

ASYLUM AND INSPECTIONS REFORM

HEARING
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL LAW,
IMMIGRATION, AND REFUGEES
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 1153, H.R. 1355, AND H.R. 1679

ASYLUM REFORM ACT OF 1993

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Mr. MAZZOLI. Professor Vaughns.

STATEMENT OF KATHERINE L. VAUGHNS, PROFESSOR, SCHOOL
OF LAW, UNIVERSITY OF MARYLAND

Ms. VAUGHNS. Yes. Good afternoon, Mr. Chairman and members of the subcommittee.

Mr. MAZZOLI. Good afternoon.

Ms. VAUGHNS. I had to make sure it was afternoon.

I want to thank the subcommittee for inviting me to speak today in connection with two bills. I am sorry, Mr. Schumer, I have not had an opportunity to look at your bill. However, I have heard enough about what is in it, and I think I can make some comments regarding it.

In the interest of full disclosure, I had another lifetime prior to entering the academy, and that was a practicing lawyer in Los Angeles, as an assistant U.S. attorney in the Central District of California, I did handle immigration matters at that time. However, that was prior to the controversies surrounding asylum taking on its present dimensions. Therefore, my experience as a practitioner in asylum matters is quite limited.

As an academic, I have been studying it, if you will, and teaching it for the last 7 or 8 years. I am compelled by the humanitarian aspects of asylum and refugees to be concerned about any measures that may dilute or take away the procedural safeguards that are presently in place.

I think it is very important that these safeguards be maintained, but I am enough of a pragmatist to believe that the time has come for the restructuring of the asylum process. At the time Congress enacted the Refugee Act of 1980, I believe, the statutory asylum provisions were already out of date, because the focus was on the overseas refugee program.

I think the comment that Mr. Schumer made about having arrived at a time where we should narrow the asylum process, but expand the refugee process goes to the corps of the issue.

The present asylum controversy is about the process which permits people who are outside of the regular immigration selection system or the regular overseas program to, in effect, obtain or gain, or at least seek, immigration status while physically present in the United States.

Numbers are a problem. I think if we did not have the large numbers of asylum-seekers here today, regardless of what application filing figures you want to settle for the 1980's, we might be having a different debate right now.

It is unfortunate that the time to see the current asylum regulations fully implemented in a functioning process may have run out. However, the system, in effect, it seems to me, is already bankrupt. A more comprehensive legislative reform program, in terms of dealing with the problem, seems to me the way to go at this juncture.

I have already submitted my written testimony, and I do tend to favor Representative Mazzoli's bill. However, I am persuaded by some of the earlier comments made today regarding Mr. McCollum's bill, that that portion of it which operates like a screening device, as opposed to an exclusion device, may be acceptable. Again, I still have concerns about any legislative measure that

seems to focus on a problem that may be isolated or has the potential of being transitory.

Also, further consideration should be given to the agency's ability, assuming requisite or adequate resources were available, to attempt to address the problem first. That is why I was impressed with Mr. Becerra's observation about what happened in Los Angeles when additional detention facilities were in place and the problem of asylum-seekers arriving without proper documentation seemed to evaporate.

Of course, the agency's response is that the phenomenon merely shifted to another place. So that is why my recommendation still remains that a more comprehensive approach to the problem seems to be appropriate.

However, I start, as I indicated in my statement, from the premise that there are more refugees or asylum-seekers deserving of a safe haven or political asylum in this country than this body or this Government is prepared to admit. That is just a fact of life.

Once you make that decision that we do not have open borders, then you go about deciding the best way to, in effect, accord immigration status or asylum status to those who do manage to come to this country or who manage to participate in the overseas refugee program.

My only concern with respect to Mr. Mazzoli's bill is that there seems to be no fail-safe mechanism in place with respect to those asylum-seekers who fail to make the affirmative step of applying for asylum at or shortly after entry and who find themselves in deportation proceedings, but who, if given an opportunity, would be able to demonstrate a bona fide persecution claim or a claim for asylum. At that point, Mr. Mazzoli's bill fails to indicate what would be done in terms of assuring that the individual would not be returned to a country where he is more likely than not to be persecuted.

Thank you.

Mr. MAZZOLI. Well, thank you very much, Professor. I appreciate your suggesting that there are, obviously, many aspects of my bill that I would welcome change in and modification of, and that is certainly one of them.

[The prepared statement of Ms. Vaughns follows:]

STATEMENT OF KATHERINE L. VAUGHNS¹SUBMITTED TO THE HOUSE SUBCOMMITTEE ON
INTERNATIONAL LAW, IMMIGRATION AND REFUGEES

Tuesday, April 27, 1993, at 9:00 a.m.

