invited aliens to apply, the West German legal system ensured them a lengthy time to enjoy the benefits. The right to asylum 56 and judicial review of administrative determinations are secured by the German Constitution. As implemented by statutes, these constitutional provisions formerly gave rise to administrative and judicial proceedings that regularly took three to five years to complete.
and often took much longer. The legal process itself, therefore, created incentives for potential asylum claimants: whether or not one's claim was ultimately granted, the process promised to take so long that even aliens with patently frivolous claims would be guaranteed a long stay in Germany.

Finally, policies regarding the return of persons denied asylum have also been a factor in the rise of applications. In West Germany, the states (Laender) have the responsibility for enforcing federal immigration laws. Authorities located in cities and districts, under the supervision of the state Ministry of the Interior, register aliens and grant them residence cards. They are also responsible for the deportation of aliens unlawfully in the country, including aliens denied refugee status by the federal government. Under this authority, the Laender have developed flexible policies that allow aliens presenting compelling humanitarian concerns or coming from certain countries to remain in the state even though their asylum claims have been denied. Thus, in 1966, the Interior Ministers of all the Laender formally agreed not to return any alien from a Warsaw Pact nation. Other Laender have made unilateral decisions not to return Afghans, Lebanese or Christian Turks. Persons in these groups are “tolerated” in the Laender for approximately a year and then are given official immigrant status with the granting of a residence card. These policies are likely to attract aliens irrespective of the ultimate merit of their asylum claims.

B. Statutory and Policy Changes

As in the United States, the German government viewed with alarm the rise in the number of asylum applications. Not only did the flood of claims seriously overburden existing adjudicatory procedures, but government officials also believed that many of the new applications were frivolous and made simply for the purpose of prolonging the aliens' time in Germany. This view is typified by the following statement of the federal Ministry of Interior:

A wide gap between the socio-economic situations of different


59. Under article 83 of the Grundgesetz, the Laender perform all executive functions absent special provisions assigning them to the federal government.


61. This practice is quite similar to the American nonreturn policy known as “extended voluntary departure.”

nations and the greater facilities existing nowadays for travel and information result in the fact that constantly growing numbers of people try, by baseless reference to the right of asylum, to enter an industrialized country for at least a temporary stay for the purpose of getting a job.  

High-ranking government authorities substantiate the claim of abuse of the system by noting instances of aliens who arrive with one-way airplane tickets and applications for asylum filled out by attorneys they have never met. They further state that fraudulent papers and identities are not uncommon, that stories of persecution often appear manufactured, and that dozens of applications may be filed by a single lawyer alleging essentially the same facts for every alien from a particular country. Finally, they note that in recent years approximately ninety percent of all claims have been rejected.

It is difficult to evaluate the claim that the huge increase in applications is due primarily to abuse of the system. Lawyers and groups representing the applicants acknowledge that some frivolous claims undoubtedly are filed, but they maintain that the government has overstated the level of abuse. These advocates assert that the ninety percent rejection rate does not mean that ninety percent of the claims are abusive or frivolous; in many cases aliens may be unable to document persecution satisfactorily or may have a well-founded fear of returning to their countries that does not come within the narrow legal definition of "refugee" under German and international law. They charge that the labeling of asylum applicants as "abusers" is simply one aspect of a general unwillingness of Germany to welcome aliens, particularly those from non-European nations.

No matter which side is closer to the truth in this debate, it is clear that the perception of abuse created the impetus for major policy changes. Furthermore, state governments, who had the obligation of providing for the asylum applicants while the seemingly interminable federal adjudication process took its course, applied pressure on the


64. Von Pollern, supra note 49, at 94.

65. See Der Spiegel, 21/1981, at 36; Der Spiegel, 26/1981, at 81. West Germany's unwillingness to accept refugees is also evidenced by its failure to adopt a program such as those in the United States and France, for taking in refugees from around the world. Responding to this contention, the government points out that Germany accepted some 20,000 "boat people" in 1980. Critics, however, maintain that this was the only time Germany has adopted such a policy and that it did so only after international pressure was applied.

federal government to adopt restrictive measures. These factors produced dramatic policy modifications that (1) made it more difficult for potential asylum applicants to get to Germany, (2) ended work and benefit policies that attracted immigrants, and (3) expedited the adjudication process.

1. **Visa requirement**— An alien wishing to enter Germany to work or to stay longer than three months must have a visa, unless her country of origin is exempted from the visa requirement. In 1980, the government removed a number of nations from the list of exempt countries. The countries removed were those that have been the primary sending countries of the asylum applicants: Turkey, Afghanistan, India, Sri Lanka, and Bangladesh.\(^{67}\) Airlines are prohibited from carrying persons from these countries unless they hold valid visas. The clear purpose and impact of the regulation is to prevent applicants from arriving in West Germany where they can make their claim for asylum.\(^{68}\)

Lawyers who represent asylum applicants charge that the visa restrictions are grossly overbroad because they prevent bona fide refugees from reaching Germany. They assert that politically persecuted persons in certain countries — particularly Afghanistan — will either not be able to get to a German consulate or will not take the risk of being seen requesting a refugee visa. Thus they claim that, whatever the original purpose of the visa rules, these rules are now being maintained as part of a general anti-refugee, anti-alien program. Government officials nonetheless respond that the visa requirements have been effective in stopping the influx of economic immigrants and that "real refugees" who truly fear political persecution will always find a way to leave their countries.

2. **Work rules**— In 1980, the government fundamentally altered its position on granting asylum applicants permission to work. Under rules presently enforced, applicants from non-Eastern European countries may not receive work permits for two years after arrival in Germany; Eastern Europeans are eligible for permits in one year.\(^{69}\) Although the

\(^{67}\) BGBl I 371 (Mar. 26, 1980); BGBl I 564 (May 12, 1980); BGBl I 782 (July 1, 1980); BGBl I 960 (July 11, 1980).

\(^{68}\) Government officials recognize that a large loophole exists in the visa requirements because West Germany does not control the border between East and West Berlin. Thus, aliens have discovered that they may fly to East Berlin and simply walk into West Berlin where they may claim asylum.

\(^{69}\) Verordnung zur Aenderung der Arbeitserlaubnisverordnung art. 1, sec. 2, 1981 BGBl I 1042 (W. Ger.), reprinted in P. BAUMUELLER, ASYLVERFAHRENSGESETZ KOMMENTAR 204 (1983). One state — Baden-Wuerttemberg — has prohibited applicants from working at any time. The state is able to do this by stamping on an applicant's identity papers that he or she is not permitted to work. Thus, although the federal government officially regulates labor supply for the nation, the role of the states in enforcing the immigration laws gives them power to go beyond the federal rules.
government views the work permit rules as an important aspect of its asylum policy, there are obviously costs attached to it. First, if applicants do not earn money working, the financial burden on the Laender governments is greater in terms of providing funds for housing, clothing, food, and other essentials. The government maintains that this maintenance cost is still considerably less than the unemployment benefits it would have to pay German workers who would lose jobs if applicants were permitted to work.) Second, many aliens are believed to obtain illegal employment despite sanctions against employers who hire aliens without a work permit. One state official estimated that an employer may save one-half to one-third by employing an applicant without a work permit because the employer pays a lower wage to the illegal worker and avoids high payroll taxes. These savings are likely to be greater than the noncriminal fine that would be assessed against the employer, even assuming adequate enforcement of the law.

3. Relocation and distribution of asylum applicants—The major legislative response to the increase in asylum claims was the Asylum Procedure Act, passed by the Bundestag in 1982. At the demand of a number of states that were particularly burdened by the arrival of large numbers of applicants, the federal government adopted a formula for allocating asylum applicants among the Laender on a percentage basis, roughly determined by the population and resources of each state. For example, under the formula, Baden-Wuerttemberg is allocated fifteen percent of all German asylum applicants. Since only about five percent of the applicants file their claims in Baden-Wuerttemberg, it must accept applicants from other states until it reaches its statutory quota.

4. Communal housing facilities—Section 23 of the 1982 statute

The government is considering a proposal that would deny work permits to all non-East European applicants pending adjudication of their claims. ZAR, 4/1982, at 166.

Because of an agreement by the Laender not to return Eastern Europeans whether or not they are granted asylum, the one-year work ban is a hardship for Eastern Europeans who want to start a new life in Germany. Accordingly, local authorities may sometimes tell the Eastern Europeans not to apply for asylum so that the work prohibition will not apply. These persons may be given temporary documents which will permit them to work; after a year they are granted permanent residence cards.

70. To lessen this burden, some states and localities have begun providing benefits in kind rather than cash. Furthermore, in some areas, applicants are required to perform unpaid or low-paying community work in order to receive welfare benefits. This policy of "workfare" is a part of German welfare law that applies generally to German welfare recipients; but it is particularly controversial as applied to asylum applicants who are otherwise prevented from working. The majority of courts have upheld such policies. See, e.g., Decision of the Oberlandesgericht Hamburg, DVBl, 17/1982, at 849.

71. Arbeitsfoerderungsgesetz art. 229, 1969 BGBI I 582 (W. Ger.); 1981 BGBI I 1390 (W. Ger.) provides a maximum penalty of approximately $20,000.

72. Asylverfahrensgesetz [AsylVfG], 1982 BGBI I 5702 (W. Ger.).

73. See AsylVfG art. 22, sec. 2.
recommends that the Laender keep asylum applicants in Gemeinschaftsunterkunften (loosely translated as "communal housing facilities"). The Laender have adopted various programs in response to the federal recommendation. Baden-Wuerttemberg requires most aliens who have filed claims since the new law — presently about 1,750 — to live in such facilities. North Rhine-Westphalia is the only state with no such facilities; applicants there live on their own or in public housing.74

State officials defend the housing program on several grounds. They state that it is less expensive to house applicants in communal living facilities than to pay rent for private quarters. The facilities also make it easier for state authorities to locate applicants. Furthermore, as reported by one state official, a primary goal of the housing policy is deterrence: assignment to a housing facility may dissuade new arrivals and also lead applicants presently in Germany to abandon their claims and return home.

The maintenance of communal living quarters for applicants, not surprisingly, is quite controversial. State officials are careful to stress that the facilities are not detention camps: applicants are free to come and go. In fact, a Baden-Wuerttemberg official reported that perhaps twenty percent of the applicants assigned to the housing leave and do not return. Many applicants have little choice but to remain, however, because free meals and lodging are available only at the facility. Critics assert that the facilities crowd people of many different cultures together with little or no privacy, that dining programs violate dietary rules of some of the applicants, and that the small monthly cash allowances granted to applicants are inadequate.75

The treatment of applicants in the facilities created a diplomatic flap in the fall of 1983. After a visit to Germany, an official in the Office of the United Nations High Commissioner for Refugees (UNHCR) drafted an internal report quite critical of the condition in the facilities. The report, which was leaked to the press, was assailed by the German government as polemical and incorrect. The Minister of Interior also announced he would not receive United Nations High Commissioner Paul Hartling on a scheduled visit until the report was corrected.76 This incident graphically demonstrates the continuing controversy surrounding the decision to house applicants in communal facilities and the sensitivity of the German government on the issue.

75. See, e.g., Dokumentation des Pressedienstes des Sekretariats der deutschen Bischofskonferenz, Nr. 16/80 (Sept. 7, 1980).
C. Procedural Changes

1. The existing adjudication process—
   a. The administrative authorities—As in the United States, asylum applicants are afforded an administrative determination of their claims followed by several levels of judicial review. But the German and American systems differ in material and important respects.

Asylum applications are initially made to the local alien authorities, who, in nearly all cases, send them to the Bundesamt fuer die Anerkennung auslaendischer Fluechtling (Federal Agency for the Recognition of Foreign Refugees). The Bundesamt, located outside of Nuernberg in Zirndorf, is charged with adjudicating the claim. The agency is under the supervision of the Federal Interior Ministry, but its determination of asylum claims is, by law, independent. The adjudication of asylum claims is the only task of the Bundesamt; it is not charged with hearing exclusion or deportation cases, as are immigration judges in the United States.

