# TOWARD A MEANINGFUL RIGHT TO COUNSEL FOR REFUGEES IN EXCLUSION PROCEEDINGS

## I

## INTRODUCTION

Tens of thousands of aliens, fleeing political or economic conditions in their countries of origin, present themselves at United States' borders yearly.[1] As applicants for admission, the burden of proof rests wholly on them to show that they are not subject to exclusion[2] for one of the grounds specified in the Immigration and Nationality Act (INA or the Act).[3] Many of these aliens are not in possession of a visa or other valid entry papers and may be excluded on this or other grounds.[4] For these aliens, the only means of gaining admission to the United States is to obtain refugee status by executive order,[5] by submitting an application for political asylum to the district director of the Immigration and Naturalization Service (INS),[6] or by suspension of deportation, a form of discretionary relief, upon meeting the statutory definition of refugee.[7] Within the meaning of the Act, a refugee is an individual who is "unable or unwilling" to return to the country of last residence or nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."[8]

As courts have noted,[9] this language was lifted from the United Nations Protocol Relating to the Status of Refugees[10] and incorporated into the INA

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1. Sample statistics from the Office of Refugee Resettlement of the Department of Health and Human Services (ORR), Monthly Data Reports, July 1981 (available on request from the ORR)

| | *Southeast Asians* | *Haitians* |
|---|---|---|
| June, 1981 | 10,542 | 1,481 |
| Total | 503,507 (since 1975) | 44,880 (total known) |

The *World Refugee Survey 1982* published by the United States Committee for Refugees suggests that at some points in 1981 Haitians were arriving at the rate of 6,000 per month. Solarz, *Haiti and El Salvador Pose Large Questions,* WORLD REFUGEE SURVEY 1982 29.

2. Immigration and Nationality Act, 8 U.S.C. §§ 1101, 1361 (Supp. V 1981). The applicant for admission also bears the burden of proof that she is eligible for political asylum if she choses to apply. 8 C.F.R. § 208.5 (1981).

3. 8 U.S.C. § 1182(a) (Supp. V 1981).

4. *Id.* at § 1182(a)(20).

5. *Id.* at § 1101(a)(42)(B) as governed by § 1157.

6. *Id.* at § 1101(a)(42)(A) as governed by § 1158.

7. *Id.* at § 1253(h). The Note will use the term "refugee" to refer to all those aliens who are seeking political asylum or refugee status. Note that suspension of deportation is available even if an application for political asylum has previously been denied.

8. *Id.* at §§ 1101(a)(42), 1253(h).

9. *See* Stevic v. Sava, 678 F.2d 401, 405-07 (2d Cir. 1982).

10. 19 U.S.T. 6257, T.I.A.S. No. 6577 (1968), 606 U.N.T.S. 268 (1967).

by the Refugee Act of 1980.[11] The Refugee Act has been said to "[reflect] one of the oldest themes in America's history—welcoming homeless refugees to our shores."[12] In general, the purpose of the Refugee Act has been characterized as intending "to regularize, not hinder" the entrance of refugees into the United States.[13] The administrative procedures by which the INS "regularizes" admission, deportation, and exclusion are set forth in the Act,[14] the agency regulations,[15] and the agency operating instructions.[16] Despite all humanitarian intentions, the special characteristics of the refugee population together with the cumbersome, self-serving nature of bureaucratic response have shown these procedures to be inadequate[17] and violative of basic fairness[18] in a crisis context. The Mariel Boatlift of refugees from Cuba in 1980 and the tremendous influx of refugees from Haiti during the same period served to publicize, if not precipitate, such a crisis in immigration processing.[19]

Though current statutory shortcomings have operated to hinder as well as to regularize the asylum and exclusion process,[20] the Reagan administration has proposed amendments to the INA that would impose additional obstacles further limiting the rights of incoming refugees under statutory law.[21] These "proposed limitation[s] on the applicant's right of advocacy [would] severely [undercut] the fairness of the [already strained] system in determining asylum claims."[22] As John Shattuck, National Legislative Director, American Civil Liberties Union, has proclaimed:

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11. Pub. L. No. 96-212, 94 Stat. 102 (March 17, 1980).

12. S. REP. No. 96-256, 96th Cong., 1st Sess. 1 (1979), *reprinted in* 1980 U.S. CODE CONG. AND AD. NEWS 141.

13. *See Stevic,* 678 F.2d at 408.

14. 8 U.S.C. §§ 1101-1330 (1976 and Supp. IV 1980).

15. 8 C.F.R. §§ 207-209 (1982).

16. UNITED STATES DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, REGULATIONS, AND INTERPRETATIONS (1982) [hereinafter cited as OPERATIONS INSTRUCTIONS]. The Operations Instructions outline internal INS procedure where not otherwise provided in the statute and regulations.

17. *Administration's Proposals on Immigration and Refugee Policy: Joint Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary and the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. 5-36 (1981) (testimony of William French Smith, U.S. Attorney General) (stating that past immigration policies have failed to achieve their goals and defending the Reagan Administration's proposals and policies as being more realistic).

18. *See Cuban-Haitian Mass Asylum: Hearings Before the Subcommittee on Immigration and Refugee Policy, Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981) (Testimony by Lawyers Committee for International Human Rights).

19. *See* Louis v. Nelson, 544 F. Supp. 973, 978-79, *aff'd in part, rev'd in part,* No. 82-5772, slip op. at 7-8 (11th Cir. April 12, 1983) (*Louis v. Nelson* is the opinion after trial on Louis v. Meissner, 530 F. Supp. 924 (S.D. Fla. 1981). *See infra* note 69.).

20. *See supra* text accompanying note 13.

21. *See* Omnibus Immigration Control Act, 127 CONG. REC. S12,065, S12,072 (daily ed. October 22, 1982); *see also infra* text accompanying notes 59-66.

22. *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. 619

> We must not lose sight of the fact that the right of asylum is in many ways the most basic of all human rights. This country was founded and was build [sic] on a promise of open doors to those who seek to escape persecution for religious, political, or ethnic reasons. The Reagan administration now proposes to weaken that promise in order to cut down on the flow of Cuban and Haitian refugees.[23]

Without the full panoply of legal safeguards the immigration system has shown itself incapable of providing basic fairness in the exclusion process and without basic fairness this country has promised little.

This Note will focus on the refugee's right to legal representation in political asylum and exclusion proceedings. It will sketch the current sources, status, and inadequacies of this right. It will also explore the derogation of the right to legal counsel in practice as illustrated in particular by the recent crisis over the processing of Haitians by INS. Finally, this Note will propose statutory and administrative changes that would assure every potential asylee a meaningful right to representation and fair consideration of his or her claim of persecution.

## II

## THE IMPORTANCE OF THE RIGHT TO COUNSEL FOR REFUGEES

The right to counsel is of crucial importance to those who claim refugee status. In large part, this is because refugees defy many of the implicit presumptions which justify the division of incoming aliens into classes receiving different treatment under immigration law. Many classifications drawn under the statutory scheme are without rational basis when applied to the continually arriving refugee population in the United States.

One example is the INA's division of inadmissible aliens into two categories: those who are excludable and those who are deportable.[24] A deportable alien is one who has effected an "entry" into the United States.[25] In practice this may simply mean that the alien has eluded INS custody for an undefined period of time:[26] weeks, days, or even hours. An excludable alien, by contrast, is one who seeks admission but who has not yet "entered,"—in other words, one who is immediately apprehended by INS customs or border patrol personnel. Though often physically present within

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(1981) (testimony of John Shattuck, National Legislature Director, ACLU) [hereinafter cited as *Hearings on Immigration Reform*].

23. *Id.*

24. *See* Louis v. Nelson, 544 F. Supp. at 977.

25. *See id.; see also* 8 U.S.C. § 1101(a)(13).

26. *See, e.g.,* United States v. Oscar, 496 F.2d 492, 493-94 (9th Cir. 1974).

United States borders during the period of exclusion proceedings,[27] such aliens, whether detained or at large, are not deemed to have been admitted.[28] The apprehended applicant for admission is fictitiously perceived as awaiting exclusion or admission at the border.

A threshold issue at a hearing on the merits of a refugee's request for asylum or suspension of deportation[29] is whether the refugee should be deemed excludable or deportable. The consequences of this initial determination are multifold. The deportable alien, though unlawfully present, will be guaranteed due process of law under the United States Constitution,[30] generally spared the burden of proving he is not deportable,[31] and eligible for a wider range of discretionary remedies.[32] In the words of one judge: "The irony of . . . [the] distinction is that deportable aliens, many of whom entered the country surreptitiously, are given more rights under the law than excludable aliens who present themselves to immigration."[33] Thus the fate of two similarly situated refugees may differ because of legal fiction and the chance circumstances of their arrival.

The rationale for according deportees a greater array of procedural rights and protections is, presumably, that on the whole they have more to lose from explusion since they are already here. There is some support for this view. Many, if not most, deportees are otherwise lawful residents, aliens who have overstayed valid non-immigrant entrance visas, or aliens who have resided in the United States for an extended period. Such deportees are presumed to have developed familial, residential, or economic ties which render the penalty for expulsion higher than for the average excludable alien

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27. "The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe . . . any alien applying for admission. . . ." 8 U.S.C. § 1182(d) (5).

28. "[B]ut such parole of such alien shall not be regarded as an admission. . . ." *Id. See generally,* Gordon, *Right to Counsel in Immigration Proceedings,* 45 MINN. L. REV. 875, 887 (1961) [hereinafter cited as *Right to Counsel*].

29. *See supra* text accompanying notes 6 and 7.

30. *See* Plyler v. Doe, 102 S. Ct. 2382, 2391 (1982); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); *see generally Right to Counsel, supra* note 28.

31. The statute reads:

> Whenever any person makes application . . . for admission or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he . . . is not subject to exclusion under any provision of this chapter. . . . In any deportation proceeding . . . the burden of proof shall be upon such person to show [only] the time, place, and manner of his entry into the United States.

8 U.S.C. § 1361. The statute does not place the burden of proving she is not deportable upon the deportee.

32. Mailman, *Inspection, Deferred Inspection and Exclusion* 9 (Paper presented at the Annual Conference of the Association of Immigration and Nationality Lawyers, San Juan, Puerto Rico (May 9, 1981)) [hereinafter cited as Mailman]; *compare* 8 U.S.C. § 1226 (1976) *with* § 12521 (1976 & Supp. V 1981).

33. Louis v. Nelson, 544 F. Supp. at 977; No. 82-5772, slip op. at 14-17 (11th Cir. April 12, 1983).

who has not yet entered the country. In the words of Justice Brandeis, the deportee may stand to lose "all that makes life worth living."[34]

This statement of the equities is entirely inapplicable to the case of a refugee. The refugee asserting a well-founded fear of persecution may stand to lose more from expulsion than the average deportee. This is because, by definition, denial of admission may result in persecution, torture, or death upon return to the country of origin. In this case, the fortuitous processing of refugees under the statutory provisions for exclusion is without basis. Chance, not equity, accounts for the virtual absence of rights and safeguards in the expulsion process.

