DETERMINING ASYLUM CLAIMS IN THE UNITED STATES: A CASE STUDY ON THE IMPLEMENTATION OF LEGAL NORMS IN AN UNSTRUCTURED ADJUDICATORY ENVIRONMENT

DEBORAH E. ANKER*

* B.A., Brandeis University; M.A.T., Harvard University; J.D., Northeastern University School of Law; LL.M., Harvard Law School; Lecturer on Law (Immigration Law and Asylum and Refugee Law), Clinical Instructor and Coordinator, Immigration and Refugee Programs, Harvard Law School. Dr. Jason Clay, Jay Levy, Dr. Lisa Raphaels, Professor Jennifer Schirmer, and Professor Barbara Yngvesson provided invaluable assistance as social science consultants to this project. The author, who served as principal investigator of this study, also gratefully acknowledges the following individuals who offered consultation, advice, reviewed drafts, or provided editorial assistance: Professors T. Alexander Aleinikoff, Carolyn Patty Blum, Christopher Edley, Martha Minow, and David Trubeck, Dr. Janet Gilboy and Dr. Marilyn Tayler, as well as Lucas Guttentag, Arthur Helton, Sarah Ignatius, Dan Kesselbrenner, Doris Meissner, and Lory Rosenberg.

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The Introduction and Executive Summary is an expanded version of an essay summarizing this study published in January of 1990. *See* Deborah E. Anker, *Determining Asylum Claims in The United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, 2 INT'L J. REFUGEE L. 252 (1990); *see also Harvard Study Looks at Role of Immigration Judges*, 11 REFUGEE REPORTS, Mar. 23, 1990, at 3-7; 67 INTERPRETER REL. 118, 118-20 (1990). Other than information obtained in March of 1990 from a Freedom of Information Act Request described *infra* note 33 and data described *infra* notes 83, 103, researchers obtained, compiled, and analyzed data discussed in this report before the issuance of that summary. Exceptions, wherever relevant, are noted.

> One of the matters that has concerned me greatly about the admission of refugees and persons who seek asylum is the fact that there really are no specific procedures that would assure that due process is granted when such persons are questioned in order [to] determine . . . whether or not they meet the statutory standards . . . .
> When Congress creates a statutory scheme and does not spell out procedures . . . it can be thwarted by the executive branch . . . . [A]lthough I think the definition in this bill is an excellent one and even though it states . . . [that a person] will be a refugee if he or she has a well-founded fear of persecution, we don't specify how that well-founded fear is to be ascertained or whether a person has a right to be questioned about the presence or absence of that well-founded fear in his or her own language. Don't you agree that the method by which a determination as to whether or not someone is a refugee is made should be spelled out in some detail?[1]
>
> Representative Elizabeth Holtzman
> Co-sponsor, Refugee Act of 1980
> Hearings on the Refugee Act

> [The agency's] previous interpretation of the [well-founded fear standard] is strikingly contrary to the plain language and the legislative history . . . . The efforts of [the circuit courts] stand in stark contrast to — but it's sad to say, alone can not make up for — the years of seemingly purposeful blindness by the [administrative agency] which only now begins its task of developing the standard entrusted to its care.[2]
>
> Justice Harry Blackmun, concurring in *INS v. Cardoza-Fonseca* (overruling the Board of Immigration Appeals' interpretation of the standard of proof in asylum determinations)

I
INTRODUCTION AND EXECUTIVE SUMMARY

In the decade since passage of comprehensive legislation addressing the legal status and protection needs of refugees and asylum seekers, United States refugee policy has been the subject of persistent controversy, and numerous proposals for reform of administrative processes have been presented.[3] De-

1. *Policy and Procedures for the Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess. 126-27 (1977).

2. INS v. Cardoza-Fonseca, 480 U.S. 421, 451-52 (1987) (Blackmun, J., concurring).

3. *See, e.g.*, T. Alexander Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183, 234-36 (1984); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of*

spite this controversy — and the growing sense of crisis about the ability of administrative structures to adjudicate claims fairly and efficiently — until recently, there has been little attention paid to the practice of asylum adjudication in the administrative agencies. This Article reports on the first intensive empirical study of the United States' asylum determination process.[4]

The study, conducted over an eighteen-month period, consisted of an in-depth investigation of practices in one immigration court.[5] Researchers attended 193 asylum hearings and interviewed attorneys, immigration judges, court personnel, and asylum applicants in order to focus on the process and quality of asylum adjudication. The research was completed in June of 1988 and distributed in a report to policy makers and interested members of the public in January of 1990.[6] This Article reproduces the findings of that report. The results of this research are presented as a resource for future policy makers as well as for scholars interested in the immigration and asylum administrative process. The major conclusion of this research is that, in the cases observed, the practice of deciding asylum claims varied substantially from the governing case law, statutes, and regulations.

This Article is organized for ease of use by the practitioner and policy maker. Part I, the Introduction and Executive Summary, presents an overview of the legal and institutional framework governing the adjudication of an alien's claim for asylum protection as well as a description of the research design of the study. Part I concludes with a summary of the study's major findings and recommendations. Those findings are then elaborated in terms of the particular hearings observed and cases decided in the course of the study. Part II compares the decisions granting asylum in the immigration court studied with legal standards developed by administrative case law. Part III compares the theoretical burden of proof on asylum claimants, derived from the governing statute, international standards, and Supreme Court decisions, with

the Refugee Act of 1980, 19 SAN DIEGO L. REV. 9, 64-89 (1981); Ira J. Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 110-17 (1981); *see also* SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY STAFF REPORT, U.S. IMMIGRATION POLICY AND THE PUBLIC INTEREST 173-74 (1981). *See generally* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990) [hereinafter Martin, *Reforming Asylum*].

4. For an earlier report on asylum practices in the immigration court and the Immigration and Naturalization Service (INS) district in New York City, see PATRICIA W. FAGEN, REFUGEE POLICY GROUP, APPLYING FOR POLITICAL ASYLUM IN NEW YORK: LAW, POLICY AND ADMINISTRATIVE PRACTICE (1984).

5. The entire study period was from February 1987 through November 1988. While the primary study period occurred from February 1987 to June 1988, researchers attended hearings involving cases which previously had been observed, from June through November 1988. Subsequently, the author conducted some follow-up interviews on the status of cases through December 1989. *See infra* note 103.

6. *See* Deborah E. Anker, *Determining Asylum Claims in The United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, 2 INT'L J. REFUGEE L. 252 (1990) [hereinafter Anker, *Summary Report*]. For discussion of this report when first released, see 11 REFUGEE REPORTS 1, 3 (Mar. 23, 1990); 67 INTERPRETER REL. 118-20 (Jan. 29, 1990).

that observed in practice at the hearings. Part IV explores the institutional context of the asylum hearing — its ambiguous character, at once adversarial and non-adversarial — and describes the roles of the immigration judge adjudicator, government attorneys, and counsel for the applicant. Part V examines the various factors (institutional roles, cross-cultural communication, and quality of foreign language interpretation) that influence the adjudicator's determination of the applicant's credibility, one of the most salient aspects of the asylum determination process. Finally, Part VI is a brief epilogue discussing the recent changes in the asylum process and their institutional implications for the immigration court.

A. The Refugee Act of 1980: Congressional Mandate for Uniform Asylum Procedures, Fairness, and Neutrality

The Refugee Act of 1980[7] created statutory asylum procedures for aliens who fear persecution in their home countries and seek United States territorial protection.[8] Congress' major purpose was to eliminate *ad hoc* treatment of refugees and the use of selection criteria based on foreign policy, country of origin, and geographic considerations.[9]

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7. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections at 8 U.S.C. (1990)).

8. Before 1980, the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1100-1503) provided no statutory vehicle for persons who feared persecution abroad to apply for asylum in the United States. In 1967, the United States ratified the United Nations Protocol Relating to the Status of Refugees, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force with respect to the United States on Nov. 1, 1968), which directly incorporates and makes the parties bound to Articles 2 through 34 inclusive of the United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter U.N. Convention/Protocol]. Article 33 of the U.N. Convention/Protocol prohibits the refoulement (or return) of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of race, religion, national origin, membership in a particular social group, or political opinion. *Id.* For the U.N. Convention/Protocol definition of refugee, see *infra* note 11 and accompanying text. However, the only pre-1980 statutory protection was a discretionary remedy, withholding of deportation, which authorized the Attorney General not to return certain aliens who claimed persecution in their home countries and who had entered the United States and had been placed in deportation proceedings. *See infra* note 14; IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM ADJUDICATION: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE (1982) [hereinafter INS ASYLUM STUDY] (internal INS study on file with author). The only other procedures provided in the INA were for those who applied from overseas. *See infra* note 9. *See generally* Anker & Posner, *supra* note 3, at 12-20; David A. Laufman, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 GEO. IMMIGR. L.J. 495, 502-11 (1986). The overseas process, however, was available exclusively to persons fleeing from communist-dominated countries and countries in the Middle East. Laufman, *supra* this note, at 531-59. The overseas program often is referred to as a "refugee" program in contrast to the in-country asylum procedure. Asylum protection within the United States, to the extent it was available, was the creature of administrative regulation, and the INS provided no coordination or training of adjudicators. *Id.*

9. *See* GOVERNMENT ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN — FEW DENIED APPLICANTS DEPORTED 8 (1987) [hereinafter GAO, ASYLUM STUDY]; GOVERNMENT ACCOUNTING OFFICE, ASYLUM: APPROVAL RATES FOR SE-

To bring the United States' legal standard for determining refugee status into conformity with international law, Congress adopted a uniform statutory eligibility standard, defining a refugee as any person unable or unwilling to return to her country of nationality or last habitual residence "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."[10] This definition was based directly on an internationally recognized concept of refugee derived from the United Nations Convention/Protocol Relating to the Status of Refugees, to which the United States is a party.[11]

The new asylum statute enacted by Congress mandated the creation of

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LECTED APPLICANTS (1987) [hereinafter GAO, ASYLUM STUDY APPROVAL RATES]; Anker & Posner, *supra* note 3, at 30-64.

As indicated, overseas refugee determinations were limited statutorily to those fleeing communist-dominated and Middle Eastern countries. Under the pre-Refugee Act regulatory asylum scheme, the disparities between the treatment of those fleeing communist countries and those fleeing countries maintaining friendly relations with the United States created a strong perception that asylum determinations were influenced by foreign policy considerations. Those who fled from friendly countries, it was argued, faced nearly impossible odds in obtaining asylum or any protective status. *See, e.g.*, Christopher T. Hanson, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107 (1978). *See generally* GIL LOESCHER & JOHN A. SCANLON, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF OPEN DOOR, 1945 TO THE PRESENT (1986); NORMAN L. ZUCKER & NAOMI FLINK ZUCKER, THE GUARDED GATE: THE REALITY OF AMERICAN REFUGEE POLICY (1987). Congress' major purposes in enacting statutory asylum procedures were to change this perception and to provide United States territorial protection based on the individual merits of persecution claims. *See* Anker & Posner, *supra* note 3, at 30-64.

In the settlement of a major lawsuit, American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991), the government bound itself to the principle that foreign policy and border enforcement considerations, along with the fact that an asylum applicant is from a nation friendly to the United States, are not relevant to the determination of whether the applicant is eligible for protection as a refugee. *Id.* at 799. (For the statutory definition of "refugee" and its relationship to asylum protection, see *infra* notes 10-12 and accompanying text.) The government agreed to follow new procedures in asylum adjudications that would reduce opportunities for discrimination against Salvadorans and Guatemalans, and to stay deportations or to defer any on-going exclusion or deportation proceedings against most Salvadorans and Guatemalans in the United States pending a readjudication of their claims. *See generally* Doris Meissner, *Reflections on the Refugee Act of 1980, in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S (David A. Martin ed., 1988) (former INS Acting Commissioner criticizing influence of foreign policy resulting in unfair treatment of Salvadoran asylum seekers).

10. 8 U.S.C. § 1101(a)(42)(A) (Supp. 1992).

11. U.N. Convention/Protocol, *supra* note 8, art. 1. One difference between the treaty and United States statutory definitions is that the latter defines a refugee as a person who cannot or will not return to her country of nationality or last habitual residence because of "persecution or a well-founded fear of persecution," thereby explicitly including those who suffered past persecution independent of finding possible future persecution. 8 U.S.C. § 1101(a)(42)(A) (Supp. 1992); *see In re* Chen, Interim Dec. 3104 (BIA 1989); 8 C.F.R. § 208.13(b)(1)(ii) (1992) (showing of past persecution sufficient to sustain asylum claim unless government shows little likelihood of future persecution and no significant humanitarian factors presented by applicant). Furthermore, the United States' statutory definition makes additional provision "in such special circumstances as the President after appropriate consultation may specify" for the admission of overseas refugees who are within — not only outside — the country of their nationality or last habitual residence. *See* 8 U.S.C. § 1101(a)(42)(B) (Supp. 1992)).

procedures[12] which would achieve uniformity, fairness, and impartiality in the determination of asylum claims. With these new procedures, Congress sought to ensure access to asylum for all applicants on a uniform basis, a full opportunity for an applicant to be heard and present her claim, and evenhanded evaluation of claims under the neutral international standard adopted by the Act.[13]

B. Current Procedures: The Immigration and Naturalization Service and the Executive Office of Immigration Review

To implement the Refugee Act, the Attorney General promulgated regulations establishing two sets of procedures for aliens physically present in the United States to apply for asylum.[14] First, an applicant who applies prior to

12. "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum at the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. § 1158(a) (Supp. 1992). Although the grant of asylum is discretionary under the statute, two commentators have argued that the discretion to deny asylum to eligible applicants is limited. *See* Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1 (1987) [hereinafter Anker, *Discretionary Asylum*]; Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999 (1985). Discretion to deny asylum has also been circumscribed under administrative interpretation of the statute. *See In re* Pula, 19 I. & N. Dec. 467, 470 (BIA 1987) (holding that "the discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors"). Although the administrative agency, the Board of Immigration Appeals, in adjudication has weighed different factors in the exercise of discretion, the regulations now set forth various mandatory grounds for the denial of asylum as a matter of discretion, including conviction of a "particularly serious crime," "firm resettlement" in a third country, and reasonable grounds for regarding the applicant as a "danger to the security of the United States." *See* 8 C.F.R. § 208.14(b) (1992); *In re* Soleimani, Interim Dec. 3118 (BIA 1989) (defining criteria for firm resettlement in a third country which may be a consideration in the exercise of discretion in case law); *In re* McMullen, 19 I. & N. Dec. 90 (BIA 1984) (denying asylum *inter alia* because of applicant's commission of a particularly serious crime), *rev. denied*, 788 F.2d 591 (9th Cir. 1986). Congress amended the asylum statute in 1990 to preclude eligibility for those convicted of an "aggravated felony." *See* 8 U.S.C. § 1158(d) (Supp. 1992).

For discussion of the mandatory withholding of deportation or return relief based on a persecution claim, see *infra* note 14.

13. H.R. REP. NO. 608, 96th Cong., 2d Sess. 18 (1979) (directing the Attorney General to "establish a new uniform asylum procedure" which would be "fair and workable"). *See generally* Anker & Posner, *supra* note 3, at 43-64.

14. 45 Fed. Reg. 37,392 (1980). Final regulations were established in 1990. 55 Fed. Reg. 30,674 (1990). They maintain the previous division of adjudication between the INS and the Executive Office of Immigration Review (EOIR), but made other changes, some of which are discussed below.

In addition to asylum, the Refugee Act of 1980 provides a mandatory form of relief from deportation or return for an alien who can prove that her "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (Supp. 1992). The alien must prove that the threat to her life or freedom is more likely than not, a less generous standard than that of a well-founded fear under the asylum provision which only requires that the alien prove that persecution is a reasonable possibility. The mandatory protection is based on Article 33 of the U.N. Convention/ Protocol, *supra* note 8. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 428-429 (1987); INS v.

the initiation of deportation or exclusion proceedings[15] files her claim with the Immigration and Naturalization Service (INS).[16] That procedure (which recently, and after this study was completed, underwent substantial revision[17])

Stevic, 467 U.S. 407, 421, 430 (1984); *infra* notes 165-69 and accompanying text. The statute provides various mandatory bars to eligibility for withholding of deportation or return including participation in the persecution of others, serious reasons for considering that the alien has committed a "serious non-political crime," commission of a "particularly serious crime" which makes the alien a danger to the community, and being a danger to the security of the United States. 8 U.S.C. § 1253(h)(2) (Supp. 1992). Withholding deportation or return only protects an alien against return to the country of persecution and provides no status in the United States, whereas a grant of asylum can lead to permanent residency status. 8 U.S.C. § 1159(b) (Supp. 1992). Like asylum, withholding of deportation or return may be applied for in proceedings before the INS and during the course of exclusion and deportation proceedings before the EOIR, described below. *See* 8 C.F.R. §§ 208.16, 236.3, 242.17(c) (1992). Regulations in effect at the time of this study only permitted the filing of applications for withholding of deportation or return during exclusion or deportation proceedings. *See* former 8 C.F.R. 208.3(b) (1988).

15. These are proceedings initiated by the government to seek the alien's removal from the United States. Exclusion refers to the process for preventing aliens' formal entry into the United States; the deportation process seeks the removal of aliens residing in the United States. *See* T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 19-20 (2d ed. 1991) [hereinafter ALEINIKOFF & MARTIN]. For a detailed description of the deportation and exclusion process, see generally *id.* at 475-97. Once an adjudicator has determined that an individual will be granted asylum, in most cases she makes no decision on the withholding of deportation or return application, since the protection and status granted are more limited and applicants for withholding must meet a higher standard of proof. *See* Anker, *Discretionary Asylum, supra* note 12, at 2 & nn.5 & 6; *see also infra* note 168 and accompanying text.

16. The INS is a constituent part of the Department of Justice. The INA delegates most of the responsibilities for administering and enforcing the immigration laws to the Attorney General and specifically provides that she may in turn authorize other agencies, including the INS, to exercise any of those delegated powers. 8 U.S.C. § 1103(a) (Supp. 1992). By regulation and by practice, the INS exercises a broad range of responsibilities including, *inter alia*, determining certain petitions for benefits under the INA, such as applications for asylum and withholding of deportation, filed before the initiation of deportation or exclusion proceedings. *See generally* ALEINIKOFF & MARTIN, *supra* note 15, at 101-107; 8 C.F.R. § 208.2 (1992) (providing for INS jurisdiction over all asylum claims filed before service of notice of referral to exclusion proceedings or order to show cause in deportation proceedings).

17. The regulations promulgated on July 27, 1990 (after the completion of this study) created a new INS asylum adjudication process. There are now seven regional asylum offices located throughout the country, a new corps of specially trained and designated INS Asylum Officers to decide cases, and an INS documentation center for the collection and dissemination of information on country human rights practices. Supervision of the process is conducted by the INS Asylum Branch in Washington, D.C. *See* 8 C.F.R. §§ 208.1, 208.12 (1992); *supra* note 14.

Other changes made by the 1990 regulations relate to evidence, procedure, and substantive interpretations of the refugee definition in 8 U.S.C. § 1101(a)(42)(A) (Supp. 1992). For example, under the new regulatory scheme, the asylum officer may make a decision without receiving a response from the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA) if at least 60 days have elapsed since the request. 8 C.F.R. § 208.11(b) (1992). The previous regulations in effect at the time of this study required a response from the State Department. *See* former 8 C.F.R. § 208.7 (1988). (For the role of the State Department generally, see *infra* note 73 and accompanying text.) The new regulations also specifically authorize the Asylum Officer to consider material provided by credible sources other than the State Department "such as international organizations, private voluntary agencies, or academic institutions." 8 C.F.R. § 208.12(a) (1992). They also provide that the credibility of the applicant's testimony is to be evaluated "in light of general conditions" in her country, 8 C.F.R. § 208.13

consists of an unrecorded, non-adversarial interview before an Asylum Officer.[18] Second, the applicant who applies after the government initiates deportation or exclusion proceedings files her claim with the Executive Office of Immigration Review (EOIR).[19] The EOIR procedure is a formal administrative hearing presided over by an immigration judge[20] who is empowered by

(1992), and that the applicant need not establish that she would be singled out for persecution if she can establish that there is a pattern or practice of persecution of groups of persons similarly situated. 8 C.F.R. § 208.13(b)(2)(i)(A) (1992).

Several of these provisions appear only to bind the INS Asylum Officers, not the EOIR immigration judges. *See, e.g.*, 8 C.F.R. § 208.12(a) (1992) (stating that the Asylum Officer may rely on country condition information provided by the Department of State or information from credible non-governmental sources).

18. *See* 8 C.F.R. § 208.9 (1992) (providing that the Asylum Officer will conduct the interview in a "non-adversarial manner"). *See generally* ALEINIKOFF & MARTIN, *supra* note 15, at 737.

19. *See* 8 C.F.R. § 3.0 (1992) (describing the organization of EOIR). The EOIR was created in 1983 as a separate agency from the INS. Prior to that time, the immigration judges were part of the INS. The purpose of the separation was to remove any perception of prosecutorial bias from the performance of the adjudicatory function of the immigration court. *See* ALEINIKOFF & MARTIN, *supra* note 15, at 107-11.

For a detailed discussion of the mechanics of these procedures, see ALEINIKOFF & MARTIN, *supra* note 15, at 638-43; DEBORAH E. ANKER, AMERICAN IMMIGRATION LAW FOUNDATION, THE LAW OF ASYLUM IN THE UNITED STATES 22-60 (1991) [hereinafter ANKER, U.S. LAW OF ASYLUM]; DEBORAH E. ANKER, AMERICAN IMMIGRATION LAW FOUNDATION, THE LAW OF ASYLUM IN THE UNITED STATES, SUPPLEMENT 1992: MAJOR DEVELOPMENTS 7-11 (1992) [hereinafter ANKER, U.S. LAW OF ASYLUM 1992 SUPPLEMENT]. Deportation and exclusion proceedings generally consist of two determinations: first, whether or not the alien is excludable or deportable as charged and second, whether or not she is eligible for various forms of discretionary or other relief. *See generally* ALEINIKOFF & MARTIN, *supra* note 15, at 597-688. Asylum and withholding of deportation or return are among a variety of forms of discretionary relief potentially available to the alien in such proceedings. The major forms of relief available in deportation proceedings and most relevant to the cases and hearings in this study are voluntary departure, 8 U.S.C. § 1254(e) (Supp. 1992) (a discretionary form of relief allowing an alien, deportable under certain grounds, who establishes good moral character for at least five years and the willingness and ability to depart, a fixed period of time to leave the United States at her own expense in lieu of a deportation order), suspension of deportation, 8 U.S.C. § 1254(a) (Supp. 1992) (a discretionary form of relief allowing an alien, deportable under certain grounds, who establishes seven years of residence, good moral character during such period, and extreme hardship to herself or certain United States citizens or permanent resident relatives, to obtain permanent residence), and adjustment of status, 8 U.S.C. § 1255 (Supp. 1992) (a discretionary form of relief allowing certain aliens, otherwise eligible for immigrant status to obtain permanent residence). For a discussion of these and other forms of relief, see ANKER, U.S. LAW OF ASYLUM, *supra* this note, at 22-24, 57-60.