EXECUTIVE SUMMARY:

The very nature of the asylum controversy centers on the ability of an asylum seeker to obtain lawful immigration status outside the regular immigration or refugee selection and pre-screening systems. No statutory mechanisms are thus in place presently to accommodate a system of asylum adjudication which handles large numbers of applications filed by individuals who do not otherwise possess lawful immigration status. Any legislative reform proposals should adopt a fundamental approach in addressing the issue of asylum abuse. Legislation which responds only to a particularized problem may not provide a lasting resolution. Moreover, administrative options may be available to address immediate problems in particular locations, such as the one identified at JFK airport in New York City.

Specifically, H.R. 1355 focuses too narrowly on exclusion proceedings. It creates a particularized ground of exclusion for "admissions fraud" which is already covered under existing law. Also, H.R. 1355 appears to dilute procedural safeguards for those individuals who present themselves to immigration officers at ports of entry. For example, the statutory bar to asylum relief based on the specific circumstances of an alien's arrival with false or without documents would not be a satisfactory policy. First, it may prevent an adjudicating officer an opportunity to weigh the totality of the circumstances and grant asylum relief to a bona fide refugee. Second, it may cause the present phenomenon at major international airports to shift to other locales at which little or no control by the INS is feasible.

H.R. 1679, on the other hand, is a legislative measure which is directed at the crux of the problem, the need for greater control in the process. It attempts to create a tighter structure for adjudication by (1) requiring an affirmative obligation to apply within a statutory period of time and (2) re-vitalizing the nonrefoulement relief, which has a higher burden of proof than asylum claims. It appears to do so without unduly compromising procedural safeguards and preserving this country's mandatory international obligation of nonrefoulement. This legislation is not without its problems, however. The exception provision is unduly limited in scope and appears to cut-off an opportunity to apply for withholding in deportation or exclusion proceedings.

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I. INTRODUCTION

This statement is submitted in connection with the hearing on H.R. 1355, the "Exclusion and Asylum Reform Amendments of 1993," and H. R. 1679, the "Asylum Reform Act of 1993," scheduled by the Subcommittee on International Law, Immigration, and Refugees, of the House Committee on the Judiciary.

II. OVERVIEW

I start from the premise that there are many more foreign nationals with *bona fide* claims to refugee status, deserving safe haven or political asylum in the United States, than this country is prepared to admit under the present immigration scheme. Congress long ago abandoned an open-border policy of lawful immigration.² Not surprisingly, however, the demand for immigration to this country in general has increased exponentially in recent years and far exceeds the numerically-restricted categories presently codified.³

In contrast, the availability of in-state asylum relief --outside the regular immigration system (including the overseas refugee program)-- fosters uncontrolled immigration of asylum-seekers who gain entry undetected or seek to enter this country at its borders without advance screening. Professor David A. Martin aptly refers to asylum as a "loophole" in the current immigration selection system.⁴ Asylum has become controversial precisely because the United States has become

² See Elwin Griffith, Deportation and the Refugee in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, 1982 MICH. YEARBOOK OF INT'L LEGAL STUDIES 125 (describing a time when immigration in this country was unrestricted and, therefore, classification as refugee or immigrant was unimportant). But see Al Kamen, INS's Unofficial Open Door: Illegal Aliens Swamp N.Y. Holding Capacity, *Washington Post*, Jan. 27, 1992, at A1, col. 1 (reporting on the recent phenomenon of foreign nationals arriving at U.S. international airports without proper or false documentation).

³ See, e.g., Alan K. Simpson, Legal Immigration Reform, 25 San Diego L. Rev. 215, 217-218 (1988)(noting a statement about the demand for immigrant visas to the U.S. far exceeding any conceivable supply as an indication of the reality of the current refugee crisis).

⁴ David A. Martin, The Refugee Act of 1980: Its Past and Future, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, 1982 MICH. YEARBOOK OF INT'L LEGAL STUDIES 91, 112 (describing how asylum "constitutes a wild card in the immigration deck"). See generally David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. PA. L. REV. 1247, 1267-1270 (1990)(discussing asylum as a loophole in the regular immigration selections system and the need for control).

a country of "first asylum."⁵ I remain convinced that Congress never intended an avenue for lawful immigration to operate in the fashion that asylum adjudication presently does.