Moreover, a refugee who has no ties to the United States but who evades the INS at the border will be accorded the same rights as a deportee who has a family, a job and a home at stake. Though this might be a desirable result, the fortuitous treatment of these refugees as deportees in the expulsion process further underscores the irrationality of the distinction. Again, chance and not equity accounts for the greater procedural and substantive rights accorded these refugees. Counsel is thus of the utmost importance to the refugee whose equities exclude her from the scenario for which the immigration system was designed to operate fairly.

As will be explained below, the unfairness engendered by the irrational classification of refugees is compounded by other problems. Central among these are the nature of the methods and policies employed by INS in processing refugees and the nature of the refugee population itself. Illustrative is the fact that INS has chosen to detain an ever-increasing number of applicants for admission in federal prisons, military camps and the like throughout the months, if not years, of processing and litigation.[35] Detention, combined with the cultural, educational and linguistic characteristics typical of the refugee population,[36] renders self-help or pro se advocacy next to impossible. Thus the need for effective and timely legal representation is once again underscored.

Since most applicants for refugee status are unlucky enough to be apprehended at the border, they are subject to exclusion rather than deportation proceedings. Their rights and remedies during and following process-

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34. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

35. Bonner, *Immigration Service Refuses to Free 83 Haitians in a Former Navy Prison in Brooklyn,* N.Y. Times, Aug. 28, 1981, at B1 col. 1; *see* Louis v. Nelson, No. 82-5772, slip op. at 18-29 (11th Cir. April 12, 1983).

36. The latest (1970) Haitian census data on literacy available through the U.S. Department of Commerce, Bureau of the Census, indicated a nationwide literacy rate of 19.6% in Haiti. Figures for the rural population are much lower (Male: 15.5%; Female: 8.1%). Thirty-one point five percent of the undocumented Haitian entrants to the United States worked in "Agriculture/Fishery" while in Haiti. Cuban and Haitian Monthly Entrant Data Report for May 31, 1981 (ORR). It is likely, therefore, that the literacy rates for the Haitian entrants is somewhat lower than the average. Of the 13.4% of the Haitians for whom data is available, 61.7% report between one and six years of education. *Id.* at Table 6 (exclusion cases only).

ing are minimal. However, while "the [exclusion] hearing is not subject to all of the protections of due process, it must be fair and in accordance with the statutes and regulations."[37] The presence of counsel is the only way to insure this result. Counsel can advise the alien of his or her rights, explain the options, and protect and shepherd the alien through a drawn out and confusing administrative process. Since this process may hold life and death ramifications for the refugee, it is crucial that a meaningful right to counsel be afforded each and every applicant for refugee status.[38]

## III

## THE ORIGIN OF THE RIGHT TO COUNSEL IN EXCLUSION PROCEEDINGS

The refugees' right to counsel in an exclusion hearing is of statutory origin.[39] Though a few modern courts have attempted to bring a constitutional standard to bear on the exclusion process,[40] a long line of case law has precluded any serious argument for a constitutional right to counsel for excludable aliens.

Traditionally, the admission of an alien into the United States has been viewed as a privilege, not a vested right.[41] As such, the granting of admission or the exclusion of an alien has been called "a fundamental act of sovereignty."[42] The Supreme Court has referred to congressional regulation

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37. Louis v. Nelson, 544 F. Supp. at 978 (citing Garcia v. Smith, 674 F.2d 838, 841 n.3 (11th Cir. 1982)).

38. Many have recognized the importance of counsel to the alien in an exclusion proceeding and particularly in the prehearing phases of processing. *See, e.g.,* Comment, *Due Process Rights for Excludable Aliens under United States Immigration Law and the United Nations Protocol Relating to the Status of Refugees—Haitian Aliens, A Case in Point,* 10 N.Y.U. J. INT'L L. & POL. 203, 232 (1977) [hereinafter cited as *Due Process Rights*]. Though it is of course essential that every applicant for admission be afforded a meaningful right to counsel, this Note will focus on refugees only. The author has chosen to single out refugees, as defined by the Act, because of the many compelling reasons that warrant special attention to this group. *See also* note 7 *supra.*

39. Whatever hazy arguments remain concerning whether fifth amendment constraints on the immigration process carry with them a right to counsel for aliens, *see infra,* it is clear that no sixth amendment right to counsel attaches. *See generally Right to Counsel, supra* note 28, at 876. This is because courts have long held that immigration proceedings are not criminal in nature or definition. *See, e.g.,* Murgia-Melendrez v. INS, 407 F.2d 207, 209 (9th Cir. 1969); *see generally* Appleman, *Right to Counsel in Deportation Proceedings,* 14 SAN DIEGO L. REV. 130, 131 (1976).

40. *See* Louis v. Nelson, No. 82-5772, slip. op. at 106 (11th Cir. April 12, 1983) (citing Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982), *aff'g as modified,* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980) (holding that due process protects the right to petition for political asylum)); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981) (leaving open the possibility that constitutional protections inhere).

41. *E.g.,* Landon v. Plasencia, ___ U.S. ___, 103 S. Ct. 321, 329 (1982); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

42. *Id.*

of admissibility procedure as the implementation of a sovereign state's "inherent" power to control its national borders.[43] Congressional power to regulate immigration is broad and nearly unrestricted by constitutional mandates. Principles of separation of powers and justiciability limit judicial review of an INS decision to exclude an alien.[44] This traditional deference has led the Supreme Court to declare that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[45] Though courts have recognized some limits to this congressional discretion,[46] no court has found a constitutionally protected right to counsel for refugees or other aliens in immigration proceedings.

In exercising the aforementioned plenary power, Congress, in its discretion, has granted excludable aliens some of the panoply of due process rights. In particular, Congress has chosen to give any person who is the subject of an exclusion or deportation hearing before a "special inquiry officer" (or Immigration Judge) the "privilege" of representation by counsel of his choice.[47] The statute calls it a "privilege" rather than a "right" in

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43. *See id.;* Louis v. Nelson, No. 82-5772, slip op. at 10-14 (11th Cir. April 12, 1983).

44. *Id.* at 543. *See* Mathews v. Diaz, 426 U.S. 67, 81-82 (1976).

45. *Knauff,* 338 U.S. at 544. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977).

46. *See* Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982). For example, in Wong Wing v. United States, 163 U.S. 228 (1896), the Supreme Court noted that fifth amendment guarantees applied to "all persons within the territory of the United States," *id.* at 238 and that Congress could not sentence an illegal alien to hard labor without a judicial trial. *Id.* at 237. *Wong Wing* has led some modern courts to hold that due process guarantees apply fully to applicants for admission who become embroiled in criminal proceedings. *See, e.g.,* United States v. Henry, 604 F.2d 908 (5th Cir. 1979). Other modern courts have likened indefinite detention of excludable aliens to imprisonment, *Rodriguez-Fernandez,* 654 F.2d at 1387, declaring that "[t]he legal fiction that an excludable alien is 'waiting at the border' wears quite thin after a year at the Atlanta Federal Penitentiary." Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1056 n.6 (N.D. Ga. 1981); Louis v. Nelson, No. 82-5772, slip op. at 54 (11th Cir. April 12, 1983). In *Louis v. Nelson,* the Eleventh Circuit recently suggested that while *Landon* held that an excludable alien "has no constitutional rights regarding his application" for admission, ___ U.S. ___; 103 S. Ct. at 329, the fifth and fourteenth amendments did protect these aliens from discriminatory exercise of discretion regarding detention and parole. *See* Louis v. Nelson, No. 82-5772, slip op. at 52-55 (11th Cir. April 12, 1983). In any event, the Court felt that congressional intent was in accord with these constitutional commands thereby satisfying the standard set forth in *Knauf, see supra* note 45 and accompanying text. Louis v. Nelson, No. 82-5772, slip op. at 56 (11th Cir. April 12, 1983). Still other courts have limited congressional and administrative discretion by applying principles of international law, such as the Universal Declaration of Human Rights, *Rodriguez-Fernandez,* 654 F.2d at 1388, and the United Nations Protocol Relating to the Status of Refugees, *Haitian Refugee Center,* 676 F.2d at 1038. *See generally Due Process Rights, supra* note 38.

47. The Immigration and Nationality Act provides:

> In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362 (1976 & Supp. V 1981). The Act defines "special inquiry officer" to be a designate of the Attorney General deemed "specially qualified to conduct specified classes of proceedings" as required by the Act. 8 U.S.C. § 1101(b)(4). Though the true meaning of the

part because the indigent alien is not entitled to government appointed counsel at government expense,[48] as is a resident, indigent criminal defendant.

These statutory guarantees have been embellished and clarified by other sources of regulatory law. To aid in the administration, enforcement, and interpretation of the provisions of the Act, the Attorney General has promulgated regulations[49] pursuant to his statutory powers.[50] The regulations attempt to explicate and delimit the nature of the statutory "right" to counsel.[51] They require the Immigration Judge to advise the excludable alien of the "nature and purpose" of the proceedings as well as of her right to counsel and to present evidence in her own behalf.[52] The judge is also instructed to insure that the alien is given a list of organizations or individuals offering free legal service and to "ascertain whether he desires representation."[53] The regulations further describe the role of an attorney at such an "examination" as encompassing the full range of activities generally performed by a legal representative in an adversarial proceeding.[54]

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term is unclear, it is certain that an Immigration Judge presiding over exclusion or deportation hearings is a "special inquiry officer," *see* 8 U.S.C. § 1226, and that inspection, by contrast, is to be performed by "immigration officers." 8 U.S.C. § 1225.

48. *See* 8 U.S.C. § 1362; *see also infra* note 51.

49. 8 C.F.R. §§ 11-499 (1981).

50. 8 U.S.C. § 1103(a).

51. This Note will use the term "right to counsel" to refer to the refugee's *right* to exercise her *privilege* of legal representation in a meaningful way. This confusion in terminology originates in the statute itself where Congress, in a section entitled "Right to Counsel," refers to the alien's "privilege" of representation. *See* 8 U.S.C., § 1362.

52. The regulations read as follows:

> The Immigration Judge shall . . . inform the applicant of the nature and purpose of the hearing; advise him of the privilege of being represented by an attorney of his own choice at no expense to the Government, and of the availability of free legal services programs qualified under Part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter located in the district where his exclusion hearing is to be held; and shall ascertain that the applicant has received a list of such programs; and request him to ascertain then and there whether he desires representation; advise him that he will have a reasonable opportunity to present evidence in his own behalf, to examine and object to evidence against him, and to cross-examine witnesses presented by the Government; and place the applicant under oath.

8 C.F.R. § 236.2(a).

53. *Id.*

54. The regulations read:

> *Right to representation.* Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who, except as otherwise specifically provided in Part 332 of this chapter, shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. . . .