20. *See* 8 C.F.R. § 3.10 (1992) (defining the function of an immigration judge to conduct exclusion and deportation proceedings). Immigration court proceedings are not subject to the separation-of-functions and other requirements for formal adjudications under section 554 of the Administrative Procedures Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1990), although some of these requirements have been adopted as a matter of regulation or practice. *See generally* ALEINIKOFF & MARTIN, *supra* note 15, at 107-08. Under current practice, immigration judges are required to be attorneys. *Id.* at 109; *see also* Ardestani v. INS, 112 S. Ct. 515 (1991) (holding that attorneys fees under the Equal Access to Justice Act (EAJA) may not be awarded against the government in deportation proceedings since EAJA strictly applies only to proceedings under section 554 of the Administrative Procedures Act (APA)); *infra* notes 242-48 and accompanying text.

statute to examine the alien and any other witnesses presented.[21] In the EOIR procedure, any evidence the applicant presents is admissible under a broad criterion of relevance; no specific rules govern the admission of evidence.[22] The immigration judge evaluates all evidence and issues decisions based on record evidence.[23]

In both the INS and EOIR processes, the regulations require the adjudicator to request an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA) before rendering a final decision on the merits of the asylum claim, and that opinion is made part of the record.[24] In the EOIR procedure, the applicant has the right to be represented by counsel at no expense to the government, to present witnesses and other evidence, and to cross-examine adverse witnesses.[25] The government also is represented by a designated INS trial attorney.[26] The EOIR proceed-

21. 8 U.S.C. § 1252(b) (Supp. 1992). *See generally* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 53-57, 81-90; ALEINIKOFF & MARTIN, *supra* note 15, at 737-38. *See infra* notes 248-49, 281-82 and accompanying text.

22. Specifically, the regulations provide that, "[t]he special inquiry officer [immigration judge] may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent [alien] or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 242.14(c) (1992). The immigration court is not bound by the Federal Rules of Civil Procedure or the Federal Rules of Evidence. *See generally* ALEINIKOFF & MARTIN, *supra* note 15, at 565 ("As with most administrative proceedings, the formal rules of evidence do not apply in deportation hearings."); ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 100-01. Hearsay clearly is admissible in deportation proceedings generally and in asylum cases in particular. *See, e.g.*, Tashnizi v. INS, 585 F.2d 781, 782-83 (5th Cir. 1978) ("Uncontradicted hearsay is admissible in deportation hearings if it is probative and its use is not "fundamentally unfair' [to the alien].").

In 1988, the Office of the Chief Immigration Judge promulgated final rules governing procedures in the immigration court. *See* 8 C.F.R. §§ 3.12-3.38 (1992). These are generally rudimentary. For example, there are no rights to discovery. *See infra* note 252. For a description of the new rules and the rule-drafting process, see William R. Robie, *The Purpose and Effect of the Proposed Rules of Procedure for Proceedings Before Immigration Judges*, 1 GEO. IMMIGR. L.J. 269 (1986); *Proceedings Before Immigration Judges*, 5 IMMIGR. L. REP. 17 (1986); *see also* 8 C.F.R. § 3.9 (1992) (defining the supervisory responsibility of the Chief Immigration Judge).

Commenting generally about immigration court proceedings, practitioners have noted the "absence of any written rules of procedures that would set out . . . rights to discovery or set a regular standard for litigation. . . . 'Because there are no formal procedures, you are left doing things informally.' " Bill Girdner, *Inside the Immigration Court*, CAL. LAW., June 1986, at 63, 65 (quoting comments of an immigration practitioner); *see also* ALEINIKOFF & MARTIN, *supra* note 15, at 565; ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 100-01.

23. 8 U.S.C. § 1252(b) (Supp. 1992) (providing that "[d]etermination of deportability in any case shall be made only upon a record before a special inquiry officer [immigration judge]"). The statute provides the applicant with other rights including a reasonable opportunity to be present, reasonable notice of the charges and time and place of the proceedings, the privilege of being represented by counsel at no expense to the government, and a reasonable opportunity to examine evidence against her, present evidence on her own behalf, and cross-examine adverse witnesses. *Id.*

24. *See* former 8 C.F.R. §§ 208.7, 208.10(b) (1990) (in effect at time of study). *See generally* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 40-43. For changes under the new asylum regulations, see *supra* note 17.

25. 8 U.S.C. § 1252(b)(1)-(4) (Supp. 1992).

26. *See* 8 C.F.R. § 242.16(c) (1992) (requiring that the government be represented by an INS trial attorney in all cases in which deportability is contested); ALEINIKOFF & MARTIN,

ings are recorded.[27] Both the government and the alien can appeal a decision to the Board of Immigration Appeals (BIA or Board), an administrative appellate unit within the EOIR.[28] The alien can further appeal to the federal district or circuit court of appeals.[29]

C. Research Design

Bilingual and other researchers obtained the data in this study in the course of observing EOIR asylum hearings[30] in one immigration court.[31] Researchers also conducted interviews with hearing participants and government officials.[32] In total, observers attended 193 hearings, comprising 149 cases of asylum claims of applicants from 31 different countries (*see infra* Table 1).

This sampling is a proportional and representative selection of the cases before the immigration court studied. Researchers confirmed the accuracy of the statistical data collected,[33] to the extent EOIR provided relevant compara-

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supra note 15, at 109 ("[I]n practice a trial attorney or other INS officer appears in virtually all deportation and exclusion proceedings, whatever the issues."), 551 (citing Jack Wasserman, *Practical Aspects of Representing an Alien at a Deportation Hearing*, 14 SAN DIEGO L. REV. 111 (1976)).

27. The record of the proceeding is maintained by a tape recording controlled by the immigration judge. *See* 8 C.F.R. §§ 3.26, 3.34 (1992); ALEINIKOFF & MARTIN, *supra* note 15, at 553.

28. *See* 8 C.F.R. § 3.1 (1992) (describing the organization and jurisdiction of the Board of Immigration Appeals (BIA)).

29. 8 U.S.C. § 1105(a) (Supp. 1992); *see* ALEINIKOFF & MARTIN, *supra* note 15, at 738; ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 14, 16-18, 90-92.

30. Researchers included a law instructor, anthropologists, law students, and observers fluent in English and Amharic, Arabic, Creole, Polish, and Spanish.

The principal investigator and social science consultants trained the observers. Observers maintained detailed notes on hearings including all transactions in the courtroom, i.e., those that were officially recorded as well as comments and exchanges made "off the record," that is, when the recording device was turned off; *see supra* note 27. The observers maintained records summarizing each hearing. In many cases, observers conducted interviews before or after the hearings. Observers also interviewed participants at other times. All data from hearing observations — quantitative and qualitative — were compiled in a data base program developed specifically for this study.

The hearing records contain information which may be important for applicants' continuing efforts to obtain relief. Applicants and others involved in the hearing process have clear interests in preserving confidentiality. *See, e.g.*, 8 C.F.R. § 208.6 (1992) (describing requirements for maintaining confidentiality of records related to asylum applications and for deleting identifying information). Accordingly, names will not be used in this Article and every effort will be made to preserve anonymity; references to hearings are indicated with a hearing number (Hearing No. —). Hearing records and summaries are on file with the author.

31. The immigration court studied is located in a major urban setting which will not be identified in this Article in order to preserve the anonymity of the various participants in the adjudication process.

32. In addition to the interviews with hearing participants, researchers conducted interviews with some immigration judges in other parts of the country as well as with various other EOIR officials. Reports of interviews omit identifying information where requested by the party or where the location of the interview would compromise the anonymity of the immigration court studied.

33. *See infra* Table 1. As indicated, researchers initially obtained the data for this study through extensive observation, monitoring, and interviewing in the immigration court studied.

tive data.[34]

TABLE 1
COUNTRY OF ORIGIN OF ASYLUM APPLICANTS

Afghanistan	2	Iran	9
Bolivia	2	Israel	1
Chile	1	Ivory Coast	1
China	4	Lebanon	3
Colombia	1	Liberia	5
Cuba	1	Libya	1
Dominican Republic	2	Nicaragua	3
El Salvador	47	Nigeria	2
Ethiopia	10	Peru	1
Ghana	2	Poland	4
Greece	1	Somalia	1
Guatemala	11	Sri Lanka	8
Haiti	12	Taiwan	1
Honduras	1	Vietnam	1
Hungary	1	Zimbabwe	1
India	2	Unknown	7
		Total Cases:	149
		Total Countries:	31

The author filed a Freedom of Information Act Request (FOIA), and a response to that request was obtained on March 6, 1990. However, EOIR does not isolate data on the immigration court in the particular city studied; instead it maintains composite data on the courts in that city, two smaller cities, and other courts to which the particular immigration judges were detailed. The EOIR designates these collectively as the "base city."

According to EOIR's information, 474 asylum applications were received in the entire "base city" during the study period; the study included 149 applications (cases) in one city.

Although the data base from the EOIR and the study are different, the FOIA information indicates that the study sample was representative with respect to most important nationality groups. For example, Salvadorans represented by far the largest nationality group in both samples, comprising 27% of cases (126 cases) in the EOIR data and 33% (47 cases) in the study sample; Guatemalans represented 9% (44 cases) in the EOIR data and 6% (9 cases) in the study sample; Haitians represented 3% (16 cases) in the EOIR data and 9% (12 cases) in the study sample; Iranians represented 6% (30 cases) in the EOIR data and 6% (9 cases) in the study sample. (The study data percentages are based on 142 cases of known countries of origin of asylum applicants.) The EOIR data indicate larger numbers of Polish, Yugoslav, and Lebanese nationals; presumably greater numbers of these nationals applied in other cities included in the "base city." The study included 31 nationalities; there were 57 reflected in the EOIR larger "base city" sample.

The EOIR data indicated that 14 out of 338 cases were granted in all the cities included in the "base city"; the study found 7 out of 42 asylum decisions granted in the sample from the one city included in the study statistics. *See infra* note 36 and Part II. This represents a 4% approval rate in the EOIR data; the study sample reflects a 17% approval rate.

34. Although the immigration court in the city studied was among those included in the "base city" EOIR data, four of the seven cases granted were not included in the EOIR data. (*See, e.g., infra* Table 2, indicating only five Sri Lankan applications in the EOIR base city, but eight in the study city.) This constitutes a significant inaccuracy and suggests that there may be other inaccurate data.

TABLE 2
ASYLUM CASES IN EOIR BASE CITY AND STUDY CITY DATA
February 1, 1987 to November 31, 1988

	EOIR Data		Study Data	
Select Countries of Origin				
El Salvador	126		47	
Guatemala	44		11	
Iran	30		9	
Haiti	16		12	
Ethiopia	10		10	
Sri Lanka[35]	5		8	
Total Countries of Origin	57		31	
Total Asylum Cases Filed	474		149	
Total Asylum Cases Granted	14	(338 decisions)	7	(42 decisions)

During the eighteen months of this research, the immigration court studied granted asylum to a total of seven applicants.[36]

D. Summary of Findings and Recommendations

1. Major Findings

The study evaluated the current process against traditional due process norms[37] and the goals of the Refugee Act of 1980. Although this study focused on EOIR asylum procedures, the GAO Asylum Study and other information suggest that many of these findings may be applicable to the more

35. *See supra* note 34 for an explanation of the discrepency in Sri Lankan data.

36. During the study period, the immigration court decided 45 cases in which the applicant filed for asylum. (This is exclusive of asylum cases which the court decided on a non-substantive basis, i.e., the court granted voluntary departure only or administratively closed the proceedings. *See infra* note 62 and Table 4.) Of these 45 cases, the court decided the asylum claim in 42 cases. In two of these cases, the court granted withholding of deportation or return only and denied the asylum claim. In the other three decisions, the court granted some other form of substantive relief and did not reach the merits of the asylum claim. *See generally infra* Part II.

37. Due process measures the adequacy of procedures based in part on considerations of accuracy and the stakes of the affected individual. *See* Mathews v. Eldridge, 424 U.S. 319 (1976). Due process theory also recognizes non-instrumental participatory values. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 718 (2d ed. 1988) ("[U]nfairness inheres in the very act of disposing of an individual's situation without allowing that individual to participate in some meaningful way — not simply because more mistakes are likely to be made thereby, but because such treatment seems incompatible with the person's claim to be treated as a human being."); Jerry Mashaw, *Dignitary Due Process*, 61 B.U. L. REV. 885, 888 (1991) (discussing the due process interest of individuals to be treated justly and "taken seriously as persons"); FRANK MICHELMAN, FORMAL AND ASSOCIATIONAL AIMS IN PROCEDURAL DUE PROCESS 126-71 (1977) (explaining that due process upholds the value that individuals feel they have participated in and have been respected by the decision-making process); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 844-859 (1984) (emphasizing intrinsic and individual dignatory interest in due process).

informal INS process.[38] Findings of another study,[39] as well as a survey of a third court, suggest that practices identified in this study may be common to other immigration courts.[40]

The principal conclusion of this study is that the current adjudicatory system remains one of *ad hoc* rules and standards.[41] Despite Congress' goals in

38. The GAO, for example, found that INS asylum examiners were not required "to explain the specific reasons why the facts that form the basis of the asylum application are or are not sufficient to merit eligibility for asylum. . . . There is generally little or no elaboration of the applicant's circumstances as these relate to the law, regulations, or precedent decisions, and there is usually no reason given for the approval or denial of the application." GAO, ASYLUM STUDY, *supra* note 9, at 13 app. I.

As indicated, new regulations substantially have revised the INS asylum adjudication processs. *See supra* notes 14 & 17. The changes attempt to address many of the criticisms of the former process raised by the GAO and others. For example, a major purpose of the new regulations was to create a professional corps of adjudicators who would have the training and confidence to make independent and reasoned decisions. *See* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 43-44. Where a decision is adverse to the applicant, the regulations require asylum officers to state why they denied asylum or withholding of deportation or return relief and to assess the applicant's credibility. 8 C.F.R. § 208.17 (1992). For a perspective on the new INS asylum system by the Director of the Asylum branch, see Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253 (1992).

39. Robert Koulish, *Asylum Determination in South Texas*, 19 N.Y.U. REV. L. & SOC. CHANGE 529 (1992). Koulish describes a combined INS and EOIR system in South Texas geared toward deterring applicants and not toward the full and fair adjudication of asylum petitions. He describes difficulties in INS asylum interviews including its failure to consider subjective fear and imposition of requirements of corroboration as well as the immigration court's practices of screening out applicants and providing poor foreign language interpretation. His study also supports the finding of this study that representation by counsel has a significant impact on applicants' ability to pursue asylum claims. Additional data also confirm other findings of this study that, for example, immigration judges impose an exaggerated burden of proof, may appear partial to the INS, and apply informal and restictive evidentiary rules. Interview with Robert Koulish (Dec. 16, 1989) and unpublished data (available from the author).

40. THE RECORDER, a newspaper in San Francisco, conducted a survey of practices in that city's immigration court. *See* THE RECORDER, Jan. 29, 1991, at 1, 7, 8; Jan. 30, 1991, at 1, 11; Jan. 31, 1991, at 1, 6, 8-10; Feb. 1, 1991, at 1, 8-10; Feb. 4, 1991, at 1, 14-15. The survey consisted of "watching the court's proceedings, reviewing court records, and talking with more than 100 lawyers, government and court officials, refugee advocates and asylum applicants." THE RECORDER, Jan. 30, 1991, at 1. The survey concluded that although the court is considered "one of the friendliest toward illegal immigrants," (citing an asylum grant rate of 39% in 1989), it "is marked by the frequent arbitrariness, abundant contradictions and ample loopholes that plague the entire system." *Id.* at 7.

The Office of the Chief Immigration Judge has made some significant changes since its creation in 1983. In particular, the appointment of immigration judges who do not have a prior history of employment with the INS has diminished the perception of bias in some immigration court districts. As of December 1989 (the time of the writing of the report for this study), there were approximately 73 immigration judges nationwide, 38 of whom were hired since EOIR was established in 1983. Of the 38 newly hired immigration judges, one third previously had been employed with the INS, approximately one third previously had been employed in the private sector, and the last third previously had been employed in state or other administrative judgeships or were lawyers with other federal agencies. Information obtained from the Office of the Chief Immigration Judge, telephone conversation (Nov. 10, 1989).

41. While some EOIR officials have questioned whether the conclusions of this study are generalizable, *see* 11 REFUGEE REPORTS, *supra* note 6, at 5, others disagree. One high level EOIR official commented to the author that, "Your conclusion that systemic problems exist is well-taken. If anything, your conclusion that asylum decisions by immigration judges are *ad*

creating statutory asylum procedures, factors rejected by Congress — including ideological preferences and unreasoned and uninvestigated political judgments — continue to influence the decision-making process. As observed in this study, the current process not only falls short of Congress' mandate for fair and uniform treatment of asylum claims, but bureaucratic inefficiencies, often inaccurately attributed to asylum applicants and their attorneys, cause significant delays in reaching final determinations of cases.[42] There is a significant disparity between the law as stated "on the books" and the law in practice.

Many of the issues identified in this study are systemic, not isolated problems. For example, EOIR relies on case-by-case adjudication at the BIA rather than administrative rule making to articulate policy and provide direction to adjudicators.[43] Furthermore, the BIA publishes few of its decisions as binding precedent,[44] and those which are published present inconsistent rationales and theories.[45] The selection of cases for publication,[46] as well as differ-

hoc and inconsistent, understates the situation." The EOIR official attributed problems to, among other things, the lack of "quality control" in the process. Statement of EOIR official (Feb. 22, 1990).

42. *See infra* notes 81-83 and accompanying text. *See generally infra* Part IV.

43. *See* Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1331-1348 (1972) (documenting INS resistance to the use of rule making with respect to the establishment of standards in adjustment of status petitions). Professor Kenneth Culp Davis also has criticized the INS in the past for making "no serious effort to state . . . substantive policies in regulations." KENNETH DAVIS, ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS 86 (1965). However, the new asylum regulations do address some important substantive issues and, in that respect, may be a response to some of these criticisms. *See supra* notes 14 & 17.

44. *See* ALEINIKOFF & MARTIN, *supra* note 15, at 112, n.12; former 8 C.F.R. § 103.9 (1990) (establishing a system for designation of certain BIA decisions as precedent decisions). Since the completion of this study, the BIA appears to have adopted a new policy which precludes any access of the public to unpublished BIA asylum decisions. The policy was discovered by the editor of ANKER, U.S. LAW OF ASYLUM, *supra* note 19, when she attempted to obtain copies of unpublished decisions for publication in that book. She reported that the reason given for the policy change was the confidentiality provisions of the new regulations. *See* 8 C.F.R. § 208.6 (1992) (providing for the preservation of the confidentiality of records of asylum applications from disclosure to third parties). Interview with Amy Novick, American Immigration Law Foundation (May 14, 1991). The regulation pertaining to confidentiality specifically provides for the deletion of names and other identifying details from asylum decisions. *See* 8 C.F.R. § 208.6 (a) (1992). The regulations otherwise require the government to make unpublished BIA decisions available to the public for review. *See* 8 C.F.R. § 103.9 (1992).

45. *See generally infra* Part II.

46. Some of the most important principles in the BIA's jurisprudence have been articulated only in unpublished decisions. These include, for example, cases which have held that minor inconsistencies peripheral to the claim should not affect credibility and that under certain circumstances citizens have a right to rebel against illegitimate governmental authority. *See generally* Deborah E. Anker, INS v. Cardoza-Fonseca, *One Year Later*, *in* 11 IN DEFENSE OF THE ALIEN 120 (1989) [hereinafter Anker, *One Year Later*]; Deborah E. Anker & Patty Blum, *New Trends in Asylum Jurisprudence: The U.S. Supreme Court Decision in*, INS v. Cardoza-Fonseca, 1 INT'L J. REFUGEE L. 67 (1989) [hereinafter Anker & Blum, *New Trends*]. Since the issuance of the Executive Summary of this report in January 1990 and other critical commentary, the Board has articulated one of these principles in a precedent decision. *See In re* Izatula, Interim Dec. 3127 (BIA 1990) (holding that where citizens in Afghanistan do not have "the

ences in results in some BIA decisions, have led to criticisms that disparate standards are applied based on ideological and nationality considerations.[47] Prominent scholars including Kenneth Culp Davis,[48] Abraham Sofaer,[49] and Maurice Roberts,[50] a former chairman of the BIA, have criticized the failure of the immigration agencies to develop rules and communicate standards. This study supports these criticisms.

2. *Specific Findings*

Exaggerated Burden of Proof: In the hearings and decisions studied, the burden of proof imposed in practice contradicted that required under international standards and the Supreme Court's ruling in *INS v. Cardoza-Fonseca*.[51] The Supreme Court's decision, which reflects the international standards explicitly adopted by Congress,[52] imposes a "reasonable possibility," rather than a "clear likelihood" burden of proof in asylum cases.[53] *Cardoza-Fonseca*, as well as decisions of the BIA, recognizes the refugee's difficulty in obtaining

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right nor the ability peacefully to change their government . . . there is no basis . . . to conclude that any punishment imposed by the Afghan Government would be a legitimate exercise of sovereign authority").

The BIA also chooses to publish as binding precedent few cases in which asylum is granted. Until the Supreme Court's decision in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), the Board had issued no precedent asylum decisions in which the applicant was granted asylum. In some cases withholding of deportation had been granted. *See, e.g., In re* Gharadaghi, Interim Dec. 3001 (BIA 1985). Other cases had been remanded. *See, e.g., In re* Frentescu, Interim Dec. 2906 (BIA 1982); *In re* Exame, Interim Dec. 920 (BIA 1982). Since the Supreme Court's decision, the Board has issued four decisions granting asylum: *In re* Mogharrabi, Interim Dec. 3028 (BIA 1988); *In re* Chen, Interim Dec. 3104 (BIA 1989); *In re* Villalta, Interim Dec. 3126 (BIA 1990); *In re* Izatula, Interim Dec. 3127. Although the largest number of asylum claims have been made by Salvadorans, it was only recently, after the original Executive Summary of this study was released, that the Board published as precedent a decision granting asylum to a Salvadoran national. *In re* Villalta, Interim Dec. 3126. However, in that case, the INS at oral argument before the Board, had indicated its concurrence in a grant of asylum, i.e., the claim was unopposed. *Id.* at 3127.

47. *See generally* Anker & Blum, *New Trends, supra* note 46; Deborah E. Anker, *The Development of U.S. Refugee Legislation, in* 6 IN DEFENSE OF THE ALIEN 159 (Lydio F. Tomasi ed., 1983); Laufman, *supra* note 8; Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243 (1984). *See also* discussion of settlement in American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991); *supra* note 9.

48. *See* Davis, *supra* note 43, at 86 (criticizing the INS for its "system of secret law," including its "careful concealment of all decisions except the few — less than 1 in 10,000 — that are published").

49. *See* Sofaer, *supra* note 43, at 1295 ("[I]nconsistency, arbitrariness, and above all waste, correlate with discretionary power.").

50. Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975).

51. 480 U.S. 421 (1987).