The adjudication procedures at the Bundesamt fall somewhere between the informal process of INS district offices and the formal hearing held before an immigration judge. Every asylum applicant must be given an interview. Although in the past the agency conducted all interviews at its headquarters in Zirndorf, the Bundesamt recently opened eight permanent suboffices in other cities in West Germany where it conducts interviews. Decisions by the Bundesamt are based upon the interview and the applicant’s file. The file usually includes the statement given by the applicant to the local authorities in the Laender, a copy of the applicant’s passport, fingerprints (to catch multiple applications), and, for the majority of cases, a letter from the alien’s lawyer detailing the factual and legal basis of the claim. Ten to fifteen

78. During the years in which the number of applications was rising exponentially, thousands of claims were denied without a hearing. See Schlink & Wieland, Klagebegehren und Spruchreife im Asylverfahren, DOEV, 11/1982, at 426. This breakdown in process produced a provision in the 1982 law that guarantees applicants a hearing before the Bundesamt, unless it is clear that asylum should be granted or the applicant has failed to attend a scheduled hearing without an adequate excuse. AsylVfG art. 12, sec. 4.

79. This development is likely to increase the number of applicants who will be represented by lawyers at their hearings and will also save the Laender the cost of paying the applicants’ fare to Zirndorf.
percent of the applicants bring lawyers to Zirndorf; legal representation is not provided by the government. Bundesamt adjudicators specialize in one, two, or three countries and are supervised by "group leaders" who give advice but do not decide cases. In order to aid officials in adjudicating claims by aliens from more than 100 countries, the Bundesamt has developed a documentation center in Zirndorf that maintains information and court decisions on a country-by-country basis. The UNHCR has a representative at the Bundesamt who has access to all files and can observe the hearings. 80

Quite unlike immigration authorities in the United States, the Bundesamt does not automatically forward each claim to the Foreign Ministry for an advisory opinion. According to a high level official at the Bundesamt, the agency occasionally requests background information and facts from the Foreign Ministry, but the Ministry's opinions regarding political persecution are neither sought nor considered binding. The official stressed that the Foreign Ministry serves as only one source of information; Bundesamt officers also consult outside experts, academics, newspapers, Amnesty International reports, and other relevant sources.

Officials at the Bundesamt emphatically state that politics play no role in their decisions and the immigration and foreign policies of the government are not considered. But lawyers who represent asylum applicants are skeptical of the Bundesamt's claim of total independence. First, they note that the agency's officials are appointed by the Interior Ministry. Although they concede that the Ministry is unlikely to intervene in particular cases, they argue that civil servants, hoping to advance in their careers, can hardly ignore the Ministry's political stance. Second, they assert that significantly different recognition rates for applicants from Eastern European countries as compared with those from Western European or Asian countries such as Turkey, Afghanistan, or Pakistan reflect political bias.

<table>
<thead>
<tr>
<th>Continent</th>
<th>Recognized</th>
<th>Not Recognized</th>
<th>% Recognized</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Europe</td>
<td>3,154</td>
<td>2,938</td>
<td>51.8</td>
</tr>
<tr>
<td>Western Europe</td>
<td>1,168</td>
<td>43,140</td>
<td>2.6</td>
</tr>
<tr>
<td>Asia</td>
<td>6,220</td>
<td>22,292</td>
<td>21.8</td>
</tr>
</tbody>
</table>

80. AsylVfG art. 12, sec. 5.
Government officials assert that these differences in recognition rates indicate not bias, but simply the relative merits of the claims filed. They state that most applicants from countries such as Turkey are "economic refugees" seeking a better standard of living in Germany, not fleeing political persecution. Federal authorities concede that the high rate of denials may make it appear that claims from certain countries have been prejudged, but they maintain that each claim is decided on a case-by-case basis. Furthermore, they explain the high recognition rate for Eastern Europeans as due to the fact that these countries punish illegal exit of citizens. Thus, the mere fact of leaving may make such aliens refugees under German law. Finally, they point to the low reversal rate of Bundesamt decisions by the administrative courts (probably under five percent). The administrative court decisions seem to support the federal agency's assertion that few aliens who qualify as refugees are denied the status; but this does not resolve the question of disparate treatment. Since administrative courts rarely review decisions to grant asylum status, it is possible that persons from certain countries (e.g., Eastern European nations) are afforded more lenient treatment than applicants from countries such as Turkey, Pakistan, or Ghana.

In sum, the centralized administrative structure of the German system differs dramatically from the decentralized American process. In Germany, all asylum claims go to a single institution whose only task is to adjudicate such claims; and adjudicators in the agency are able to develop experience in asylum law and particular countries. This expertise, in turn, permits the adjudicators to be far less reliant upon advice

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81. See Antwort der Bundesregierung, supra note 58, at 4.
82. Arguably, the low reversal rate in the administrative courts could simply indicate that the courts have the same bias as the agency. Yet, conversations with approximately a dozen administrative judges lead me to believe that the judges start with no such bias.
83. Occasionally, the federal government will appeal the granting of asylum by the Bundesamt or by an administrative court. The federal officer charged with representing the federal government's interests is the Bundesbeauftragter.
from the Foreign Ministry. Whether or not political considerations influence decision making is a matter of dispute, as it is in the United States.

b. The courts—As previously mentioned, the West German Constitution guarantees judicial review of administrative decisions. Until 1980, all appeals from the Bundesamt were heard by a trial-level administrative court in Anspach. When the large increase in asylum claims in the late 1970's inundated this court, the law was changed to make denials of asylum claims reviewable in the administrative court of the state in which the applicant resides. The rise in applications and the decentralization of review brought administrative judges thousands of cases with which they had no prior experience. In response, judicial training programs in asylum law were conducted in which academics and UNHCR personnel, among others, participated.

German administrative judges are members of the judicial branch and view themselves as wholly independent from, and a check upon, administrative authorities. They thus are more analogous to United States federal judges than to immigration judges who are employees of the Department of Justice and whose decisions are reviewable by the BIA and the Attorney General. Yet the German administrative judges play a role in asylum cases quite different from that assumed by American federal judges. The trial-level administrative court, which usually sits with five members (three professional and two lay judges), is charged with making an independent, de novo, investigation of the case before it. Although the applicant has some burden of bringing forward facts upon which an inference could be based to support his claim, there is no formal "burden of proof." The court must determine the facts for itself and reach its own conclusions about the validity of the claim.84

This role for the court presents obvious difficulties in asylum cases. Since independent investigations of conditions in the home country are virtually impossible, the judges must rely on information provided by a variety of sources: newspapers, testimony of experts, and Amnesty International reports. The file may often include comments from the Foreign Ministry (which may also have been given to the Bundesamt), but several administrative judges stated that they tend to give little weight to such information, recognizing the demands that diplomacy places on the Foreign Ministry not to offend certain countries. To improve the information available for judges, courts may collect reports, articles, and decisions of other courts. In Wiesbaden, the administrative court has established a documentation center which methodically maintains

84. Verwaltungsgerichtsordnung [VwGO] para. 86, 1960 BGBl I 17, as amended 1982 BGBl I 1834 (W. Ger.).
records and information on a country-by-country basis. The center subscribes to numerous newspapers and journals and occasionally publishes papers on conditions in particular countries. Judges and lawyers are given access to the materials.

Judges may also be assigned cases involving only a few countries or one area of the world. This specialization permits judges to develop expertise and to ask specific questions about political parties, events, and people. Such knowledge helps the judges evaluate the credibility of the applicant's testimony.

Most of the asylum applicants appearing before the administrative courts have lawyers. The role of lawyers in the court proceedings, however, is less important than the corresponding role played by American lawyers. Given the duty of the court to establish the facts independently, the hearing is largely taken up with questions directed to the applicant by the five judges on the court. The role of lawyers is generally restricted to asking questions or making a final statement when the judges have completed their inquiries.

The Bundesamt is entitled to send a lawyer to defend the agency's denial of the claim, but rarely does so. The agency has twenty lawyers to monitor 60,000 pending cases. Usually the agency participates only by way of a letter which states that it has nothing to add to its earlier written decision.

Not surprisingly, there are informal methods of resolving cases. For example, some judges reported that they may "negotiate" a settlement with the alien whereby the local authorities will not enforce the expulsion order for a short period of time if the alien agrees not to appeal the denial of the asylum claim. This permits the alien to accomplish her purpose in coming to Germany while saving the courts further proceedings. Another informal device is for the judges to agree not to decide a particularly difficult case. Since the appeal usually has a suspensive effect on expulsion by the local authorities, the alien remains in the country. After two years the alien may get permission to work and may ultimately be granted a residence card. These kinds of informal dispositions appear to be rare, but they do indicate a certain flexibility in the system.

85. The lawyers are usually paid by their clients or other organizations, although it is possible to ask the court to pay the lawyer's fee. In such cases, the court examining the case makes a preliminary determination as to the alien's probability of success. Where the court decides that success is likely, the state will pay the lawyer whether or not the alien ultimately prevails. One judge estimated that fee requests are made in five to ten percent of the cases, but almost none are granted.

86. Judges tended to divide the lawyers into different categories. Some are viewed as zealous advocates who firmly believe in the merits of the client's claims and take an active role in the proceedings. Others are seen as simply interested in a high volume of cases. The papers filed by this group are often conclusory and repeat claims made in other cases.
On the whole it appears that West Germany has developed an experienced corps of administrative judges in a relatively short period of time. Although many of these administrative judges are young and possibly more liberal than judges on the appeals court, the low rate of reversals of Bundesamt decisions indicates that they do not freely grant asylum claims. Finally, whether or not the Bundesamt is free from political pressure, it appears that the administrative judges are at least as independent as United States federal district judges.

2. Recent changes to expedite the adjudication of claims—Until 1978, asylum claims were generally treated like other cases under German administrative law: an alien could file an action in a state administrative court challenging an agency denial of his claim. The filing of an asylum case had a suspensive effect on the deportation of the alien. If the trial-level court denied his claim, the alien could appeal to the state appellate administrative court, and from there to the Federal Administrative Supreme Court (Bundesverwaltungsgericht). Additionally, the alien could file a collateral action in the Federal Supreme Constitutional Court (Bundesverfassungsgericht) alleging deprivation of a constitutional right.87

The flood of new applications in the 1970’s seriously overburdened the Bundesamt and the administrative courts. As in the United States, the lengthy adjudication process probably stimulated the filing of additional claims. It also dramatically increased the burden on state governments, which were charged with maintaining the applicants pending final determination of the claims.

After minor changes in procedure in 1978 and 1980,88 the adjudication process was substantially modified by the 1982 Asylum Procedure Act. The new law permits the local authorities to disregard applications from aliens who have been granted refugee status by another country or are traveling under a passport issued by a country other than their country of origin.89 All other applications must be forwarded to the federal agency. The Bundesamt is authorized to grant the claim or find that it is either “unfounded” or “obviously unfounded.” If

87. GG art. 93, sec. 4(a). The complaint has no suspensive effect, and the chances that the Court will hear the case are minimal. In fact, complainants have been fined by the Court in asylum cases for filing clearly unfounded claims. See NEUE JURISTISCHE WOCHENSCHRIFT [NJW], 35/1981, at 1986, at 1986.

88. In 1978, a federal statute attempted to speed up the adjudication time by (1) abolishing an appeal within the federal agency, and (2) excluding appeals from the first-level administrative court where the decision was unanimous. Gesetz zur Beschleunigung des Asylverfahrens, 1978 BGBl I 1108 (W. Ger.). Further changes were made in 1980, including (1) authorizing decisions by a single official at the Bundesamt (rather than a panel of three officials), and (2) combining the alien’s asylum and deportation case in the administrative court (which had the effect of denying an appeal in a deportation case where the court decision was unanimous). Zweites Gesetz zur Beschleunigung des Asylverfahrens, 1980 BGBl I 1437 (W. Ger.).