8 C.F.R. § 292.5(b) (1981). (Part 332 of C.F.R. deals with naturalization for citizenship examinations.)

Though the Act itself does not explicitly exclude from its ambit the prehearing phases of INS processing, the regulations carefully interpret the Act to preclude a right to representation during primary and secondary inspection of an excludable applicant for admission.[55] INS Operations Instructions and Interpretations, published by the Department of Justice, are cautious though somewhat more permissive on the subject of a prehearing role for legal counsel. They permit counsel to assist an alien in the preparation of papers and applications for submission to the INS.[56] This presumably includes the preparation of an application for political asylum made to the district director prior to the exclusion hearing itself. In discussing parole into the United States for purposes of deferred inspection by immigration officers, the Instructions also provide for the presence of counsel. At deferred inspection, counsel's role is limited to that of "observer" and "consultant" to the alien,[57] and the alien need not be advised of the "privilege."[58]

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55. The regulations continue:

> Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant has become the focus of a criminal investigation and has been taken into custody.

*Id. See also supra* note 46, regarding the rights of an excludable alien who is the subject of criminal proceedings. "Secondary inspection," as defined at 2 OPERATIONS INSTRUCTIONS § 235.1(5), refers to a secondary investigation of an individual's admissibility where something more than a routine primary inspection appears to be warranted. A secondary inspection occurs at the border or other point of entry. *See id.* "Deferred inspection," as defined in 2 OPERATIONS INSTRUCTIONS § 235.4(d), occurs when a final decision on admissibility cannot be made during either primary or secondary inspection at the point of entry but where "it appears that a determination as to admissibility can be made within two weeks." *Id.* at 2341. In such a case the alien is paroled into the United States pending a deferred inspection. *Id.* This is not an admission, *see supra* notes 27 and 28, and the alien remains excludable (not deportable) and fictitiously outside of United States' borders. *See supra* text accompanying notes 24-28.

56. The Operations Instructions state "[a]n attorney may assist a client in preparing an application and related papers for presentation for the Service; however, he may not participate in a preliminary investigation conducted under 8 C.F.R. 332." 3 OPERATIONS INSTRUCTIONS § 292.2. Note that courts have held that INS internal operating instructions do not have the force of law and confer no substantive rights on aliens. *See, e.g.*, Pasquini v. Morris, 700 F.2d 658 (11th Cir. 1983).

57. The Operations Instructions read:

> *Attorneys.* An applicant for admission whose inspection was deferred may, if he so requests, have an attorney of his own choosing present during deferred inspection. It is not necessary, however, to inform him of this privilege except in response to an inquiry on the subject. The role of the attorney during deferred inspection shall be strictly limited to that of an observer and a consultant to the applicant, and he shall not be permitted to participate otherwise in the inspection.

2 OPERATIONS INSTRUCTIONS § 235.11(b). Primary, secondary and deferred inspection by INS officials are defined in the Operations Instructions. 8 C.F.R. § 235.1(s). *See supra* note 55.

58. 2 OPERATIONS INSTRUCTIONS § 235.11(b).

The statutory scheme just reviewed is under attack by the Reagan administration. The proposed Omnibus Immigration Control Act represents the administration's comprehensive attempt to deal with the increasing numbers of illegal aliens within the United States' borders and with those who continue to arrive.[59] Title IV of the proposed legislation, The Fair and Expeditious Appeal, Asylum, and Exclusion Act of 1981, attempts to streamline current exclusion and asylum procedures.[60] It would limit the role of counsel and the administrative and judicial avenues for review of an immigration officer's disposition of an asylum application.[61] The proposed amendments further limit the conditions under which an asylum claim can be reopened[62] and provide a 14-day limit on submission of an application to an asylum officer for any alien served with notice of the commencement of exclusion proceedings.[63] Under the proposed Act, asylum claims would no longer be heard by special inquiry officers in exclusion hearings.[64] In addition, final orders of exclusion would not be judicially reviewable.[65] The current status of these proposals is as yet unresolved.[66]

## IV

## How Current Law and Practice Render the Statutory Right to Counsel Meaningless

### *A. Access to Counsel*

Under current law, refugees are left to request, seek, obtain and communicate with counsel on their own.[67] The only aid to the refugee is pro-

59. 127 Cong. Rec. at S12084 (daily ed. October 22, 1981) (letter to Vice President George Bush from William French Smith, U.S. Attorney General).

60. *Id.* at S12066 (section-by-section analysis by Senator Thurmond).

61. Under the proposed amendment:

> An alien seeking asylum shall appear before the asylum officer in an informal, nonadversary interview, and may be accompanied by counsel at no expense and no delay to the government. Counsel may advise the alien during the interview but shall not otherwise participate in the interview. . . . The determination of the asylum officer shall be final. . . .

*Id.* at S12074 (Section 208(a)(2) of the proposed amendments).

62. *Id.* (Section 208(a)(6)).

63. *Id.* (Section 208(a)(5)).

64. *See id.* (Section 208(a)(2) states that "[t]he procedures set forth in this section shall be the sole and exclusive procedures for determining asylum.")

65. *Id.* at S12072 (Section 106 of the proposed amendments omitting Sec. 106(b) of the INA).

66. On August 17, 1982, the Senate passed a modified version of the administration's proposed amendments. *See* S.2222, 97th Cong., 2d Sess., 128 Cong. Rec. S10619 (daily ed. August 17, 1982). The bill eliminates judicial review of final orders of exclusion or asylum with a few narrow exceptions. *See id.* at S10622 (Section 123). The bill also limits the amount of time within which an application for asylum may be filed, provides for quasi-independent judges for asylum applications, and reaffirms the statutory right to counsel mandating that it be implemented in a "non-adversarial, informal manner." *Id.* (Section 124).

67. This Note will not belabor the point made by others that basic fairness and logic require government-appointed counsel at least in deportation proceedings where the stakes

vided by regulations promulgated by the Attorney General. As discussed above, these regulations require the Immigration Judge to give the alien a list of legal service offices, private attorneys, and duly certified voluntary agencies who may provide free representation.[68] These referral lists have been found to be inaccurate and outdated.[69] Even if this were not so, the provision of this list would still fall short of what is necessary for the average refugee to exercise his or her privilege to be represented by counsel. Refugees are nearly always penniless. Many of them arrive in small skiffs with few belongings. Few of them are literate and still fewer speak English.

Furthermore, an increasing number of them are being detained in remote, sometimes high security, facilities.[70] Haitians are currently being detained not only in Miami, Florida and Brooklyn, New York, but in such places as Fort Allen, Puerto Rico; Morgantown, West Virginia; Big Springs, Texas; Lexington, Kentucky; Lake Placid and Otisville, New York.[71] INS officials report that "[t]he average stay of Haitians in these

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may be as high as for the criminal defendant. *See, e.g.,* Burquez v. INS, 513 F.2d 755 (8th Cir. 1975). *See generally* Fragomen, *Procedural Aspects of Illegal Search and Seizure in Deportation Cases,* 14 SAN DIEGO L. REV. 151 (1976) (arguing that this and other procedural manifestations of the substantive determination that deportation proceedings are not criminal ought to be abandoned) [hereinafter cited as *Fragomen*]; *Right to Counsel, supra* note 28, at 893-95.

68. 8 C.F.R. § 236.2(a).

69. Louis v. Meissner, 530 F. Supp. 924, 927 (S.D. Fla. 1981) (order granting preliminary injunction) decided after trial *sub nom.* Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982).

70. *See supra* note 35; *Montana Site Reported for Cuba-Haiti Refugees,* N.Y. Times, Sept. 6, 1981, at 28, col. 6 (city ed.); *Racism is Charged in Fort Drum Plan,* N.Y. Times, Nov. 12, 1981, at B14, col. 6 (city ed).

71. Louis v. Meisser, 530 F. Supp. at 926. Haitian plaintiffs have sought to challenge the INS policy of detention pending exclusion hearings on a variety of grounds. In Bertrand v. Sava, 535 F. Supp. 1020 (S.D.N.Y. 1982) an abuse of discretion argument was sustained in the district court but reversed on appeal. *See* Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982) (holding that the district court had substituted its opinion for that of the district director of INS and that plaintiffs had not "overcome the presumptive legitimacy of the Government's discretionary decisions." *Id.* at 218 (footnote omitted)). In Louis v. Nelson, 544 F. Supp. 973, Judge Spellman held that INS had not intentionally discriminated against Haitians in its detention policy but that the policy was null and void due to a violation of the Administrative Procedure Act's requirement of public notice and opportunity to comment. *See* 5 U.S.C. § 553.

Only days before Judge Spellman's decision was released, INS announced a new policy permitting the parole of Haitians who are represented by counsel, who have a sponsor and provide "acceptable assurances" that they will not abscond. *See U.S. Announces New Policy for Parole of Some Haitians,* N.Y. Times, June 15, 1982, at A24, col. 1 (city ed.). Spellman's opinion required only that the Haitians have sponsors and report to INS once a week. *See Parole of Haitians Ordered; U.S. Balks and Sets Appeals,* N.Y. Times, June 30, 1982, at A16, col. 1. The judicially mandated standard did not rest on the double bind of permitting parole only where the detainee has a lawyer while inhibiting the process of obtaining a lawyer by keeping refugees detained. *See generally supra* text accompanying notes 67-84. On appeal, the Eleventh Circuit affirmed Judge Spellman's holding on the Administrative Procedure Act while reversing that part of the district court opinion which found that Haitian plaintiffs had failed to make out a prima facie case of discriminatory use of the power to parole. Louis v.

facilities . . . has been one year . . . although the average for aliens generally is 120 days."[72] In one class action brought by Haitian refugees, the plaintiff class members have asserted that they "will be deprived of effective assistance of counsel . . . at these locations."[73] In fact, plaintiffs and others allege that the transfer of Haitians to detention centers around the country represents a calculated attempt to deprive them of access to counsel, and of the resources and witnesses necessary to complete an application for asylum.[74] Intentional or not, this has in fact been the effect.[75]

At many of the locations in which Haitians are currently being detained, there are few lawyers who are both willing and able to represent Haitian refugees in large numbers on a pro bono basis.[76] As one court has put it, INS has "subjected [Haitians] to a human shell game . . . scatter[ing] them to locations that are nearly all in desolate, remote, hostile . . . areas . . . containing a paucity of available legal support and few, if any, Creole interpreters."[77]

Even if refugees were detained in an area where qualified, willing lawyers practice, there would remain severe problems of access to legal counsel. Many refugees, and most Haitians, who are detained in this manner have neither money nor access to the telephone and translator which they need in order to contact a lawyer.[78] Only in Miami and New York City are there certain to be large and well-established Haitian communities within which Creole translators (and knowledgeable witnesses) may readily be found. [79] In addition, attorneys may have to travel a substantial distance to reach these detention centers [80] and may be forced to meet with clients at inconvenient times [81] and under prohibitive circumstances.[82]

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Nelson, No. 82-5772, slip op. at 111-12 (11th Cir. April 12, 1983). The court of appeals found that the "plaintiffs were denied equal protection of the laws" as required by the Constitution and the INA. *Id.* at 112.