52. If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968. *Cardoza-Fonseca*, 480 U.S. at 436 (citation omitted).

53. *See supra* note 14.

direct corroborative proof. The reasonable possibility standard, as elaborated in those decisions, emphasizes the relevance of the applicant's subjective beliefs, the sufficiency of the applicant's own testimony, and evidence of country conditions and persecution of relatives and others similarly situated, over requirements of individualized corroborative proof.[54]

By contrast, in the cases studied, immigration judges generally expected asylum applicants to produce corroborative "printed proof" or testimony regarding persecutory events that they directly had experienced or visually observed. Immigration judges did not consider evidence of country conditions, human rights, and persecutory practices relevant to the determination. They also regularly discounted evidence related to subjective fear and beliefs and persecution of similarly situated individuals, including an applicant's family members.[55]

Informal and Restrictive Evidentiary Rules: Formally, there are no rules of evidence in immigration court proceedings. In practice, however, judges applied restrictive evidentiary and procedural rules, albeit frequently on an *ad hoc* and unpredictable basis. For example, they excluded or discounted hearsay evidence, required applicants to provide short "yes or no" answers, and refused to allow narrative answers. As a result, it often was difficult for applicants to communicate and for immigration judges to consider the basic facts of the asylum claim.[56]

Appearance of Adjudicator Partiality: International standards require that the adjudicator of an asylum claim create a supportive environment and engage with the applicant in establishing and probing the basis of her claim.[57] Fundamental principles of due process also require that immigration judges conduct proceedings in a fair and neutral manner.[58] In practice, immigration

54. *See generally infra* Part III. The new asylum regulations address some of these issues. *See supra* notes 14 & 17; 8 C.F.R. § 208.13(a) (1992) ("[T]he testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof *without corroboration*." (emphasis added)).

55. *See generally infra* Part III.

56. *See generally infra* Parts III, IV, V.

57. *See infra* notes 166-76 and accompanying text.

58. *See* Yamataya v. Fisher, 189 U.S. 86, 101 (1906) (the Japanese immigrant case) (holding that protections of the Fifth Amendment Due Process Clause apply to deportation proceedings: "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution"). *But see* Marcello v. Bond, 349 U.S. 302, 311 (1955) (dismissing a constitutional challenge to the institutional dependence of immigration judges on the INS); note that this practice has been changed by administrative regulation with the creation of the EOIR as a separate agency, see *supra* note 19. Deportation is regarded as a civil, not criminal, sanction. *See generally* ALEINIKOFF & MARTIN, *supra* note 15, at 546-585. *See* Bugajewitz v. Adams, 228 U.S. 589 (1913) (holding that an alien generally must show substantial prejudice in conduct of proceeding to sustain due process challenge); Ibrahim v. United States (INS), 821 F.2d 1547, 1550 (11th Cir. 1987). *But see* Montilla v. INS, 926 F.2d 162, 168-170 (2d Cir. 1991) (rejecting BIA's rule that respondent in deportation proceeding

judges actively participated in the hearings, sometimes helping the applicants to preserve limited procedural rights, but frequently "testing credibility" in a manner which resembled the cross-examination techniques of the government attorney.[59] Thus, applicants may experience the immigration judge's role as that of a second prosecutor.

The presumptive skepticism with which immigration judges viewed claims also undermined the appearance of impartiality. Immigration judges frequently appeared to be reluctant to grant asylum claims over the objections of the government's attorney.[60]

Major Problems in Foreign Language Interpretation: The immigration court provided limited[61] and poor quality foreign language interpretation for the majority of applicants, who were non-English speaking (*see infra* Table 3).

TABLE 3
LANGUAGES USED IN ASYLUM HEARINGS

Spanish	87	Mandarin	2
English	43	Punjab	2
Creole	12	Greek	1
Tamil	6	Cantonese	1
Polish	6	Hungarian	1
Amharic	5	Twi	1
Farsi	4	Vietnamese	1
Arabic	4	Unknown	14
Tigrayan	3		
		Total Hearings:	193
		Total Foreign Languages:	15
		Total Non-English Hearings:	136

The court chose interpreters without any standardized selection criteria, and did not provide training or instruction in interpretation during the course of

must show prejudice from government's failure to follow regulations before such failure can justify remand).

59. *See generally infra* Part IV.

60. *See generally infra* Parts II, IV.

61. It is the policy of the EOIR to provide interpretation only of questions directed to the applicant and of her response; other parts of the proceeding generally are not interpreted. *See generally infra* Part V. During the study period, a federal court held that the failure to provide complete interpretation of immigration court proceedings violated the statutory due process protections of the INA, the APA, and principles of fundamental fairness. *See* El Rescate Legal Services, Inc. v. Executive Office for Immigration Review, 727 F. Supp. 557 (C.D. Cal. 1989), *rev'd*, 959 F.2d 742 (9th Cir. 1992). Pursuant to the order in that case, the EOIR offered complete interpretation in the immigration courts in Los Angeles, San Diego, and El Centro, California. As indicated, that decision recently was overruled. *See* 959 F.2d at 752 (holding that the BIA's policy on its face "violates neither the Constitution nor the INA as construed by the agency to which Congress committed discretion"). However, EOIR has changed its policy as a result of the litigation. It has instituted a nationwide training program and certification examination for interpreters and has modified its guidance to immigration judges on the provision of interpretation of portions of the proceedings other than the applicant's testimony. *See infra* note 462.

the interpreter's employment. The credibility determination, an explicit factor in 48% of the decisions studied, was substantially affected by standard interpreter errors, including non-interpretations and misinterpretations of important parts of the applicants' testimony (*see infra* Tables 4 & 5).[62]

The immigration court did not interpret large portions of the hearings to the applicants, including the decision on the asylum claims. As a result, Congress' goal — to create procedures which allow for the fair and accurate assessment of the applicant's testimony — was significantly impeded.

TABLE 4
REASONS CITED FOR ASYLUM DECISIONS: LEGAL STANDARD, DISCRETION, CREDIBILITY

A. Reason Cited in All Decisions	
Legal Standard Only	14
Discretion Only	5
Credibility Only	1
Credibility and Legal Standard	14
Legal Standard and Discretion	3
Credibility and Discretion	1
All three	4
Total	42
B. Number of Times Reason Cited	
Legal Standard	35
Discretion	13
Credibility	20

TABLE 5
INTERPRETER ERROR TYPES AT ASYLUM HEARINGS

No Errors	7
One to Two Error Types	11
Three or More Error Types	31
Total Hearings with Bilingual Observers	49

Rejection of Objective Human Rights Assessments: Immigration judges generally did not consider evidence of human rights abuses and persecutory practices in the home country in determining the merits of an applicant's asylum claim. They often allowed expert testimony and human rights reports from non-governmental organizations to be admitted into the record, but this testimony and documentation usually was treated as insignificant in the determination of the claim. Thus, immigration judges generally evaluated asylum

62. The information in Table 5 counts the frequency of categories of interpreter errors, not the absolute number of errors. For categories of errors, see *infra* note 344 and accompanying text. Table 4 includes all the 42 decisions in which the immigration court reached the merits of the asylum claim. *See supra* note 36.

claims without consideration of political realities in the applicants' home countries while also imposing their own cultural and political assumptions in assessing applicants' credibility,[63] and making implicit political and ideological judgments.

Inconsistent Standards: As noted above, during the eighteen-month period of this study, the immigration court granted seven asylum applications. No consistent application or coherent view of legal doctrine governed the outcome of these decisions; many of the cases granted were approved on the basis of theories rejected in other cases in which asylum was denied.[64]

The EOIR does not make immigration judges' decisions publicly available. In the immigration court studied, judges approved few asylum claims and attempted to obtain the government's concurrence before granting asylum.[65] In addition, government attorneys were not likely to appeal the grants of asylum; they acquiesced by not pursuing an appeal to the BIA in all but one of the seven granted cases.[66] As a result, cases and theories which supported a grant of asylum effectively were buried in the decision-making process.[67]

The process produced outcomes at variance with the legal standards which allegedly govern it, particularly among those cases which appeared to rest on the strongest factual and legal grounds.[68] The immigration court studied granted ten percent of the cases in which applicants presented claims of highly visible political activism and/or serious past persecution

63. *See generally infra* Part V.

64. *See generally infra* Part II.

65. *See generally infra* Parts II, IV.

66. *See infra* notes 162 & 259. An EOIR official commented that the "INS seldom appeals such grants [of asylum]." *See supra* note 4, Statement of EOIR official (Feb. 22, 1990).

67. Another commentator has made a similar observation in connection with a study of INS adjudication of adjustment of status petitions under 8 U.S.C. § 1255(a) (1990):

> [T]he overwhelming majority of written decisions, especially those prepared by [INS] Examiners, are denials of relief. The only written decisions found during this study that granted relief on the merits were a handful of cases in which the Regional Commissioner reversed an Examiner's position. . . . This practice allows the development of two systems of law — one that is written, and entirely unfavorable to applicants, another that is favorable to applicants, but unwritten. A person seeking guidance from decisions finds only instances in which relief is denied, and virtually no precedent for granting relief. The discretion of adjudicators to deny is thereby left unrestricted, except to the limited extent that a BIA decision upholding a grant of relief or reversing a denial is available.

Sofaer, *supra* note 43, at 1316-17.

68. All cases were coded under one of the categories described in Table 6. The selection of categories was based on doctrinal distinctions made by the BIA and the federal courts in interpreting elements in the refugee definition. For a discussion of these interpretations, see *infra* notes 106, 115 & 128.

The principal investigator placed cases into categories based on the particular hearing or hearings attended, not on a complete review of all hearings related to the claim and the case files. This review may have led to some distortions: in some cases, the categorization of a claim may only have been based on testimony during cross-examination which conveyed a limited version of the factual basis of the claim. The principle investigator was unable to categorize 36 cases based on recorded data. She discounted these cases in computing percentages.

TABLE 6
TYPOLOGY OF ASYLUM CLAIMS

Categories	Number	Percent
Categories 1-4 Applicant presented different categories of claims that appeared to be frivolous.	12	11
Category 5 Applicant presented claim almost exclusively related to general conditions in the country of political or civil violence and strife.	9	8
Category 6 Applicant or someone applicant knew (relative, neighbor, friend) had experienced some personal consequence of that political or civil violence and strife in the applicant's country.	21	18
Category 7 Applicant or similarly situated individual (relative, neighbor, or friend) personally had experienced some serious victimization (arrest, detention, beatings). Included specific threat of future harm, imputed political opinion, or forced recruitment which applicant resists into guerrilla or armed forces.	26	23
Category 8 Applicant affirmatively and actively asserted a position of neutrality; position led to specific threat or related consequences.	6	5
Category 9 Applicant either had an opposition political opinion that was known to government or was working for an organization involved in political conflict. Applicant anticipated arrest.	17	15
Category 10 Applicant was active in political movement, had been arrested in the past and/or beaten/tortured and anticipated re-arrest.	12	11
Category 11 Applicant was from Eastern bloc country. Applicant disagreed with political system but had suffered minimal consequences as a result.	7	6
Category 12 Applicant belonged to a persecuted group.	3	3
Total	113*	100

* Researchers were unable to categorize 36 cases. Percentages were based on 113 categorized cases.

(*see supra* Table 6).[69] These decisions did not appear to be guided by a consistent understanding or application of current legal standards.[70]

The Role of Cultural, Social, and Ideological Factors: Congress sought to achieve an evenhanded process in which determinations would be based on the merits of the individual case. In practice, social class, cultural factors, and the adjudicator's perceptions of the applicant's ideological beliefs or the political orientation of her home government seemed to play a significant role in determining which cases were granted asylum.[71] In all cases in which the immigration court granted asylum, the applicant was relatively well-educated, represented by experienced counsel, and generally able to produce an extraordinary quantity of corroborative evidence.[72]

Several commentators have suggested that one of the measures of ideological bias is the influence of the State Department's Advisory Opinion on the outcome of asylum decisions.[73] The State Department issued positive advisory opinions in only eleven of the 149 cases observed (*see infra* Table 7). However, with only one exception, all of the granted cases had received positive State Department recommendations.[74]

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69. This calculation is based on a composite of Categories 9 and 10, consisting of 29 cases in the study sample. Of these 29 cases, the immigration court granted asylum to three applicants: the Afghanistani (Hearing Nos. 216, 216B, 216C), the Ethiopian (Hearing No. 207), and the El Salvadoran (Hearing No. 213), all of which are described in *infra* Part II. The other four granted claims were category 6 or 7 cases. The immigration court denied asylum to the other 26 applicants. The principal investigator obtained this information during the study period as well as during subsequent interviews with attorneys. *See infra* note 103.

70. *See generally infra* Part II.

71. *See generally infra* Part II. The settlement in American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991), represents an attempt by the INS to provide corrective and preventive measures against the inappropriate influence of ideology and foreign policy factors in determining eligibility for asylum. In connection with that settlement, the Department of State agreed not to recommend denial of asylum to Salvadorans and Guatemalans without articulating reasons for the recommendation, and agreed that each Bureau of Human Rights and Humanitarian Affairs (BHRHA) opinion letter must state that it is "advisory only" and only one of several sources of information relevant to evaluating the claim and that the final determination must be made by the INS or EOIR. *Id.* at 807; *see also supra* note 24.

72. *See generally infra* Part II.

73. *See* Aleinikoff, *supra* note 3, at 234-236; Richard N. Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugee's Right and U.S. International Obligations?*, 45 MD. L. REV. 91, 116-22 (1986) (criticizing role of State Department as violative of U.S. domestic and international legal obligations); INS ASYLUM STUDY, *supra* note 8, at 62 (finding that advisory opinions are given excessive weight in adjudications; quoting one INS staff person that "I would never, never overrule the State Department"); *see also* Zamora v. INS, 534 F.2d 1055, 1063 (2d Cir. 1976) ("There is a risk that such communications will carry a weight they do not deserve."); Martin, *Reforming Asylum*, *supra* note 3, at 1310-13, 1330-34 (recommending elimination of State Department role in order to remove perception of undue influence and ensure primary adjudicatory responsibility with the Justice Department). *See generally* ALEINIKOFF & MARTIN, *supra* note 15, at 823-30 (discussing cases and commentators' criticisms of the role of advisory opinions).

74. *See infra* notes 148-49 and accompanying text. In one other case the State Department recommended that the applicant not be returned, although it stated that his fear was not based on political grounds. *See infra* note 130.

This observation — that immigration judges are highly influenced by the State Department

The outcomes in many cases suggest that the agency has not achieved the nationality- and ideology-neutral determination process that Congress mandated. For example, although there existed extensive documentation of human rights abuses and high levels of politically motivated violence in Guatemala,[75] Haiti,[76] and El Salvador,[77] the immigration court studied granted asylum to no Guatemalans or Haitians and granted asylum to only one Salvadoran applicant during the study period. That case was the only Salvadoran claim that received an initially positive State Department recommendation.[78]

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recommendation — is consistent with the one other completed study of asylum adjudication conducted by the Refugee Policy Group. *See* FAGEN, *supra* note 4, at 13 ("Notwithstanding their criticism of the advisory opinions . . . in the vast majority of cases the judges' final decisions coincided with those of the [State Department].").

75. *See, e.g.*, AMERICAS WATCH, CLOSING THE SPACE: HUMAN RIGHTS IN GUATEMALA: MAY 1987-OCTOBER 1988 (Nov. 1988) (documenting that, despite the installation of Guatemala's first civilian president in nearly two decades, political killings by government forces and death squads increased during 1987-88 and thousands of civilians were forcibly relocated by the army to model villages or forced to participate in civil patrols); AMNESTY INTERNATIONAL, GUATEMALA: HUMAN RIGHTS VIOLATIONS UNDER THE CIVILIAN GOVERNMENT (June 1989) (documenting that after an initial decrease in human rights violations following the election of a civilian president, there was a resurgence in abductions, "disappearances," and extrajudicial executions believed to have been carried out by official security forces).

76. *See, e.g.*, AMNESTY INTERNATIONAL, HAITI: DEATHS IN DETENTION, TORTURE AND INHUMANE PRISON CONDITIONS (Dec. 1987) (documenting the refusal of the National Government Council to adhere to Haiti's new constitution and its failure to stop human rights abuses by security forces, including mass killings of protesters, arbitrary arrests, and torture of detainees held captive without trial).

77. *See, e.g.*, AMERICAS WATCH, NIGHTMARE REVISITED: 1987-1988, 10TH SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR (Sept. 1988) (documenting resurgence in political killings, torture, and mutilation of several hundred civilians by government forces and death squads as well as a rise in summary killings by guerrilla forces); LAWYERS COMMITTEE FOR HUMAN RIGHTS, UNDERWRITING INJUSTICE: AID AND EL SALVADOR'S JUDICIAL REFORM MOVEMENT (Apr. 1989) (documenting an alarming increase in state-sponsored human rights abuses during 1988).

78. In another case, the applicant initially had received a negative and then subsequently a positive State Department opinion letter. *See infra* note 145.

TABLE 7
RELATIONSHIP OF STATE DEPARTMENT OPINION (SDO) TO OUTCOME

State Department Opinion	
Positive	11
Negative	118
Other	5
Unknown/Inapplicable	15
Total Cases	149

Outcomes of Positive SDO Cases	
Granted	6
Denied on Merits	3
Denied as a Result of Failure to Appear	1
Undecided as of 12/89	1
Total Positive SDOs	11

Distribution of Outcomes[79] in Positive SDO Cases	
Total Positive SDO	11
Granted with Positive SDO	6
Granted without Positive SDO	1
Total Granted Asylum	7

Bureaucratic Inefficiencies and Causes of Delay: While INS officials and some commentators have suggested that the long delays in adjudicating asylum claims may be the result of prolonged hearings and requests for continuances intitiated by asylum applicants and their attorneys,[80] the findings of this study suggest other causes. The data indicate that the INS, through its refusal to concede claims early on in the adjudication process, and through sometimes protracted cross-examinations, may be responsible in part for delays in the resolution of meritorious claims.[81] Perhaps more importantly, in the majority of cases continued for further hearing, the immigration court had not allocated a sufficient amount of time for the completion of testimony. Most cases were allocated only one to two hours for a hearing; most were continued by the immigration judge and the largest number were continued for between one and ten months. In less than one percent of the continued cases were those continuances attributable to the lawyer's or the applicant's failure to appear.[82]

79. *See infra* note 151.

80. *See infra* Figure 9. For some discussion of this position, see Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 41 (1984); Martin, *Reforming Asylum*, *supra* note 3, at 1267-70.

81. *See generally infra* Part IV. In *In re* Villalta, Interim Dec. 3126 (BIA 1990), the INS indicated its position that the applicant should be granted asylum for the first time at oral argument before the Board. *See supra* note 46. It had not submitted a brief to the Board. *Id.* at 7. The former INS General Counsel expressed his opposition to a policy in which INS attorney offices "appeal every adverse decision regardless of the merits . . . [and] refuse to have stipulations." Tom Watson, *No More Independent Operators: At INS, Lawyers in the Field Face New Regime*, 12 LEGAL TIMES, May 14, 1990, at 2.

82. In an additional seven percent of the cases, continuances were the result of the lawyer's need for a postponement because she had been recently retained, was unprepared, ill, or had a scheduling conflict. *See* Figure 9.

TABLE 8
DURATION OF ASYLUM HEARINGS

	Number	Percent
Less than 30 minutes	16	11
30 minutes to 1 hour	29	20
1 to 2 hours	87	59
2 to 3 hours	15	10
3 to 4 hours	1	0
Over 4 hours	0	0
Unknown	45	N/A
Total	193	100

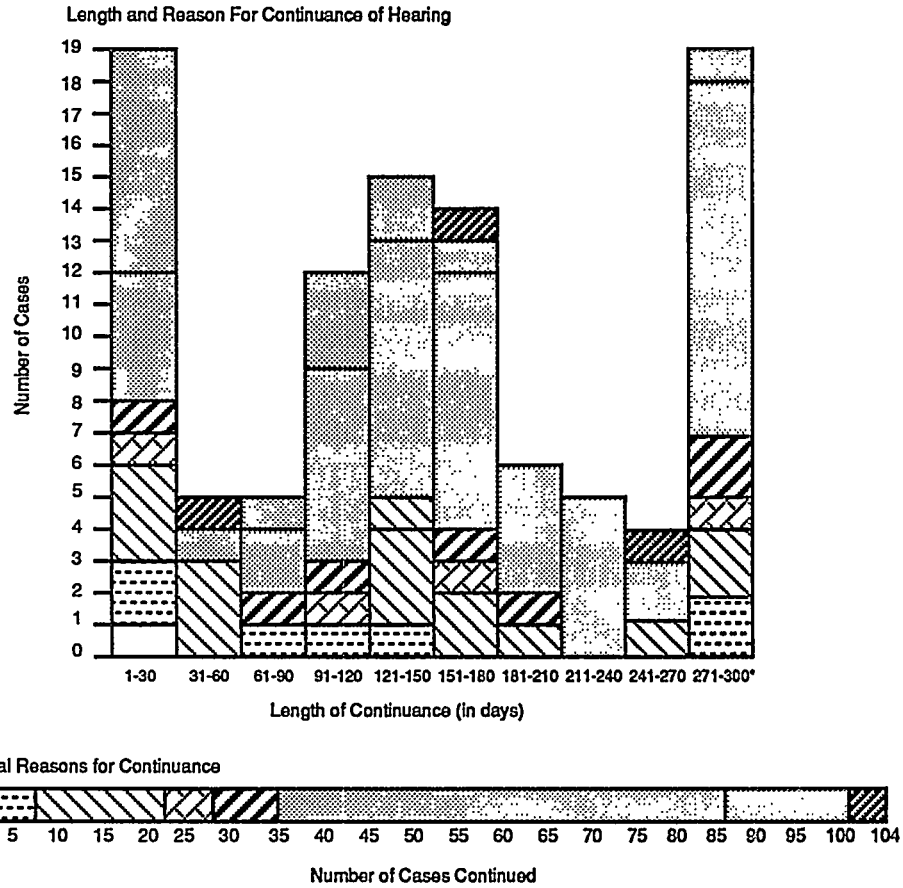
Where the lawyer requested the continuance, it was usually to allow for the submission of additional information or documentation, including expert witness testimony. The EOIR's difficulty in producing transcripts for appeals was the most significant cause of delay in the process. The unavailability of these transcripts resulted in delays averaging twenty-two months after the immigration judge had rendered a decision. In addition, the data suggest that the Board of Immigration Appeals requires, in most cases, two to three years and sometimes longer to issue decisions after briefs were submitted.[83] Another immigration court study arrived at similar findings.[84]

3. *Recommendations*

The central recommendation of this study is the enhancement of formal safeguards in the asylum determination process. Some commentators have suggested separating asylum adjudication from other immigration court proceedings in order to eliminate the perception of political and foreign policy

83. Researchers obtained the data by surveying the four major legal services and pro bono organizations providing legal representation to asylum applicants in the city in which the immigration court studied was located. Attorneys in those offices had not received decisions from the Board in cases in which they had filed briefs two, three, and more years ago. The survey was conducted by telephone in July 1990. For example, one organization had been waiting for a decision since May 1987, when it filed its brief. The last Board decision it received, dated February 15, 1989, was for a case in which a brief had been filed on February 20, 1987.

84. Robert Koulish found that of the delays in calendared appearances for hearings on the merits of asylum claims, 8% were attributable to causes related to the applicant or her counsel; 59% were attributable to administrative problems at the immigration court (these included hearings which were never begun because too many cases were scheduled for the same time period or hearings which were not completed because insufficient time was allotted for testimony); 21% were attributable to the non-receipt of the State Department Opinion letter at the time the case was scheduled for hearing which resulted in the continuation of hearings; and 7% were rescheduled for hearing in another court because the applicant recently either had been detained or released from detention. The remaining cases were rescheduled because they had not been calendared (2%) or were continued at the request of the government attorney (3%). Koulish found that the average period for transcript receipt was 15-18 months for cases in which the alien was detained and 25-26 months for non-detained cases (unpublished data on file with author). *See* Koulish, *supra* note 39.



bias from the current process.[85] For example, the Administrative Conference of the United States (ACUS) recently recommended the development of a separate asylum adjudication system, under the continued administrative authority of the EOIR.[86] This study, however, suggests that failure to address systemic problems within the EOIR is the cause of some significant problems. Irrespective of structural change, the protection of basic rights and greater procedural regularity is a necessary component of the asylum adjudication process.