89. AsylVfG art. 7, sec. 3.
the claim is determined to be "obviously unfounded," the local authorities are permitted to deport the alien immediately. The alien, however, has the right to apply to an administrative court for a preliminary injunction to prevent the deportation pending review of the agency decision. Such application must be made within seven days of receiving the deportation order. The alien may also file an action in the administrative court challenging the decision on the merits, but the action does not have a suspensive effect on the deportation. As to those claims denied as "unfounded," the alien's action in the administrative court has a suspensive effect.

The new law severely limits appeals beyond the trial-level court. The lower administrative court may either reverse the Bundesamt's denial or find that the claim is "obviously unfounded" or "unfounded." If the court determines that the claim is "obviously unfounded," there is no further appeal. If the claim is deemed to be "unfounded," the administrative court may authorize an appeal only if the case raises an important issue of law or differs from higher court decisions. For appeals that are determined to be "unfounded" and for which the court does not permit an appeal, the alien may file a special petition before the appellate court asking that the appeal be permitted. The law also permits a single trial judge to hear the case, but generally the courts have maintained the five-person panel.

No definitive data have been published on the operation of the new system. A high-level official at the Bundesamt estimates that, since the enactment of the new law, about twenty percent of the claims it has denied have been deemed "obviously unfounded." He further estimated that this will rise to about thirty-three and maybe as high as forty percent. Figures for the administrative court are not yet available, but individual judges estimate that only about two to five percent of the Bundesamt's denials are reversed. They further estimate

90. AsylVfG art. 11, sec. 1.
91. VwGO para. 80, sec. 5, 1960 BGBl I 17, as amended 1982 BGBl I 1834 (W. Ger.).
92. AsylVfG art. 11, sec. 2; id. art. 10, sec. 3. It is an open question whether these statutory changes violate the constitutionally secured rights of asylum and judicial review of agency decisions. See P. Baumueller, supra note 69, at 320; Beus, "Vorlaufiger" Rechtsschutz bei offensichtlich unbegründetem Asylantrag, ZAR, 4/1982, at 191; Huber, Die Entwicklung des Ausländer-und Arbeitserlaubnisrechts im Jahre 1981, NJW, 35/1982, at 1919. The Bundesverwaltungsgericht (Federal Administrative Supreme Court) has upheld the constitutionality of the provisions, Decree from Dec. 6, 1982, DVB1, 4/1983, at 719. But its decision is not definitive, since only the Constitutional Supreme Court can decide constitutional questions with full binding effect.
93. AsylVfG art. 32, sec. 6.
94. AsylVfG art. 32, sec. 2.
95. AsylVfG art. 32, sec. 4.
96. The Constitutional Supreme Court has refused to hear a case challenging this provision as violative of art. 19 of the German Constitution. Beschluss vom. 22 Sept. 1983, NJW, 1984, at 559.
that approximately one third of the cases rejected by the administrative courts are deemed "obviously unfounded" (and thus are not appealable), half are "unfounded without appeal," and the remainder are "unfounded with appeal." It seems clear that, although the new law still maintains a number of avenues for appeal, a significant percentage of asylum claims are not likely to be reviewed beyond the Bundesamt, and a substantial majority will not be appealed beyond the trial-level administrative court.

**D. The Result of the Changes**

The combined impact of the statutory and policy changes on the number of asylum applications filed is apparent, as Table Three indicated. It is not clear, however, how much each element of the government's response contributed to the decline. The changes in the administrative and judicial procedures no doubt have expedited adjudication of the claims and have removed a significant burden on the two upper levels of administrative appeals courts. But West German officials seem to believe that a streamlined process has not been the primary factor in decreased asylum applications. It is far more likely that the visa requirements, the removal of authorization to work and receive benefits during the pendency of the claim, and the institution of the communal housing facilities have been largely responsible for the decrease. This conclusion is strengthened by the fact that the number of claims filed began to drop in 1980 — two years before the major procedural changes were enacted. Whatever the reasons for the decrease, the fact of the substantial reduction in claims filed makes additional reform unlikely in the near future. 97

This apparent success, however, is not viewed with equanimity by all. The government maintains that "the sole objective of the measures taken . . . [is] to remove the incentives for those foreigners who are not politically persecuted to enter the Federal Republic of Germany illegally for economic reasons by abusing the right of asylum." 98 But some knowledgeable observers of the asylum process believe that the new policies have gone beyond the government's stated goal. They see the new policies as part of a larger agenda to limit immigration of bona fide refugees and other aliens. Further, they note with alarm a

97. The government recognizes, of course, that there are exogenous factors beyond its control that affect the flow of refugees. The declaration of martial law in Poland, the change of government in Ethiopia, and the invasion of Afghanistan brought thousands of asylum seekers to Germany. As long as the political situation in many countries remains volatile, West Germany can never be certain that it has eliminated the possibility of massive asylum applicant flows in the future.

98. FEDERAL MINISTRY COMMENTS ON UNHCR REPORT, supra note 63, para. 3.3 (unnumbered page 3).
seeming drift toward xenophobia,\textsuperscript{99} evidenced in part by growing tensions between the large Turkish population in West Germany and German citizens\textsuperscript{100} and by government proposals to further limit immigration and induce Turks to return to their native land.\textsuperscript{101} Although West Germany has never considered itself a country of immigration, there are now over four million aliens among a native population of fifty-seven million.\textsuperscript{102} With a declining population, hard economic times and the 1983 electoral victory of the Christian Democrats, it seems a certainty that Germany will continue to pursue restrictive policies towards immigration and refugees.\textsuperscript{103}

Questions remain regarding the asylum process which this study cannot answer. These include the relative importance of the various policies in reducing the number of applicants, whether bona fide refugees are being deterred from applying in Germany, and whether the claims of aliens who do apply are being adjudicated in an evenhanded fashion. Furthermore, the reduction in the number of applicants for asylum may tell us little about the overall flow of aliens into Germany. Just as the ending of the guest worker program produced, in part, the increase in asylum claims, so too the tightening of the asylum system


\textsuperscript{100} The government points to low naturalization rates of long-term Turkish residents as evidencing nonintegration of aliens into German society. This has second generation consequences since, under German law (and quite unlike American law), children born to aliens in Germany are not automatically German citizens. Reichs-und Staatsangehoerigkeitsgesetz art. 4, 1913, as of Reichsgesetzblatt S. 1953 (Ger.).

\textsuperscript{101} Policies under study mix the stick with the carrot. Interior Minister Friedrich Zimmermann has proposed reducing the age limit for the entry of immigrant children from 16 to 6 and cutting back on foreign student programs. A right-wing face of Germany, ECONOMIST, Aug. 27, 1983, at 27. As a carrot, the government is considering direct cash payments to Turks who return to Turkey. The funds would come from the employee's contribution to unemployment and social security programs. ZAR, 4/1982, at 166.

A large problem facing the German government is the EEC's 1963 Association Agreement with Turkey, which appears to grant Turks free access to jobs in any EEC country beginning in 1986. EEC-Turkey Association Agreement art. 12 (Sept. 12, 1963): Additional Protocol art. 36, signed at Brussels (Nov. 23, 1970); Decision of Association Council (Dec. 20, 1976). See generally Fear that Turkish treaty with EEC will lead to huge influx, Stuttgarter Zeitung, Feb. 22, 1982, reprinted as translated in German Tribune, Mar. 7, 1982, at 4; Antwort der Bundesregierung, supra note 58, at 9. The Kohl government has stated that it will seek an agreement with Turkey restricting migrant labor under the Association Agreement. ZAR, 4/1982, at 166. See generally Turkey and the EEC: Wait and See, ECONOMIST, Nov. 12, 1983, at 60.

\textsuperscript{102} In some areas, such as greater Frankfurt, Stuttgart, Munich and Berlin, as much as 20% of the population are aliens.

\textsuperscript{103} An official policy statement of the Kohl government states:

Germany is not a country of immigration. Thus, all necessary measures, acceptable from a humanitarian standpoint, must be taken to prevent further immigration. The recruitment [of foreign workers] ban must be maintained. Illegal entry and employment must be prevented. A stay for education and study must not, as a matter of principle, lead to permanent residence . . . . The negotiations with Turkey regarding a restriction of the Association Agreement must continue promptly.

ZAR, 4/1982, at 166 (translated from German).
may simply shift aliens to other routes of entry — such as illegal entry. 104
It does seem clear, however, that changes in policies and procedures
 can be effective in influencing aliens' choices about applying for asylum.

III. FRANCE

France, in recent years, has experienced a leap in the number of
applications for asylum. Although the total number of claims is con­
siderably smaller than the number filed in West Germany or the United
States, the increase has severely strained adjudicatory institutions and
has imposed unanticipated financial burdens. The government has
recognized that the present state of affairs cannot continue, but no
significant reform measures have yet been developed or implemented.
In short, while West Germany is several years ahead of the United
States in terms of adopting programs to deal with huge increases in
asylum applications, France is a year or two behind.

A. The Problem

France admits refugees in two ways. Each year a predetermined
number of refugees is selected and processed overseas. This program
is similar to the system established in the United States by the Refugee
Act of 1980. In addition, France, like the United States, permits an
unlimited number of aliens at the border or inside the country to apply
for asylum.

The great majority of refugees selected through the overseas pro­
gram are Indo-Chinese. Since the fall of Saigon in 1975, France has
taken almost 75,000 South East Asians; in recent years the Indo-Chinese
program has brought in between 8,000 and 10,000 refugees annually.
France also reserves several hundred visas a month for refugees from
other countries. These are issued overseas by French consulates, and
usually are made available to Latin Americans or East Europeans.

France regulates the number of refugees it selects abroad, but it has
no such controls on the number of aliens who may apply for asylum
in France. In the last five years, the number of applications adjudicated
in France — not including South East Asia quota cases — has more
than tripled as table 5 indicates.

104. Or, it may deflect asylum seekers to other countries viewed as more hospitable — for
example, France.
TABLE 5

ASYLUM ADJUDICATIONS IN FRANCE (EXCLUDING SOUTH EAST ASIANS), 1977-1982

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>3,070</td>
</tr>
<tr>
<td>1978</td>
<td>3,234</td>
</tr>
<tr>
<td>1979</td>
<td>6,134</td>
</tr>
<tr>
<td>1980</td>
<td>7,864</td>
</tr>
<tr>
<td>1981</td>
<td>8,929</td>
</tr>
<tr>
<td>1982</td>
<td>11,196</td>
</tr>
</tbody>
</table>

The countries contributing most to this rise are generally not the same as those in West Germany. In France, the major groups (excluding East Europeans and South East Asians) have been Sri Lankans, Zairians, Angolans, Haitians, Ghanaians, Pakistanis, Indians, Chileans, and Turks.

The causes of the rise in applications in France appear to be quite similar to those in West Germany. First, asylum seekers in France are eligible for an array of privileges and benefits. Programs established primarily for Indo-Chinese refugees — emergency aid upon arrival, housing, clothing, welfare payments, permission to work, language training, and other services — are also made available to applicants from other countries not selected through the overseas quota program. Thus, an alien who has applied for asylum in France is entitled to a temporary residence card and permission to work. Applicants unable to find work are entitled to unemployment benefits. They also are eligible for housing allowances, medical care, and other benefits subsidized by the French government through private organizations.