72. Solarz, *supra* note 1, at 29.

73. *Id.* at 2; Testimony of Carlos Gutierrez at 46-47, hearing on motion for preliminary injunction, Sept. 9, 1981, Louis v. Meissner, 530 F. Supp. 924 [hereinafter cited as *Testimony of Carlos Gutierrez*].

74. *See* Louis v. Meissner, 530 F. Supp. at 927. (These access claims were dismissed by the trial court, Louis v. Nelson, 544 F. Supp. 973, and remanded for a full hearing on the merits by the Eleventh Circuit on appeal. *Id.* at No. 82-5772, slip op. at 108-11 (11th Cir. April 12, 1983)); *see also U.S. Seeks to Deport 40 Haitians Who Lack Legal Representation,* N.Y. Times, Aug. 31, 1981, at B2, col. 1 [hereinafter cited as *U.S. Seeks to Deport*].

75. *U.S. Seeks to Deport, supra* note 74.

76. Louis v. Meissner, 530 F. Supp. at 926.

77. *Id.* at 926.

78. *Id.* at 927.

79. *See id.* at 926; *U.S. Seeks to Deport, supra* note 74.

80. *See, e.g., Testimony of Carlos Gutierrez* at 46 (1 hour 45 minutes from San Juan, Puerto Rico to Fort Allen).

81. *Id.*

82. *See* Haitian Refugee Center v. Smith, 676 F.2d at 1031; Report of the Committee on Civil Rights of the Association of the Bar, City of New York, Treatment of Haitian Refugees by The Immigration and Naturalization Service of the United States Department of Justice:

INS has no statutory duty to detain excludable aliens where free legal representation can readily be obtained. The regulations do not require ready access to interpreters or telephones. Because this minimal amount of good faith cooperation has not been codified as a regulation of INS's plenary discretion, the already circumscribed right to counsel granted by Congress has been effectively subverted. Without judicial intervention, [83] numerous Haitians would have been deported without access to individual legal representation during exclusion or asylum processing.[84]

### *B. Prehearing Rights*

Neither the statute nor the regulations provide an applicant for refugee status with a full prehearing right to counsel.[85] The Act, by specifying a right to counsel only in hearings before a special inquiry officer,[86] implies an intent to restrict the role of counsel to preparation and representation at final ajudicatory proceedings and not at early phases of processing. The INS regulations codify this implication in an explicit proviso.[87] The agency operating instructions provide only for a limited privilege to be accompanied by counsel at deferred inspection.[88] The immigration officer is not required to advise the applicant of this privilege.[89]

These statutory and procedural shortcomings have denied refugees access to effective legal representation prior to the exclusion hearing. This absence of proper representation in the prehearing phases of processing can entirely undermine the essential fairness that Congress sought to insure by granting a right to counsel at the exclusion hearing itself. If already prejudiced by events preceding the exclusion hearing, a refugee's case against exclusion and in favor of asylum may not be resurrected in strength at the time of the hearing itself. The statutory right to counsel during the hearing does little to insure fairness if the harm has already been done.

Even these inadequate prehearing rights to counsel are essentially denied by ineffectual, untimely notice procedures. The first notice of the right to legal representation received by refugees embroiled in exclusion proceedings appears on INS Form I-122, "Notice to Applicant For Admission

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The Need For Reform, 20-21 (June 24, 1982). These sources cite a general lack of privacy and the overcrowded, noisy conditions of large interviewing rooms rendering effective, confidential communication between attorney and client impossible.

83. Louis v. Meissner, 530 F. Supp. 924.

84. *See U.S. Seeks to Deport, supra* note 74.

85. *See supra* text accompanying notes 47-66.

86. *See supra* note 47.

87. *See supra* text accompanying note 55.

88. *See supra* notes 56 and 57; *but cf.* Pasquini v. Morris, 700 F.2d 658 (holding that operating instructions providing for discretionary deferred inspection confer no substantive rights on the alien).

89. *See supra* note 57.

Detained for Hearing Before Immigration Judge."[90] This notice is printed in English and a few other major languages. Haitians, most of whom speak only Creole,[91] are unable to understand the advisory words contained on the form. Testimony by witnesses for the Haitians detained in the Krome Detention Center in Miami, Florida, indicated that "translations were frequently omitted."[92] Furthermore, INS does not advise the applicant of her limited right to counsel at deferred inspection[93] and the Service will only advise the alien of his or her rights at primary or secondary inspection if "the interrogation . . . is custodial in nature in which information is sought for the purpose of using it against such person in criminal proceeding."[94] Though the regulations require the Immigration Judge to ascertain *at the hearing* whether the refugee wishes to be represented by counsel, this is already too late. Much damage may already have been done to the unrepresented alien's case during the prehearing stage.[95] Without proper notice of the right to counsel the chances of obtaining timely legal advice are minimal.

There are many reasons why refugees seeking asylum may be prejudiced by their early encounters with INS officials in the absence of counsel. First, special characteristics of the refugee population make it difficult for officials to obtain an accurate and complete account of events and experiences. Haitians, for example, have little education,[96] are generally illiterate,[97] and may speak only Creole.[98] Also, fear is inherent in flight from persecution; thus, nearly every refugee will feel frightened, lost, and alone while detained by INS and questioned by its agents as to an asylum claim.

Furthermore, expert testimony by a Haitian anthropologist, Anselme Remy, has indicated that for Haitians of the lower socio-economic classes, there is a strong, self-protective aversion to bringing up anything political in front of a governmental authority (such as an INS agent or judge).[99] A guide published by the United Nations High Commission on Refugees for the use of its employees states:

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90. Defendants' Memorandum of Law in Support of their Motion to Dismiss or Transfer and for Trial at 7, Louis v. Meissner, 530 F. Supp. 924 (S.D. Fla. 1981) [hereinafter cited as *Defendant Meissner's Motion to Dismiss*].

91. Creole is a term used to describe the mixture of French, Spanish, and African dialect that is spoken in Haiti. Because it was not originally a written language written translation is often inaccurate and difficult for even Haitians to understand.

92. Louis v. Meissner, 530 F. Supp. at 927.

93. 2 OPERATIONS INSTRUCTIONS § 235.11(b).

94. United States v. Henry, 604 F.2d at 915; *see also* I United States Commission on Civil Rights Hearing on Immigration Policy, Washington, D.C. 180 (1978).

95. *See generally supra* text accompanying notes 79-129.

96. *See supra* note 36; *see generally,* Louis v. Nelson No. 82-5772, slip op. at 107 (11th Cir. April 12, 1983).

97. *See supra* note 36.

98. *See id.*

99. Testimony of Anselme Remy, hearing on motion for preliminary injunction, June 17, 1981, Jean v. Meissner, *granted sub nom.* Louis v. Meissner, 530 F. Supp. 924 [hereinafter cited as *Testimony of Anselme Remy*]. In his view, this tendency has caused many Haitians not to request political asylum. *Id.* at 87-88.

> The words "fear" and "persecution" . . . are foreign to a refugee's normal vocabulary . . . [a] refugee seldom invokes fear of persecution though he will often imply it in his story. A refugee often tells his story in nonpolitical terms. Some refugees are politically inarticulate . . . though they may have very definite opinions for which they have had to suffer. [S]ome . . . are afraid to say what they think . . . and it may be necessary to reveal the applicant's psychological attitudes by indirect questioning without the use of political terms. . . . [100]

The district court in *Haitian Refugee Center v. Civiletti*[101] took judicial notice of the fact that Haitians' "answers to questions tended to be brief and quite literal; details were uncovered only through exploration."[102] The difficulty in obtaining a coherent story, created by the characteristics discussed above, is exacerbated by the nature of INS interrogation.[103] Trial testimony indicated that "it takes 'a minimum of an hour just to get the basic information . . . ' "[104] Yet expedited processing and translation difficulties gave INS agents a total of only "fifteen minutes of substantive dialogue" with each asylum applicant.[105]

The coercive nature of custodial interrogation by INS officials compounds the problem. An alien picked up by an INS border patrol and thereafter detained in a federal penitentiary is surely in custody.[106] It is hard to argue that such a refugee, fleeing persecution and taken into custody by foreign government officials, will not be intimidated and subject to the coercive pressures of interrogation by immigration authorities.

It is within the bounds of traditional jurisprudence to use constitutional guarantees as a model for informing standards of basic fairness even where those guarantees are inapplicable. In this regard, the Supreme Court's analysis in *Miranda v. Arizona*,[107] though not binding in the immigration context, is illuminating. To the extent that it announces a principle of fair

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100. ELIGIBILITY: A GUIDE (Office of the United Nations High Commissioner for Refugees, Geneva 1962) 67 [hereinafter cited as *Eligibility*].

101. 503 F. Supp. 442 (S.D. Fla. 1980).

102. *Id.* at 527.

103. It is also exacerbated by the conditions of detention described above; *see supra* note 82. Even a personal, patient and well-trained advocate would have difficulty obtaining the trust of a refugee under these circumstances.

104. *Id.* (quoting testimony of David Carliner).

105. Haitian Refugee Center v. Smith, 676 F.2d at 1031 (characterizing the findings of the court below, on appeal). *See generally id.* (describing the effects of expedited processing under the Haitian program on the rights of refugees).

106. *Cf.* Marquez v. Kiley, 436 F. Supp. 100, 113-14 (S.D.N.Y. 1977). (Of the deportation context, the court said: "It is in the nature of an oxymoron to speak of 'casual' inquiry between a government official, armed with a badge and a gun and charged with enforcing the nation's immigration laws, and a person suspected of alienage.").

107. 384 U.S. 436 (1965) (where the Supreme Court recognized that custodial interrogation in the criminal context is inherently coercive).

play, the *Miranda* formulation suggests that Haitian refugees have not even been accorded their statutory due. In *Miranda* the Court spoke of the "compelling influence of . . . [custodial] interrogation"[108] which "operates on the individual to overcome free choice in producing a statement."[109] Recognizing that such coercion could act to produce involuntary confessions and inculpatory statements in contravention of the sixth amendment's privilege against self-incrimination, the Court mandated that the defendant be advised of his right to counsel and to remain silent *before* any statements may be taken.[110]

Haitians at the 79th Street Processing Center in Miami, for example, "are *not* advised of their right to counsel or the availability of free legal services prior to . . . [the] initial interrogation. . . . INS plays on the ignorance of rights, and apprehensions and fears of these recent arrivals, to gather facts which effectively resolve questions of excludability or deportability."[111] The facts gathered in these early uncounseled encounters may be decisive in the determination of whether a given refugee is fleeing political or economic repression. In the latter case the refugee would not be entitled to political asylum in the United States.[112] Without counsel present, there is no way to insure that "inculpatory" or damaging statements indicating economic motives for immigration are accurate or voluntarily made.