Representation by Counsel: Congress' goal of evenhanded treatment of all asylum applicants cannot be achieved unless every asylum seeker has the benefit of counsel.[87] According to the GAO, asylum applicants represented by counsel are more than three times as likely to receive asylum in immigration court proceedings than are applicants unrepresented by counsel.[88] As found

85. *See* Aleinikoff, *supra* note 3; *see also* Martin, *Reforming Asylum*, *supra* note 3, at 1330-34, 1338-46 (recommending the creation of a separate corps of asylum adjudicators as an exclusive forum for adjudication of claims in order to increase efficiency and remove unnecessary layers of review). In contrast to the findings of this study, Professor Martin also deemphasizes formal protections in asylum adjudication and recommends one, non-adversarial proceeding. *See id.* at 1346-52.

86. Former 8 C.F.R. § 305.89-4 (1990). A report by Professor David Martin formed the basis of these recommendations. *See* Martin, *Reforming Asylum*, *supra* note 3.

87. There are no official statistics on the extent to which asylum seekers are able to secure representation. The Lawyers Committee for Human Rights estimates that one-half of applicants are unrepresented in EOIR proceedings. Telephone interview with Arthur Helton, Director, Refugee Project of the Lawyers Committee for Human Rights (Dec. 7, 1989). An official of the EOIR estimated that one-third are unrepresented. Interview with EOIR official (Nov. 10, 1989). The FOIA response from EOIR stated, without further documentation, that approximately 80% of asylum applicants nationwide were represented by counsel. *See supra* note 33.

In the city where the immigration court under study is located, most asylum applicants were represented by counsel. However, there is a major problem in providing representation in areas of the country where large numbers of asylum applicants arrive and make their initial applications for asylum. *See* ABA COORDINATING COMMITTEE ON IMMIGRATION LAW, LIVES ON THE LINE: SEEKING ASYLUM IN SOUTH TEXAS (1989) [hereinafter LIVES ON THE LINE]; *see also* Reyes-Palacios v. INS, 836 F.2d 1154, 1155 (9th Cir. 1988) ("The importance of counsel, particularly in asylum cases where the law is complex and developing, can neither be overemphasized nor ignored."); Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988) ("We have consistently emphasized the critical role of counsel in deportation proceedings. We have characterized an alien's right to counsel as 'fundamental' . . . . Other circuits agree that counsel may play a critical role in deportation proceedings.") (citations omitted). In *Orantes-Hernandez*, the court found that "INS agents often did not allow Salvadorans to consult with counsel prior to signing the voluntary departure forms, although acknowledging that aliens have the right [to do so]." 685 F. Supp. at 1495; *see also* Ardestani v. INS, 112 S. Ct. 515, 531 (Blackmun, J., dissenting) (arguing that application of the Equal Access to Justice Act's provision of award of attorney fees in deportation proceedings would advance Act's purposes because alien generally is "unfamiliar with the arcane system of immigration law, is often unskilled in the English language, and sometimes is uneducated" and requires assistance of counsel (citing *inter alia* Anker, *Summary Report*, *supra* note 6)). *See generally* Elizabeth Glazer, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157 (1985).

88. GAO, ASYLUM STUDY APPROVAL RATES, *supra* note 9, at app. 1.1. The GAO also found that those who have legal representation are more than twice as likely as unrepresented applicants to be granted asylum in the INS proceedings. The American Bar Association likewise has concluded that "[u]nrepresented applicants . . . face almost insuperable barriers to achieving asylum." LIVES ON THE LINE, *supra* note 87, at 19.

in this study of an immigration court in which most asylum applicants were represented, even those who have counsel face significant barriers to communicating basic facts and effectively presenting their claims.

It is unreasonable to expect an immigration judge, given her primary role as adjudicator, to be in a position to protect the interests of the unrepresented asylum seeker and meaningfully to assist the applicant in developing the asylum claim. Moreover, the potential harms faced by the asylum seeker suggest that representation should be guaranteed.[89] Legal representation should be provided for those who cannot afford counsel.

Accurate and Complete Foreign Language Interpretation: The applicant's claim cannot be developed or fairly assessed if the proceedings are not accurately and completely interpreted. Interpreters should be trained professionals, selected according to standardized criteria. The applicant should be provided with consecutive interpretation during her testimony and simultaneous interpretation of the other parts of the proceedings.[90]

Evidentiary Rules: Regulations are needed to clarify and articulate the kinds of evidence relevant to the adjudication of an asylum claim. Applicants should be encouraged to tell their stories in their own way; considerable leeway should be given to applicants in giving narrative answers. Regulations should be promulgated governing substantive interpretations of the well-founded fear definition (*e.g.*, the meaning of political opinion and persecution) and the kinds of evidence necessary to prove an individualized fear (*e.g.*, proof of persecution of similarly situated individuals).[91] Regulations also should instruct adjudicators to evaluate the applicant's claim in the light of human rights and persecutory practices in the applicant's home country and to consider information from non-governmental human rights organizations in mak-

89. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (weighing the nature of private interest in due process calculus); Glazer, *The Right to Counsel*, *supra* note 87; Kurzban, *supra* note 3, at 114 ("In no other area of law, apart from capital punishment, are the consequences of an erroneous decision as severe."). *But see* Martin, *Reforming Asylum*, *supra* note 3, at 1346-52 (arguing that the Supreme Court's analysis in *Mathews* does not require adversarial proceedings, but rather suggests sensitivity to adjudicatory context and that a non-adversarial proceeding with a passive role of counsel is more appropriate to the nature of asylum adjudication).

90. *See* H.R. CONF. REP. NO. 1687, 100th Cong., 2d Sess. (1988) (codified at 28 U.S.C. § 1827 (Supp. 1992)) (defining the simultaneous and consecutive modes of interpretation). The Conference Report defines "simultaneous translation" as "requir[ing] the language interpreter to interpret and to speak contemporaneously with the individual whose communication is being translated. No pauses by the individual are required. . . . Under the consecutive mode, the speaker, whose communication is being translated, must pause to allow the interpreter to convey the testimony given. (The pause would be at short, agreed upon intervals.)." The Act provides for the use of the "simultaneous" mode "for any party" to the proceedings and the "consecutive" mode for interpretation of witnesses' testimony. 28 U.S.C. § 1827(k) (Supp. 1992). The Act generally applies to judicial proceedings instituted by the United States; it is not directly applicable to administrative deportation proceedings.

91. The recommendation to promulgate regulations governing substantive issues, including proof of persecution of similarly situated individuals, was partially adopted by the INS after the release of the report of this study and the publication of the executive summary. *See supra* note 6. For a discussion of the new regulations, see *supra* notes 14 & 17.

ing those assessments.[92] Guidelines governing some of these matters have been issued with respect to overseas refugee applications.[93] Similar regulations would be useful in the asylum context. The Justice Department should discontinue exclusive reliance on adjudication as a means of interpreting the statute and articulating substantive policy.[94]

Elimination of the State Department's Formal Role: Because the State Department's assessments appear to be given undue weight in the determination of claims, the required consultation with the State Department should be eliminated.[95] Immigration judges of course may continue to consult and consider State Department materials in assessing the merits of asylum claims and the credibility of applicants' factual allegations. But there is no reason to give the State Department a special quasi-adjudicative role when Congress clearly delegated decision making to the Attorney General.[96]

Availability of Immigration Judge Decisions and Publication of More BIA Decisions: Decisions of immigration judges in asylum cases should be made available to the public. The Board should be required to publish and designate as precedents a significant portion of its decisions. Published decisions should include those which grant and deny asylum claims so that the public and the immigration judges have a more complete understanding of the BIA's guidelines.[97]

Increased Efficiency: Serious efforts should be made to remove the inefficiencies and delays in the current process. Cases should be scheduled for a reasonable period of time. Transcripts for appeal should be produced and delivered to attorneys more quickly, without sacrificing accuracy. The Board of

92. As noted, the new regulations do provide that Asylum Officers may consider information from credible non-governmental organizations. 8 C.F.R. § 208.12 (1992).

93. These guidelines establish presumptions that applicants have a well-founded fear of persecution if they share common characteristics that identify them as targets of persecution in the former Soviet Union, Vietnam, Laos, and Cambodia. The legislation designates certain of these targeted groups including Jews, Evangelical Christians, and active members of the Ukrainian Catholic Church or the Ukrainian Orthodox Church from the former Soviet Union. *See* Pub. L. No. 101-167, § 599D, 103 Stat. 1195, 1261 (1989). *See generally* 66 INTERPRETER REL. 805 (1989); 67 INTERPRETER REL. 101-03 (1990).

94. The regulations in effect at the time of this study generally governed procedures and did not address substantive or evidentiary matters. As noted, some correction of this trend has been instituted in the new regulations, promulgated after the completion of this study. *See supra* notes 14, 17 & 92.

95. *See supra* notes 17 & 74 (discussing modifications in the role of the State Department under the new regulations); *see also* Martin, *Reforming Asylum*, *supra* note 3, at 1330-34 (recommending discontinuation of the State Department's advisory opinion letter practice).

96. 8 U.S.C. § 1158(a) (Supp. 1992); *see infra* note 335.

97. The Administrative Conference of the United States (ACUS) has stated its concern with agencies that "fail to index, publish, or make their decisions available to the public or fail to do so adequately." ACUS recommended the "[a]pplication of affirmative disclosure requirements, beyond simply precedential decisions" because, among other things, "agencies would be less inclined to be restrictive or one-sided in the selection of cases to be accorded precedential effect." ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 89-8: AGENCY PRACTICES AND PROCEDURES FOR THE INDEXING AND PUBLIC AVAILABILITY OF ADJUDICATORY DECISIONS (Adopted Dec. 14, 1989).

Immigration Appeals should be allocated sufficient resources to issue decisions within reasonable periods of time. INS should encourage trial attorneys to resolve meritorious cases in early stages of the adjudication process.[98]

Training of Adjudicators and Creation of a Non-Governmental Human Rights Documentation Center: Immigration judges should receive training in refugee and human rights law. A centralized non-governmental documentation center, responsible for disseminating information provided by governmental bodies and non-governmental organizations, should be created.[99] The Center would document human rights developments and the treatment of politically-vulnerable groups and individuals. Information provided by such a Center should be available to asylum applicants and their lawyers, as well as to immigration judges. The Center also should develop a list of academic and human rights experts, and make videotapes and affidavits of these experts available to the immigration bar, applicants, and immigration judges.

Preservation of Judicial Review: Federal court review should be retained.[100] Since federal courts have heard few asylum cases, their review has not contributed significantly to delays in the current process. In 1984, for example, only 117 asylum applicants appealed their cases to the federal system.[101] However, the federal courts have played a critical role in correcting administrative misinterpretations and misapplications of the law.[102] The role of federal courts is essential, particularly given the problematic agency implementation of the Refugee Act.

Congressional Oversight: The Justice Department can adopt this study's recommendations largely through regulatory modifications and other changes.

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98. *See supra* note 81; *see also infra* Parts II, IV.

99. A similar recommendation was made by Professor David Martin and the Administrative Conference of the United States. *See supra* note 3, at 1342-44; *see also supra* note 86. In addition, the new asylum regulations establish a human rights documentation center within the INS Central Office of Refugees, Asylum and Parole (CORAP). *See* 8 C.F.R. § 208.1(c) (1992); *see supra* notes 14 & 17. A critical difference is that the recommendation here is for a non-governmental documentation center. Given past perceptions of bias and the inappropriate influence of foreign policy and ideology in the determination of asylum claims, the non-governmental character of a documentation center is important to ensure the objectivity of the information and the credibility of the process.

100. *But see* Martin, *Reforming Asylum*, *supra* note 3, at 1361-65 (suggesting some limitations on judicial review such as a "leave to appeal" provision similar to the *certiorari* process in the Supreme Court and that reviewing courts give "substantial deference" to administrative decisions).

101. *See* Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1215 (1989).

102. Moreover, the process of judicial review has led to important changes in agency practice and interpretations. For example, the provision in 8 C.F.R. § 208.13 (1992) establishing that "[t]he testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration" is based on principles first articulated by the Ninth Circuit. *See* Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) (overruling the Board and finding sufficient, even under the clear probability standard for withholding of deportation, the applicant's "general evidence and newspaper articles that demonstrate the political and social turmoil in El Salvador . . . coupled with testimony about a specific threat to his life made by the guerrillas").

Congress should conduct hearings and in general provide more rigorous oversight in order to ensure proper implementation by the immigration agencies.

II
DECISIONS: CONSISTENCY AND RELATED ISSUES

As noted, during the eighteen-month period of this study, the immigration court granted asylum to seven applicants.[103] Decisions in those cases

103. The immigration court decided 45 of the 149 cases studied during the research period. *See supra* notes 36 & 52. Neither court personnel nor practicing attorneys could report any petitions granted by the court during that period other than those included in this study. Moreover, information obtained during follow-up interviews with lawyers as of December 1989 indicates that the court either had denied or had not decided the remaining cases in the study sample. The cases denied by the court included all 26 of the remaining claims involving highly visible political activisim or serious past persecution. *See supra* note 69.

A few cases warrant further explanation, particularly because some form of substantive alternative relief (other than asylum) was granted. One applicant (Hearing No. 88) was denied asylum but granted withholding of deportation or return. *See supra* note 14. Another, an Iranian Jew (Hearing No. 96), also was granted withholding of deportation or return but denied asylum, based in part on the immigration court's conclusion that he had been firmly resettled in Israel. *See supra* note 12, *infra* note 255. The latter decision directly followed the recommendation of the State Department. Several cases were terminated in the applicant's favor for other reasons, including eligibility for non-asylum related benefits.

Shortly after the study period ended, the immigration court granted asylum to two applicants who were not included in this study but whose initial hearings took place during the study period. The decisions in these cases followed the pattern of the other granted cases and provide similar examples of the factors influencing the decision to grant asylum including: social class, perceptions of the applicants' political beliefs, the State Department's opinion letter, special circumstances including family and other United States ties, and presentation of specific corroborative evidence.

The first of these cases (decided in December 1988) was that of a young Cambodian, whose close family had been executed by the Khmer Rouge. The State Department stated its opinion that the applicant's fear was well-founded, but that he was firmly resettled in France where he had been admitted as a refugee. The applicant had been sponsored to come to the United States as a foreign student by the family of a very high official in the state government in which the immigration court was located; members of that family testified on his behalf. The applicant was educated, had fled from a communist country, had received a positive State Department opinion letter on the issue of eligibility, and had strong United States ties. Interview with applicant's lawyer (Jan. 12, 1989).

The second case (decided in January 1989) involved a Peruvian. According to his lawyer, the applicant was a student activist who had campaigned for the governing Aprista party. As a result, he was physically attacked and his life threatened by the Sendero Luminoso, an opposition Marxist peasant party. He received a mixed State Department opinion, which confirmed the basic facts of his case, but stated the Department's belief that he could reside safely in other parts of his home country. The lawyer stated that he refuted that negative aspect of the State Department Opinion directly through expert and lay witnesses. The lawyer found an expert witness whom he described as "one of the three experts in the world on the Sendero" and who happened to be residing in the city where this immigration court was located during the time of the hearing. The lawyer also presented a witness who had traveled extensively throughout Peru and who, according to the lawyer, could describe graphically the country-wide chaos and danger. The applicant produced corroborative proof including his diplomas and a photo of his bombed car with the Sendero party's "hammer and sickle" insignia. According to his lawyer, the factors which led to the grant of asylum were: 1) the applicant's class and education; 2) the fact that he feared leftist forces ("there's a different attitude when you can say 'the communists are after my client' "); and 3) the extensive preparation of the applicant's testimony and of the

granting asylum illustrate the courts' inconsistent application of legal standards. Commentators[104] and federal courts[105] have arrived at similar conclusions regarding Board of Immigration Appeals' decisions.

The immigration court granted two petitions *irrespective* of the Board's legal standards,[106] two which *did not meet* that legal standard, and three

claim in general. The lawyer also commented that the case was decided one week before Christmas. Interview with applicant's lawyer (Feb. 15, 1989).

104. *See* Anker, *One Year Later, supra* note 46; Anker & Blum, *New Trends, supra* note 46; Derek Smith, *A Refugee By Any Other Name: Asylum Decision Making at the Board of Immigration Appeals*, 75 VA. L. REV. 681 (1989). For related criticisms of the BIA, see *supra* notes 43-50 and accompanying text.

105. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 447 n.30 (1987) (noting BIA's "long pattern of erratic treatment" of standard of proof in persecution cases); Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988) (overruling the Board's denial of asylum to Ghanaian who had participated in a coup attempt and noting that the Board had granted asylum to another individual who had participated in a separate but related coup attempt and who had fled Ghana with the applicant).

106. Commentators have noted the Board's generally narrow approach to the interpretation of these legal standards and in particular to the meaning of the statutory terms "political opinion" and "persecution." *See, e.g.*, Anker, *One Year Later, supra* note 46; Anker & Blum, *New Trends, supra* note 46; Smith, *supra* note 104; *cf.* David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES 30 (Howard Edelman ed., 1991) [hereinafter Martin, *The Refugee Concept*] (criticizing the Board's restrictive reading of what constitutes persecution, but arguing that the U.N. Convention/Protocol definition should be understood narrowly in order to preserve the core purposes of asylum without overtaxing the good will of haven countries).

The Board has characterized physical violence (e.g., rape) and threats of harm resulting from the applicant's failure to comply with extortionist demands, even if perpetrated by military officers or government security forces, as "personal" rather than "political." *See* Desir v. Ilchert, 840 F.2d 723, 729 (9th Cir. 1988) (overruling BIA decision holding that extortionist demands and physical violence by Ton Ton Macoute forces in Duvalier's Haiti did not establish a politically-based persecution claim). The Board has emphasized that the threat of harm must be on account of political opinion and has strictly defined "political opinion" with reference to the motives of the alleged persecutee and persecutor. Thus the Board has held that the actions of the persecutor must be directed at the alleged victim of persecution; the persecutor must have an intent to harm *that* individual due to her belief or a characteristic which the persecutor seeks to overcome. *In re* Acosta, 19 I. & N. Dec. 211 (BIA 1985), *modified on other grounds*, *In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

According to the Board, the fact that the alleged perpetrator has overall political objectives of which its actions against the victim are a part (e.g., guerrillas in El Salvador engaged in forced recruitment of civilians), does not render the action political unless the harm is directed against the individual specifically because of her individual and personally held political beliefs. *See In re* Maldonado-Cruz, 19 I. & N. Dec. 509 (BIA 1988), *rev'd*, Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989). The Board has moderated this position to some extent in other decisions, holding that the asylum applicant "does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible." *In re* Fuentes, 19 I. & N. Dec. 658 (BIA 1988). *See generally* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 133-34. *See also* INS v. Elias-Zacarias, 112 S. Ct. 812, 817 (1992), decided shortly before this Article went to press, in which the Supreme Court, in upholding the Board's denial of asylum, also found that the statute makes proof of motive critical — on the part of the victim and/or perhaps persecutor; it is not clear which. The Court also stated that the applicant need not produce direct proof of the persecutor's motive. *See generally* Deborah E. Anker, Carolyn P. Blum & Kevin R. Johnson, *The Supreme Court's Decision in INS v. Elias-Zacarias: Is There Any 'There' There?*, 69 INTERPRETER REL. 285 (Mar. 9, 1992).

The Board has not adopted in any precedent decision — although it has not explicitly

others because *exceptional factors* were present. Many petitions which presented equally strong or stronger cases on the merits were denied.[107] Rather than applying a coherent and consistent legal standard, in practice the court employed two operative standards. The first was a standard of serious threat to life on account of war, civil violence, or political conditions. This standard, which the Board of Immigration Appeals has rejected,[103] was applied selectively. The second was an exceptionality standard, under which the court required applicants to demonstrate the presence of extraordinary factors which might — but did not necessarily — relate to the substance of their asylum claims.

The immigration court appears to have applied the exceptionality requirement with particularly problematic results to Salvadoran, Guatemalan, and Haitian asylum petitions. Persons from these countries represented the largest nationality groups applying for asylum in the immigration court studied.[109] Many submitted extensive documentation of human rights abuses and high levels of politically-motivated violence in their countries.[110] However,

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rejected either — the doctrine developed in the Ninth Circuit that political opinion can be imputed, irrespective of the subjectively-held motives of persecutor or victim. *See* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 131-35. For other examples of the Ninth Circuit doctrine, see Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984) (overruling the Board and finding that neutrality — an affirmative choice not to join either side in a political conflict — can be a political opinion within the meaning of the asylum statute); Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (overruling the Board and finding a presumption of political motive from the fact that persecutor is a government agent). Other circuit courts have been more deferential to the Board. *See, e.g.*, Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1298 (11th Cir. 1990) (upholding the Board and finding that the applicant's actions did not constitute a sufficiently open articulation of neutrality to constitute a political opinion); Novoa-Umania v. INS, 896 F.2d 1 (1st Cir. 1990) (upholding the Board but finding that neutrality may be a political opinion under certain circumstances); M.A. v. INS, 899 F.2d 304, 312 (4th Cir. 1990) (upholding the Board's requirement that a conscientious objector must prove that repugnant acts are official policy). It should be noted that the Supreme Court, in *Elias-Zacarias*, seemed to reject the notion that political motivation could be inferred without further proof from the mere existence of generalized political motives on the part of the persecutor. 112 S. Ct. at 816. Certainly, a major tenet of the Board's doctrine is that the asylum statute's refugee concept does not protect victims of war, even those whose victimization is based on their current military, official, or governmental status. *In re* Fuentes, 19 I. & N. Dec. 658 (BIA 1988).

Immigration judges are bound by precedent decisions of the Board of Immigration Appeals except in those jurisdictions where there has been a contrary ruling by the federal circuit court of appeals. 8 C.F.R. § 3.1(g) (1992); *In re* Bowe, 17 I. & N. Dec. 488 (BIA 1980) (holding that the BIA is bound by decisions within that circuit).

Both the Board and several circuit courts have held that the perpetrator of the persecutory act can be the government or a group which the government cannot control. *See* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 119-20.

As noted, there has been some criticism that the BIA's jurisprudence provides incomplete and inconsistent standards and does not provide coherent guidance for immigration judges. *See* Anker, *One Year Later*, *supra* note 46; Anker & Blum, *New Trends*, *supra* note 46; M.A. v. INS, *supra* this note, at 316, 324-26 (Winter, J., dissenting); Smith, *supra* note 104.

107. *See, e.g.*, *infra* notes 135 & 139.

108. *See supra* note 106.

109. *See supra* Table 1; *infra* notes 136 & 138.