These programs and policies make France a desirable country of resettlement for aliens fleeing persecution. Yet they also have proven attractive to aliens with marginal or frivolous claims whose primary motivations in leaving their home countries are economic. French authorities maintain that these aliens have resorted to the asylum process in increasing numbers following France's "suspension" of immigration a decade ago. Prior to that time, relatively open immigration policies had permitted large numbers of aliens seeking jobs to enter

105. These are adjudications by the Office française de protection des réfugiés et apatrides (OFPRA), not claims filed. Since OFPRA decides most claims within a year of filing, these numbers properly identify the trend in filings even if they may be somewhat smaller than actual number of claims filed. In excluding South East Asians, the Table may slightly underestimate the total number of asylum applicants, since not all South East Asian applicants enter under the overseas refugee program.
and reside in France.\textsuperscript{106} The closing of lawful immigration for laborers in July 1974,\textsuperscript{107} however, has led some aliens to apply for asylum to receive authorization to work and stay in France pending adjudication of their claims. Because of a lengthy adjudication process, such aliens can count on being able to work and receive welfare payments for several years. Indeed, as France makes no serious effort to deport aliens whose claims are eventually denied, a claim for asylum, no matter what its merit, effectively leads to permanent residence.

The increase in claims filed may also be due, in part, to the restrictive policies recently adopted by West Germany. France today is clearly a more hospitable country to asylum seekers. Therefore, it is not surprising that the decline of Turks applying for asylum in Germany is occurring at the same time that French officials are reporting an increase in the number of Turkish applications.

\textbf{B. The Procedures}

\textit{1. The legal framework}—The Preamble to the 1946 French Constitution, which is incorporated by reference into the Constitution of the Fifth Republic (1958),\textsuperscript{108} provides: \textit{"Tout homme persecuté en raison de son action en faveur de la liberté a droit d’asile dans les territoires de la République."}\textsuperscript{109} Although this provision is apparently not deemed to have legal effect (as does the asylum article of the German Constitution), it clearly reflects the liberal policy France has traditionally adopted toward asylum seekers.

The French asylum adjudication procedure has remained largely unchanged since its establishment by statute in 1952 and government decree in 1953.\textsuperscript{110} As in Germany, a central federal agency is charged with the initial determination of claims. The \textit{Office français de protection des réfugiés et apatrides} (OFPRA) is technically part of the Ministry of Foreign Relations; but it, like the German \textit{Bundesamt}, is endowed with independent decision-making authority. OFPRA is run by a Director appointed by the Minister of Foreign Relations. Its operations are overseen by an interministerial council comprised of representatives from

\begin{itemize}
\item \textsuperscript{107} See Thomas, \textit{supra} note 106, at 41-42.
\item \textsuperscript{108} Const. preamble (France).
\item \textsuperscript{109} Const. preamble (France 1946) ("Anyone persecuted because of his activities in the cause of freedom has the right of asylum within the territories of the Republic").
\item \textsuperscript{110} Law No. 52-893, July 25, 1952 (1952 J.O.); Decree No. 53-377, May 2, 1953 (1953 J.O.), as amended.
\end{itemize}
the Ministries of Foreign Relations, Interior, Social Affairs, Justice, Economy and Finance, and Labor.\textsuperscript{111}

An alien seeking asylum in France is first directed to a local préfecture where she receives a card authorizing temporary residence in France (\textit{autorisation provisoire de séjour}).\textsuperscript{112} The alien is then referred to OFPRA, where a formal request for recognition is submitted. OFPRA gives the applicant documentation which makes the alien eligible for social benefits and authorizes employment. If able to find a job, she presents the labor contract to the local Direction de Département de Travail and is issued a temporary work permit. The work authorization is valid for an initial period of six months and is renewable. If unable to find work, the applicant registers with the Agence National Pour L'emploi, a national hiring hall.\textsuperscript{113}

If OFPRA grants the alien refugee status, she is given a carte de réfugié. She must then return to the préfecture for a carte de séjour which authorizes permanent residence in France.\textsuperscript{114} If OFPRA denies the claim, the alien has one month to appeal to the Commission des recours des réfugiés. She may also appeal if OFPRA has not rendered a decision within four months after the filing of the application. In such cases, the claim is deemed to have been "implicitly denied."\textsuperscript{115}

The membership of the Commission des recours makes it extraordinary in comparison to asylum adjudication systems in the United States and Germany. It is composed of three persons: a member of the Conseil d'Etat, a representative from one of the ministries on OFPRA's council (usually the Labor Ministry), and a representative from the UNHCR's office in France. The UNHCR representative is a full voting member in the Commission.\textsuperscript{116}

The filing of an appeal before the Commission has a suspensive effect on deportation of the alien.\textsuperscript{117} The Director of OFPRA is given notice that an appeal has been filed, and OFPRA has one month to comment on the case.\textsuperscript{118} However, OFPRA may also decide to reverse its initial denial of asylum and grant recognition. In such cases, of course, the appeal is withdrawn. The judicial role of the Commission appears closer to that of an American appellate court (giving deference to the administrative agency and placing the burden of proof on the alien) than to a German administrative court (which is charged with an independent duty to investigate and determine the facts).

\textsuperscript{111} Law No. 52-893, July 25, 1952 (1952 J.O.), art. 3.
\textsuperscript{113} \textit{Id.} at 5.
\textsuperscript{114} \textit{Id.} at 6.
\textsuperscript{116} Law No. 52-893, July 25, 1952 (1952 J.O.), art. 5.
\textsuperscript{117} \textit{Id.} art. 5(b).
\textsuperscript{118} Decree No. 53-377, May 2, 1953 (1953 J.O.), title III, ch. II, art. 21.
Most cases end with the decision of the Commission des recours. The alien may file an appeal, however, before the Conseil d'Etat, which, among other things, serves as the administrative supreme court. The appeal to the Conseil d'Etat is limited strictly to legal issues and has no suspensive effect. The proceeding is written and the alien must be represented by an attorney.

2. The process in action—

a. Before OFPRA—The rise in the number of asylum claims has seriously overburdened OFPRA. Including applications from the Indo-Chinese selected under the overseas program, OFPRA receives about 20,000 to 25,000 new cases a year. No real adjudication of the South East Asian claims occurs; OFPRA simply accepts the overseas determination that the alien is a refugee. Surprisingly, however, a senior OFPRA official reported that hearings involving these aliens are often quite complex and time-consuming. This is because the primary criterion used by the French government to select the Indo-Chinese is family reunification. It is thus quite important to establish accurately the identity and family members of the refugees to prevent subsequent abuse of the system.

For the remaining applicants, the crucial question is whether the alien comes within the definition of "refugee." OFPRA's investigation and documentation of such claims seem far less thorough than that done in Germany. The primary basis for the decision is an interview of the applicant; OFPRA has twenty interviewers who, together, conduct approximately 20,000 interviews a year. No documentation center on the German scale exists, and lawyers for the applicants are rarely present. Occasionally, additional information is supplied from the Interior or Foreign Ministries or French embassies. Nonetheless, as an official in another Ministry stated, the OFPRA dossiers are rather thin.

OFPRA's difficulty in obtaining sufficient information for the adjudication of claims has been exacerbated as the countries of origin...

120. Ordinance No. 45-1708, July 31, 1945 (1945 J.O.), § IV, art. 48.
121. Decree No. 53-934, September 30, 1953 (1953 J.O.), art. 11.
122. Several government officials commented that many of the recent South East Asian entrants do not come within the definition of "refugee" in the Geneva Convention because their motivations for leaving appear to be primarily economic. OFPRA, however, considers the overseas selection as determinative, and justifies the granting of refugee status on humanitarian grounds and in recognition of France's special concern for such persons given its earlier role in South East Asia.

A similar development has been noticed in the American refugee process. Refugees selected overseas seem to be judged by a lower standard than aliens who apply for asylum here. See Select Commission on Immigration and Refugee Policy, Final Report, U.S. Immigration Policy and the National Interest 169-71 (1981). For an argument in support of the current practice, see Martin, supra note 1, at 101-04.
of the applicants have shifted. In the years just after World War II, ninety percent of the asylum seekers were Europeans; the French authorities had good information regarding the political conditions in the claimants' home countries. Today, with applicants from over eighty countries (eighty percent of whom are non-Europeans), OFPRA is far less able to gather reliable information about individuals and political events. These developments are further complicated by the market in false documents and identities. OFPRA is aware of individuals who have applied for asylum under several names, claiming a different nationality and presenting different sets of false documents each time.

b. The four month rule ("refus implicite")—As mentioned above, French law directs OFPRA to reach a decision on each application within four months. Failure to do so constitutes a "refus implicite," from which the alien may appeal immediately to the Commission des recours.123 Although the "four month rule" is generally hailed in international circles as a model for other countries, it actually plays a minor role in the adjudication process and is used primarily in circumstances that have nothing to do with untoward delay.

OFPRA apparently decides the cases of aliens who appear to be true refugees in fairly short order (four to five months). For aliens from countries with low recognition rates, however, the process averages about one year. Aliens from these countries could invoke the four month rule, but rarely do; either they are not aware of the rule or have no interest in invoking it since their appeals are likely to be rejected. They, of course, would prefer that the process take as long as possible, during which time they are authorized to work and receive social benefits. Accordingly, invocation of the "four month rule" by the alien is quite exceptional. More often it appears to be a device used by the French government to avoid making a decision with unpleasant political ramifications. For example, if an opposition leader in a country friendly to France applies for political asylum, recognition of the claim could be an embarrassment to the government's conduct of foreign policy. One way to avoid the problem is for OFPRA to "decide not to decide" the claim. After four months, the alien may take his claim to the Commission des recours. The Commission, particularly because of the presence of the UNHCR representative, has the appearance of being a truly independent body, not subject to control by the government. Under these circumstances, asylum may be granted; but recognition is not as likely to be viewed as an act of the French government.

c. Political interference in the asylum process—The preceding discussion raises the question of how independent OFPRA is from government political pressure and foreign relation interests. There seems

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to be general agreement among government officials, academics, and private lawyers that, for a substantial majority of the cases, OFPRA reaches its decision on the merits with no interference from other government ministries.

But, as was obvious from a number of comments by government and OFPRA officials, the agency does not exist in a political vacuum. The Director is appointed by the Minister of Foreign Affairs; OFPRA is overseen by a council composed of representatives from a number of ministries; and all recognize that asylum decisions may have serious political implications both domestically and abroad. Indeed, several high-ranking government officials in the ministries candidly stated that they will occasionally call OFPRA to check on the progress of a case — although they maintained that their intervention is limited to seeking expedition or delay in the processing of the claim and not for the purpose of influencing the decision on the merits. Furthermore, to some extent changes in recognition rates for certain countries have followed political shifts. For example, since the Mitterand government took power, a substantially higher percentage of Haitian claimants (almost sixty percent in 1981, and almost ninety percent in 1982) are being granted refugee status by OFPRA.

In addition to setting general policies, the government theoretically may intervene in the asylum process through advice given by the Foreign Ministry and the embassies on particular cases. The French Foreign Ministry, however, appears to play a far less important role than does the State Department in American asylum determinations. There exists no procedure by which the Foreign Ministry is regularly requested to state its views on cases.

d. The Commission des recours— Like OFPRA, the Commission des recours has been hit hard by the rapid rise in asylum applications. Of course, if OFPRA granted most claims, it would not affect the work of the Commission. But a large portion of the claims now being filed are deemed by OFPRA to be frivolous or economically based;124 and approximately seventy percent of the claims denied by OFPRA are appealed. Thus the Commission's work load has been steadily ris-

<table>
<thead>
<tr>
<th>Year</th>
<th>Claims Denied</th>
<th>Percent Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(not including South East Asians)</td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td>894</td>
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<tr>
<td>1979</td>
<td>2,514</td>
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<td>1980</td>
<td>2,914</td>
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<tr>
<td>1981</td>
<td>4,181</td>
<td>46.8</td>
</tr>
<tr>
<td>1982</td>
<td>5,240</td>
<td>46.8</td>
</tr>
</tbody>
</table>

124. The number and percentage of claims denied by OFPRA have risen in recent years.
ing, and appeals now may take over a year to be decided. In 1982, the Commission decided 3,269 cases, while 4,609 were filed.