Even where the coercive effects of interrogation do not produce an inaccurate account of the refugee's story, personal biases on the part of interviewing agents have been shown, in some instances, to color the agent's characterization of the refugee's words for the record. INS agents are persons with their own political beliefs operating under instructions heavily influenced by current foreign policy concerns transmitted through higher levels of the United States Department of State,[113] the Justice Department,

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108. *Id.* at 476.

109. *Id.* at 474.

110. *Id.* at 478-79. It is beyond the scope of this article to argue for constitutional guarantees in exclusion proceedings. It is, however interesting to note that the Supreme Court itself has extended the privilege against self-incrimination to juvenile civil proceedings. *See In re Gault,* 387 U.S. 1 (1967). In doing so, the Court emphasized that:

> [t]he privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.

*Id.* at 49.

111. Unpublished memorandum re Observations of INS Processing of Cuban & Haitian Boatpeople from Peter A. Schey (Lead Counsel, Haitian Refugee Center v. Civiletti) to David Crosland (INS Acting Commissioner) 2 (August 14, 1980) [hereinafter cited as *INS Processing Memo*] (on file at NYU Review of Law and Social Change). Haitian plaintiffs have claimed there is a right to counsel at the border inspections. Louis v. Nelson, No. 82-5772 (11th Cir. April 12, 1983). The Eleventh Circuit held these claims barred because plaintiffs had failed to exhaust administrative remedies. *Id.* slip op. at 103-04.

112. *See supra* text accompanying note 8.

113. *See* Haitian Refugee Center v. Smith, 676 F.2d at 1040 (describing the role of the state department in the asylum process).

and the Service itself. Many have described a "serious attitude problem"[114] within the Service: It is characterized by "disdain for its clientele and resistance to efficiency . . . [resulting in] a policeman's attitude toward adjudication of applications and petitions rather than dispassionate evaluation and impartial judgment based on the evidence of record."[115] These problems can take on a political dimension as well.

The recent influx of Haitians and Cubans, processed side by side, provided onlookers with an opportunity to witness these agency biases. Observers of INS processing at the 79th Street Center in Miami, Florida reported:

> [P]rocessing procedures continue to favor and assist Cuban refugees while discriminating against Haitian refugees. This disparate treatment is manifested in the different forms administered to Haitians and Cubans, different procedures which apply during the processing, and differences in perceptions and attitudes held by INS agents conducting the processing.[116]

These same observers, after attending numerous asylum interviews, concluded that "[i]t was the INS agents who interpreted what Cubans said as indicating they were 'political' refugees while different INS agents interviewing Haitian refugees interpreted what they said as indicating that they were 'economic' refugees."[117] Though INS policy requires an individual

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114. Bernsen, *INS: An Agency With Too Many Problems,* 58 INTERPRETER RELEASES 335, 337 (1981) (Bernsen was employed by INS for 37 years. At the time he retired in 1977 he was general counsel).

115. *Id.* at 336.

116. *INS Processing Memo, supra* note 111, at 1. *See also* Haitian Refugee Center v. Civiletti, 503 F. Supp. at 511-32 (finding a pattern and practice of intentional discrimination against Haitians).

117. *INS Processing Memo, supra* note 111, at 3 (emphasis omitted). The observation team at the 79th Street Processing Center reported the following diaglogue in an asylum interview of a Cuban:

> INS Agent: "Tell me why you left Cuba."
> Cuban interviewee: "I wanted a better life; I cannot live there on what the government gives me."
> INS Agent: "Were you suffering there?"
> Cuban interviewee: "Everyone suffers there."
> INS Agent: "Would you be mistreated if we sent you back because you don't like it there?"
> Cuban interviewee: "Yes."
> INS Agent wrote . . . "Would suffer mistreatment if returned because of opposition to regime."

*Id.* at 4.

The team reported the following incident in an asylum interview of a Haitian:

> INS Agent: "Do you wish to apply for political asylum in the U.S.?"
> Interpreter: "She says no."
> Anselme Remy (observation team): "Wait, she said she didn't understand the question."

assessment of each and every asylum application,[118] it was apparent to onlookers that Service personnel were unable to refrain from prejudging each applicant based on political opinion and their impressions of the group of refugees as a whole.[119] In short, refugees from countries viewed as hostile to the interests of the United States were seen as fleeing political persecution while those from American allies were seen as fleeing economic conditions.

It should be clear from this discussion that the prehearing refugee-INS encounter is laced with opportunities for the violation of basic fairness. Notice of existing rights is inadequate and untimely. Because of the nature of their plight, refugees must be questioned with special care. INS agents are often unable and perhaps unwilling to surmount these cultural and linguistic barriers to effective communication. This is because of the inherently coercive nature of custodial interrrogation by hurried, sometimes unsympathetic, or biased officials. Consequently, the facts obtained by INS officials in support of a refugee's application for political asylum may be incomplete, inaccurate or mischaracterized.

There are two points in the exclusion process where such misstatements of fact may prejudice the refugee's case. First, an application for asylum made to the district director of INS[120] may be denied on the basis of this misinformation obtained without the presence of counsel. Second, at the exclusion hearing, a re-application for asylum in the form of discretionary relief from deportation[121] may again be unfairly prejudiced. While attempting to meet her burden of proof,[122] the refugee may find her true statements at the hearing impeached by admissions against interest made under the

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> INS Agent: "Well, how can she claim something if she doesn't know what it means?"
> With that comment, the INS agent proceeded with the interview, the Haitian respondent "on record" as saying she did *not* wish to seek asylum in the United States.

*Id.* at 5 (emphasis in original).

118. "Because of the wide variety of circumstances which may be involved, each request must be dealt with on an individual basis, taking into account humanitarian principles, applicable laws and other factors." OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS, 618.31 (1975) (Appendix to § 108).

119. *INS Processing Memo, supra* note 111, at 3-5. Lest the reader think that the overall impact of INS's lack of sympathy for the asylum claims of Haitian refugees was negligible, a look at the relevant statistics is revealing. In fiscal year 1981 "[f]ewer than five asylum claims by Haitians were approved . . . [though] over 5,000 were pending." Solarz, *supra* note 1, at 29. Of the 4,000 Haitians processed in Florida during the "accelerated program adopted by INS" not a single one was granted asylum. Haitian Refugee Center v. Smith, 676 F.2d at 1032 (footnote omitted). The court also found that the travel control section in the Miami INS Office kept a daily tally of claims that were processed: "The tally sheet contained space only for the total number of denials; there was no column for recording grants of asylum." *Id.* at 1031. A clearer indication of prejudged claims would be hard to find.

120. *See supra* note 6.

121. *See supra* note 7.

122. *See supra* note 2.

circumstances reviewed above. The government itself has conceded that "the taking of a statement in supposed derogation of a right to counsel is a first step in the exclusion process and harms the alien . . . if it is subsequently admitted at the exclusion hearing."[123] Though counsel may be present at the hearing, there is little that can be done to keep the damaging statements from being considered by the immigration judge. There are few formal rules of evidence in immigration proceedings,[124] no exclusionary rule,[125] and no procedure available to suppress inculpatory statements taken from an alien unaware of her rights.[126]

The presence of trusted, individual legal counsel at asylum interviews and during prehearing processing would insure that refugees are fully and fairly heard before INS makes initial determinations. Counsel could advise the alien on the law, object to inappropriate questioning, check for mistranslation and mischaracterization of the refugee's responses, insist on a fair and regular procedure, and generally represent the applicant's interests. Most refugees do not understand the nature of the immigration process, and those truly fleeing a repressive regime are unlikely to assert their rights or object to the way they are treated for fear of government reprisal to which they are accustomed.[127] Without an uncompromised right to counsel during these early encounters with INS, the refugee's application for asylum may be unfairly denied while her statutory right to counsel at the exclusion hearing is effectively subverted.

As noted above,[128] current law permits only a severely limited role for counsel during the early phases of processing. As the preceding discussion

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123. *Defendant Meissner's Motion to Dismiss, supra* note 90, at 10.

124. 1A C. GORDON AND H. ROSENTHAL, IMMIGRATION LAW AND PROCEDURE § 3.20(f)(1) (1959). In Paul v. INS, 521 F.2d 194, 198 (5th Cir. 1975), Haitian petitioners argued that they were denied their statutory right to counsel because "the representation afforded them was . . . deficient" because their counsel stipulated to the admissibility of statements made to INS in counsel's absence. The court rejected this argument because "these statements would have been admissible without stipulation unless their admission made the proceeding unfair." *Id.*

125. The Board of Immigration Appeals has held that the exclusionary rule, used to remedy violations of fourth amendment rights in criminal cases, does not apply to deportation proceedings. *In re* Sandoval, 2725 Int. Dec. 1 (August 20, 1979). This rule was modified less than a year later in a Board decision holding in dicta that "cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the fifth amendment's due process requirement of fundamental fairness." *In re* Toro, 2784 Int. Dec. 5 (February 27, 1980). This modification is of little or no use to a refugee in an exclusion proceeding.

126. 1A C. GORDON AND H. ROSENTHAL, IMMIGRATION LAW AND PROCEDURE § 3.20(f)(b). It is beyond the scope of this Note to argue that the rationale behind such constitutionally mandated evidentiary protections warrants their extension to the immigration context. There is some support, however, for the proposition that a showing that a particular statement was inaccurate or involuntarily made would warrant suppression in furtherance of the guarantee of basic fairness. *See* Paul v. INS, 521 F.2d at 198.

127. *See, e.g., Testimony of Anselme Remy, supra* note 99 at 76-88.

128. *See supra* text accompanying notes 55-58 and 85-88.

illustrates, fairness cannot be achieved if the role of counsel is limited by considerations of delay and by the proposed requirement that asylum interviews be nonadversarial in nature.[129] INS has treated selected groups of refugees with flagrant disregard for the fair and regularized statutory procedure of admitting and excluding aliens. Only aggressive assertion of the rights impliedly accorded refugees at the prehearing phase can prevent the guarantees of basic fairness in the exclusion process from being subsumed by bureaucratic concerns. A prehearing right to counsel is necessary to attain this end.

### *C. Effective Representation at the Exclusion Hearing*

Even where access to counsel has not been effectively barred and the detrimental impact of early INS-refugee encounters has not undermined the refugee's case for asylum, attorneys have been unable to represent their Haitian clients. This is because INS has failed to comply with explicit statutory mandates.

The "Haitian Program," involving expedited processing of Haitian refugees, [130] illustrated this problem. "The Haitian cases were processed at an unprecedented rate," increasing the number of hearings per day in Miami from between one and ten to as many as eighty.[131] Immigration judges refused to suspend hearings when a request for asylum was advanced. Instead the refugee was found excludable or deportable and given ten days to file an application with the district director and ten days to request suspension of deportation.[132] There is no statutory basis for these time limitations. In a case challenging the Haitian Program, the Fifth Circuit summarized the district court's findings as follows:

> Hearings on requests for withholding deportation also were being conducted simultaneously with asylum and deportation hearings, at several different locations. It was not unusual for an attorney representing Haitians to have three hearings at the same hour in different buildings; this kind of scheduling conflict was a daily occurrence for attorneys throughout the Haitian program. The INS was fully aware that only approximately twelve attorneys were available to represent the thousands of Haitians being processed, and that scheduling made it impossible for counsel to attend the hearings.[133]

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129. *See supra* text accompanying notes 60-66 (discussing proposed statutory amendments).