110. *See, e.g.*, Hearing Nos. 70, 85, 157.1.

during the eighteen-month study period, the immigration court did not grant any Guatemalan or Haitian claims, and granted only one Salvadoran petition to an applicant who had many exceptional facts associated with his case.[111] The pattern of outcomes indicates that the court had not achieved the nationality- and ideology-neutral determination process mandated by Congress. In addition, the State Department's advisory opinions seemed to play a significant role in determining the outcomes of the decided cases.[112]

A. Board of Immigration Appeals' Legal Standards Ignored

Of the two petitions granted *irrespective* of this Board's legal standards, one involved a Nicaraguan[113] who was granted asylum on the basis of a positive opinion by the State Department. According to a lawyer, the immigration judge who granted asylum had told her that he believed in following the recommendation of the State Department.[114] The content of the decision itself indicated the judge's predominant reliance on that advisory opinion.[115]

111. *See supra* note 103; *infra* notes 139-47.

112. *See infra* notes 149-51.

113. Hearing No. 65B.

114. Interview with local lawyer in city in which immigration court was located (Oct. 6, 1988) (describing conversation with immigration judge).

115. Hearing No. 65B. The hearing lasted 50 minutes. The judge, the lawyer, and the trial attorney in various respects acted as if the outcome was clear before the hearing, which was apparently conducted as mere formality. The lawyer, aware that this judge weighed the opinion of the State Department heavily, presented minimal testimony from the applicant, stating that he was "resting on the affidavit." There also was an unusually short cross-examination, with *pro forma* questioning by the government trial attorney. The trial attorney had indicated before the hearing began that he, too, was inclined to follow the recommendation of the State Department. The decision, which was oral (the immigration judge did not prepare a written decision since the case was not appealed), stated simply that "based on the record and the positive State Department opinion," asylum was granted. The court did not assess the applicant's credibility, either during the course of the hearing or in its decision.

After the hearing, researchers reviewed the affidavit. On its merits, the case had significant weaknesses under the Board's legal standards and the standards applied by the immigration court to other cases. The applicant, a prior supporter of the Sandinistas, became disillusioned and refused to serve in the government militia. He was later rejected for one job, but was able to secure alternate employment as an electrician for an engineering contractor. He became a member of a union which chose not to join with the government's union because its members felt they could obtain better financial protection if they remained independent. The leader of the union was jailed as an enemy of the revolution. Later the applicant became the director of another union which refused to endorse a letter denouncing a union leader as a United States Central Intelligence Agency (CIA) agent. The applicant was arrested on three occasions (he believed because of statements he had made critical of the Sandinista government), questioned, and released. His house was spray painted ("Here lives a Contra") by a Sandinista volunteer group, "the Turbos," which he stated was known for using extreme violence to promote conformity. He then left the country.

This analysis is not a judgment on the merits of the applicant's asylum claim and should not be read to suggest that the applicant did not have legitimate fears which led him to leave Nicaragua. Rather, the argument here is that the claim was problematic under criteria usually applied by the immigration court and by governing BIA standards. The applicant was not involved in extensive political activities. He was arrested on several occasions, but he always was released. Moreover, the Board has held that governments have a right to investigate and interrogate people whom they suspect of affiliation with armed resistance movements. *See, e.g.*,

The other petition granted irrespective of the Board's legal standards involved a Ghanaian woman whose claim was approved because her brother had worked for the CIA.[116] After the first hearing, the CIA contacted the trial attorney who agreed that asylum should be granted. Consequently the applicant, who also received a positive State Department advisory opinion, never fully had to present evidence and testimony in support of her claim.[117] Interestingly, both of these claims, evaluated on their merits, had,significant weaknesses under the Board's governing doctrine.[118]

As in the granted Nicaraguan case,[119] the Ghanaian asylum claim was problematic on its merits under Board doctrine. Her claim was based largely on her brother's activities; however, the doctrine of imputed political opinion, as noted, has not been adopted by the Board in a precedent decision. The Board also has required a direct causal and motivational link between the individual's personally-held political beliefs and the act of persecution.[120] Furthermore, it is questionable whether under Board doctrine the opinion imputed to her was political. It also is not clear under the Board's governing interpretations, whether employment with the CIA is either an "opinion" or a political act.

In re Maldonado-Cruz, 19 I. & N. Dec. 509 (BIA 1988), *rev'd*, Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989). Additionally, the Board and the immigration court rejected numerous claims which were based on a refusal to serve in the armed forces of the applicant's home country. *See, e.g.*, Hearing No. 192 (Chilean Christian Democratic Party activist arrested and beaten, but claim denied in part because he was subsequently released). The Board has rejected claims based on conscience and religious belief and has upheld the right of sovereign governments to draft men into its military. *See In re* A.G., 19 I. & N. Dec. 502 (BIA 1987), *aff'd sub. nom.* M.A. v. INS, 899 F.2d 304 (1990); *In re* Canas, 19 I. & N. Dec. 697 (BIA 1988), *rev'd*, Canas-Segovia v. INS, 902 F.2d 717, 723 (9th Cir. 1990), *vacated and remanded*, 112 S. Ct. 112 (1992), *rev'd on remand*, 970 F.2d 599 (9th Cir. 1992) (reversing BIA and finding that the applicant who refused to serve in the military for reasons of religion and conscience established a well-founded fear of persecution based on a theory of imputed political opinion). In addition, the applicant's fear of the Turbos was based on what he heard the group had done to others; however, the immigration court had rejected evidence of the treatment of similarly situated persons in other cases.

116. Hearing Nos. 46, 46B.

117. *Id.* At the beginning of the first hearing on this case, the applicant presented evidence of her political activities. She testified that she had participated in an anti-government demonstration and had been arrested and held for eight hours as a result, after which she was released. As noted, her brother also was accused of being a CIA informant and became the subject of a prisoner exchange between the government of Ghana and the United States government. She had another brother who also had received asylum in the United States. Before the applicant fled Ghana, the police came looking for her at her house; their search for her precipitated her flight. The facts relating to her political activities and governmental retaliation (facts which were subject to close questioning by the judge during the first hearing) appeared to have been irrelevant to the grant of asylum. At the beginning of the second hearing, the trial attorney, after contacting the CIA, stated that he supported a grant of asylum, and the court granted asylum without further hearing. The court neither evaluated her credibility nor treated it as a factor relevant to the decision.

118. *See supra* note 106.

119. *See* Hearing No. 65B; *supra* notes 113-15.

120. *See supra* note 106.

In another Ghanaian case, *Matter of Dwomoh*,[121] the Board denied asylum to a Ghanaian who was arrested and held incommunicado without trial for over a year because of his participation in an abortive coup attempt. In the *Dwomoh* decision, the Board's view of political opinion, rejected by the federal court on appeal, distinguished between political beliefs and political acts; the Board held that only the former are protected.[122]

B. Reliance on Rejected Legal Standards

The immigration court granted two other petitions based on theories and interpretations of legal doctrine which the Board has rejected and which this particular immigration court had disapproved in Salvadoran, Haitian, and other cases. One involved a Lebanese military officer who had been the official representative of the Israeli occupying forces in an area of South Lebanon.[123] His life had been threatened by Shiite Moslem and other military forces opposing the Israeli occupation. As noted above, the BIA has held that even where a substantial and serious threat to an applicant's life arises from the applicant's official military or quasi-military position during an armed conflict, that danger, real though it may be, does not constitute a threat of political persecution.[124] The immigration court also rejected the claims of Salvadorans who presented evidence that they were targets of the military or guerrillas. The court rejected cases in which applicants testified that they had received death threats and witnessed violence, including death and torture, against close family members and others similarly situated.[125] In these cases, the immigration court found that the targeting was the consequence of war, not of politically-motivated persecution. If the court had applied that criterion of political persecution in the Lebanese case, it would have been denied.[126]

The same issue — the selective application of a liberalized doctrine, rejected by the Board — is raised by the immigration court's grant of asylum to a Colombian judge who had been kidnapped and subjected to death threats by a Colombian drug cartel.[127] The judge argued that his persecution by the drug cartel was politically-motivated because it was based on the cartel's affiliation with leftist forces. However, this connection was too attenuated to survive scrutiny under current Board doctrine.[128] Under that doctrine, the Colom-

121. *See* Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988); *see supra* note 105.

122. *Id.*

123. Hearing Nos. 50A, 130A.

124. *See supra* note 106.

125. *See, e.g.*, Hearing Nos. 123, 150, 34, 43, 85.

126. Indeed, the facts of the Lebanese case were remarkably similar to those in a Board precedent decision in which asylum was denied. *See In re* Fuentes, 19 I. & N. Dec. 658 (BIA 1988).

127. Hearing Nos. 227, 235.

128. Hearing No. 227. For example, as discussed *supra* note 106, the Board held in *In re* Desir (reversed by the Ninth Circuit, but still controlling doctrine in other jurisdictions) that direct threats by *government* forces (Ton Ton Macoutes) are not political where their actions consist of the extortion of money and the killing of those who refuse to comply. Desir v. Ichert,

bian judge could establish a real threat to his life, but not on account of his political opinion. In this case, as in all but one of the other granted cases,[129] the State Department recommended that the applicant not be returned.[130]

C. *Restrictive Legal Standards: The Exceptionality Requirement*

In the final three granted cases, the immigration judges apparently ap-

840 F.2d 723 (9th Cir. 1988). In *Desir*, the Board found that the Ton Ton Macoutes' motivation was "personal," not political. The Board's approach in *Desir* and other cases focuses upon the immediate interaction between victim and persecutor and essentially considers irrelevant the context of political structure and mechanisms of oppression. It would appear that these kinds of inferences, based on political context which have been rejected by the Board, are greater in the Colombian judge's case than they are in the case of *Desir* or other Haitians fleeing threats by the Ton Ton Macoutes. The Ton Ton Macoutes are affiliated with the Haitian government. The connection between the drug cartel and the leftists is not as direct but, according to the evidence presented, must be inferred from the fact that leftists opposed extradition treaties because they were collaborating with the drug traffickers. The leftists' political objectives then have to be imputed to the drug cartel.

Even accepting those connections, the court's analysis apparently contradicts Board doctrine. The Board has held that simply because an organization has overall political objectives, its specific actions against individuals in furtherance of those objectives are not "political" unless the action is motivationally directed against the particular individual on account of personally-held political beliefs. *See In re* Maldonado-Cruz, 19 I. & N. Dec. 509 (BIA 1988), *rev'd*, Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989). Furthermore, the immigration judge in the Colombian case did not base his decision to grant asylum on an alliance between the drug traffickers and leftists; nor did he base his decision on an analysis of political context or motivation. Instead he focused largely on the fact that the Colombian government could not protect the judge. This criterion was met by many other asylum applicants whose claims were rejected by the immigration court.

The Colombian judge also argued a political connection between the government and the drug traffickers based on their infiltration of the government. This basis for his claim was cited in the immigration judge's decision. However, this theory has not been applied in other cases. For example, the connection between right-wing forces and the government in El Salvador did not factor in decisions denying Salvadoran asylum petitions. In the Colombian judge's case, the immigration judge also found that "kidnapping is harm . . . and constitutes persecution," a theory that again was not applied to the many Salvadoran cases based on forced recruitment by the guerrillas.

Perhaps the most fundamental problem with the Colombian judge's case under Board doctrine is that his claim is most appropriately viewed under a social group theory. *See* former 8 U.S.C. §§ 1258(a), 1101(a) (1990); *supra* notes 10 & 11 and accompanying text. It was the Colombian judge's position as a *judge* that endangered his life. However, the Board has held that a claim based on "membership in a particular social group" can be sustained only where membership is based on an "immutable" characteristic. *See In re* Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985). Claims based on occupation, for example, have been rejected. The Board has argued that employment status is not an immutable characteristic since a person can change jobs. *Id. But see Fuentes*, 19 I. & N. Dec. 658 (noting that where persecution is based on past employment status, the characteristic may be immutable). During one of the hearings in the Colombian judge's case, the trial attorney raised this point, stating to the judge that "the respondent can change jobs." The judge's off-the-record response indicates the extent to which an immigration judge's ability to identify with the applicant factors in favorable asylum decisions. "But he's a judge; I don't think he should be asked to step down from the bench, but perhaps I'm biased." Hearing No. 235.

129. Hearing Nos. 50A, 130A; *supra* note 125.

130. Hearing Nos. 227, 235. The State Department in this case recommended that the applicant be allowed to remain in the United States since his fears were well-founded. However, the letter also stated that the claim was not one of *politically*-based persecution.

plied the Board's legal standard, but with an additional requirement of exceptionality. The fifth petition granted was that of an Afghanistani who not only had a compelling claim,[131] but had an unusually precise memory for details and remained undaunted during extensive examination. Perhaps more importantly, the applicant had left his country with an extraordinary quantity and quality of corroborative evidence including verification of his individual circumstances from the United Nations High Commissioner for Refugees (UNHCR)[132] and actual prison release records.[133] He also had received a positive recommendation from the State Department.

In at least one case, the exceptionality requirement was met by factors not relevant *per se* to eligibility. That case involved a young Ethiopian man who had been jailed on three occasions because of his refusal to attend government-sponsored student meetings.[134] His last release was conditioned by an explicit warning from government officials to cease his noncompliance. The applicant demonstrated that he possessed a political opinion under governing Board doctrine. However, the immigration court denied other apparently stronger claims in which applicants presented evidence of extensive torture and active involvement in opposition political movements.[135] A critical aspect of the Ethiopian case seems to have been the fact that, as attested to in a letter from

131. Hearing Nos. 216, 216B, 216C. The applicant, who had belonged to a secret anti-government student union, had been arrested, beaten, and tortured in Afghanistan. Despite prohibitions by the Indian government, he continued to participate in political demonstrations while in India. *But see infra* notes 135 & 139 (reaching contrary results in Tamil, Ethiopian, Salvadoran, and Haitian cases, where the applicants similarly presented evidence of political activism and consequent arrests, beatings, and torture by government agents).

132. The United Nations High Commissioner for Refugees (UNHCR) serves as the principal United Nations agency responding to refugee problems. *See* Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V) (Dec. 14, 1950). UNHCR's competence has been extended over the years to provide protection and assistance to involuntary migrants, including Convention refugees, throughout the world. *See generally* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 11-13 (1991); GUY S. GOODWIN-GILL, REFUGEE IN INTERNATIONAL LAW 5-12 (1983).

133. Hearing No. 216C. The judge's decision granting asylum despite the applicant's five-year stay in India, is an example of the lack of consistent legal standards and inconsistent results in such cases. The judge did not find as a negative discretionary factor the applicant's firm resettlement in India. *See supra* note 12. Among other reasons, he noted that the applicant did not have permission to work in India, which the judge described as a "fundamental human right." Hearing No. 216C.

In many Salvadoran cases the same immigration judge cited as a negative discretionary consideration the fact that the applicants traveled through Mexico, although in those cases, the sojourns were brief and transitory; the applicants had no legal status or permission to work. *See, e.g.*, Hearing Nos. 125, 237, 225. In the Afghanistani case, the applicant did not have permission to work in India, but he was allowed to remain and pursue his education in that country for several years. Hearing Nos. 216, 216B, 216C; *supra* notes 131-33 and accompanying text.

134. Hearing No. 207.

135. *See, e.g.*, Hearing Nos. 1, 97 (presenting Eritrean and Ethiopian petitions in which applicants testified to active support of opposition movements and consequent arrests and beatings or torture); Hearing Nos. 37, 211, 229 (presenting Tamil petitions in which the applicants testified to active involvement with the Tamil United Liberation Front and arrests, beatings, or torture by the government).

the *charge d'affaires* in the United States embassy in Addis Ababa, Ethiopia, the applicant's father had worked for that embassy for many years, had been an exemplary employee, and had been allowed to immigrate to the United States on that basis. The applicant's family ties to the United States and its government apparently played a significant role in the decision to grant asylum.

Although Salvadorans represented by far the largest group of asylum applicants,[136] the immigration court granted only one Salvadoran claim.[137] The court did not grant asylum to Haitians nor Guatemalans, although these represented the next largest groups of applicants.[138] The circumstances of the successful Salvadoran case suggest that applicants from El Salvador may have been held to particularly exacting standards of eligibility and proof.[139] The case involved a lawyer who, as a result of working for the Salvadoran Human Rights Commission, was arrested and tortured. As in the case of the granted Afghanistani claim, this petition was exceptional in terms of the quantity of supportive documentation submitted; there also were a number of highly unusual fortuitous circumstances favoring this applicant.[140] For example, the ap-

136. There were 47 Salvadoran cases. *See supra* Table 1.

137. Hearing No. 213.

138. There were 12 applicants from Haiti, 11 from Guatemala, and 10 from Ethiopia. The next largest groups were Iranians (9 cases) and Sri Lankans (8 cases). *See supra* Table 1.

139. The court denied compelling Salvadoran claims. The following list is not exhaustive. Many of these cases may have relevant facts other than those briefly adverted to here. In most cases, researchers were able to assess the merits of claims based solely on testimony at hearings, and in some cases the hearing observed involved only cross-examination. *See supra* note 68.

See Hearing No. 70 (involving a Christian Democratic party activist and vocal supporter of agrarian reform; others similarly situated had their lives threatened and suffered other reprisals, including the burning of their homes); Hearing No. 85 (involving a victim of torture by the military); Hearing No. 150 (involving an applicant whose name appeared on a guerrilla "hit list"); Hearing No. 157.1 (involving an agrarian reform activist who organized work stoppages and whose landlord gave his name to right-wing paramilitary forces); Hearing No. 225 (involving a Christian Democratic Party activist whose brother was killed by the military and helped others escape military duty); *see also* Hearing No. 95 (involving a politically active Guatemalan businessman who was subjected to death threats); Hearing No. 43.3 (involving a Guatemalan university student whose father was killed by leftists; applicant was shot and received several death threats); Hearing No. 71 (involving a teacher, member of an underground revolutionary group, who had a violent confrontation with a Ton Ton Macoute); Hearing No. 72 (involving an applicant whose family members belonged to an opposition group, who was arrested and tortured because he was closely associated with them and was considered anti-government and anti-Ton Ton Macoute); Hearing Nos. 7, 23 (involving an applicant and his family who were accused of being "*Kamoke*," or enemies of the state); Hearing No. 218 (involving an applicant and family who had experienced major confrontations with Ton Ton Macoutes; applicant's brother was killed and his mother arrested and her arm broken by Ton Ton Macoutes; applicant was publicly threatened and denounced immediately before he left his country).

140. Many asylum petitions are submitted initially when the applicant is apprehended, often near the United States-Mexico border. After it is submitted, venue may be changed to some other city within the interior of the United States. The initial application may be prepared under rushed circumstances (frequently while the applicant is in detention) and by an attorney other than the one who represents the applicant at the asylum hearing. Under regulations which were in effect until July 1990, applications for withholding of deportation had to be submitted within 10 days of the immigration judge's designation of the country of deportation. *See* 8 C.F.R. § 242.17(c) (1989) (repealed 1990). Many judges reportedly imposed the 10-day

plicant's lawyer had traveled to El Salvador and was familiar with the work of the Human Rights Commission.[141] Coincidentally, members of the Human Rights Commission visited the United States while the applicant's case was pending, and his lawyer was able to obtain affidavits from them verifying the applicant's employment.[142] She was even able to obtain a photograph of him at the Commission's office.[143] The State Department also issued a positive opinion. The lawyer believed that the issuance of a favorable opinion in this case was due at least in part to fortuitous circumstances.[144] Few Salvadoran cases received positive State Department opinions; this was the only initially favorable opinion issued in all the Salvadoran cases observed.[145] In this case, because the immigration court misplaced the file, the State Department opinion happened to issue[146] at exactly the time the head of the Salvadoran Human Rights Commission was assassinated, an event that drew significant national and international attention.[147]

Foreign policy considerations, as reflected in the views of the Department of State, appeared to have had a significant impact on these asylum decisions. As noted, with one exception,[148] the State Department issued a favorable advisory opinion in all of the granted cases.[149] This is particularly significant since

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requirement, although it did not specifically apply to asylum applications. This provision appears to have been removed under the new regulations. *See generally supra* note 14 for a discussion of the new regulations; ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 85-88.

In this case, due to a recent meeting of asylum lawyers, the lawyer who initially handled the case at the border knew the attorney who would represent the applicant at the hearing on the merits of the claim and the fact that she was familiar with the work of the Human Rights Commission. The attorney thus became involved in the case, including the preparation of the written application, from the beginning. She believes this contributed to the presentation of a coherent case which included a written application consistent with subsequent testimony. Interview with applicant's lawyer (Jan. 15, 1989).

141. Interview with applicant's lawyer (Jan. 15, 1989).

142. The lawyer also claims that these affidavits were regarded as more authentic because they were obtained in the United States. *Id.*

143. *Id.*

144. *Id.*

145. In one other Salvadoran case the applicant received a positive opinion after having initially received a negative one. *See* Hearing No. 208.

146. According to the lawyer, the case materials originally were misplaced at the State Department. She believes that had the Department taken up the matter in a timely fashion, it would not have issued the favorable opinion. Interview with applicant's lawyer (Jan. 15, 1989).

147. *See, e.g.*, Chris Norton, *Salvador Rights Leader's Murder Seen Tied to Rise of Death Squads*, CHRISTIAN SCIENCE MONITOR, Oct. 27, 1987, at 9; *Salvadoran Human Rights Activist Slain*, N.Y. TIMES, Oct. 27, 1987, at 3.

148. The exception is the Lebanese case, Hearing Nos. 50A, 130A. *See supra* notes 123-26 and accompanying text. Arguably the Colombian judge's case, Hearing Nos. 227, 235, constitutes a second exception, but the State Department had recommended that he not be returned to Colombia, although it did not believe he faced politically-motivated persecution. *See supra* notes 127-28 and accompanying text.

149. However, the judges did not always appear to believe in the influence of the State department's advisory opinion on their decisions. *See supra* note 74. The judges repeatedly stated that the State Department opinion is only advisory and of limited importance. In one case, for example, the judge refused to obtain a new State Department opinion even though the opinion misstated the basic facts of the case. In several other cases, judges, in refusing to grant

only eleven of the entire group of observed cases received positive State Department opinions.[150]

Moreover, the immigration court denied on their merits only three of the cases which received favorable State Department opinions.[151] With the exception of the Salvadoran case, all of the applicants who received favorable opinions were associated with United States supported resistance movements, opposed governments that the United States officially has opposed, or otherwise were (as in the Lebanese case) involved in activities supportive of established United States foreign policy interests. According to one lawyer, a judge frankly stated that he did not feel comfortable passing judgment on the governments of other nations.[152]

There are a number of unusual factors present in these cases which also may explain the favorable results. All of the applicants in the granted cases were educated, articulate, and able to explain themselves well.[153] All found experienced attorneys who represented them vigorously and effectively pre-

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lawyers' requests for new opinion letters, stated that they gave minimal weight to the State Department's recommendations. *See* Hearing Nos. 150, 132.

However, in several of the granted cases, the judge noted the importance of a positive State Department opinion in the decision granting asylum. *See, e.g.*, Hearing No. 207 (Ethiopian grant) (finding that the State Department's opinion is "not binding, but evidence"); Hearing No. 216C (Afghanistani grant) (stating that "I conclude and agree with the State Department"); *see also* Hearing No. 213 (Salvadoran grant); Hearing No. 154 (two negative State Department opinions mentioned in the judge's decision denying asylum). One lawyer reported that a judge had told her that he considered favorable State Department opinions of particular significance in Salvadoran cases, since they were so rare. Interview with lawyer (Sept. 21, 1989).