Congress last considered the fundamental aspects of the asylum process in 1980. In drafting the Refugee Act of 1980, Congress created an orderly mechanism for the operation of the overseas refugee program. At the time of the Act's passage, the United States was still a country of second asylum;⁶ therefore, little attention was paid to the then newly-created statutory provisions enacted for in-state asylum relief. Within a few months after passage, however, greater numbers of asylum-seekers from the Caribbean area began to arrive in South Florida. Then, a few years later, ever-increasing numbers of asylum-seekers from Central American countries began to dominate the applications filed in Texas and California. More recently, attention has been focused on the once anticipated influx of large numbers of Haitian refugees (again into the South Florida area). But the concept of asylum-seekers today has taken on a decidedly more global character with the daily arrivals of foreign nationals at U.S. airports (principally JFK Airport in NYC) coming directly from distant countries to claim asylum.

Although the United States is now a country of first asylum, no statutory mechanisms are presently in place (thus causing the Immigration and Naturalization Service ("INS") to rely on such highly controversial policies like indefinite detention and interdiction⁷ as functional equivalents) to pre-screen the vast numbers of asylum-seekers and therefore regulate their admission. Once they are physically present in the United States, undocumented status notwithstanding, this nation's

⁵ "First asylum" refers to countries to which large numbers of refugees arrive directly. See generally G. Melander, Basic Differences in Refugee Policy in Western Europe and North America, 9 IN DEFENSE OF THE ALIEN 97, 97-98 (L. Tomasi ed., 1986).

⁶ The concept of "second asylum" describes situations in which individuals seeking asylum to this country apply while in another country where they are screened prior to an orderly entry here, as in the context of the U.S. overseas refugee program under INA § 207, instead of traveling directly to apply while in the United States (i.e., by-passing the overseas operation).

⁷ A program of Coast Guard interdiction of boats sailing between Haiti and the United States was inaugurated in October 1981 by the Reagan Administration along with its new detention policies aimed at restricting the flow of asylum-seekers into the United States. T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 836-837 (2d ed. 1991).

obligation to honor its international commitment to nonrefoulement⁸ should remain paramount. Thus, a present imperative exists for a legislative proposal that will impose some order on an adjudicatory system that appears to be administratively chaotic, at least at some ports of entry.

Equally important to this discussion is the ever-present danger that the public at large will demand more restrictive refugee policies. Recent media reports suggest that a critical juncture in the public debate over asylum has been reached.⁹ Added to this is apparent public concern over the widely publicized events relating to the CIA employee killings in January and the New York World Trade Center bombing in February of this year. These two events involved criminal suspects who happened to be foreign nationals.¹⁰ It should be underscored, however, that although these events may have drawn renewed attention to the on-going concern about potential asylum abuse, particularly at major international airports, these particular suspects appeared to have entered this country lawfully under the regular system of immigration. Thus linking the two isolated events with the current airport phenomenon involving global asylum-seekers would be unfortunate and would mis-characterize the essential nature of the asylum controversy. Moreover, these two events underscore, perhaps, a more fundamental problem in the administration of U.S. immigration laws, to wit, a lack of sufficient resources.¹¹

⁸ "Nonrefoulement" (translation "no return") is a technical term for refugee protection. It derives from Article 33 of the United Nations Convention relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 137, protecting individuals against return to a country "where [his or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion." See generally GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 69-100 (1983).

⁹ Two recent examples are the recent CBS "60 Minutes" segment entitled *HOW DID HE GET HERE?* involving the asylum problem at JFK which aired March 14, 1993 and the NBC NEWS broadcast of the *BROKAW REPORTS* on March 28, 1993 entitled *IMMIGRATION--THE GOOD, THE BAD, THE ILLEGAL*.

¹⁰ FBI Official Thinks New York Bombing Was the Work of Large Terrorist Group, *The Wall Street Journal*, March 10, 1993.

¹¹ The Subcommittee on Information, Justice, Transportation and Agriculture of the House of Representatives' Government Operations Committee addressed this particular question, among other immigration issues, at public hearings last month. Reported in Congressional Panel Probes INS Management, Other Immigration Issues, 70 *Interpreter Releases* 449 (1993) (congressional subcommittee heard testimony on March 30, 1993 at which many argued that management and efficiency problems continue to hamper the INS).

Whatever the impetus, now is the time to enact legislation designed to gain control of a system which seems to be burdened with intractable problems. Any legislative reform measure, however, should not dilute the current procedural safeguards for deciding asylum claims. For a *bona fide* asylum-seeker, the stakes are simply too high. Moreover, the international obligation of refugee protection mandates that this country honor its agreement of "no return" once a qualified alien reaches its borders. In such matters, it is preferable to err on the side of caution. But that does not mean, necessarily, that we should continue an asylum process which acts more like a magnet for those who have not as yet reached our borders, even if they possess qualified asylum claims, and therefore an incentive to come here at all costs. This is particularly so if the available asylum data were to demonstrate that a significant number of those seeking asylum eventually do not qualify under the statutorily-prescribed criteria.