130. *See* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd sub nom.* Haitian Refugee Center v. Smith, 676 F.2d at 1029. *See generally* Louis v. Nelson, No. 82-S772, slip op. at 3 (11th Cir. April 12, 1983).

131. Haitian Refugee Center v. Smith, 676 F.2d at 1031.

132. *Id.* This ten day requirement foreshadowed the legislative developments described above, *see supra* note 66.

133. Haitian Refugee Center v. Smith, 676 F.2d at 1031.

The circuit court concluded that the "INS had knowingly made it impossible for Haitians and their attorneys to prepare and file asylum applications in a timely manner."[134]

In short, the expedited processing of Haitians made effective legal representation virtually impossible. It strained the resources and human capacity of the few attorneys available, hampered the filing of complete, well-documented asylum claims, and prevented effective exercise of the Haitians' right to counsel in the exclusion hearings themselves.

### *D. Judicial Standards of Waiver, Comprehension and Review of Agency Action*

In assessing the effectiveness of the right to counsel for refugees in exclusion proceedings, it is crucial to examine the role of the courts in enforcing the statutory command. Courts have employed only minimal scrutiny in reviewing INS decisions[135] and have applied a weak standard in determining whether waiver of the right to counsel in immigration proceedings has occurred. The narrow scope of review and the ease with which reviewing courts will find waiver of the right to counsel have together served to further undermine the statutory protections to which refugees are entitled.

Since Congress has plenary power in the immigration area,[136] its decision to delegate a complex combination of discretionary and mandatory powers to exclude, deport, detain, and admit aliens to a specialized agency such as INS does not exceed the permissible bounds of delegation. The INS is presumed to have developed expertise in the immigration domain. This expertise, along with the "historic deference of the courts to the political branches of our national government in immigration matters is at the heart of the Supreme Court's statement of the [narrow] scope of review"[137] employed by courts hearing immigration appeals.[138]

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134. *Id.* at 1031-32.

135. A petition for judicial review of a final order of deportation may be filed within six months with the appropriate judicial circuit as set forth in the Act. 8 U.S.C. § 1105a(1), (2). Judicial review of a final order of exclusion may be had through habeas corpus proceedings only. *Id.* at § 1105b. Note that Senate Bill Number 2222 would nearly eliminate judicial review for asylum claims and final orders of exclusion. *See supra* note 66; *see also supra* text accompanying note 65.

136. *See supra* text accompanying notes 41-46.

137. Bertrand v. Sava, 684 F.2d at 212.

138. *See id.* at 212-13 "The unusually broad Congressional power over the admission of aliens into the United States is reflected in the narrow construction by the courts of their own power to review the discretionary decisions of the Attorney General made pursuant to authority delegated to him by Congress." Burquez v. INS, 513 F.2d 751, 755 (10th Cir. 1975) (Administrative ruling under facts of the case is upheld because "[t]o hold otherwise would involve judicial activism into a political, legislative and/or executive arena.").

The standard of judicial review differs depending upon whether the agency action below was mandatory or discretionary. Where the administrative action is discretionary, the standard applied is whether that discretion has been exercised in an arbitrary or capricious manner, in violation of procedural due process and the applicable rules of law.[139] Where a court finds that discretion has in fact been properly exercised (i.e. that the agency action isn't arbitrary) and that it has not been abused (i.e. that the decision was rational), it will uphold the discretionary decision and refrain from substituting its own judgment for that of the INS.[140] By contrast, where the INS function at issue is a mandatory one, the courts seem to be concerned with the "fundamental fairness" of the proceeding, whether it does or does not violate existing law or regulations.[141] This standard permits more aggressive scrutiny of the administrative action below.[142]

The scope of judicial review described above is integrally related to the standards of waiver and comprehension used by the courts in evaluating claims that an INS decision should be vacated because it was made in derogation of the alien's right to counsel. Since the right to exercise the privilege of counsel at a hearing is mandatory, not discretionary, courts tend to look at whether the absence of counsel undercuts the fundamental fairness of the proceeding—even if they find that the alien did not waive her right.[143] Nevertheless, courts must first analyze whether a waiver in fact occurred.

Most courts claim to apply the same standard of waiver in deportation and exclusion proceedings that the Supreme Court has used in criminal proceedings.[144] The Supreme Court has defined waiver of the right to coun-

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139. Kam Ng v. Pilliod, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denicd*, 365 U.S. 860 (1961); *cf.* Soroa-Gonzales, 515 F. Supp. 1049 (1981) (abuse of discretion found in revocation and failure to reinstate parole).

140. *See, e.g.*, Bertrand v. Sava, 684 F.2d at 213-14, 219 (reversing lower court decision on these grounds).

141. United States v. Floulis, 457 F. Supp. 1350, 1355 (W.D. Pa. 1978); *see, e.g.*, Paul v. INS, 521 F.2d 194, 198 (5th Cir. 1975).

142. *See* Paul v. INS, 521 F.2d at 198. As to the substantive standard in political asylum claims, the Second Circuit has recently held that the "adoption of a uniform definition of refugee" in the Refugee Act of 1980 "eliminates the prior distinction between the standard for determining eligibility for a discretionary grant of asylum . . . and the standard for determining eligibility for the mandatory withholding of deportation . . . ." Stevic v. Sava, 678 F.2d at 407-08. For both, the refugee must show something like a "reasonable fear", no longer a "clear probability" of persecution. *Id.* at 408.

143. *See, e.g.*, Burquez v. INS, 513 F.2d at 754, 755 ("the fact that an alien is without counsel [in a deportation hearing] is not considered a denial of due process, if he does not show that he was prejudiced thereby."); *cf.* Paul v. INS, 521 F.2d at 198 (holding that deficiency of counsel at hearing which undermined fairness was cured by adequacy of representation on appeal to the Board of Immigration Appeals).

144. In considering waiver of an applicant's right to an exclusion hearing, the district court in *Hernandez v. Casillas* said: "While the United States Supreme Court has not yet authoritatively decided whether the same waiver standard applies in civil cases as in criminal cases, the lower federal courts have universally applied the same standard." 520 F. Supp.

sel in criminal proceedings as "an intentional relinquishment or abandonment of a known right or privilege."[145] The Court has imposed a " 'presumption against waiver' of fundamental constitutional rights."[146] Since the right to counsel in criminal proceedings is a fundamental constitutional right, the standard for waiver must be high.[147] Waiver of the right to counsel must be knowing, intelligent, and voluntary as measured by the totality of the circumstances.[148] An explicit oral statement of waiver is not necessary,[149] but silence is insufficient.[150] A showing that the defendant responded to police-initiated interrogation after requesting counsel is also insufficient and suppression of the statements may result.[151] The totality of the circumstances test is flexible; factors such as education, intelligence, experience and age can all be examined[152] in the trial court's "serious and weighty" determination[153] of whether a defendant has in fact[154] waived his or her rights. Thus, there is a heavy burden of proof on the prosecution.[155]

Underlying the law of waiver in criminal proceedings are the standards of comprehension by which courts deem a right to be knowingly waived. What must the defendant know? Must she know only that the right exists or must she understand the nature of the proceedings and the import of the right in that context? At least one commentator has suggested that the Supreme Court has developed a more stringent standard of comprehension for waiver of the sixth amendment right to counsel than for waiver of the fifth amendment right to counsel.[156] *Miranda v. Arizona*[157] indicates that the fifth amendment right to counsel is deemed "known" upon the issuance

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389, 393 (S.D. Tex. 1981) (citations omitted). (This case in one of few waiver cases regarding exclusion proceedings to reach the federal courts. Probably, this is the result of the limited resources and prompt expulsion of excluded aliens as a group.)

145. Johnson v. Zerbst, 304 U.S. 458, 464 (1937).

146. *Id.* (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

147. *See Zerbst*, 304 U.S. 458.

148. Fare v. Michael C., 442 U.S. 707, 724-25 (1979); Miranda v. Arizona, 384 U.S. 436, 475 (1966); *Zerbst*, 304 U.S. at 464-65.

149. North Carolina v. Butler, 441 U.S. 369, 373 (1979).

150. *Id.*; *Miranda*, 384 U.S. at 475; Carnley v. Cochran, 369 U.S. 506, 516 (1962) ("Presuming waiver from a silent record is impermissible.").

151. Edwards v. Arizona, 451 U.S. 477, 484 (1981).

152. *Michael C.*, 442 U.S. at 725.

153. Von Moltke v. Gillies, 332 U.S. 708, 723 (1948).

154. "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the right delineated in the *Miranda* case." North Carolina v. Butler, 441 U.S. at 373.

155. "[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475 (citation omitted); *but see* Johnson v. Zerbst, 304 U.S. at 468-69.

156. Wasserman, *Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pre-trial Waivers*, 60 B.U.L. REV. 738, 750 (1980) [hereinafter cited as *Standards for Knowing*].

157. 384 U.S. 436 (1966).

of a set of warnings. The right *may* be deemed waived if the defendant voluntarily proceeds with the investigation soon after affirmatively indicating that she understands her rights.[158] Where the defendant actually requests counsel and then appears to answer police-initiated questions voluntarily, the right will not automatically be deemed waived.[159] The *Miranda* Court requires an "effective and express explanation"[160] of the right itself to the defendant in the form of warnings. The standard of comprehension is met if it can be ascertained that the defendant understood the mere existence of her right to counsel.

In contrast, waiver of the sixth amendment right to counsel appears to "[require] comprehension of the *risks of waiving the right* and facing trial without an attorney."[161] In *Von Moltke v. Gillies,*[162] the Supreme Court particularized a standard of comprehension in sixth amendment cases that requires more than "a mere routine inquiry" by the trial court judge.[163] The Court stated:

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances . . . .[164]

More recently, in *Faretta v. California,*[165] the Court stated that a defendant waiving a sixth amendment right to counsel "should be made aware of the dangers and disadvantages of self-representation . . . ."[166] The Fourth Circuit[167] elaborated on this standard by requiring that the defendant know "the charges against him, the possible punishment and the manner in which an attorney can be of assistance."[168] It appears, then, that a defendant's waiver of her sixth amendment right to counsel will not easily withstand appellate scrutiny. Under the sixth amendment the right to counsel may not

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158. *Id.* at 475; *see* Tague v. Louisiana, 444 U.S. 469 (1980) (per curiam).
159. Edwards v. Arizona, 451 U.S. at 484.
160. 384 U.S. at 473.
161. *Standards or Knowing, supra* note 156, at 750.
162. Von Moltke v. Gillies, 332 U.S. 708 (1948).
163. *Id.* at 724.
164. *Id.*
165. 422 U.S. 806 (1975) (holding that a defendant in a criminal trial has a constitutional right to proceed pro se).
166. *Id.* at 835.
167. United States v. King, 582 F.2d 888 (4th Cir. 1978).
168. "The defendant must be made aware that he will be on his own in a complex area where experience and professional training are greatly to be desired." *Id.* at 890.

be waived upon the mere provision of notice of the right as may the fifth amendment right under *Miranda*.[169] The trial judge must take an active role in assuring that the apparent waiver has been knowingly made.