The Commission, in 1982, reversed the decision of OFPRA in approximately twelve percent of the appeals filed. This is a substantially higher proportion than the percentage of Bundesamt decisions reversed by the German administrative courts, even though OFPRA grants asylum with much greater frequency than does the Bundesamt. The reversal rate does not appear to be a product of strict or incorrect legal interpretation by OFPRA. Rather, the reversal rate seems to be a product of the inability of OFPRA to conduct a thorough investigation of the claim prior to rendering its decision. Thus, files are often incomplete and missing significant information that is made available for the first time to the Commission. Two other factors are important. First, while almost no applicants have lawyers present during the OFPRA interview, lawyers often help in preparing the appeal and sometimes represent applicants before the Commission. Furthermore, the applicant receives a written decision from OFPRA indicating the reasons for the denial. This affords the alien an opportunity to develop further information to support the claim.

As noted above, OFPRA is sent a copy of the appeal as soon as it is filed. The ability of the alien to make a far better case before the Commission than he did before OFPRA is indicated by the practice of OFPRA reversing its own denial of the claim after considering the appellate file. In 1982, OFPRA reversed itself in approximately thirteen percent of the cases appealed to the Commission.

At the beginning of a Commission hearing, a rapporteur reads a summary of the file and usually recommends a disposition of the case. His report is based primarily on the case file, although occasionally he may undertake independent research; the rapporteur does not contact the applicant. The three judges then ask the alien questions, seeking additional information and exploring any inconsistencies in the alien's statements before OFPRA and the Commission. It appears that the Commission's evaluation of the alien's credibility is of critical importance. The Commission does not provide interpreters, and the proceedings are neither recorded nor transcribed. In observing the proceedings, one is struck by the clear lack of understanding on the part of some aliens as to what is being asked. The Commission usually issues a written decision, which is prepared by the rapporteur, within a month or two of the hearing.

125. This situation is analogous to the high reversal rates by American administrative law judges of agency determinations denying applicants social security disability benefits. See generally Bloch, Representation and Advocacy at Non-Adversary Hearings: The Need for Non-Adversary Representatives at Social Security Disability Hearings, 59 WASH. U.L.Q. 349, 351-52 (1981).
e. Role of the UNHCR—The UNHCR plays a far more important role in the French asylum system than it does in the American or German systems. It has three points of access: it observes OFPRA’s application of the Geneva Convention; it sits on the OFPRA council; and it serves on the Commission des recours. The presence of the international organization is significant in several respects. First, it improves decision making to the extent it provides information on conditions in an alien’s home country not otherwise easily available to OFPRA or the French government. Second, because of its monitoring of other nations, it can also report on interpretations of the Convention reached by other countries. Third, the role of the UNHCR on the Commission des recours helps give a nonpolitical, independent appearance to the appellate process. Finally, the UNHCR presence assists the French government in justifying and legitimating the system’s decisions for domestic and international audiences. Charges that the system is either too strict or too lenient, or infected by political concerns, can be answered by pointing to the concurrence of the UNHCR.

The UNHCR does not use its role to serve as an advocate for asylum applicants. It recognizes that adherence to the Convention’s definition of “refugee” is in the long-term interest of all present and future political refugees; both the UNHCR’s credibility and the willingness of France to accept refugees would be harmed by an attitude that anyone who claims political asylum should receive it. The purpose of the UNHCR, one of its officials stated, is not to “manufacture refugees.” Rather it plays a cautious role, intervening only when convinced that recognition should be granted. Thus, during the proceedings of the Commission des recours, the UNHCR representative often questions the aliens closely, probing their stories for facts or contradictions. Because of their evenhandedness, UNHCR representatives are not ignored by the government members on the Commission. It is significant that, according to one member, the Commission reaches a unanimous decision in about ninety percent of the cases it hears.

f. The Conseil d’Etat—An alien may, under certain circumstances, appeal a decision of the Commission des recours to the Conseil d’Etat. Until 1979, no aliens had used this procedure to appeal a Commission decision. Since then, however, the number of such appeals has exploded:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
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<tbody>
<tr>
<td>1979</td>
<td>10</td>
</tr>
<tr>
<td>1980</td>
<td>27</td>
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<tr>
<td>1981</td>
<td>71</td>
</tr>
<tr>
<td>1982</td>
<td>97</td>
</tr>
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</table>
The *Conseil d'État* will review the proceedings below only for errors of law or procedure. Its decisions can have significant consequences. For example, in January 1981, the *Conseil d'État* fundamentally altered a well-established rule of law that OFPRA and the *Commission des recours* had been applying for twenty-five years. It held that an alien who came within the Geneva Convention's definition of "refugee" should not be denied asylum in France on the ground that he had stayed for some time in a country of first asylum ("pays d'acceuil") prior to arriving in France.

The rise in the number of cases appealed to the *Conseil d'État* poses serious problems for French attempts to speed up the adjudication process. Additional levels of appeal, as the German and American experiences make clear, are likely to be exploited.

g. The return of aliens denied asylum—In West Germany, the responsibility for the return of applicants denied asylum rests with the states. State officials have no hard data on the numbers of aliens who return to their countries of origin after exhausting judicial remedies. Some claim that most aliens leave because of the difficulty of finding work without proper documentation. And occasionally, a state will pay the expense of sending an alien and his family home. Nonetheless, it appears that a significant percentage either leave Germany for another country (other than their country of origin) or go underground in Germany.

In France, the government currently makes no attempt to send home any aliens denied asylum. Unsuccessful applicants may be sent a letter by the government informing them that they have a certain number of months to leave, but no effort is made to locate or deport the aliens. French officials generally justify this situation on the ground that an alien denied asylum has probably been residing in France for several years by the time the process ends and thus has probably developed significant ties with the French economy and society. Furthermore, the administrative costs may be substantial in finding the alien and paying his airfare home. Yet it is difficult to believe that the French will

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129. M. Gilles Rosset, Secretary-General of OFPRA, has recently commented on this problem:

*La refouler ou? Sur le pays d'origine? En général, c'est très lointain. La mettre dans un avion? Cela coûte très cher. C'est compliqué juridiquement. Et moralement? Et puis, on court le risque qu'elle soit vraiment menacée. Même si elle ne répond pas au statut de réfugié, il s'agit peut-être quand même d'un réfugié. On peut s'être trompé. Il ne semble pas que les candidats au statut de réfugié à qui la protection de l'Office a été refusée, aient été expulsés ou même refoulés.*

(Return him? Where? To his home country? In general, that's very distant. Put him on a plane? This is very expensive. It is legally complicated. And morally? Then we
be able to maintain this de facto policy of nonreturn. Quite simply, it effectively grants permanent residence to any alien who arrives in France and asks for asylum.

h. Benefits for asylum applicants— As noted above, France provides substantial financial and resettlement assistance to asylum applicants. These programs began after World War II and expanded to help welcome refugees from South East Asia. Today the programs remain generally available to all asylum applicants, even though a rising number of non-South East Asian applicants are not being granted asylum. The programs are generally provided by private voluntary agencies funded by the government. They provide emergency lodging, clothing, and other aid as well as an initial two or three month stipend of about 1200 francs per person. Longer range programs such as French language and occupational training may also be available. Applicants are also entitled to free medical care and unemployment benefits if they are unable to find work.

The voluntary agencies providing these programs have begun to be overtaxed by the increased number of asylum applicants. For example, temporary housing is now reportedly oversubscribed, and some applicants are being sent to public shelters or go without lodging.

Given the increased cost of providing adequate programs, combined with a depressed economy and the beginning of anti-alien agitation, it seems clear that the government will come under increasing pressure to reduce benefits.

C. French Proposals for Change

The government is clearly aware that the asylum system is on the verge of breaking down. Although the number of claims filed and pending is substantially below the levels that produced the dramatic German policy changes, OFPRA is seriously overworked. In addition, the delays at the Commission des recours are viewed as unacceptable and the increasing cost of benefits to applicants is a potential political

run the risk that he really will be threatened. Even if he doesn't fit the status of refugees, he could still be a refugee. We can be mistaken. It doesn't seem that people who have applied for asylum but have been refused protection by the office have been expelled or even returned.)


133. LA CIMADE, GUIDE DU REFUGIÉ: TRAVAILLER EN FRANCE-AIDE AUX TRAVAILLEURS PRIVÉS D'EMPLOI 1b-6b (1981).

134. See supra text accompanying notes 138-44.
liability. Small reforms have occurred; the staff at OFPRA has been augmented, and the Commission des recours has been divided into several sections to help handle the growing backlog of claims. Recently, OFPRA has decided to establish fifteen regional offices near border crossing points. The purpose of these suboffices is to identify more quickly frivolous claims and to avoid the problem of applicants disappearing between their place of entry and OFPRA's central office outside Paris.

The government, however, has not yet generated a larger set of proposals to deal with the situation. The French are clearly unwilling to adopt the German approach, particularly the communal housing facilities for applicants. Other proposals have been suggested, such as reducing benefit levels, expelling aliens denied asylum, or repealing the suspensive effect of appeals to the Commission des recours. But these are generally viewed as retreating from France's traditional welcoming of refugees and thus are unpalatable to the Socialist government. One official stated that France lacks, at the moment, the volonté politique to change the system. Nonetheless, it seems reasonably clear that something must, and will, change in France in a year or two if the number of applications continues to rise at the current rate.

The asylum "crisis" must also be viewed in a broader context. Immigration in France has become a major social issue. In the past twenty years, the alien population in France has more than doubled, and now stands at more than three and one-half million (almost seven percent of the total French population). More importantly, the percentage of aliens from Third World nations has increased most dramatically. Finally, even with such measures as the 1974 suspension of immigration, the number of aliens in France continues to grow as family members are permitted to join earlier immigrants and other aliens enter illegally.

The political controversy surrounding immigration became apparent in the 1970's when aliens began to be identified with social problems

137. The largest groups of aliens in France are:

<table>
<thead>
<tr>
<th>Nationality</th>
<th>Number</th>
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<tr>
<td>Algerian</td>
<td>795,920</td>
</tr>
<tr>
<td>Portuguese</td>
<td>764,860</td>
</tr>
<tr>
<td>Morrocan</td>
<td>431,120</td>
</tr>
<tr>
<td>Italian</td>
<td>333,740</td>
</tr>
<tr>
<td>Spanish</td>
<td>321,440</td>
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<tr>
<td>Tunisian</td>
<td>189,400</td>
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</table>
such as crime, deterioration in housing, and ghettoization. Aliens' roles in labor strikes and militant protests against living conditions further contributed to anti-alien sentiment. Even the French Communist Party joined in some local anti-alien actions. The Mitterand government, shortly after taking office, instituted a number of important reforms, including a legalization program for long-term undocumented workers and increased judicial involvement in the deportation process. Nonetheless, a deteriorating French economy and alien participation in strikes and acts of terrorism have continued to fuel animus against aliens. Recently, political candidates of the right have run on tough anti-immigration platforms calling for the expulsion of resident aliens. This backlash has, in turn, produced a countermovement against what the left terms the racist underpinnings of the anti-alien fervor. In the fall of 1983, 70,000 persons marched in Paris in support of fair treatment for aliens.

The vociferous debates in France over immigration and the treatment of aliens are likely to influence government policies regarding asylum applicants. To the extent that the anti-alien forces gain political power, government programs that appear to support persons without bona fide claims will come under serious fire. The problem that lies ahead for France is how to structure and implement policies that reduce the number and burden of frivolous claims without betraying the nation's historical commitment to helping refugees.