The influence of the State Department creates another level of consistency problems. Lawyers complained that in several Salvadoran cases there was no logic to the opinion letters. For example, in one case, the applicant's husband had applied for asylum to the INS and had received a favorable opinion letter from the State Department. The applicant's petition, based on the same facts, received a negative opinion letter. *See* Hearing No. 2.

150. *See supra* Table 7.

151. *Id.* Of the 11 cases which received positive opinions (including that of the Colombian judge), six received asylum; three were denied on the merits (Hearing No. 92 (Libyan); Hearing No. 91 (Cuban); and Hearing No. 5 (Polish)); one, a Polish case (Hearing No. 160), was denied because of the applicant's failure to appear at the hearing. The final case, that of a Ghanaian (Hearing No. 217), had not been decided as of December 1989.

152. Statement of a lawyer at a meeting of the local chapter of the American Immigration Lawyers Association in the city in which the immigration court studied was located (Nov. 17, 1988).

This point may be critical. The court appeared to be reluctant to grant asylum in cases of fundamental conflict between the individual and her government, particularly if the applicant's activities or beliefs were not clearly consistent with United States foreign policy interests. There were other indications that the court eschewed explicit judgments about foreign governments. As discussed *infra* Part III, the court failed to consider documentation of human rights abuses and, as discusssed *infra* Part V, the court maintained a presumptively benevolent view of governmental authority, which affected its evaluation of the credibility of applicants' testimony. At times the court appeared to identify generally with governmental authority.

153. Of those granted asylum, three had completed secondary or technical school. *See* Hearing No. 65B (Nicaraguan); Hearing Nos. 50A, 130A (Lebanese); Hearing No. 213 (Salvadoran). Three had completed college. *See* Hearing Nos. 216, 216B, 216C (Afghanistani); Hearing No. 207 (Ethiopian); Hearing Nos. 46, 46B (Ghanaian). One had post-graduate training. *See* Hearing No. 227 (Colombian judge).

pared and presented their claims.[154] With the exception of the granted petitions in the Ghanaian and Nicaraguan cases (where the State Department opinions and CIA "opinion" rendered the merits virtually irrelevant), all the granted petitions included what the judges considered to be "corroborative evidence"; none of these applicants had to rely solely on the judge's belief in their testimony.[155] Thus, corroborative evidence, effective representation, education, and social class, in addition to political orientation, seemed to have played a significant role in determining the outcome of these cases.

Decisions to grant or deny asylum did not appear to be the result of a consistent application or coherent view of prevailing asylum doctrine. The granted claims did not necessarily meet the strict legal standard applied in other cases; they were not necessarily the strongest cases. Furthermore, the immigration judges generally appeared to view asylum as a narrow and selective remedy.[156] Judges were concerned that granting cases would increase their administrative burden and encourage applicants from the same country to apply for asylum. As a result, they appeared to grant petitions in those cases which appeared to have the least precedential impact.

Judges were also responsive to applicants with a political and class background similar to their own.[157] This affinity, combined with corroborative documentation and other factors, made the danger to the individual's life palpable to the judge. In other words, when they granted asylum, the judges were less concerned with strict definitions of political opinion and more with what they perceived to be realistic dangers to the applicant's life.[158] Yet danger to life based on conditions of civil war or civil or political violence is a standard that the Board formally has rejected.[159] Moreover, it was not a stan-

154. This conclusion is based on observers' notes at hearings and categorizations of the lawyers' experience. *See infra* note 313.

155. *See infra* notes 181-88 and accompanying text.

156. Following the hearing in the Ghanaian cases in which asylum was granted, the judge commented, "so now I guess we can expect a flood of Ghanaians applying for asylum." Hearing No. 46B. A similar comment was made during the course of a hearing on a Haitian claim. *See* Hearing No. 22.

157. *See, e.g., supra* note 128.

158. In one interview, a judge described a case in which he had been involved representing the applicant before becoming an immigration judge. The applicant had acted as a neighborhood guard in his village. According to the judge, the applicant was neither a guerrilla nor a member of the government. The judge described the case as "good" because it "turned on its facts." The applicant had newspaper articles with his picture in it, "so there was no question of credibility." He was glad that the petitioner's claim had been granted because he felt certain that if this man had been returned to El Salvador he "would have been killed." The judge had explained that he did not think the "viewed as" theory (imputed political opinion) was a valid basis for an asylum claim. Yet the example he gave of a valid case appeared to have rested on an imputed political opinion or "neutrality as a political opinion" theory. *See supra* note 106. The applicant was not active politically nor did he have political views sympathetic with either contending side. Apparently what was important to the judge was that, in this particular case, it was clear (e.g., corroborated) that the applicant's life was in danger. The newspaper-verified threat to his life was more important than whether the threat faced by the applicant was politically-motivated under Board doctrine. Interview with judge (Apr. 22, 1987).

159. *See supra* note 106. This standard more closely resembles that of the Organization of

dard that the immigration court consistently applied.

Practices at the immigration court and EOIR's publication procedures contribute to the inconsistent application, and effective suppression, of this broader and more generous legal standard. Immigration judges' decisions are not published or made available to the public.[160] Most decisions are not written but are only issued orally.[161] Immigration judges write decisions only when they are appealed; however, the INS rarely appeals decisions granting asylum. As discussed below, immigration judges often vigorously attempted to persuade INS trial attorneys to concur with the decision to grant asylum before they issued decisions; they may have been reluctant to grant asylum when the trial attorneys did not concur. Of the seven granted cases, the INS appealed only one.[162] This pattern results in what Abraham Sofaer has described as a negative jurisprudence: decisions and legal theories supporting grants of asylum remain essentially buried at the hearing level and unarticulated in formal doctrine.[163] Petitions may be granted that effectively sustain a claim based on a certain legal theory (e.g., imputed political opinion in the case of the Lebanese military officer) that the Board does not adopt in any of its published decisions.[164] One doctrine may exist and be selectively applied at

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African States, which defines a refugee as someone who is compelled to leave her home country "owing to external aggression, occupation, foreign domination or events seriously disturbing public order." *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, art. I(2), U.N.T.S. 14, 691 (entered into force June 20, 1974). *See generally* HATHAWAY, *supra* note 132, at 16-19. Many have argued for an expanded refugee definition. *See, e.g.*, Astri Suhrke, *Global Refugee Movements and Strategies of Response*, *in* U.S. IMMIGRATION AND REFUGEE POLICY 157-162 (M. Kritz ed., 1983) (cited in ALEINIKOFF & MARTIN, *supra* note 15, at 697-702). This study suggests that some immigration judges — albeit selectively — apply such an expanded definition. These indications may complicate arguments for a narrow interpretation of the definition. *See* T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5 (1991) (arguing that the interpretive emphasis in the U.N. Convention/Protocol definition should be on 'persecution,' the degree and nature of state-sanctioned or tolerated harm, rather than on the narrowing 'on account of' grounds); *cf.* Martin, *Refugee Concept*, *supra* note 106 (arguing for a narrow interpretation of the U.N. Convention/Protocol definition in order to preserve the present framework of protection).

160. *See supra* note 44 (discussing the Board's recent policy not to make unpublished BIA decisions available to the public).

161. In all of the cases observed, immigration judges issued decisions orally. *See generally* 8 C.F.R. § 3.35 (1992) (indicating that an immigration judge's decision may be written or oral); UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, OFFICE OF THE CHIEF IMMIGRATION JUDGE IMMIGRATION JUDGE BENCHBOOK 9, 36-44 (June 1986) (providing that as a general rule, decisions should be read into the record at the end of the hearing and instructing immigration judges to issue written decisions only when the facts and law are so complicated that an oral decision is impossible or in case of a decision following an *in absentia* hearing). Generally when a decision was appealed, it was transcribed and published after the hearing and served on the parties by mail. *See* 8 C.F.R. § 242.19(a) (1992) (stating that written decisions shall be served upon the respondent and trial attorney).

162. *See infra* note 259 and acompanying text. Information on the appeal status of two of the granted cases was obtained after publication of the Executive Summary in January 1990. *See* Anker, *Summary Report*, *supra* note 6.

163. *See supra* notes 43 & 67.

164. This problem is further exacerbated by the low rates of publication of Board decisions and related problems. *See supra* note 44.

the hearing level and another — even one embodying a contrary theory — may be expressed as formal legal doctrine.

III
THE BURDEN OF PROOF

A. The Burden of Proof Under International and Domestic Law

An applicant for political asylum must prove that she is a refugee, defined as an individual unable or unwilling to return to her country of origin as a result of persecution or a well-founded fear of persecution based on race, religion, national origin, membership in a particular social group, or political opinion.[165] In 1987, the Supreme Court in *INS v. Cardoza-Fonseca* overruled the Board of Immigration Appeals which had imposed a probability standard of proof in asylum cases.[166] The Court held that the well-founded standard required the applicant to prove only a "reasonable possibility" of persecution.[167] That burden, the Court found, was less than a probability, the burden that an individual normally has to bear in a civil proceeding.[168] Moreover, the Court noted the emphasis on fear in the standard and obtained that an applicant's subjective beliefs were an essential component of the well-founded fear standard.[169]

The Court in *Cardoza-Fonseca* also found that Congress' principal objective in enacting the Refugee Act was to bring United States law into conformity with international law and standards.[170] The Court discussed at length the origins of the well-founded fear standard in international treaties and the history of its interpretation by international bodies.[171] The Court also relied on

165. 8 U.S.C. § 1158(a) (Supp. 1992); *see supra* notes 10 & 11 and accompanying text (explaining difference in international and United States refugee definitions in that the latter explicitly provides for a claim based on past persecution independent of a showing of a well-founded fear of future persecution).

166. 480 U.S. 421, 431 (1987).

167. *Id.* at 438-39.

168. *Id.* at 440. The Court had held earlier that the probability standard was appropriate in applications for the withholding of deportation or return under 8 U.S.C. § 1253(h) (Supp. 1992); *supra* note 14; *see* INS v. Stevic, 467 U.S. 407, 430 (1984). *See generally* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 94-96.

169. *Cardoza-Fonseca*, 480 U.S. at 431. ("That the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs . . . ."). The establishment of subjective fear is of course not sufficient for asylum eligibility. The well-founded fear standard implicates a requirement of objective reasonableness; there must be some basis in reality or a reasonable possibility that the individual would be persecuted. *See, e.g.*, Hernandez-Ortiz v. INS, 777 F.2d 509, 513 (9th Cir. 1985). *See generally* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 96-98. As discussed *infra*, however, the objective component may be established through testimonial evidence. *See supra* notes 178-80 and accompanying text.

170. 480 U.S. at 435; *see supra* note 52.

171. *Cardoza-Fonseca*, 480 U.S. at 436. However, the Court stated that it was not setting forth a detailed description of how the well-founded fear standard should be applied, but was leaving that to the process of case-by-case adjudication. Separate concurring opinions by Justices Scalia and Blackmun placed different emphases on the extent to which the Court's opinion should be limited to an analysis of the 'plain meaning' of the statutory text, and the extent to which the agency must be guided by international law and legislative records in developing

the *Handbook on Procedures for Determining Refugee Status of the United Nations High Commissioner for Refugees* [172] as an important source of interpretation for the standard.[173] The *U.N. Handbook* focuses on the subjective component of the definition and emphasizes the refugee's difficulty in obtaining specific corroborative proof of her claim.[174] Courts repeatedly have noted that, when fleeing their countries, refugees do not ordinarily carry with them documentary, corroborative proof of acts of persecution.[175] Because of these obstacles to obtaining proof, as well as the applicant's natural difficulty in explaining herself before immigration authorities, the *U.N. Handbook* emphasizes the importance of a supportive adjudicatory environment.[176]

After *Cardoza-Fonseca*, the Board of Immigration Appeals in *In re Mogharrabi*[177] elaborated its understanding of the new, liberalized burden of proof for asylum claimants. Under the Board's formulation, the salient inquiry is whether a "reasonable person in the circumstances of the respondent" would fear persecution on the basis of one of the statutory grounds.[178] The

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doctrine and applying the statutory standard. *Id.* at 452 (Scalia, J., concurring); *Id.* at 450 (Blackmun, J., concurring); *see* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 96, n.507.

In a recent opinion, Justice Scalia applied the interpretive approach urged in his concurring opinion in *Cardoza-Fonseca* and construed the statutory language in the refugee definition without reference to the Refugee Act's legislative history or the U.N. Convention/Protocol treaty upon which it was based. *See* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992); Anker, Blum & Johnson, *The Supreme Court's Decision in* INS v. Elias-Zacarias, *supra* note 106. In another recent opinion, however, Justice Scalia cited to the Court's opinion in *Cardoza-Fonseca* with particular reference to its discussion of the international law basis for the mandatory withholding of deportation or return obligation. *See* INS v. Doherty, 112 S. Ct. 719 (1992) (Scalia, J., concurring in part, dissenting in part) (supporting the majority's opinion that the abuse of discretion standard of review applies to motions to reopen an application for asylum, but dissenting with respect to applications for withholding of deportation or return).

172. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES FOR DETERMINING REFUGEE STATUS (1979) [hereinafter U.N. HANDBOOK].

173. *Cardoza-Fonseca*, 480 U.S. at 440.

174. *See* U.N. HANDBOOK, *supra* note 172, at para. 37 (stating that the well-founded fear standard "replaces the earlier method of defining refugees . . . by the general concept of 'fear' for a relevant motive"); *id.* at para. 40 ("An evaluation of the *subjective element* is inseparable from an assessment of the personality of the applicant. . . .") (emphasis in the original); *id.* at para. 196 ("Often . . . an applicant may not be able to support his statements by documentary or other proof. . . . In most cases a person fleeing persecution will have arrived with the barest necessities and very frequently even without personal documents.").

175. *See, e.g.*, Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984); *see supra* note 102 (citing 8 C.F.R. § 208.13 (1992) (adopting this principle)). The Board has held that the applicant may be required to submit evidence related to human rights practices and patterns of persecution in the country of origin as well as other corroborative proof where available. *See In re* Dass, I. & N. Dec. 3122 (BIA 1989) (corroborative evidence should generally be introduced where available). *See generally* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 102-03.

176. *See* U.N. HANDBOOK, *supra* note 172, at 190, 195-205. The U.N. HANDBOOK also suggests that because of these difficulties, "the applicant's testimony should be given the benefit of the doubt." *Id.* at para. 196.

177. 19 I. & N. Dec. 438 (BIA 1987).

178. *Id.* There are differences over the propriety of this formulation. Some commentators suggest it may be too expansive, see ALEINIKOFF & MARTIN, *supra* note 15, at 790, while others believe the Board's 'reasonable person' formulation is an objective, not a subjective standard

Board held that corroborative proof of a persecution claim is not required. Although the burden lies with the applicant to prove her claim for asylum, her own testimony must be given careful consideration since it may be the only proof she can present; as a result, an evaluation of the credibility of the applicant is critical to the asylum determination.[179] In addition to the applicant's testimony, the BIA held that relevant proof would include the history of persecution of those similarly situated to the applicant in the country from which the applicant is fleeing.[180]

In summary, according to Supreme Court and BIA decisions, the determination of a well-founded fear from an evidentiary standpoint is governed by four basic principles: (1) the burden of proof is on the applicant, but with a recognition of the applicant's special problems in obtaining proof; (2) the applicant's own testimony may be sufficient evidence; (3) subjective fear is a critical component of the standard; and (4) the applicant's testimony, as well as the claim in general, must be evaluated in the context of the history of persecutory practices and the human rights record of the country of origin.

B. The Burden in Practice: Real Facts and Epistemology in the Immigration Court

The standard of proof applied in practice by the immigration court did not reflect the Supreme Court's "reasonable possibility" formulation. Instead, the immigration court seemed to apply a stringent version of the rejected probability standard. Generally, the immigration judges required printed corroborative proof, which they considered to be "objective" evidence. The judges also disregarded evidence of political persecution and human rights violations in the applicant's country or evidence of persecution of family members and other similarly situated persons. They generally expected applicants to produce evidence of direct visual observation of persecutory events, viewed the applicant's own testimony as inherently unreliable and insufficient to establish a claim, and discounted testimony related to subjective fear and beliefs.

In addition, judges appeared to believe that applicants should rest their case on their written affidavit, and that their credibility should be tested through trial attorney and judicial examination. The immigration judges held

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and is therefore inconsistent with the Supreme Court's ruling in *Cardoza-Fonseca*. *See* Cuadras v. INS, 910 F.2d 567, 573 (9th Cir. 1990) (Noonan, J., dissenting). For a general critique of the subjective fear requirement, see HATHAWAY, *supra* note 132, at 70-74.

179. *See Mogharrabi*, 19 I. & N. Dec. at 439 ("The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."). *See generally* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 109-115.

180. *Mogharrabbi*, 19 I. & N. Dec. at 439; *see also* 8 C.F.R. § 208.13(b)(2)(i) (1992) ("[T]he Asylum Officer or Immigration Judge shall not require the applicant to provide evidence that he would be singled out individually for persecution if . . . (A) He established there is a pattern in practice . . . of persecution of groups of persons similarly situated to the applicant . . . and (B). . . his own inclusion in and identification with such a group of persons . . . ." (regulation promulgated after completion of study period; *see supra* notes 14 & 17).

a conception of the asylum hearing and imposed evidentiary rules which resulted in significant limitations on the applicants' ability to present their own testimony.

1. The Requirement of Corroboration

In practice the judges generally required applicants to produce corroborative proof. In five of the seven cases in which asylum was granted,[181] the applicants were able to corroborate specific facts related to their claims. These successful petitions were remarkable for the quantity and quality of corroborative proof that the applicants were able to produce.[182] Judges regularly asked for corroborative proof and often disbelieved applicants who could not produce it. For example, a judge refused to credit the testimony and denied the claim of a Sikh applicant in part because there was "no corroboration of the physical beating" which he testified had occurred while he was detained and imprisoned in India.[183]

In several cases, judges disbelieved applicants who had not brought with them from their home countries documentary proof supporting particular aspects of their claims. In one Salvadoran case, the applicant testified that his name had appeared in a newspaper among those on a guerrilla hit list.[184] The judge found his explanation of why he did not save the article — "because at the time, I wasn't even thinking of leaving the country" — unconvincing. In another Salvadoran case,[185] an applicant testified that he had served in the

181. The exceptions were the Nicaraguan and Ghanaian petitions, in which the decisions to grant asylum were based on favorable State Department and CIA opinions. *See supra* notes 113-15, Hearing No. 65B (Nicaraguan case); notes 116-22, Hearing Nos. 46, 46B (Ghanaian case). The Ghanaian in fact did present specific corroboration: the CIA verified her brother's identity and the fact that he had been working for them.

182. *See supra* notes 131-32, Hearing Nos. 216, 216B, 216C (Afghanistani case). The applicant presented a UNHCR letter supporting his allegation that he registered with that organization in India; he also submitted his release papers from prison. *See supra* note 134, Hearing No. 207 (Ethiopian case). The Ethiopian applicant had a copy of his release papers from prison and a letter from the charge d'affaires at the United States embassy corroborating the fact that his father had worked for the embassy and opining that persecution was likely against former United States government employees. *See supra* notes 127-28, Hearing No. 227 (Colombian judge case). The Colombian judge had newspaper articles which named him as having been threatened by the drug traffickers, letters from his superiors telling him not to return, books and articles naming him, and tape recordings of threatening phone calls he had received. He also had documents verifying his identity (his birth certificate, all his diplomas, his license as an attorney, etc.). *See supra* notes 123-24, Hearing Nos. 50A, 130A (Lebanese case). The Lebanese applicant produced papers indicating his military rank and tape recordings of newscasts confirming that the fighting he described had taken place and that other military people, whom he had named, had been killed. *See supra* notes 136-47, Hearing No. 213 (Salvadoran case). The Salvadoran had pictures of himself at the Salvadoran Human Rights Commission and affidavits, obtained from members of the Human Rights Commission during their visits to the United States, attesting to his employment there. The Salvadoran also presented a medical expert who testified that he had wounds which were the result of torture.

183. Hearing No. 19A.

184. Hearing No. 150.

185. Hearing No. 123.

civilian patrol[186] and that his brothers and others who had served were killed by anti-government guerrilla forces. After personally receiving both a written warning from a friend who was associated with the guerrillas and a letter containing a death threat, he immediately left the country. The judge questioned the testimony because the applicant did not have a copy of the death threat letter, and rejected the applicant's explanation that "you can't carry those letters around in your pocket." The judge asked the applicant where he threw it out and why he left El Salvador rather than first talking to the person who wrote the warning letter. The judge remained unconvinced by the applicant's explanation of the immediacy of danger — that he could not approach the man because "the people he was with wanted to kill me."[187]

When applicants did present particularized documentary proof, the judges often viewed such evidence skeptically, holding it to high standards of authenticity. For example, a Guatemalan student activist who had worked with trade unionists, participated in demonstrations, and received several threats on his life before leaving the country, produced two letters from his family warning him not to come home. The letters were discounted because they did not specifically state the reason he should not return home. The judge denied the claim, finding that, other than his "self-serving" testimony, the applicant had not produced "one scintilla of evidence" in support of his claim.[188]

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186. Part of the Salvadoran government's military strategy against the guerrilla resistance was to organize and arm civilian patrols (*patrullas*) in various rural areas and towns. While the Salvadoran government maintained that civil defense was voluntary, Americas Watch and other human rights organizations "continue[d] to receive reports from many parts of El Salvador of forced participation in civil defense." *See* AMERICAS WATCH, THE CIVILIAN TOLL: 1986-1987, NINTH SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR 118 (1987). There were reports of military retaliation for failure to serve. For example, in April 1988 military attacks on the civilian population in rural communities in northeastern Chalatenango province were reportedly "part of the army's response to the lack of support shown by the local population to its plans to establish civil defense forces in the area. Attempts in past weeks to create civil defense patrols in the coastal communities of Usulutan have been accompanied by threats, abductions and assassinations by the army. . . ." EL SOL WEEKLY, Apr. 4, 1988, at 4.

187. *See* Hearing No. 123.

188. *See* Hearing No. 197. The Guatemalan applicant had received anonymous calls threatening his life before he left the country. His brother also was later questioned by the military regarding his whereabouts. In addition to the two letters from home, he had submitted extensive documentation on human rights conditions generally in Guatemala and on the persecution of trade unionists and students.