Courts reviewing immigration proceedings, though purporting to apply the standards of waiver and comprehension invoked in criminal proceedings,[170] in fact have failed to scrutinize adequately administrative findings that the right to counsel has been waived. If what federal courts do in these cases can be labeled scrutiny at all, it has been applied according to a standard of comprehension more akin to that used in the fifth amendment cases described above.[171] Although they require that the waiver be intelligent and voluntary under the totality of the circumstances, courts look only for the alien's understanding that the right exists and for a *pro forma* advisory opinion from the immigration judge in the administrative proceedings below.[172]

In reviewing deportation proceedings[173] courts have found the duty of the immigration judge[174] to be fulfilled when the alien has been given a perfunctory statement as to the existence of the right to counsel.[175] Waiver of the right to counsel can occur if the alien agrees to proceed without counsel.[176] Generally a "yes" or "no" answer will suffice[177] when the alien

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169. A discussion of the point in criminal procedure at which a defendant's sixth amendment right to counsel attaches is beyond the scope of this Note. However, some have argued that this particularized standard of comprehension is equally applicable to waiver of the right to counsel whenever it accrues prior to trial (whether by way of the fifth or sixth amendment). *See Standards of Knowing*, *supra* note 156, at 757-61; United States v. Mohabir, 624 F.2d 1140, 1148-51 (2d Cir. 1980).

170. *See supra* note 144; *see also Right to Counsel*, *supra* note 28, at 892-93.

171. This choice of standards is consistent with the fact that immigration proceedings have long been held not to be criminal in nature. *See supra* note 39. *See also* Barthold v. INS, 517 F.2d 689, 690 (5th Cir. 1975).

172. *See, e.g.*, Ramirez v. INS, 550 F.2d 560, 565 (9th Cir. 1977); SeSouza v. Barber, 263 F.2d 470, 477 (9th Cir. 1959), *cert. denied*, 359 U.S. 989 (1959).

173. Most of the case law involves the review of deportation proceedings; as mentioned above, *supra* note 144, few exclusion cases seem to have reached the federal courts on appeal.

174. "It is the duty of the immigration judge to insure that a waiver of a right to counsel is competently and understandingly made." In re Gutierrez, 16 I & N Dec. 226, 228 (BIA 1977) (citations omitted).

175. *See, e.g.*, Tupacyupanqui-Marin v. INS, 447 F.2d 603, 606 (7th Cir. 1971).

176. *See, e.g.*, Ramirez v. INS, 550 F.2d at 565; Barthold v. INS, 517 F.2d at 691; Burquez v. INS, 513 F.2d 751, 755 (10th Cir. 1975).

177. *See, e.g.*, Murgia-Melendrez v. INS, 407 F.2d 207, 208-09 (9th Cir. 1969). In holding that the petitioner had knowingly waived counsel, the Ninth Circuit noted that the nineteen-year-old Mexican "was informed of his rights by the Special Inquiry Office" in the following exchange:

> Q. In these proceedings you have the right to be represented by counsel or other authorized representative of your choice, but at no expense to the United States Government. Have you obtained representation for this hearing?
> A. Not for this hearing, sir.
> Q. Are you willing to proceed with the hearing of this matter at this time without representation?
> A. Yes, sir.

has been informed of the nature of the proceedings and there is no evidence that she did not understand.[178] In a few isolated instances, courts have adopted a more exacting standard of waiver in reviewing deportation proceedings. These courts have required that the immigration judge take a more active stance in insuring that the alien understands all the implications of waiver of counsel.[179] The standard applied in these cases more closely approximates the sixth amendment standard described above. These cases, however, are few and far between.

In the case of Haitian refugees, the inadequate appellate review of the facts underlying an asserted waiver of the right to counsel operates to eviscerate the right. In most cases, no matter how many times a judge may ask the question, no matter how many times the alien answers "no" regarding her desire to be represented, the waiver cannot be assumed to be knowing, intelligent, and voluntary *in fact*. Cultural and linguistic factors often make even an explicit waiver of the right to counsel by a refugee unknowingly made.

Refugees agree to proceed without legal counsel for many reasons. They may be afraid to request counsel even when notified that it is their right and "their silence" or acquiescence "may well be the result of fear of persecution."[180] For many refugees, and for Haitians in particular, the idea

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*Id.* at 208. The court's analysis indicates that since the petitioner spoke and understood English, and since he had been advised that the hearing would determine his deportability, this was a knowing waiver of counsel. *Id.* at 208-09. Such a superficial attempt to ascertain the alien's understanding of his right to counsel is clearly inadequate. When the appellate court upheld the finding of deportability it did not employ a sixth amendment standard.

178. *See, e.g.*, *Barthold*, 517 F.2d at 691; *Murgia-Melendrez*, 407 F.2d at 209; Velasquez Espinoza v. INS, 404 F.2d 544, 546 (9th Cir. 1968).

179. In Handlovits v. Adcock, 80 F. Supp. 425 (E.D. Mich. 1948), the court remanded the case to INS for a new deportation hearing. The judge explained:

> I am not satisfied that when . . . [the petitioner] answered, "No" to the question as to whether she desired to have a lawyer or a friend represent her, she understood the question. It was the duty of the examining officer to explain such an important right to a person, not in a perfunctory way but in a manner which would assure such an examining officer that the alien fully understood her rights . . . .

*Id.* at 428. One modern court has elaborated upon this standard. In Partible v. INS, 600 F.2d 1094 (5th Cir. 1979), emphasizing the importance of counsel in aiding an alien plaintiff in the presentation of her case, the court concluded:

> Although [petitioner] was informed at the commencement of the hearing by the immigration judge of her statutory right to counsel and nevertheless elected to proceed unassisted, she waived her rights without being provided with any understanding by the immigration judge of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf . . . .

*Id.* at 1096 (footnote omitted). These courts are requiring more than a perfunctory explanation to the deportee for waiver of the right to counsel to occur.

180. *Eligibility, supra* note 100, at 67. *See also*, Haitian Refugee Center v. Civiletti, 503 F. Supp. at 527.

of requesting legal representation (or political asylum) which is rightfully theirs may be frightening and foreign. Refugees fleeing a repressive regime often associate lawyers with government action and with political corruption or oppression.[181] The notion of individual "rights" in dealing with government officials may be beyond their comprehension and experience.[182] Their instinct may lead them to be subservient with government authorities out of fear or a desire to speed their release from custody. For Haitians "[i]t is an attitude . . . collaborative, meek, [and] subservient. . . . [T]here is a desire and a manifestation of the willingness—let us say, not to challenge, to antagonize the decision of the Court, even when the Court, the Judge, informed them of the right to do so."[183]

Aliens may also agree to proceed because they do not understand the significance of a right to counsel. Without an explanation of administrative process, legal options, and of the role of counsel in shepherding an individual through the process toward an informed exercise of choice, there is no reason to expect the refugee to request counsel or to decline to waive the right. Because the prevailing standard of waiver in the immigration context does not require such explanation, the right to counsel should not depend on the alien exercising her initiative.

Considering the right to counsel and its waiver in the criminal domain, the Supreme Court has held that "where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."[184] The justifications for a right to counsel without request in criminal proceedings are equally applicable to the refugee in immigration proceedings. The Supreme Court's pronouncement reflects its acknowledgement that not all criminal defendants understand the meaning of legal representation in our judicial system. A defendant may not know that counsel is theoretically independent from government, bound to represent her interests in confidence, and better trained than she to advocate the cause of available defenses in a court of law. Without this knowledge, she may fail to request legal assistance when asked. If this is true for a resident criminal defendant, imagine how much more true it must be for a refugee who understands neither the language nor the system, who is inadequately notified of the right to counsel in the first place, and who experiences the fear and cultural barriers described above.

Difficulties in translation (of words, concepts and rights) may further disguise an unwitting waiver of counsel from the reviewing court which fails to scrutinize the scant record with care. Many refugees speak dialects and languages which do not have adequate equivalents for crucial concepts of immigration processing. For example, the word "exclusion" cannot be

181. *See generally Testimony of Anselme Remy, supra* note 99, at 76-82.

182. *See id.* (describing the nature of the Haitian response to the political asylum process in Florida).

183. *Testimony of Anselme Remy, supra* note 99, at 81-82.

184. Carnley v. Cochran, 369 U.S. 506, 513 (1962).

translated into Creole, the language of most Haitians.[185] Though Haitians were facially advised of the nature of the proceedings, the concepts, when literally translated, often had no colloquial meaning at all. Testimony indicates that at one hearing, when a refugee was asked if he wanted to appeal the case "the interpreter said 'a large tribunal,' which, in fact, is not the right translation. The refugee answered, '[a] court is a court. What is the need for me to go to another one?' "[186] Unintentional waivers of the right to apply for political asylum also occurred through mistranslation.[187] In the face of such evidence, it is unjust for an appellate court to fail to aggressively scrutinize the record below. Without a more stringent standard of waiver and comprehension, enforced through judicial review, the right to counsel may be forfeited in violation of the guarantees of basic fairness. Refugees clearly run a high risk of waiving rights they never knew they had. Since counsel could prevent this from occurring, courts should take special care to insure that the right to counsel is itself not unwittingly lost.

## V

## PROPOSALS FOR INSURING A MEANINGFUL RIGHT TO COUNSEL FOR REFUGEES

INS has an implied statutory duty to process refugees without impinging on their right to exercise their privilege to be represented. To insure that INS fulfills its statutory duty, the INA and its implementing regulations should be amended to make the rights and prohibitions in the processing of refugees explicit.[188] Thus, where INS chooses to detain refugees until their

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185. Testimony of Anselme Remy:

Q. Were there any other mistranslations that you believe affected the meaning of the proceedings for the Haitians?
A. Oh, yes, there are plenty of them.
Q. Would you give some other examples?
A. There is in English the term "exclusion", which does not exist in creole . . . they use the term, "You will be 'excluded' . . . ."
Q. And what does that mean?
A. It means nothing.
Q. In creole language?
A. Nothing.

*Testimony of Anselme Remy, supra* note 99, at 96-97.

186. *Id.* at 84.

187. *See supra* note 117.

188. Critics of these proposals will surely point to the increased burden on the federal fisc assertedly inherent in the implementation of expanded statutory safeguards and more searching judicial review. Before acceding to these hasty conclusions, however, a closer examination of these competing interests is necessary.