III. THE LEGISLATIVE PROPOSALS

The two bills submitted to me for comment present two distinctly different approaches. One bill --H.R. 1355-- is too narrowly focused on exclusion proceedings and takes a decidedly reactive approach to the specific situation recently detailed in the media. The other measure --H.R. 1679-- attempts to tighten up the process, recognizing that something must be done to lessen asylum's magnet effect, while still preserving important procedural safeguards. It thus represents an inevitable direction in addressing the asylum controversy.

My specific impressions of both of them are as follows:

H.R. 1355, as suggested above, aspires to do too much in a narrowly defined context. The goal is to severely limit opportunities for asylum abuse with the current situation at major U.S. airports in mind. However, such a phenomenon could change once appropriate preventive measures are in place. And concerning an amendment to the INA to create a specific exclusion ground to address this particular scenario, this aspect of the reform measure seems unnecessary. The current immigration law already provides for the exclusion of aliens who arrive without proper documentation or present fraudulent papers at U.S. ports of entry.¹² If INS were to report difficulty in excluding aliens in these types of situations then, perhaps, a clarifying amendment would be in order. Otherwise, the statute should remain as presently drafted.

¹² The INA statute specifically provides for "admissions fraud." See INA §212(a)(6)(C)(i): see also INA § 212(a)(7) (Documents requirements for admission as immigrants or nonimmigrants.)

My next concern relates to the provision to exclude aliens who seek asylum but have transited other countries prior to coming here. In Matter of Salim, 18 I.& N. Dec. 311(BIA 1982), the Board of Immigration Appeals ("Board") determined that although the alien in that case had established the requisite probability of persecution in this homeland, he would nevertheless be denied asylum in the exercise of discretion because he had, in effect, committed "admissions fraud." The specific basis for the discretionary denial of asylum relief was attributed to the alien's "fraudulent avoidance of the orderly refugee procedures this country has established." Id. But in a later decision in which the alien had similarly committed "admissions fraud," The Board modified its position finding that it had placed too much emphasis on the circumvention of orderly refugee procedures factor in the earlier Salim case. Matter of Pula, 19 I.&N.Dec. 467 (BIA 1987). In the latter case, the Board granted asylum relief after balancing the countervailing equities and circumstances surrounding the acts which led to the "admissions fraud" ground of exclusion.

A statutory bar preventing an adjudicating officer from assessing the totality of the circumstances in determining whether the alien's manner of flight (in fleeing persecution) to the United States was justified would not be wise immigration or refugee policy. Like the Board's rejection of its earlier consideration of false documents as a sole discretionary factor for denying asylum relief, Congress should not adopt a counter approach. An automatic bar in the exclusion context discriminates unfairly and indirectly favors similarly situated asylum-seekers (i.e., those without proper documentation) who manage to enter without inspection. H.R. 1355 thus seems to be unduly harsh insofar as its treatment of those who enter via airports as compared to others who enter surreptitiously across U.S. borders from Canada or Mexico without detection. It could conceivably encourage more entries without inspection.

Ironically, the U.S. government ostensibly has greater control of the process when excludable aliens present their asylum claims at a port of entry than it does when asylum-seekers enter undetected. Further, nothing in the INA statute requires INS to parole asylum-seekers into this country or issue work authorizations who present themselves at ports of entry. INS does so, apparently at JFK airport, because of a lack of detention space.¹³ If INS had sufficient resources to detain excludable aliens entering the country at major airports pending exclusion

¹³ As reported in a recent article:

...The detention center at JFK airport has a maximum capacity of 100 beds and only 12 to 15 vacancies for some 1,300 new excludable aliens every month.

Ira H. Mehlman, The New Jet Set, *National Review*, March 15, 1993, at p. 40.

proceedings, consideration of an asylum application and, if found ineligible, expulsion, perhaps drastic statutorily-created measures would not be needed.¹⁴

H.R. 1355's attempt to expedite the asylum adjudication process, particularly at ports of entry is, nonetheless, understandable. Case law does support the proposition that whatever statutory exclusion procedures Congress authorizes "as far as an alien denied entry is concerned," is constitutionally sufficient. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). And although the requirement of a "credible fear" of persecution is, presumably, a higher burden than the current "non-frivolous" requirement for asylum applications, which triggers work authorization for applicants who present them, an international airport is no place to make these kinds of determinations. Also, the measure does not appear to afford the alien any opportunity to avail himself or herself of the privilege of counsel for representation in these matters.