There were numerous examples of applicants being closely questioned regarding corroborative evidence or testimony. In Hearing No. 162, the applicant was able to produce a letter from his wife saying the guerrillas were looking for him, but the evidence was not considered convincing since he did not have the envelope in which it was sent. In the Ghanaian case in which asylum was granted (Hearing No. 46, *supra* notes 116-22), the applicant presented a newspaper article naming her brother as exchanged for prisoners in the United States by the CIA. The judge wanted proof that the person named in the article was her brother. (This transpired at the hearing which took place before the trial attorney received a communication from the CIA recommending that asylum be granted in this case.) In an Afghanistani case (Hearing No. 49), the testimony of the applicant's mother that he was her son was persistently disbelieved, because no birth certificate was produced, because he spelled his name with an

2. *The Requirement of "Printed Proof" and the Irrelevancy of Country Condition Evidence*

The only evidence which the judges appeared to view as reliable was that which appeared in printed "independent" sources, such as newspapers. In the immigration court studied, facts became real when they were presented in print. Thus in one case a judge required a Somalian applicant to produce "independent historical documents" to support his claim. The judge then questioned the applicant's inability to produce proof of his participation in anti-government demonstrations, such as a "list[ing] in a newspaper," where his "name [was] mentioned."[189]

Without corroborative proof, the immigration judges generally would not believe applicants. Furthermore, the judges considered relevant only those facts directly connected to the individual. The judges regularly stated their belief that the only relevant proof in an asylum claim is that which relates to the particular facts of the applicant's case. The judges viewed any information about persecutory practices or human rights practices in the home country as irrelevant unless the documentation named the individual asylum applicant. Thus, for example, judges would not grant requests for new State Department opinions where the conditions had changed in the home country. As one judge commented: "Are the facts different in *this* case because the situation back home is different?" In cases in which applicants produced country condition documentation, the judges generally asked the applicant's lawyer whether any of the documents named the applicant specifically.[190] If they did not, as was almost inevitably the case, the documentary evidence was dismissed as "background." Mechanically admitted into evidence, such documentation did not factor in any decision.[191]

Similarly, judges discounted expert testimony. The immigration judges either disallowed or limited the scope of expert testimony[192] unless the expert

additional letter, and because she had given incorrect information about his whereabouts in an application she had filed. (She testified that this was a period after he had fled and during which she was uncertain about where he was living.)

189. Hearing No. 20.

190. Hearing No. 19.

191. *Id.* In one case, a judge bargained with a lawyer, saying he would grant a request for a new State Department opinion only if the lawyer did *not* submit "background" information. The applicant's claim was based on his active involvement with one Christian faction in Lebanon, but the judge warned the lawyer not to submit general information regarding the various forces fighting in Lebanon. "Just give me factual stuff about them, no background information. Otherwise you are not going to get a second advisory opinion out of me." Hearing No. 18.

192. Judges and trial attorneys also appeared confused and inconsistent in their view of the role of expert witnesses. Immigration judges and trial attorneys often challenged experts because they did not have "personal knowledge" to corroborate specific facts in the applicant's claim. For example, an expert testified that the government of El Salvador had a computerized databank and the applicant's name was likely to be in it. The trial attorney challenged him, "Do you know of your personal knowledge that the respondent here today is in the databank?" Hearing No. 57A; *see also* Hearing No. 218A (trial attorney objected to the affidavit of an expert because the expert had not interviewed the applicant). While witnesses' expertise was deprecated where they did not have direct knowledge of the applicant, in some cases, and by

had witnessed or could verify particular aspects of the applicant's claim. The court required expert witnesses to have had direct experience in the applicant's home country[193] and to have witnessed events or traveled to areas about which the applicant testified.[194] The judges generally viewed evidence regarding political conditions and institutions as conclusory and irrelevant. In one case,[195] a Salvadoran applicant testified that his participation in the civilian patrol was involuntary, and that he feared being killed if he did not join. He stated that people who refused to participate were killed, but the judge would not credit this testimony because the applicant had never been physically present when a particular individual was killed. The lawyer argued to the judge that the nature of the coercion was difficult to explain, that an expert was necessary because the "sociological facts were complicated" and the applicant was "unsophisticated." The judge dismissed the need for an expert: "Isn't it the same in any country . . . either the facts are there or they aren't."[196]

As one judge explained, asylum cases are "straightforward" and "turn on the facts."[197] Documentary and expert evidence was not relevant, according to the judges, because a good asylum case is one where there are facts[198] di-

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one judge in particular, experts were directed not to use their knowledge of the applicant in answering a question. In these cases the judge challenged experts because they *did* have specific knowledge of the applicant's claim. The judge felt it inappropriate for an expert to testify if that testimony was based on conversations he had had with the applicant outside the court, treating such contact as a form of improper *ex parte* communication. *See, e.g.*, Hearing No. 36.

193. Judges considered expert testimony relevant only if the expert had traveled to and lived in the country. *See, e.g.*, Hearing No. 31C (expert's testimony was characterized as irrelevant by the judge because he had traveled to areas of El Salvador other than where the applicant had lived).

194. In several cases, the judge responded to lawyers' arguments that they wanted an expert to testify by questioning the necessity for such testimony when the expert lacked specific information about the applicant. *See* Hearing No. 233 ("[I]s [the expert] in possession of evidence directly related to the respondent?"); Hearing No. 72 ("[D]id he actually observe [the events about which he will testify] or did other people tell him?"). One judge commented that he did not consider background information on countries as important, unless perhaps, the country was a new one that he had never heard about before. He noted that while the lawyers complained that State Department opinions are "conclusory," he found expert testimony and documentation conclusory as well. The judge stated that an expert could be useful where an applicant testified regarding a particular place — a prison, for example — if the expert had seen the prison and could verify its existence and location. Interview with judge (Apr. 22, 1987).

195. Hearing No. 123.

196. *Id.*

197. Interview with judge (Apr. 22, 1987); *supra* note 158. Since they viewed these cases as "turning on the facts," the judges regularly denied requests for new State Department opinions which were made after the Supreme Court's decision in *Cardoza-Fonseca* liberalized the burden of proof in asylum claims. 480 U.S. 421 (1987); *see, e.g.*, Hearing No. 132. Thus, from the judges' perspective, "facts" are sharply dichotomized from "law." The judges seemed to view the legal standard of proof as either narrow or — given the individualized and fact-specific nature of the determination — as irrelevant.

198. *See, e.g.*, Hearing No. 43.3 (dismissing documentary evidence, the judge stated: "We'll wait until we get factual evidence"); *see also* Hearing No. 45 (admonishing lawyer to present only "specific instances in which he was personally involved. . . . I want instances in which he was personally involved, approached by the guerrillas or army where they say, 'come with me.' ").

rectly related to the individual.[199] Thus, if the requirement of corroboration was not satisfied by country condition documentation, it also was not satisfied by evidence that members of a group with which the applicant was affiliated had been persecuted,[200] or even that members of the applicant's family were victims of persecution. Judges frequently denied applicants the opportunity to testify about other individuals similarly situated who were victims of persecution, including close family members who had suffered persecutory violence. Although testimony that family members resided in apparent safety in the home country was on several occasions cited as evidence that applicants had no reasonable fear in returning,[201] evidence of persecution of family members presented in support of their claims was excluded or substantially discounted.[202] Immigration judges discounted evidence that a family member had suffered persecution even when a member of the applicant's close family had received asylum or refugee status in the United States. In one case, a judge commented that "the respondent must establish his own claim [and] not [rely] on . . . relatives."[203] In another case, an immigration judge would not allow into the record evidence regarding a successful asylum claim by the applicant's sister, heard by another judge in the same court.[204] However, the immigration court did not consistently apply this principle emphasizing strictly individual circumstances. For example, the successful Ghanaian ap-

199. *See supra* note 158, discussion of an interview with a judge describing a Salvadoran case. The applicant had been a "neighborhood guard" in his village; he was not a member of the guerrillas or the government. The critical element, according to the judge, was that he was able to produce newspaper articles with his picture in them, "so there was no question of credibility." According to the judge, this man properly was granted asylum. The claim was not necessarily stronger than others under current legal standards; it probably was grounded on a theory of imputed political opinion. Rather, the favorable decision was based on the availability of individualized and "independent" corroborative evidence. Interview with judge (Apr. 22, 1987).

200. *See, e.g.*, Hearing No. 102. This applicant's claim was based on the fact that she came from a wealthy pro-Shah family in Iran. Various family members and similarly situated friends had been arrested, tortured, and/or killed. The judge challenged the evidence on the grounds that it did not relate to the applicant individually. The judge also believed the evidence relevant to "economic" but not politically-based persecution.

201. *See* Hearing No. 48 (citing evidence of applicant's mother's presence in Haiti for proposition that applicant would not suffer persecution there); Hearing No. 237 (citing testimony that applicant's family resided in El Salvador and that he had no knowledge of members of his family having any problems).

202. Hearing No. 13 (denying applicant opportunity to testify that his brother fled Guatemala because his father was wanted by the government on the grounds that such evidence was "too remote"); Hearing No. 199 (finding that applicant did not have a well-founded fear despite grant of asylum to applicant's wife by INS district director and grant of refugee status to siblings through the overseas program (*see supra* notes 8 & 9 for a discussion of the difference between refugee status and asylum status); Hearing No. 224 (denying applicant opportunity to testify about father's United States asylum claim which was granted in 1969).

203. Hearing No. 158 (denying lawyer's motion for a new State Department opinion when Guatemalan applicant's father had been killed since previous hearing, on grounds that applicant "must establish his own case").

204. Hearing No. 39 (involving the claim of an Iranian applicant based on the fact that her father worked for the Shah and the entire family suffered as a result).

plicant's case largely was based on the situation of her brother.[205]

The judges repeatedly told lawyers that they wanted to hear only about "the applicant's acts or failures to act."[206] As one judge stated, the applicant's testimony should be limited exclusively to his "personal background, why he'd be singled out."[207] Evidence regarding the applicant's family was relevant only insofar as it directly "impact[ed] upon him."[208] The judges applied this requirement strictly. When a Haitian, who testified that he had been targeted by the Ton Ton Macoutes, as had other members of his family, was asked by an irritated judge "what was the complaint against you," the applicant tried to explain that his father had been considered anti-government. The judge found the answer evasive and concluded that "[i]t didn't involve you, then," despite the applicant's attempt to explain through an interpreter that "in Haiti, when you have a problem, all the family have [sic] a problem."[209]

3. *The Requirement of Direct Visual Observation of Persecutory Events*

As discussed above, the immigration judges did not consider evidence relating to the historical or political context of persecution relevant. The immigration court discouraged or did not allow applicants to present this type of evidence,[210] nor did it allow applicants to testify about facts related to the persecution of family members. The judges' conception of knowledge and verification of proof was literal and positivistic. They generally would not evaluate individual facts in the context of patterns of persecution and related conditions in the applicants' home countries. Judges considered even the applicants' testimony about their own experiences as generally unreliable unless it was based on "actual knowledge" or "direct experience."[211] For example, one Guatemalan applicant testified that his father, a businessman associated with right-wing forces, was kidnapped and killed by leftists, who, he testified, also had made several attempts on the applicant's own life. The applicant had discovered his father's maimed and tortured body at his place of business. The judge found the conclusion that the father had been killed by leftists "merely speculative" because the applicant had no "direct knowledge" as to who was responsible for the killing. The judge stated in his decision that the death

205. Hearing Nos. 46, 46B; *see supra* notes 116-22 and accompanying text.

206. *See, e.g.*, Hearing No. 13.

207. Hearing No. 1.

208. *Id.* In this case, involving an Eritrean, the father's activities as a union organizer were relevant to the political motivations behind his own behavior and constituted evidence supportive of the government's past and future motivation to persecute him. The judge insisted, however, that the lawyer "keep the issues focused on him," since only his own "personal background" was relevant.

209. Hearing No. 71.

210. One applicant, an Eritrean active with guerrillas fighting the Ethiopian government who testified that he had been detained and beaten for eleven months, tried to explain the background of the war with Ethiopia. The judge sustained the trial attorney's objection that the testimony was inadmissible on the grounds that the applicant lacked "personal knowledge," since he had not been born at the time the conflict began. *See* Hearing No. 1.

211. Hearing No. 197.

"could have been" the result of a failed business deal.[212] In one Salvadoran case, a judge questioned the authenticity of a written warning and a death threat letter and the reasonableness of the applicant's flight from El Salvador based on them because in one instance, he knew the name of the person who signed the threat but had never seen his signature before, and because in the other, the note was unsigned.[213]

By "direct experience," the judges often meant direct visual observation. One judge told a lawyer that "any evidence that [the applicant] did not see or participate in will not support his foundation."[214] In another case, a judge commented "what the respondent heard or read is objectionable as hearsay."[215] One applicant testified that he saw the guerrillas remove men from a bus and take them away; he then heard shots. The judge did not believe the applicant's testimony that they were killed since he was not physically present when the killings occurred and did not later go to see the bodies.[216] At first, this applicant had testified that he had "seen" the killings. Later he explained: "I didn't see with my eyes, but I heard the shots." According to the judge, the fact of the killings had not been verified. Moreover, the judge found the applicant could not be certain why they had been killed, since he did not testify that the guerillas announced their intentions to the men.

In the same hearing, the applicant testified that his brother was killed by guerrillas because they believed him to be a government supporter. Neighbors told the applicant that his brother and twelve others were shot; he later also heard a report of the killings on the radio, naming his brother. The judge disputed the applicant's explanation on the grounds that no one had heard the conversation between the killers and the victims. The judge apparently would only believe in the identity of the killers as guerrillas if they had announced themselves as guerrillas or had worn uniforms.[217] One applicant testified that he felt his life was threatened by his commander, whom he had opposed. He described a meeting that the commandant called, in which he lined people up and brandished a gun, which he usually did not carry. The judge stopped the applicant from describing the meeting: "The question is, did he threaten you."[218]

212. Hearing No. 43.3; *cf.* Hearing No. 95, wherein the same judge denied asylum to a Guatemalan applicant, discounting death threats because they were anonymous and "could have come from a person jealous of you for opening a business."

213. Hearing No. 123; *see also* Hearing No. 157 in which the judge denied asylum to a Salvadoran woman whose two brothers had been killed and who herself had received an anonymous death threat which warned that she would be next. The judge concluded that since the death threat was anonymous, he could not attribute it to any source and therefore the applicant had not proven her claim.

214. Hearing No. 81.

215. Hearing No. 1; *see supra* note 22 regarding the admissibility of hearsay evidence in immigration court hearings.

216. Hearing No. 123.

217. *Id.*

218. Hearing No. 150.

4. The Irrelevancy of Subjective Fears and Beliefs

Judges regularly questioned the reliability of the applicant's own testimonial evidence, including instances when applicant's testified to events they observed or experienced. Although the Board had abandoned in principle the presumption that the applicant's testimony should be dismissed as inherently self-serving,[219] judges continued to view such evidence with skepticism. The judges often treated applicants' oral testimony, including testimony about serious persecution, as inherently unreliable.[220]

The case of a Sikh applicant illustrates the presumptive skepticism with which judges viewed personal testimony. The judge, in denying asylum, found that the applicant lacked credibility because he testified that he was struck with a gun, a fact the judge believed he could not have known since he stated he was hit in the back of the neck.[221] In another case, an Afghanistani applicant was denied asylum because the judge found it "incredible" that he "could not name the airline he flew on from Pakistan to Cairo where he switched flights to the U.S." The judge also noted that the applicant "identified the type of machine gun he used, [but] was unable to describe the size of the bullet."[222]

Judges also did not regard as relevant testimony relating to an applicant's subjective beliefs and fears. Applicants were admonished to "stick to the facts" and "not to speculate."[223] A Libyan applicant tried to explain that his academic scholarship was revoked because the Libyan government "wanted to send me back home" due to his anti-government activities in the United States. The judge stopped him: "You're speculating about what Libyan officials were thinking. Would you just answer the question?"[224] Similarly, when a Haitian applicant was being questioned about a physical assault on him by some Ton Ton Macoutes, the judge interrupted when he started to explain the reasons for the assault. The judge directed the applicant that he wanted to hear only what the attacker said his reason was, not what the applicant believed his reasons were.[225]

Judges described the standard of proof in asylum cases as requiring "objective proof," or as one judge described it, "objective fear."[226] This charac-

219. *In re* Acosta, 19 I. & N. Dec. 211, 218 (BIA 1985), *modified as to other parts by, In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987) (noting that a respondent's testimony should not be rejected solely because it is self-serving).

220. *See, e.g.*, Hearing No. 38 (striking testimony of Guatemalan Indian woman describing brutal rape by military colonel); Hearing No. 71.

221. Hearing No. 19A.

222. Hearing No. 49.

223. Hearing No. 92.

224. *Id.*

225. Hearing No. 71; *see also* Hearing No. 22 (admonishing a lawyer: "I remind you that you must establish the factual basis for any knowledge. His own knowledge alone may be stricken.").

226. Hearing No. 74; *see also* Hearing No. 98 (arguing (by judge) that an applicant must show "evidence that the government was concerned with his activities" and "objective evidence"); Hearing No. 63 (denying asylum on the grounds that the applicant had "failed to

terization was not changed by the opinion in *INS v. Cardoza-Fonseca*[227] issued by the Supreme Court one month after the study began.[228] For example, a Ghanaian applicant testified that he was a prince of the persecuted Ashante people, that his father had died in prison and that he had fled Ghana after being personally imprisoned and tortured. He explained that he was "afraid" when he first arrived in the United States and confronted immigration officials at the airport. He had told them that the passport on which he was traveling was his, when in fact it was issued to another person. The judge told him: "I don't want to know what you felt. I want to know what you said."[229] In other cases, judges focused on factual details related to applicants' testimony, and discouraged testimony relating to subjective fear.[230]

5. *"Paper Hearings": Limiting Oral Testimony*

The immigration judges' conception of the standard of proof and of the range of relevant evidence resulted in their disfavoring the hearing itself as a vehicle for the presentation of an applicant's case. For example, one judge stated in an interview that credibility could be determined based on "content" and "consistency."[231] He suggested that asylum hearings could be more efficiently and appropriately conducted "telephonically."[232] The judge commented that oral testimony was not necessary since applicants provided

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establish based on objective evidence that leads to a reasonable possibility the fear is well-founded").

One judge in particular seemed to require objective evidence of past persecution in the form of prior arrests and detention. In several cases the judge, at the beginning of the hearing, asked the lawyer, "was the applicant ever detained for more than, say, 12 hours?" *See, e.g.*, Hearing No. 1. In another case where the lawyer responded affirmatively to the judge's inquiry (the Ethiopian applicant testified that he had been arrested, detained, and tortured, the latter fact "corroborated" through a medical expert's affidavit), the judge commented that there was only one incident of detention. Hearing No. 161; *see also* Hearing No. 16 (involving a case of a Polish Solidarity worker in which, to the judge's query of whether the applicant was ever arrested or detained, the affirmative response prompted the follow-up question, "for less than 12 hours?").

In several cases (Hearing Nos. 92, 167, 222), the judge asked about prior detentions or arrests, without the "12-hours" threshold requirement. In the case of the Eritrean liberation activist who had been beaten during an eleven-month detention, the judge questioned him both as to whether he had been arrested and detained "for any period of time," and also as to whether he had been charged by the government with any criminal violation. Hearing No. 1. As discussed above, past persecution is an alternative ground for establishing eligibility as a refugee and for asylum. *See supra* note 11. It is not a requirement for establishing a well-founded fear of future persecution.

227. 480 U.S. 421 (1987); *see supra* notes 166-73 and accompanying text.

228. The study began in February 1987. The Supreme Court decided *Cardoza-Fonseca* on March 9 of that year.

229. Hearing No. 217. His lawyer then asked the question directly:
Lawyer: Were you afraid?
Applicant: Yes.
Trial Attorney: Objection. Leading.
Judge: Sustained. The question and answer will be stricken from the record.

230. *See, e.g.*, Hearing Nos. 123, 150.

231. Interview with judge (Apr. 22, 1987).

232. *Id.*

affidavits which described the basis of their claims.[233] Thus judges often tried to limit the applicant's lawyer from repeating in direct examination information recounted in the affidavit. When lawyers protested that such testimony was necessary to establish credibility and subjective fear, the judges responded that the only issue in credibility was whether the applicant's testimony is "consistent with the information in the affidavit. . . . Credibility [therefore] can be tested through the trial attorney's cross-examination."[234] Lawyers commented that this practice left the applicant in the difficult position of having to establish credibility by responding to the trial attorney, whose purpose was to discredit the applicant's case and her testimony.[235]

The basic conception of the hearing as a "test" of the applicant's credibility meant that judges' own questioning often entailed a search for inconsistencies in that testimony.[236] Because of this view of the purpose of the hearing, and the judges' restrictions on the applicants' oral presentation, applicants often achieved little more than discrediting their own case if they insisted on testifying. On the one hand, they were prevented from testifying as to the events described in the affidavit, which the judges viewed as repetitious. On the other hand, judges also discredited testimony about events not included in the affidavit, reasoning that applicants would have included accurate and salient factual information in their affidavits.[237] Lawyers complained that this exclusive reliance on affidavits was unfair.[238] Affidavits often were incomplete and inaccurate because they were frequently prepared under rushed and difficult circumstances, in part as a result of a regulatory ten-day filing policy enforced in border regions.[239] Limitations on the presentation of oral testimony often prevented applicants from having an opportunity to explain discrepancies between the written application and testimony at the hearing.[240] These discrepancies then formed a significant basis for negative credibility findings.[241]

IV
THE "NON-ADVERSARIAL" ADVERSARIAL PROCEEDING

Originally, administrative deportation hearings were non-adversarial proceedings presided over by senior INS officials.[242] The government was not

233. *Id.*
234. *See* Hearing Nos. 100, 150.
235. *See, e.g.*, Interview with lawyer (Apr. 25, 1988).
236. *See infra* Part IV-B.
237. *See, e.g.*, Hearing No. 31.
238. Interview with lawyer (Nov. 18, 1988).
239. *See generally supra* note 140.
240. *See generally infra* Parts IV, V.
241. *See, e.g.*, Hearing No. 120A. *See generally* ANKER, U.S. ASYLUM LAW, *supra* note 19, at 111-12 (describing recent developments in doctrine including BIA case law which generally provide that minor inconsistencies, misrepresentations, or concealments should not lead to a finding of incredibility). *See supra* note 46.
242. ALEINIKOFF & MARTIN, *supra* note 15, at 107; *see supra* notes 20-26. For an histori-

separately represented.[243] Later, the statute provided for "special inquiry officers" to preside over these hearings.[244] Eventually, trial attorneys were brought into deportation proceedings to represent the government so that the special inquiry officers (since 1973 titled "immigration judges")[245] could play a more detached and passive adjudicatory role.[246] In 1983, the immigration judges' independence from the INS was further institutionalized with the reorganization of the corps of immigration judges within a separate agency.[247]

Immigration judges are empowered by statute to actively engage in the examination of the alien.[248] In the court observed in this study, judges' questioning frequently was aggressive and often appeared to be directed at uncovering facts supporting denial of the claim, including inconsistencies in testimony and issues tangential to the basis of the persecution claim. Instead of an independent adjudicator and an opposing counsel, the perception arose in many cases that applicants faced two, instead of one, opposing counsels. In practice, counsels for applicants were constrained in the presentation of evidence and testimony by the judges' interruptions and by the court's use of informal and *ad hoc* procedural and evidentiary rules. In many cases, the judges viewed applicants' oral testimony as unnecessary and a significant part of the evidence that they presented as not relevant to establishing eligibility for asylum. The hearing process in practice appeared to undermine the basic procedural protections guaranteed to the applicant by statute — the right to present her case, to be represented by counsel, and to a decision by a neutral adjudicator.[249]

A. The Role of the Trial Attorney

During the hearings observed, the trial attorney's main function was to discover weaknesses in the asylum applicant's case by challenging the credibility of her testimony and written application. Immigration judges generally gave trial attorneys considerable leeway in conducting cross-examination. While an asylum applicant in practice bore a heavy burden of proof, the trial attorney had no defined obligation to rebut, refute, or present any affirmative case. There are no rules or policies governing the shifting or allocation of the burden of proof. There is no definition, for example, of the evidence necessary to establish a *prima facie* case, after which the burden would shift to the government to disprove the claim.[250] Although trial attorneys have a general ob-

cal perspective on the evolution of the immigration judge's role, see Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER REL. 453 (May 2, 1988).