139. Id.


The government has recently announced that it would pay unemployed immigrants up to $3,750 to return to their home countries. N.Y. Times, Apr. 29, 1984, at A5, col. 2.
IV. LESSONS FOR THE UNITED STATES

A. Comparison of Responses and Results

The three western democracies examined here have had similar experiences in recent years. World events, improved transportation and communication, generous asylum policies, high standards of living, and limits on legal immigration have produced in each country a huge rise in the number of asylum claims. The rapid increases have overwhelmed existing adjudicatory institutions causing long delays which themselves may well have stimulated more filings.

The responses of the three countries, which have varied considerably, have been directed at two aims: expediting the adjudication of claims and deterring the filing of new claims. Germany has moved vigorously on both fronts. It has enacted measures that streamline the adjudication process by bringing more judges into the process and restricting appeals. To deter the filing of claims, Germany has cut benefits, restricted work authorization, required visas and instituted communal housing arrangements. The results of these new policies have been dramatic. France, so far, has hardly altered its adjudication process and has done little to deter the filing of claims.

The United States, under the Reagan Administration, has focused primarily on programs designed to deter additional asylum claims. These measures have been part of a broader initiative to "regain control of our borders." In the summer of 1981, the INS instituted a new policy of detaining aliens who arrive at the border without documentation or a colorable right to enter. The government also sought to stop the flow of Haitian boat people into Southern Florida. President Reagan issued an Executive Order authorizing the Coast Guard to stop and return vessels believed to be transporting aliens to the United States in violation of the immigration laws. By exchange of notes, the government also entered into an agreement with Haiti that permits

145. The Carter Administration policy was largely ad hoc and incoherent. President Carter initially welcomed the Mariel Cubans with "an open heart and open arms," N.Y. Times, May 6, 1980, at A1, col. 1, but the Justice Department subsequently sought to prosecute over 300 persons who transported the Cubans between Mariel and Florida. (The indictments were later dismissed on the ground that the defendants' actions — which included openly presenting the Cubans to immigration officials upon arrival in the United States — were not condemned by the antismuggling provisions of the immigration laws, INA § 274, 8 U.S.C. § 1324 (1982). United States v. Anaya, 509 F. Supp. 289 (S.D. Fla. 1980) (en banc)). Similarly, although the Administration made human rights a mainstay of its foreign policy, the INS initiated a program of mass adjudication of Haitian asylum claims that seriously violated the due process rights of the applicants. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

146. See Joint Hearing, supra note 19, at 6 (statement of Attorney General Smith).

American authorities to return ships to Haiti in order to enforce "appropriate Haitian laws." Under this interdiction program, the United States has stopped and returned to Haiti some 56 vessels carrying 1367 Haitians. Furthermore, the government adopted a regulation restricting opportunities for asylum applicants to work pending adjudication of their claims. Under the new rule, an INS district director may grant employment authorization only upon a determination that the asylum claim is "non-frivolous."

Legal actions have stymied some of these deterrent measures. A federal district court invalidated the detention policy; and a panel of the Eleventh Circuit affirmed, holding that the policy had been promulgated in violation of the Administrative Procedure Act and applied to Haitian applicants in a discriminatory manner. Although the panel's decision was recently overturned on other grounds by the Eleventh Circuit sitting en banc, most of the Haitian detainees had been released by order of the district court. In the southwest, two lawsuits have successfully challenged border patrol practices that persuaded Salvadorans to leave the United States without filing asylum claims. An action brought by a Haitian refugee group in the United States challenging the legality of the interdiction program was dismissed for lack of standing — although the government has never asserted a satisfactory moral or legal basis for the policy.

153. The Office of Legal Counsel of the Department of Justice (OLC), in a memorandum to the Attorney General, asserted that both the agreement with Haiti and the immigration laws provide legal authority for the interdiction program. Memorandum of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to the Attorney General (August 11, 1981). It may well be, as the OLC memorandum argues, that the President has inherent authority to enter into executive agreements with a foreign nation to aid the enforcement of that country's laws. But what does it say about the United States when it acts to enforce the laws of one of the most repressive regimes in the Western Hemisphere? Furthermore, such a policy would seem to undercut American criticisms of Eastern bloc nations who have similar laws restricting or burdening the right to emigrate. The second claimed source of authority — American immigration laws — is quite doubtful. The OLC memorandum relies upon 8 U.S.C. § 1182(f) (1982), which authorizes the President to suspend the entry of "any class of aliens" into the United States where entry "would be detrimental to the interests of the United States." It is hard to see how this provision, which appears aimed at suspending the entry of otherwise admissible aliens, authorizes the President to order the return of aliens stopped on the high seas. The Coast Guard's action essentially permits the executive branch to avoid the procedures established by the INA for determining the admissibility of an alien seeking entry.

The interdiction program is pernicious. It raises serious questions about American compliance with the Geneva Convention, see Helton, supra note 1, at 255-56, puts the United States in the
The second goal — expedition of asylum adjudications — has been the subject of several governmental initiatives. Legislation supported by the Administration and passed twice by the Senate would assign asylum claims to administrative law judges trained in refugee and international law, and would limit opportunities for judicial review. The government has also taken part in a program to train members of the bar to handle asylum cases and has made action on asylum claims a priority in INS district offices and at the State Department.

The deterrent and procedural measures adopted to date have not been as successful as the German programs in stemming the influx of asylum seekers. The number of applicants from Haiti — while never a substantial portion of the total number of claimants — has dropped to a trickle under the interdiction program. But increases from other countries have kept the backlog of asylum claims steadily rising. Furthermore, although greater devotion of resources has begun to reduce the backlogs in INS offices, over 40,000 claims (not including Cuban applications) remain to be adjudicated. Some 8,000 to 10,000 additional applications are pending before immigration judges, and two cases are being docketed for every one decided.

It is clear that additional proposals for change are necessary. Such proposals must begin with identification and exploration of the fundamental goals of asylum policy.

B. The Goals of American Asylum Policy

At the foundation of American asylum policy is our legal and moral obligation not to return persons to countries in which there is a reasonable likelihood that they will be persecuted. It is important to notice what this statement does not say. First, it does not require the United States to grant asylum — effectively, permanent resident status — to all aliens who come within the definition of "refugee";
it simply prohibits the return of a bona fide refugee (non-refoulement). This distinction is important because we may wish to limit the number of aliens to whom we grant asylum in light of broader immigration decisions regarding the number of aliens the nation is prepared to absorb each year. 157 Such a decision may not violate legal or moral norms if we can find other nations that would welcome aliens eligible for asylum. Second, the mere statement of the principle of non-return says nothing about the obvious trade-off between the cost of adjudicating claims and the degree of certainty of our decisions on the merits of claims. Concern about the terrible consequences of wrongly denying asylum may argue in favor of the fullest kind of investigation of claims. But arriving at certainty about the likelihood of persecution could be an extraordinarily expensive enterprise (assuming such certainty is attainable at all). The alternatives, however, are no less troublesome: tolerating a lower level of certainty in decision making may either spark the filing of marginal claims (if the standard of proof is too lenient) or may run the risk of violating our obligation not to return refugees (if the standard of proof is too strict). Taking these factors into consideration, a more refined statement of the basic American goal may be to devise a set of policies and procedures that identify, with an acceptable degree of certainty, an acceptable number of aliens who are likely to be persecuted if returned home, provided that the policies and procedures do not stimulate the filing of a large number of non-bona fide claims that threaten both the accuracy of decisions and public support for the program as a whole.

If this is an accurate statement of what the American goal should be, then the present system falls alarmingly short of achieving it. A critical observer of current policies and institutions would be led to

157. A generous asylum policy also raises issues of equity regarding overseas refugees waiting for resettlement. (I am indebted to Michael Teitelbaum for calling this point to my attention.) If there is a finite number of refugees the United States is willing to admit each year, then a huge increase in the number of aliens granted asylum may affect the willingness of the United States to select refugees from camps overseas. Is it rational for American policy to reward refugees who can make it to the United States on their own over refugees who cannot? There is no easy answer here.

One response is that, given our accession to the Geneva Convention, we have little choice but to recognize the claims of bona fide asylum applicants. But the Geneva Convention only mandates a policy of non-refoulement (nonreturn), not the granting of a formal residence. A second response is that our refugee law, as actually implemented, applies a stricter standard for asylum applicants than for overseas refugees. Finally, it may well be that any inequity that exists cannot be overcome until an international approach to asylum is agreed to by the receiving countries of the world. Under such a strategy, as conceived by Dale F. Swartz, President of the National Immigration, Refugee and Citizenship Forum, countries of first asylum would transfer applicants to an international holding center where claims could be adjudicated. Aliens recognized as refugees would then be resettled in a country which may or may not be the country in which the alien first claimed asylum. This proposal would go a long way toward ameliorating the present appearance of inequity.
conclude that we are pursuing two rather different goals: first, the deterrence of all asylum claims from aliens whose countries of origin are friendly to the United States (particularly Haiti and El Salvador); and second, effective control of decisions by the State Department, which can inject political considerations into the process in the guise of aiding inefficient and undertrained immigration officials. In beginning to rethink how American practices and institutions ought to be restructured, there are several lessons that can be drawn from the German and French experiences.

C. Deterring the Filing of Claims

Should the United States adopt measures aimed primarily at reducing the number of asylum claims? What is troubling about such a strategy is that aliens with bona fide claims may be deterred or prevented from applying and perhaps returned to likely persecution. The challenge, therefore, is to develop a set of policies that creates burdens or disincentives great enough to deter frivolous claims but not so great as to deter bona fide claimants from applying. This appears to be the central aim of the new West Germany policies. As stated openly by the German Ministry of the Interior: "The sole objective of the [recent] measures taken . . . has been, and still is, to remove the incentives for those foreigners who are not politically persecuted to enter [West Germany] illegally for economic reasons by abusing the rights of asylum."

Not surprisingly, advocates of asylum seekers attack the West German strategy as overbroad. They assert that the visa requirement and housing program prevent true refugees from getting to Germany and cause bona fide claimants in Germany to abandon good claims or seek protection in another country. The response of the government is, in effect, that aliens will get to Germany and tolerate current policies if they have legitimate fears of persecution.

The obvious problem we face in fairly evaluating the German strategy—or any other similar set of policies—is our extraordinary lack of information regarding the motivations and actions of asylum seekers. In such a vacuum, a policy of deterrence runs a serious risk of incorrect calibrations that produce dire consequences.

This is seen most dramatically in the Haitian interdiction program. Presently, an American Coast Guard ship patrols the shores of Haiti, stopping outbound vessels and returning aliens seeking to enter the United States without documentation. Clearly, the purpose of the pro-

158. Of course, bona fide applicants deterred from filing in the United States may be able to find safe haven elsewhere, or they may seek to enter the United States surreptitiously.
159. Federal Ministry Comments on UNHCR Report, supra note 63 (unnumbered page 3).
gram is to prevent Haitians from arriving in Florida where they can file asylum claims and receive legal advice. Although American officials on board ask Haitians why they want to come to the United States, many Haitians may be afraid to assert that they are victims of political persecution, particularly if they are aware that the Coast Guard cooperates with the Haitian government in regularly returning vessels to Haiti.  

Similarly, two district court cases describe border patrol conduct that is aimed at convincing Salvadorans not to request asylum without any investigation of the possible merits of such claims. The government’s view is that Salvadorans are no different from other undocumented workers whose only motives for entering the United States are economic. It purports to substantiate this argument by noting that most Salvadorans pass through Mexico or other third countries where they could seek asylum before coming to the United States. The government further asserts the fact that ninety percent of the apprehended Salvadorans voluntarily depart from the United States demonstrates that no real fear of return exists.