First, there is the broader point that increased cost and administrative inconvenience pale in comparison to the human equities involved. *See* Stanley v. Illinois, 405 U.S. 645, 656 (1972) (noting that the constitution recognizes more than just speed and efficiency). Is not the consequence of the erroneous expulsion of a refugee truly entitled to asylum as "shocking to the conscience" as incarcerating the innocent after a criminal trial? Surely it is preferable to

hearing date, it must be required to detain them at locations where expert, pro bono representation and knowledgeable witnesses are available. By regulation, detention centers should be equipped with telephones, translators, and personnel readily available to aid refugees in their attempts to obtain and communicate with counsel. Detention facilities should provide reasonably private conditions for prolonged confidential attorney-client interviews. Attorneys and duly certified representatives should be afforded reasonable access to detained refugees even where their services have not previously been requested by those detained.[189]

All excludable aliens who are to be detained throughout processing should have a right to legal representation from the moment they are paroled into the United States for this purpose.[190] It should be recognized that indefinite discretionary detention for aliens, who may not speak English and most often have committed no crime, gives rise to all the dangers inherent in custodial interrogation recognized by the Supreme Court in *Miranda*. Consequently, some variety of *Miranda* warnings should be required to be issued to all detainees before interrogation. Moreover, these aliens should be advised of their rights in a comprehensible way. An explanation of immigration processing and of the role of counsel in representing

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expend funds on procedural protections, possibly resulting in an occasional erroneous admission or grant of asylum rather than risk a single erroneous expulsion of one seeking asylum. Our criminal justice system reflects such a system of priorities: constitutional rights, evidentiary rules and the burden of proof all express a preference for risking that the guilty go free rather than risking the punishment of the innocent.

Second, even if one were to concede that immigration is different—that the government simply cannot afford to give every potential immigrant the preference it gives to its own citizens or permanent residents—criticisms based on projected cost may be shortsighted. Increased expenditures injecting higher standards of fairness into the intitial phases of immigration processing may save costs later. There would be fewer appeals, *but see* the Reagan administration proposals eliminating some appeals described *supra* note 66, fewer class action lawsuits to defend, and possibly an increase in *legal* immigration with a concommitant decrease in *illegal* immigration and all its subsequent problems.

Indeed, it is not unlikely that attorneys might aid in the process of explaining rights, filing asylum claims, and performing the initial interrogation of incoming refugees. The displacement of some of the burdens of fair processing onto individual legal representatives could help to streamline procedures, and to relieve INS of its overload. The presence of attorneys and certified representatives, trained in and dedicated to the asylum process and bound by codes of professional conduct to advocate only within the bounds of applicable law, might actually diminish financial and administrative burdens on government.

189. In fact, the Eleventh Circuit has recently held that the Haitian Refugee Center has a first amendment right to solicit Haitian clients in detention and inform them of their legal rights. Louis v. Nelson, No. 82-5772, slip op. at 110 (11th Cir. April 12, 1983).

190. The Report of the Canadian Task Force on Immigration Practices and Procedures on The Refugee Status Determination Process, September, 1980, recommended that a refugee have a right to counsel "immediately upon indication of his intention to ask for refugee status and should be informed of this right. TASK FORCE ON IMMIGRATION PRACTICES AND PROCEDURES, THE REFUGEE STATUS DETERMINATION PROCESS 22 (1981). The problem with this approach is that it depends upon the refugee's request which in turn depends on comprehension of the significance of the right. The flaw in such a standard is described above. *See supra* text accompanying notes 180-84.

an individual throughout these inherently adversarial procedures must be offered to each refugee. This explanation must be carefully tailored to the particular refugee's ability to understand. Though time-consuming, "a high price is paid if efficiency must depend upon the subject's ignorance of his legal rights."[191]

INS must permit counsel to fully represent the refugee's interests both in the prehearing asylum interview and during the exclusion or deportation hearing itself. Counsel must be given a reasonable time period within which to prepare and document a political asylum application. Processing must be scheduled so as to maximize regularized exclusion and not so as to circumvent statutory rights to counsel and basic fairness. Counsel must also be accorded free rein to object to questions, to cross-examine witnesses, and to introduce evidence on behalf of her client. It cannot be forcefully argued that rights and fairness should be contingent on expedient processing and the absence of delay. The nominally nonadversarial nature of immigration proceedings may not justify the deprivation of rights, though only statutory in origin, in immigration processing.[192] Courts should aggressively enforce INS compliance with statutory mandates by scrutinizing INS practice on a good faith standard.

To bolster the efficacy of the prehearing right to counsel, the statute should provide some evidentiary sanction for obtaining statements from detained aliens without counsel present. It must be presumed that the coercive effects of the custodial interrogation of unrepresented aliens constitute as much of a threat to the fundamental fairness of the immigration process as do their criminal counterparts in criminal justice. A formalized suppression procedure must be available to preserve the integrity of legal representation at the hearing.

Though "[i]t may be assumed that . . . a person would not normally abandon his home and country without some compelling reason,"[193] an excludable alien bears the burden of proving that she is admissible.[194] The burden of proving a prima facie case for political asylum sensibly lies on the refugee. This is because the burden of proof incorporates a substantially subjective component;[195] only the refugee can assert her fear of persecution.

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191. *Id.* at 22. For the same reasons cited in this Note, the Eleventh Circuit has held that the right to apply for political asylum carries with it the requirement that INS notify incoming refugees of that right. *See* Louis v. Nelson, 82-5772, slip op. at 105, 107 (11th Cir. April 12, 1983). Similarly, efficiency in processing cannot adequately justify a failure to adequately notify refugees of their right to counsel.

192. *Cf.* In Re Gault, 387 U.S. at 26-30 (where nonadversarial nature of juvenile proceedings held not to justify the absence of constitutional protections).

193. Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, Geneva, 12, U.N. Doc. A/AC 96, HCR/120/33/78/Rev. (1978) [hereinafter cited as *Handbook*].

194. 8 U.S.C. § 1361 (1981).

195. *Handbook, supra* note 191, at 11-12.

However, once the prima facie case has been established, the burden of proof should shift to the government to show that this fear is not "well-founded." This is the objective component of the standard.[196] This is because in large part, information as to the reasonableness of the fear is available to INS. There is no justification for saddling incoming refugees with the burden of documenting the condition of human rights in their country of origin or with other objective evidentiary showings. Rather, only when the government has proven the unreasonable nature of the refugee's fears should the burden shift once again to the refugee for rebuttal of the objective showing based on his or her particular case.[197]

To render proceedings on excludability truly fair, Congress should require that independent judges preside over asylum claims and exclusion hearings.[198] Policies including expedited processing of select groups should be disallowed or at a minimum their adoption should be procedurally formalized permitting public comment and government accountability.[199] Fortuitous distinctions between excludable and deportable refugees should be abolished. After all, "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."[200] Refugees who have made a colorable claim for asylum should be accorded protections in direct proportion to the risk of error in the adjudication of their excludability. Since persecution, imprisonment or death may be the result of expulsion, the criminal model may be applicable.

In furtherance of a meaningful right to counsel, courts should adopt the higher standard of knowing waiver held applicable to a sixth amendment right to counsel in criminal proceedings. Courts should perform a "penetrating and comprehensive examination of all the circumstances"[201] in an attempt to ascertain whether the refugee truly understood the "dangers and disadvantages of self-representation."[202] Among other things, the refugee must be advised "of the complexity" of the proceedings and have an "awareness" in fact "of the cogent legal arguments which could . . . [be] made on her behalf."[203] This standard should extend into the pretrial period

196. *Id.* at 12.

197. This division of burdens between the parties is not unlike that required in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-57 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 802-03 (1973).

198. *See* Prepared Statement of Michael H. Posner, Lawyers Committee for International Human Rights, Hearings on Immigration Reform, *supra* note 22, at 612, 616. *See also*, *supra* note 66. Immigration Judges are frequently former INS government attorneys who have been promoted.

199. *See* Louis v. Nelson, 544 F. Supp. at 993-97.

200. Plyler v. Doe, 102 S. Ct. at 2391 (referring to deportees, that is, aliens who are admittedly within the United States, though unlawfully).

201. Von Moltke v. Gillies, 332 U.S. at 724.

202. Faretta v. California, 422 U.S. at 835.

203. Partible v. INS, 600 F.2d at 1096; *see supra* note 179.

where functionally custodial interrogation occurs.[204] Refugees should receive timely, adequate notice and explanation of their right to counsel. Refugees should be presumed to desire legal representation, and where circumstances indicate the contrary, INS agents should be required to explain the implications of waiving the fundamental right to counsel.

Courts should scrutinize claims that fundamental rights have been waived in deportation and exclusion proceedings with special care. Upon review of a final order of exclusion, where political asylum for an unrepresented claimant was denied, this is especially important. Without stringent sanctions—such as reversal on appeal—this suspect class, in search of refuge, will be subjected to the risks of discriminatory or irrational administrative action without redress.

## VI

## CONCLUSION

It should be clear from the discussion above that under the current system refugees do not have a meaningful right to counsel despite the statutory command. They are deprived of a fair expulsion procedure on the basis of senseless legal fiction and outdated international notions of sovereignty. No rational justification can be found to distinguish an applicant for refugee status or political asylum from a deportee or a resident criminal defendant. The Supreme Court has recognized that the deportee, whose "liberty . . . is at stake" is entitled to "[m]eticulous care . . . lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."[205] Yet our law persistently refuses to recognize the plight of the refugee as sufficient to justify similar "meticulous care" in his or her process of exclusion or admission.

Problems with access to counsel and notice of the right make timely initial contact between refugees and attorneys improbable. Without counsel's presence throughout pre-hearing processing, counsel's ability to effectively represent the refugee at a subsequent exclusion or deportation hearing may be impaired through the admission of inaccurate, incomplete statements into evidence. INS has also made effective advocacy difficult through policies of detention and expedited processing for select groups of incoming refugees. Furthermore, the narrow scope of judicial review and the low standard of proof required to establish that the right to counsel has been waived, have effectively made the immigration judge the final arbiter on these issues. Refugees have been permitted to forfeit their right to counsel inadvertently. Taken together, these facts have undermined statutory guarantees and the refugee's opportunity to be heard.

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204. *See supra* note 156 and accompanying text.
205. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

In omitting a statutory duty of good faith cooperation, a prehearing guarantee of counsel and fair play, and evidentiary and judicial sanctions of sufficient impact to deter abuse of discretion, and to prevent unknowing waiver of rights, Congress has granted an illusory right to counsel. With judicial review of final orders of exclusion and asylum determinations under attack by the Reagan administration,[206] a meaningful right to counsel throughout immigration processing has never been more important. It is clear that the current statutory scheme is inadequate in its failure to control INS abuses in a crisis. In overhauling the statute, Congress should take care not to trade fundamental rights for the demands of efficiency alone. To place a national interest in controlling immigration before the promises this country has always held out to refugees fleeing persecution is to forget the plight of our Puritan founders.

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206. *See supra* note 56 and accompanying text.

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