In short, this particular bill focuses too narrowly on one aspect of the problem. Moreover, with statutory provisions already in place to cover the "admissions fraud" exclusion ground, other administrative options should be pursued first. In that regard, it appears that INS lacks sufficient resources to implement the current system more efficiently and/or effectively, at least at certain major airports. So, until other administrative options to expedite the process of adjudication in exclusion proceedings are studied or explored, I am reluctant to recommend the codification of unduly harsh measures (which may not be necessary).¹⁵

H.R. 1679, on the other hand, appears to be legislation which aspires to get at the crux of the problem. Its goal is to tighten up the present asylum adjudicatory structure without unduly compromising procedural safeguards. As long as adequate enforcement at the border remains problematic, a logical alternative would be to shift the onus on the applicant to come forward at the earliest opportunity. H.R. 1679 does this with its proposal of an affirmative obligation requiring asylum seekers to present their claims to the appropriate immigration officials within a particular period of time after entry into this country.

As previously discussed above, an asylum application affords an alien who is otherwise ineligible for regular immigration an opportunity to obtain lawful

¹⁴ For example, Canada deals with the problem of asylum abuse involving document fraud or fraudulent admissions by doing a better job of advance screening prior to entry to avoid administrative chaos at the airports. Id. at 41.

¹⁵ Moreover, it appears that the hard data needed to assess the true picture of this particular phenomenon is not yet available. Id. at 40-41.

immigration status while in the United States. H.R. 1679, although not without its own problems, is a suitable approach to the inherent problems associated with this very nature of the asylum process: an opportunity to apply for lawful asylum without advance screening. As such, it is an attempt to bring some modicum of orderliness to a process that admittedly has the potential for considerable abuse. Further, H.R. 1679 appears to equalize the opportunity for asylum no matter how the undocumented alien physically enters the country.

H.R. 1679 also revitalizes the claim of nonrefoulement which has been rendered non-viable, as a practical matter, in light of the Supreme Court's decision in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). In Cardoza-Fonseca, the Court lowered the burden of proof for aliens seeking asylum under INA § 208(a). This decision occurred in the wake of a prior decision of the Court which had sanctioned the use of the higher, more restrictive burden of proof in nonrefoulement cases. See INS v. Stevic, 467 U.S. 407 (1984). Asylum is a discretionary determination. Thus, the availability of such relief is not mandated under international agreement. It remains for the host government to decide the circumstances under which more permanent relief will be granted. Therefore requiring, as H.R. 1679 does, the establishment of nonrefoulement relief as a pre-condition to lawful asylum status, appears to be a policy choice that may be necessary, given the current demands for immigration. This is indeed a difficult choice to make but Congress is the better forum in which to debate hard choices than in the courts or in the executive branch.

This legislation, however, is not without problems. First, I have a concern about the reasonableness of a seven day time period within which to come forward and file a notice. (How reasonable this time frame is depends on how quickly an alien entering undetected will be apprised of this affirmative obligation.) But even assuming that seven days is deemed a reasonable period, how is the agency realistically going to determine actual compliance?

Second, the provision for exceptions appears to be unduly limited. As presently drafted, the only recognized exception is the one which covers "changed circumstances." Presumably, this situation would arise when changed circumstances in the government in the alien's home country occurred after the statutory period. But what about the alien who fails to file within the statutorily-prescribed period but finds himself or herself in deportation proceedings and if allowed the opportunity to establish nonrefoulement would be able to do so? To return such an alien to his or her homeland would be contrary to our international obligation of non-refoulement. On the other hand, attempting to carve out a multitude of exceptions could operate as a disincentive to come forward and seek nonrefoulement within the statutory period and would create another loophole in the process at the back end.

The dilemma is obvious. If there were an exception which permitted an explanation for failure to comply in a timely fashion for the newly-created relief, it is possible that such a provision could become the loophole in the new procedure much the way in which asylum operates as the loophole in the regular immigration system. A possible alternative would be to make nonrefoulement nonetheless available in deportation or exclusion proceedings without the opportunity to seek affirmative asylum status. There are problems with this proposal as well because of the prospect of having a substantial class of aliens without lawful status. But it is unlikely that this country can comply with its international obligation of nonrefoulement unless a fail-safe provision is built into the statutory provisions governing deportation and exclusion proceedings for those individuals who could establish nonrefoulement entitlement but failed to apply for such relief affirmatively within the statutory period.

IV. CONCLUSION

Based on the foregoing reasons, I recommend further consideration of H.R. 1679 as a realistic approach to addressing the asylum abuse problem with particular attention to creating more viable exceptions or, at least, retaining the opportunity to apply for the present withholding of deportation relief in deportation or exclusion proceedings.