Both these positions are dangerously simplistic. The first fails to make a crucial distinction between why an alien leaves her home country and why she chooses a particular country in which to ask for asylum. The current civil war in El Salvador, graphically and gruesomely reported by the American media, makes untenable any claim that all asylum seekers from that country have left solely for economic reasons. Such reasons may well explain why they file claims here; but they do not indicate ipso facto that the claims are frivolous. As to the second argument of the government, a UNHCR report on treatment of Salvadorans in the United States provides troubling data. Apparently many Salvadorans choose return to El Salvador over long-term detention either because they are more willing to assume the risk of harm in returning than to remain in confinement, or because they will later...

160. See Helton, supra note 1, at 256-57. Moreover, the exchange of notes specifically provides that “[t]he Government of the United States agrees to the presence of a representative of the Navy of the Republic of Haiti as liaison aboard any United States vessel engaged in the implementation of the cooperative program.” Agreement on Interdiction of Migrants, supra note 148. It is thus hardly surprising that no Haitian brought aboard a United States vessel has requested asylum.

161. See cases cited supra note 151.

162. C. JONES, supra note 20, at 3. Furthermore, a Senate Staff Report has concluded that there is no creditable evidence that Salvadorans returned to El Salvador have been subjected to persecution. STAFF OF SENATE COMM. ON THE JUDICIARY, 98TH CONG., 1ST SESS., REFUGEE PROBLEMS IN CENTRAL AMERICA 4-5 (Comm. Print 1983). See generally 129 CONG. REc. S12736 (daily ed. Sept. 23, 1983) (remarks of Sen. Simpson). This finding is contested by asylum applicant advocates. See AMERICAN CIVIL LIBERTIES UNION, NATIONAL IMMIGRATION AND ALIEN RIGHTS PROJECT, SALVADORANS IN THE UNITED STATES: THE CASE FOR EXTENDED VOLUNTARY DEPARTURE 63-64, app. III (1983) (Report No. 1).
seek illegal reentry to the United States.¹⁶³ In neither case can we safely assume that abandonment of a claim for asylum means necessarily that the claim was frivolous.

The interdiction and detention policies in the United States, at least as they are directed against Haitians and Salvadorans, give no guarantee of deterring only frivolous claims. In short, a respectable policy of deterrence has not been, and without far better information cannot be, achieved.

Could the United States do better by adopting the German deterrent policies? It is quite doubtful. First, this country already has two of the German measures in place: aliens need visas to enter the United States, and work authorization is only granted for asylum applicants with "non-frivolous" claims. These policies seek to deter asylum applications by preventing aliens from getting to the United States or by making this country a less attractive country in which to reside. Given a porous border and a healthy demand for undocumented workers, however, neither measure effectively deters unlawful entry. Thus aliens with frivolous claims still are likely to be able to enter and reside in the United States.

The communal housing program presents different issues. To understand how it might work, we must distinguish among three groups of aliens: those who request asylum at the border; those who request it while lawfully residing in the United States; and those who claim asylum only after being placed in deportation proceedings. For the first group, a communal housing policy might be reasonable. Indeed, short-term detention — already authorized by the INA¹⁶⁴ — could be an acceptable policy, provided that mechanisms are available for release of aliens with non-frivolous claims¹⁶⁵ and that the adjudication process moves with expedition. Short-term detention would let aliens at the border know that an asylum claim is not automatically a ticket for entry and residence in the United States. It should be stressed, however, that the


¹⁶⁵. From the closing of Ellis Island in 1954 until 1981, detention of excludable aliens was the exception, not the rule. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), dismissed in part, rev'd in part, No. 82-5772, slip op. (11th Cir. Feb. 28, 1984) (en banc). The promulgation of the present detention policy in the summer of 1981 reversed the presumption. Now an undocumented alien stopped at the border is detained unless she can demonstrate special reasons for release, such as a serious medical condition, pregnancy, or close relatives in the United States who may file a visa petition on her behalf. 8 C.F.R. §§ 235.3(b), 212.5(a) (1983).

Aliens who request asylum at the border should be released into the custody of relatives or private agencies if their claims appear to be non-frivolous. The current regulations already call for INS to make such a determination: aliens who file "non-frivolous" claims for asylum may be granted employment authorization. 8 C.F.R. § 208.4 (1983).
current American detention policy goes far beyond the German housing program. Whatever deterrence the German policy brings about, long-term imprisonment — which too many asylum seekers in this country have suffered — runs a real risk of being inhumane and causing aliens to abandon legitimate claims. 166

For the second category — aliens who request asylum while lawfully in the United States — a housing program would not be appropriate. Aliens in this category are the most likely to have legitimate claims, and requiring them to move into government housing facilities would be a needless expense.

For the third group — aliens already in a deportation proceeding — a communal housing policy would also be expensive and would have uncertain results. Conceivably, some aliens with frivolous claims might decide not to press them if it meant having to leave one’s home for a government facility. But unless such facilities are detention centers, there is little reason why an alien would not leave and return to his American home. Furthermore, there is no reason to assume that all aliens who wait to file asylum claims in deportation hearings are making frivolous claims. If some groups of aliens currently believe that the government is not fairly adjudicating their claims, it may be rational to hold off filing a claim until it is absolutely necessary.

In sum, current American policies aimed at deterring frivolous claims either appear to be ineffective or give no adequate assurance that bona fide claims are not also deterred. Policies recently adopted by the German government appear to offer little promise; some are already in place in this country and others are not likely to be effective. These conclusions suggest that efforts to deter the filing of mala fide claims must proceed along two fronts. The first is improved border control and short-term detention of aliens at the border who present patently frivolous claims for asylum. The second is expedition of the adjudication of claims (without sacrificing accuracy). Expedition will diminish incentives to file a claim that merely seeks to gain an alien time and also will make acceptable a policy of detention at the border. The remainder of this Article will explore proposals for the reform of the asylum adjudication process.

D. Procedural and Structural Reform

Development of a fair and expeditious process would have a substantial deterrent effect on frivolous claimants: would-be migrants in their home countries would see earlier voyagers who were stopped at the border returning home after only a short stay in the United States.

166. See Helton, supra note 1, at 259.
An expedited process would also mean that filing an asylum claim would no longer be a way to put off deportation for a considerable period of time. Equally important, a reformed asylum adjudication process would restore faith that the system is not being manipulated for political purposes and could obviate the need for intrusive judicial intervention which has severely slowed the process. If we are willing to seriously reformulate the way asylum claims are adjudicated in the United States, the West German and French systems provide some extremely interesting possibilities.

1. The need for an independent federal agency to adjudicate asylum claims—Foremost is the need for the United States to create an independent federal agency to adjudicate asylum claims.\textsuperscript{167} As described in Part I, an alien may apply for asylum to an INS official or an immigration judge. Adjudicating asylum claims may be a small portion of these officials’ duties. Moreover, few have specialized training in international law or refugee matters; they therefore almost universally rely upon “advice” received from the State Department. The involvement of the State Department creates opportunities for political considerations to affect decisions on the merits of the claim and adds another layer to the process.

The adjudication systems in West Germany and France suggest an alternative for the United States. Both countries have a centralized federal agency whose only mission is to adjudicate asylum claims. The existence of such an institution fosters the development of expertise and knowledge, the evenhanded application of rules and policies, and far less reliance upon the foreign ministries for information and advice. In both countries, decision makers can concentrate on particular countries and become thoroughly familiar with conditions, events, political parties, and social groups in those countries. This kind of expertise significantly improves the ability of the decision makers to judge the credibility of the applicant.

Adoption of this model in the United States could help ensure a similar expertise in decision making. Furthermore, the centralization of asylum adjudications would also end the present maldistribution of asylum claims among INS districts. It would also facilitate the creation of a library and documentation center which could be available to both decision makers and lawyers.\textsuperscript{168} Obviously some logistical problems would occur. But both Germany and France have recently opened


\textsuperscript{168} Presently, documentation centers are being established by attorneys representing asylum claimants. See 60 Interpreter Releases 975 (1983) (documentation center to assist Salvadoran asylum claimants created by American Civil Liberties Union Fund of the National Capitol Area and the Center for National Security Studies).
up a few suboffices in other cities. That model could be adopted here, or adjudicators could conceivably "ride circuit."

The establishment of an independent agency to adjudicate asylum claims would have the additional salutary effect of decreasing the likelihood of court intervention in the processing of claims. Under the current system, courts have ordered intrusive injunctive relief when faced with evidence of massive violations of due process. The adjudication of Haitian asylum claims, for example, has been tied up by courts for nearly a decade. Independent agency adjudication of asylum claims would help alleviate this problem; courts would have increased confidence in the fairness and accuracy of decisions reached by an agency operating with a corps of professional, well-trained adjudicators who are removed from the enforcement side of the immigration system.

2. The independence of the federal agency and the removal of the advisory role of the State Department—A serious problem with the present American asylum system is the widely shared perception that it is politically biased. The German and French experiences demonstrate that no governmental agency is fully immune from political pressures. But the general perception in both countries is that the federal asylum agencies are largely free from political influence. No such perception exists in the United States. The relative ease with which Eastern Europeans and Cubans have been granted asylum as opposed to the extremely low recognition rates for Haitians and Salvadorans casts a long shadow on the proclaimed neutrality of the system. A major purpose of the Refugee Act of 1980 was to remove the political and ideological aspects of American refugee law, but many persons involved in the process are not convinced that this has occurred. Establishment of an agency outside the Department of Justice and not dependent upon the State Department would help eliminate the appearance of, and potential for, political influence in the asylum process.169 The agency could be run by a Board of Directors appointed for lengthy, staggered terms by the President with advice and consent from the Senate.170 The Board

169. Of course, formal independence cannot ensure actual independence, particularly if agency personnel are drafted from the ranks of the State and Justice Departments. Furthermore, the literature on administrative law and policy abounds with stories of "capture" of supposedly independent agencies. Yet some grounds for hope exist here. First, it would be advisable to adopt the provision in the Simpson-Mazzoli legislation that prohibits current immigration judges from sitting as judges in asylum cases until they have received special training in international relations and international law. S. 529, 98th Cong., 1st Sess. § 124 (1983), 129 CONG. REC. S6975 (daily ed. May 18, 1983). Second, it is not obvious who would "capture" the new agency. Certainly asylum applicants do not have the requisite political power.

170. Cf. 5 U.S.C. § 1201-1209 (1982) (Merit Systems Protection Board; three members appointed by the President of which not more than two may be of the same political party; seven year terms; removal only for inefficiency, neglect of duty or malfeasance); 47 U.S.C. § 396 (1976) (Corporation for Public Broadcasting; fifteen member Board of Directors; no more than eight directors may be members of the same political party; six year, staggered terms).
would be responsible for selecting an Executive Director who would hire qualified adjudicators and other staff. The agency's independence could be further demonstrated by following Germany's example of permitting the UNHCR to have a permanent observer at the agency.

Crucial to the independence of the agency would be the termination of the State Department's "advisory" role. Presently, the asylum section of the State Department's Bureau on Human Rights and Humanitarian Affairs is asked to issue an opinion on each asylum claim, and such opinions generally must be "cleared" with the relevant country desk in the Department. Officials in both the French and West German agencies openly talked about the problems of crediting information and advice from foreign service officers and ambassadors who have diplomatic roles to perform. The centralized, single-mission nature of both agencies has permitted each to develop sufficient expertise to make reliance upon the respective foreign ministry unnecessary.

Obviously, it would be a mistake to deny the State Department any role in the asylum process. It is perhaps the best source of information on conditions in other countries, and both the French and German agencies often seek information from their foreign ministries. But the independent asylum agency should use information from other sources as well, such as newspapers, Amnesty International, academics, and expert witnesses. In no case should the State Department be asked to render an opinion on whether or not the individual is entitled to refugee status; rather, the State Department should be seen as precisely what it is: one very good source of information, but not the decision maker.111

This limited role for the State Department is bound to benefit the government as much as the alien. It will help deflect charges of political interference, and it will clearly separate the legal issue of "refugeeship" from the political issues of foreign policy.

3. Limiting opportunities of review— The French system has only one real level of judicial review of the administrative decision (although appeals to Conseil d'Etat are technically possible). Germany has streamlined its judicial process considerably. The United States, however, has a system that guarantees multi-level review through several avenues. These opportunities for judicial review must be limited if any progress is to be made on speeding up the process. Assuming a new agency is created with the requisite independence and expertise, judicial review should be restricted.

At least two models of appellate review are worth exploring. The first would make decisions of the new agency reviewable in a federal

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111. Additionally, it may be advisable to give the State Department statutory authority to intervene in a particular case on its own motion. This would guarantee the government the ability to bring important facts to the attention of the decision maker.
court of appeals as part of a petition for review under present law from an exclusion or deportation order. 172 (This would mean that aliens who are in a lawful status would not be able to appeal a denial of an asylum claim. Only when the government sought to return the alien would appellate review be possible.) Under this plan, review could be limited further in two ways. First, in cases where deportability is not contested and the federal agency has determined the claim to be "clearly without merit," a single appellate judge could be authorized to dismiss the alien's claim if she concludes that the alien raises no serious issue of law in his appeal. 173 Second, the Supreme Court could be denied jurisdiction in cases determined by the appellate court to be "clearly without merit." 174

This proposed structure would reduce the levels of appeal, but it would still hold the asylum process hostage to the burgeoning dockets


173. This procedure would be somewhat analogous to the federal rules governing habeas corpus proceedings which permit a judge to dismiss a petition "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief." Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 4(b), 28 U.S.C. § 2255 (1976).

A further streamlining of the system could deny any court review in a case which the federal agency determines to be "clearly without merit." This proposal, however, does not appear to comport with the UNHCR's recommendation that applicants denied asylum "be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial." OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS para. 192 (1979). This objection could be cured by creating an internal appeals panel in the federal agency to review claims deemed to be frivolous by the initial decision maker. It might be argued that a system that makes the administrative determination final and unreviewable raises a serious constitutional issue. See, e.g., Crowell v. Benson, 285 U.S. 22 (1932); Johnson v. Robison, 415 U.S. 361 (1974). However, the availability of habeas corpus prior to the alien's removal from the country should allay any constitutional doubts.

174. In response to these suggestions regarding limitations on judicial review, Arthur Helton, Director of the Political Asylum Project of the Lawyers Committee for International Rights, has written the following:

Certainly, to the extent that due process is enhanced in the administrative context, recourse to judicial review will be necessary less frequently. However, it seems to me unwarranted to assume that even with the structural reforms that you propose administrative due process will, in fact, be enhanced. Immigration authorities in the United States have steadfastly refused to implement the Refugee Act of 1980. As a matter of policy, then, it may make more sense to attempt the administrative reforms that you propose, and yet maintain full judicial review as a failsafe mechanism.

Letter to the author (February 2, 1984). No doubt, as Helton asserts, there is always a risk that in limiting avenues for review, some mistakes made at the administrative level will not be caught. But the present system of "full judicial review" imposes severe costs on the asylum process. The creation of an independent federal agency should remove much of the bias Helton sees in the current system. If so, then streamlined judicial review appears appropriate and advisable.
of the federal appellate courts.\textsuperscript{175} Accordingly, a novel alternative, patterned somewhat after the French system, might be advisable: appeals from the federal agency could go to a special tribunal for asylum appeals.\textsuperscript{176} The membership of the tribunal could include designated federal judges, distinguished members of the bar or nonlawyers knowledgeable in international and refugee affairs, and a representative of the UNHCR. No appeal beyond the tribunal would be allowed, although habeas corpus would — by constitutional necessity — be available to challenge the constitutionality of the proceedings.\textsuperscript{177} The tribunal could also be empowered to dismiss an appeal on the pleadings if the claim was determined by the agency to be "clearly without merit."

4. \textit{The need to accommodate foreign policy concerns: presidential granting of "safe haven"} — Refugee and asylum issues are too wrapped up in fundamental issues of foreign policy and international relations to permit creation of an adjudication process that is entirely free of political influence. The creation of an independent federal agency that excludes the political branches from any formal voice would be an improvement, but it is not enough. It would also be advisable to create forums quite distinct from the adjudication process in which political considerations could legitimately be exercised.

One example of this is the authority of the \textit{Laender} governments in Germany to withhold expulsion of persons even though their asylum claims have been denied. This is viewed simply as a political decision, and one that can be accomplished without putting pressure on the \textit{Bundesamt} to stretch the definition of "refugee" or to avoid deciding certain claims.

A similar distinction between adjudication and politics should be developed in the United States. Current practices evidence a confusion of adjudicative and political functions that undermines procedural credibility and effectiveness. This confusion is best evidenced in the government's use of "extended voluntary departure." Extended voluntary departure (EVD) — an inelegant phrase for an administrative prac-
tice supported by questionable statutory authority — is a technique used by the government to keep deportable aliens in the United States. Since 1960, the government has adopted EVD programs for nationals of fifteen different countries. Some programs have lasted only a few months; others far longer. Presently, Ugandans, Poles, Ethiopians, and Afghaniis benefit from blanket grants of EVD; they are not sent home even if found deportable.

The EVD programs have often served as a low visibility means for the accomplishment of American foreign policy objectives. Thus, Poles have been granted EVD as part of the United States' response to Soviet involvement in Poland, even though most of the Poles do not satisfy the definition of "refugee" in the immigration act. The government, however, has refused to grant EVD to Salvadorans. It has defended its decision on the grounds that "the degree of civil strife varies greatly in different parts of El Salvador," and that "a grant of EVD would probably constitute a magnet inducing members of the beneficiary nationality to enter the United States illegally."

The reasons cited by the government for denial of EVD to Salvadorans have been assailed as erroneous and disingenuous. Critics assert that the government's policy toward Salvadorans in the United States is part of its economic and military support for the regime in El Salvador. More importantly, the government's foreign policy objectives are said to account for the extremely low number of Salvadoran asylum claims that have been granted. Thus, the overall perception is that purportedly humanitarian programs — asylum and EVD — are

178. EVD programs have been instituted for aliens from several countries.

<table>
<thead>
<tr>
<th>Country</th>
<th>Dates of Program</th>
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<tbody>
<tr>
<td>Cuba</td>
<td>(1960-66)*</td>
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<tr>
<td>Czechoslovakia</td>
<td>(1968-present)**</td>
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<tr>
<td>Chile</td>
<td>(April-May 1971)</td>
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<tr>
<td>Cambodia</td>
<td>(1975-77)*</td>
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<tr>
<td>Vietnam</td>
<td>(1975-77)*</td>
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<tr>
<td>Laos</td>
<td>(1975-77)*</td>
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<tr>
<td>Lebanon</td>
<td>(1976-present)</td>
</tr>
<tr>
<td>Hungary</td>
<td>(1971-present)**</td>
</tr>
<tr>
<td>Rumania</td>
<td>(1977-present)**</td>
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<tr>
<td>Uganda</td>
<td>(1978-present)**</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>(1979-1980)**</td>
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<tr>
<td>Iran</td>
<td>(1979)**</td>
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<tr>
<td>Afghanistan</td>
<td>(1980-present)</td>
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<tr>
<td>Poland</td>
<td>(1981-present)</td>
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</table>

* Status regularized by statute.
** Case-by-case determination in effect at present.

INS ADJUDICATIONS, supra note 8, at 67-68.

179. Letter from Secretary of State George P. Schultz to Congressman John J. Moakley (July 30, 1983); see Letter from Attorney General William French Smith to Congressman Lawrence J. Smith (July 19, 1983).
being driven by political considerations. The perception is strengthened when one appreciates that EVD decisions and asylum adjudications are both joint decisions of the Departments of Justice and State.

What is needed are different channels that separate political decisions from the asylum decisions. The creation of an independent asylum agency would be an obvious start; but this must be supplemented by statutory changes in the immigration law that clearly locate EVD decisions for classes of aliens outside the asylum process. This could be accomplished by enacting legislation that expressly authorizes the President to grant "safe haven" to classes of aliens when he determines such action to be in the national interest. 180 (The immigration laws presently give the President authority to suspend the entry of classes of aliens if he deems such entry to be detrimental to the interests of the United States. 181) A grant of "safe haven" would be a political decision conferring on the aliens no entitlement to remain in the United States beyond the life of the proclamation and should in no way influence the asylum process. Aliens afforded such protection should be able to apply for asylum and have their claims adjudicated. The federal agency would not simply put all such claims on hold, as the INS presently does for aliens granted EVD.

This separation of adjudication and political concerns should leave the federal asylum agency more freedom to carry out its mandate irrespective of the political objectives of the Administration. It would thus help eliminate the appearance that the asylum process is being used simply to further American foreign policy objectives.

CONCLUSION

The proposals described here pursue a goal familiar to lawyers and public administrators: better decisions through a more independent, expert, and centralized process. The idea (and ideal) that institutions can be created to apply neutrally a shared conception of the public interest has been around at least since the early years of this century. Unfortunately, almost every part of this fantasy is denied by what we know about how the real world operates. Independent agencies may sometimes be "captured" by the interests they are supposed to be regulating; agency adjudicators may care more about meeting bureaucratic performance standards than deciding cases correctly; decision makers inhabit a world of values and political pressures; "the public interest" cannot be objectively identified or deduced from shared premises. The recent experience

180. This proposal has been more fully developed in Refugee Assistance Hearings, supra note 43, at 102-04 (prepared statement of the author).
of the reconstituting of the “independent” Civil Rights Commission shows how far the real can deviate from the ideal.

What, then, is the value of “better process” in the asylum context? Perhaps it reduces to nothing more than the claim that greater expertise and independence are far better than what we have now.\textsuperscript{182} Centralizing the process, upgrading the expertise of the adjudicators, downplaying the role of the State Department, and creating a new avenue for political decisions should go far in removing the primary causes of concern about the present system.\textsuperscript{183} The French and German models provide some ground for cautious optimism here.

Yet “better process” will not solve all the problems facing the current asylum system. Process is not neutral; it is instrumental. It should be obvious that the best process in the world is worthless if it applies substantive legal standards that are intolerable. Thus, procedural improvements cannot permit us to ignore questions regarding the scope and meaning of our substantive asylum law. Nor should procedural reforms blind us to unacceptable policies currently in place that attempt to prevent applicants from filing asylum claims. As argued above, some current policies of deterrence are probably impossible to implement with any decent assurance of accuracy. Finally, “better process” may ultimately be unavailing if the future brings huge increases in asylum requests. To a large degree, the number of asylees will depend upon world events over which we have little control. There are thousands of Cubans who would come to Florida if given the opportunity, and thousands of Haitians in the Bahamas. Moreover, military coups could bring us substantial numbers of applicants from Guatemala, Honduras, or other Latin American countries. Clearly, everything would be up for grabs if every undocumented alien apprehended this year — probably well over one million — were to request asylum.

Although “better process” cannot guarantee perfect decisions, clarify underlying legal standards, or stop world events that create asylum applicants, it can make a number of immediate, tangible improvements. In the search for such improvements, the German and French experiences offer some suggestions worth pursuing.

\textsuperscript{182} Cf. J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 78 (1983) (“The realization that the ideal of instrumentally rational administration cannot be achieved does not justify a resigned cynicism, . . . only a more balanced idealism.”).

\textsuperscript{183} No doubt, there is some risk that the agency can be “packed” by an Administration favorable or unfavorable to the claims of applicants from particular nations. A system of staggered, lengthy terms for board members should reduce the risk. See, e.g., 15 U.S.C. § 41 (1982) (seven year staggered terms for Federal Trade Commissioners).