243. ALEINIKOFF & MARTIN, *supra* note 15, at 108-09.

244. 8 U.S.C. § 1101(b)(4) (Supp. 1992).

245. 8 U.S.C. § 1101(b)(4) (1992); 8 C.F.R. § 1.1(l) (Supp. 1992).

246. ALEINIKOFF & MARTIN, *supra* note 15, at 109; *see infra* note 282.

247. *Id.* at 109-10.

248. "An [immigration judge] . . . shall present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses." 8 U.S.C. § 1252(b) (Supp. 1992).

249. 8 U.S.C. § 1252(b) (Supp. 1992); *see supra* notes 21-23 and accompanying text.

250. For a suggestion of this approach, see Kurzban, *supra* note 3, at 113-16.

ligation to represent the public interest,[251] they are not obligated to produce exculpatory evidence and applicants have no right to discovery.[252]

The trial attorneys offered evidence into the record infrequently and the only evidence they introduced was State Department country reports.[253] Significantly, the most important evidence for the government, the State Department opinion, automatically was incorporated into the record. When lawyers challenged the State Department opinion, the trial attorney did not have to defend it. Judges responded that the admission of the opinion letter was required by regulation.[254]

Like their prosecutorial counterparts in the Justice Department, INS attorneys, as representatives of the government, are bound by two professional obligations: to represent their client diligently and to see that justice is done.[255] However, trial attorneys rarely viewed a case as meritorious and thus

251. In criminal cases, since the consequences are viewed as serious and the full weight of the State is brought to bear against the defendant, the government not only has a heavy burden of proof ("beyond a reasonable doubt"), but also must come forward with exculpatory evidence. Asylum cases have been analogized to those criminal cases in which the consequences are particularly significant. *See, e.g.*, Kurzban, *supra* note 3, at 110-17 (comparing asylum cases to death penalty cases).

252. In Hearing No. 163, the government attorney questioned the applicant about being smuggled across the border, apparently relying on the arresting officer's report, which contained statements made by the applicant. The applicant's attorney objected to the use of documents that he had a right to see under the doctrine of Brady v. Maryland, 373 U.S. 83, 86 (1963) (finding that a prosecutor's failure in a criminal case to disclose exculpatory material deprives a defendant of a fair hearing). In response, the judge said: "There is no discovery here."

The only means of discovery generally available in deportation proceedings is the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (Supp. 1991); 8 C.F.R. § 103 (1992). *See supra* note 22 and accompanying text.

Immigration judges routinely denied motions by applicants' lawyers for interrogatories of the State Department to discover the basis and foundation of the opinion letter. The judges responded to any challenge to the State Department letter by stating that the opinion letter was advisory as required by regulation and non-binding. *See, e.g.*, Hearing No. 138. The judges believed that they ultimately made their decisions independent of the State Department's recommendation. *But see supra* notes 74 & 149 and accompanying text.

253. *See* Hearing No. 57B. However, this evidence, when introduced, was treated somewhat casually. When trial attorneys did introduce country reports, those reports at times were out of date or irrelevant to the time period in question. *See, e.g.*, Hearing No. 112 (introducing a country report that was three years old). The case involved a Guatemalan of Mayan origin who claimed persecution during a period when massive atrocities against the Indian population had reached the point that President Carter had suspended foreign aid. *See generally* THE MINORITY RIGHTS GROUP REPORT: THE MAYA OF GUATEMALA, No. 62, 18-21 (1989). The country report related to a later period. Trial attorneys most often introduced country reports to refute the testimony of expert witnesses called by the applicant. *See, e.g.*, Hearing No. 35.

254. *See* Hearing No. 138.

255. The Justice Department regularly faces the inevitable conflict between these two objectives (diligent representation of the government agency and the obligation to see that justice is done). As a result, it commonly declines, in the name of justice as well as the efficient use of budgetary and personnel resources, to prosecute each case to the fullest extent. *See generally* EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS MANUAL, TITLE 9, CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE (1988). This is the prosecutorial analogue to the immigration bar's obligation not to argue frivolous cases. As noted, trial attorneys in immigration proceedings do not concede claims, a practice that a former General Counsel identified as a significant problem. *See supra* note 81. Lawyers representing aliens are

rarely conceded to the granting of asylum. They also generally did not intervene to assist the court or the asylum applicant. In one case, the trial attorney told the study observer of a substantial error of law, but felt it was not his responsibility to inform the court or counsel for the applicant.[256] In another case where the judge had entered an *in absentia* order[257] because the lawyer arrived for the hearing late after attending a social service agency meeting, but stated he would reopen the case if the government agreed, the trial attorney refused. "My client [INS] wants a deport order. We couldn't have done better."[258]

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subject to direct sanctions for frivolous or unethical behavior, but there are no comparable penalties for trial attorney conduct. *See* 8 C.F.R. § 292.3(b) (1988) (repealed 1990) (sanctioning attorneys practicing before immigration judges for unethical conduct); *see also* Immigration Act of 1990, Pub. L. No. 101-649, § 545; 8 C.F.R. § 292.3(b) (1992), *as amended by* Act of Apr. 6, 1992, 57 Fed. Reg. 11,568 (establishing new sanctions initiated by the immigration judges, BIA, or Attorney General against attorneys practicing before the agency who engage in "frivolous behavior" in deportation proceedings). Complaints of frivolous behavior on the part of INS attorneys are to be directed to the Justice Department's Office of Professional Responsibility. *See generally EOIR Publishes Revisions to Immigration Judge Proceedings*, 69 INTERPRETER REL. 445-47 (Apr. 13, 1992) [hereinafter *EOIR Revisions*].

256. Hearing No. 96. In this case, involving an Iranian Jew whose family had played a leadership role in a Jewish group in Iran, the trial attorney did not challenge the applicant's eligibility for asylum. The State Department had issued an opinion letter stating that the applicant had a well-founded fear of persecution in Iran, but suggested that he was firmly resettled in Israel and therefore did not merit protection in the United States and should be denied asylum as a matter of discretion. Thus, the only disputed issues were whether asylum should be granted or denied in the exercise of discretion and whether he should be granted the alternative relief of voluntary departure. (The court granted withholding of departure relief.) *See generally supra* note 12. The applicant had spent some time in Israel (where he had the right to citizenship) before coming to the United States and also had a criminal conviction in the United States for fraudulent use of a credit card. The sentencing judge in the criminal case had issued a formal "judicial recommendation against deportation," which under statutory provisions applicable at the time (8 U.S.C. § 1251 (b)(2) (1988), *repealed by* Immigration Act of 1990, § 505) precluded the use of the conviction as a basis for deportation and under some precedents also precluded its use as grounds for an automatic denial of certain forms of discretionary relief from deportation. *See In re* Gonzalez, 16 I. & N. Dec. 134 (BIA 1977). Despite the granting of the recommendation, the immigration judge found that, based on the conviction, the applicant was statutorily ineligible for voluntary departure relief. *See* 8 U.S.C. § 1254(e) (Supp. 1992) (allowing an alien to leave the United States without the consequences of a deportation order); ALEINIKOFF & MARTIN, *supra* note 15, at 587-598, 600-602. *See generally supra* note 19. The immigration judge also considered the fact of the conviction on his decision to deny asylum as a matter of discretion. The trial attorney commented to the study observer that the judge had made a mistake, and that the lawyer could have argued that the applicant should be awarded voluntary departure as a matter of discretion. However, he did not feel under an obligation to inform the court or the applicant's lawyer of the error.

257. *See* 8 U.S.C. § 1252(b) (Supp. 1992) (allowing for determination at deportation hearing where an alien has been given reasonable opportunity to be present and without reasonable cause fails or refuses to attend); 8 C.F.R. § 3.24 (1988) (repealed 1990) (in effect at the time of the study); 8 C.F.R. § 3.26 (repealed 1990) (instituting changes in authorization for *in absentia* hearings). *See generally EOIR Revisions, supra* note 255, at 446.

258. Hearing No. 193. In another case, a trial attorney commented to an observer that he believed trial attorneys should not oppose cases that were meritorious. Quoting a superior in the INS General Counsel's office, he said "if it's a real asylum case, you'll know it and the government shouldn't object." Hearing No. 88.

The case involved an Ethiopian who testified that he had been imprisoned and severely

The trial attorneys took an oppositional stance in every case.[259] In most cases, including those in which the State Department opinions recommended a grant of asylum, the government did not concede that the applicant merited asylum until after a decision had been issued. In only one case [the Ghanian —— for whom the CJA had intervened] did the trial attorneys concede asylum before the full hearing on the claim was completed.[260] In a meeting between lawyers and trial attorneys, the lawyers complained of this practice, arguing that as representatives of the government, the trial attorneys have a responsibility to see that "justice is done."[261] One trial attorney, while deny-

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tortured as a result of his participation in an opposition political group. The observer noted that he testified well; an expert also testified that the applicant would be killed if he returned. The judge indicated he was inclined to grant asylum and he asked for the trial attorney's position. The trial attorney stated that he initially agreed, but wanted to cross-examine. His cross-examination focused on the applicant's misrepresentations to the United States consul in order to obtain a visa to come to the United States. He also challenged the applicant, who had lived in France before coming to the United States, for not "wait[ing] his turn in line for U.S. refugee processing." He argued to the judge that since the applicant had lied to get a visa and was educated, his entire case could have been fabricated. "He's smart enough to have memorized the country report for Ethiopia." Eventually the judge granted withholding of deportation, but denied asylum as a matter of discretion. *Id.*

259. In all cases but one (*see infra* note 260), the trial attorney decided to pursue the deportation and never conceded to asylum until the hearings were completed. *Compare* Hearing No. 88, involving an Ethiopian applicant, and Hearing No. 96, involving an Iranian Jewish applicant, in which the trial attorney conceded *eligibility* for asylum, but opposed the granting of asylum on discretionary grounds. It should be noted that in all of the other granted cases except one, the trial attorney's office decided not to pursue an appeal either immediately after the judge's decision, or during the appeals process. *See* Hearing Nos. 216, 216B, 216C; *supra* notes 131-33 and accompanying text (adjudicating the Afghanistani case). In that case, the government only contested the granting of asylum on discretionary grounds. The immigration judge's decision granting asylum eventually was sustained by the BIA. *In re* S, (unpublished decision) (BIA Nov. 19, 1990).

The Colombian judge's case illustrates the government's routine oppositional stance. The United States consul had given the judge a visitor's visa to facilitate the judge's departure from Colombia because his life was in danger. The State Department recommended that he be allowed to stay for the same reason. This seemed to be a case in which the government might have considered exercising its prosecutorial discretion to allow the applicant to stay, for example, in an extended voluntary departure status. *See* ALEINIKOFF & MARTIN, *supra* note 15, at 601-02. Instead, when asked by the immigration judge what could be done to resolve the applicant's status, the trial attorney left the courtroom to check with his superiors. When he returned he stated (off the record) that "the position of the U.S. government is that Colombia is a democracy." Hearing No. 227.

260. *See* Hearing Nos. 46, 46B; *supra* notes 116-20 and accompanying text (adjudicating the Ghanaian case in which the government conceded to a grant of asylum after being contacted by the CIA, was the only exception).

261. *See supra* note 255. Meeting of Local Immigration Lawyers Committee and Trial Attorneys, Oct. 13, 1988 [hereinafter Immigration lawyers/Trial attorneys meeting]. Lawyers complained of what they regarded as the trial attorneys' unbending oppositional stance with respect to other matters as well. One lawyer, for example, asked why it was the policy of the trial attorneys to oppose expert witnesses in every case. ("The odds are so much in [the trial attorney's] favor and the respondent has the burden. [Their opposition is] pointless."). Later in the meeting, the same attorney complained that "the trial attorney will ask very detailed questions of the applicant about omissions between the application and the testimony or about exact dates. This is a low blow. Maybe you don't realize what we do to prepare. It's a rare client who reads every word in an affidavit; in Central American cases, they don't read at the level to pick

ing that trial attorneys contested all cases, described the reasons for his contrary conception of his duties. An asylum hearing, he argued, is not a criminal case in which the government has a burden to produce exculpatory evidence or to make choices in the interests of justice and efficiency not to prosecute cases. Rather, it is more like a civil case, in which each side presents its case, and the judge functions as "neutral adjudicator."[262]

There were a number of hearings in which study observers noted that the trial attorney conducted professional, respectful, and efficient cross-examinations.[263] In other cases, however, observers reported that the trial attorney conducted lengthy and aggressive cross-examinations.[264] The trial attorney's manner frequently was hostile, sarcastic, or disbelieving. Trial attorney cross-examination tactics at times included attempting to block the applicant from elaborating or explaining her answer and seemed to have as their purpose portraying the applicant as evasive.[265]

The trial attorneys' cross-examinations usually did not focus on the merits of the applicants' cases, but rather on the moral character of the applicant: *e.g.*, why she told INS officials when she first entered that she had family in the United States when she had none; how and why she had used a false document or a smuggler.[266] Since judges allowed trial attorneys wide latitude in asking these questions, trial attorneys' cross-examination strategies remained seemingly unaffected by decisions of the federal courts and the BIA holding that these issues are not of central concern to the exercise of discretion in asylum cases.[267]

Trial attorneys' questions frequently focused on character issues quite remote from the merits of the asylum claim:[268] why the applicant had not mar-

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up every discrepancy. It's not fair." While the federal and BIA caselaw held that minor discrepancies should not affect credibility (*see supra* note 241), she argued, the trial attorneys had not modified this approach to cross-examination.

262. This trial attorney indicated that he had problems with this conception, but argued that each side had to play designated institutional roles and to treat the hearing like a normal adversarial proceeding. If there is an error, he said, "let the circuit courts decide." Immigration lawyers/Trial attorneys meeting, *supra* note 261.

The trial attorney also discussed his difficulties in litigating asylum cases. "Try to see it from our point of view. All we have is what the border patrol wrote up, which is sketchy, and what you present. Most of the information is self-provided and non-verifiable." He also said that if the State Department issues a favorable opinion, "it always says, 'if the person is credible.' In our experience, the applicant has a paper claim, but can't communicate it, or the paper is a lot more substantial than the case at the hearing." *Id.*

263. *See, e.g.*, Hearing No. 60.

264. Hearing No. 21 (involving a trial attorney who appeared to be trying to structure and sequence questions so that the Haitian applicant who had just testified regarding his brother's torture and murder, would contradict himself and state his brother was alive).

265. *See* Hearing Nos. 5, 7.1, 19.

266. *See* Hearing Nos. 37, 41, 100. Related questioning focusing on why the applicant did not apply for asylum in third countries or immediately upon arrival in the United States.

267. *See generally* ANKER, U.S. LAW OF ASYLUM, *supra* note 19, at 165-71; Anker, *Discretionary Asylum*, *supra* note 12.

268. Hearing No. 164.

ried the mother of his children and why he had left his children behind.[269] In one case involving a Guatemalan university student, the trial attorney's cross-examination focused almost entirely on the applicant's university education: the fact that the applicant switched his course of study from Economics to English (from which the attorney concluded that he must have planned to come to the United States for a long time); that he failed some of his classes (impugning the applicant's character on the grounds that he was not a serious student); and that the student body at his university was known for drug dealing (implying that the applicant must have been involved).[270] In many hearings, the trial attorneys focused on aspects of the applicant's character which put into question her trustworthiness and reliability as a witness.[271] Indeed, most of the questioning, even that which arguably related to the merits of the case, was directed at pointing out inconsistencies rather than exploring the basis of the applicant's persecution claim.[272]

Observers noted that the trial attorneys' cross-examinations often were extensive and detailed, which did not contribute to the efficient resolution of these cases. In addition, as noted, the content of cross-examinations frequently concerned issues not directly related to the merits of the persecution claims. Even when it was clear that the applicant's testimony had not established a claim and/or that the judge was not inclined to grant asylum, the trial attorney would frequently engage in substantial cross-examination. When an observer asked one INS attorney why he did not just rest instead of cross-examining, he answered, "Well, sometimes I think about just resting, but I want to send a message to the judge and to the BIA that I think this case is a

269. Hearing No. 195.

270. Hearing No. 158.

271. *See, e.g.*, Hearing No. 20, in which the trial attorney's cross-examination focused almost exclusively on showing that the applicant had lied regarding his immigration status when applying for educational loans.

272. *Id.* Trial attorney questioning, like judge questioning, frequently focused on the applicant's ability to recollect, in great detail, times, dates, and locations. In one case, an Afghanistani applicant testified that he had been picked up and arrested at work, taken to prison, and subjected to extensive torture, including electric shock to his genitals. The trial attorney asked him how he knew exactly where the prison was located and that he was taken to the political rather than the criminal section of the prison. The applicant had testified that one day he was suddenly taken out of his cell. He had been there a long time; he knew that because his hair had grown so long. The trial attorney asked him exactly how long his hair was when he was taken from his cell. He said he really did not remember. The trial attorney asked him to estimate. He said he really was not paying attention; he was completely fearful since he had no idea why he was being removed from the cell and thought they were going to cut his head off. The trial attorney did not give up, continuing to ask him to estimate the length of his hair at that time. The applicant was educated and unusually assertive in his response: "If I had thought I would be asked the measurement of my hair when I arrived here in court . . . I would have measured it." The trial attorney persisted, asking him to "demonstrate the length." Hearing No. 56.2.

In another case involving a Salvadoran who had described brutal torture including electric shock through cables, the trial attorney challenged him by asking "how did you know there were cables if your eyes were blindfolded?" Hearing No. 85.

piece of crap, that's why I always cross-examine."[273]

Trial attorneys also raised repeated and vigorous objections during direct examination. Although there are no formal rules of evidence in immigration proceedings,[274] trial attorneys made numerous objections to testimony and evidence including narrative answer, hearsay, lack of foundation, and leading question. In many cases, this use of objections made it difficult for applicants to communicate fear and other feelings they had experienced, or simply to present the objective facts upon which their claims were based. The following example was not atypical:

> Lawyer: "Can you describe [the scene]?"
> Applicant (through interpreter): "I was going on the road to San Vicente. We were in a car. There were seven dead people exposed on the road. That was for me . . . I got paralyzed and got close to my father."
> Judge: "I'll have the last part stricken. The last sentence [goes beyond the question asked]."
> Lawyer: "Ok, how did you feel?"
> INS Trial Attorney: "Objection! I think it's been said."
> Judge: "Mr.[INS attorney], I had just struck it [so the lawyer could properly ask the question]."
> Applicant: "I was paralyzed. I asked father what was going on. He told me. . . ."
> INS Attorney: "That answer should be stricken."
> Judge: "Let it stand."[275]

Trial attorneys maintained a similar oppositional position with respect to other evidence and witnesses presented by the applicants. In one case, for example, the trial attorney first objected to several documents because of hearsay problems and a violation of paper size regulations. He then successfully blocked the lawyer's questioning of an expert witness by challenging the witness's qualifications.[276] In another case, the trial attorney refused to stipulate to the witness's qualifications as an expert.[277] In other cases the trial attorney challenged the witnesses' credibility by asking about their association with foreign governments, with international organizations, and with the applicant.[278] Trial attorneys also sought to limit or discredit the witnesses' participation by cutting short their answers (*e.g.*, "only answer the questions"[279]) or by *not* questioning the expert witness at all about conditions in the applicant's home country and thereby indicating to the judge that the testimony was worthless,

273. Hearing No.164.
274. *See supra* notes 22 & 250-52 and accompanying text.
275. Hearing No. 76. At this hearing, the observer counted 29 objections by the trial attorney during one and a half hours of direct examination.
276. Hearing No. 19.
277. Hearing No. 36.
278. Hearing Nos. 35, 7A.
279. Hearing No. 19.

irrelevant, or both.[280]

B. *The Role of the Immigration Judge: Active Inquisitor or Second Prosecutor?*

In deportation proceedings, the judge may either play the role of passive adjudicator or, as permitted by statute, engage actively in the examination of witnesses.[281] In the majority of the observed hearings, the immigration judge did not choose the passive stance, even where the applicant was represented by counsel.[282] Rather, the immigration judge played an active role in questioning the applicant and other witnesses, by interrupting, and by engaging in lengthy questioning during direct or cross-examination or after both attorneys had completed their questioning. In many cases, the judge interrupted and dominated the questioning of the applicant for an extended period of time. Such judicial activism can operate neutrally: a judge can ask questions which both test the veracity of the applicant's testimony and also assist her in developing facts which help establish her claim. However, most judicial questioning challenged the applicant's credibility, memory, and general reliability as a witness.

Judges did affirmatively assist applicants in several cases. This occurred particularly in cases in which the applicant was unrepresented or the judge believed the applicant's attorney was unprepared or inexperienced.[283] In several cases, the judge attempted to assist the applicant in preserving certain procedural rights. For example, in one case, the applicant's representative, a clearly inexperienced non-attorney acting in a pro bono capacity, tried to withdraw the asylum claim because he thought the negative State Department opinion letter in the case was determinative of the claim.[284] The judge would not automatically allow the withdrawal but instead questioned the applicant directly, urging her to wait for his decision (a denial of the claim which he read into the record), and then to decide whether or not to appeal. Following

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280. Hearing No. 36.

281. *See* 8 U.S.C. § 1252(b) (Supp. 1992); *supra* notes 21 & 248-49 and accompanying text.

282. *See supra* note 246.

> [The] broad [statutory] authority for an active or "inquisitorial" role is based, at least in part, on a desire to permit a full development of the record even when neither party — the government or the alien — is represented by counsel. Such a statutory framework, however, has drawn frequent condemnation, not only because it departs from the adversarial model but particularly because it does so in a setting where the decisionmaker, by training and background, may be biased towards enforcement and skeptical of the alien's claims.

ALEINIKOFF & MARTIN, *supra* note 15, at 88 (citing *inter alia* U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 37-43 (1980)).

283. *See, e.g.*, Hearing No. 45. The judge felt that the applicant's affidavit was poorly prepared and that the lawyer was unfamiliar with the law. He continued the case *sua sponte*, admonishing the lawyer to prepare better.

284. Hearing No. 226. Persons who are not attorneys but are accredited representatives employed by non-profit organizations qualified for recognition by the BIA may represent aliens in proceedings before immigration judges. *See* 8 C.F.R. §§ 292.1(a)(4), 292.2 (1992).

the judge's lead, the applicant asserted her right to an appeal.[285]

Judges, however, were not consistently protective of applicants' procedural rights. At the first hearing of another case, the same non-attorney representative stated that he wanted to withdraw the applicant's claim based on a negative State Department opinion.[286] The judge in that case (a different judge) failed to inform the representative or the applicant that a negative State Department opinion would not automatically defeat the claim and the representative withdrew the asylum petition.[287]

In general, judges' activism was not directed at assisting the applicant in developing the substance of her claim. In one of the few cases in this study in which an applicant was not represented by counsel, a young Guatemalan asylum applicant attempted to withdraw his claim based on his assumption that a negative State Department opinion was determinative. He also had received advice from a lawyer who told him that he had no possibility of success. The judge stated that he was impressed by the honesty of the applicant (who readily admitted his inability to produce documentary evidence) and encouraged him to present his case. The applicant appeared to have substantial reasons for fearing return to Guatemala. The son of a union organizer, he had organized student demonstrations against the government while in high school.[288] After high school, the applicant became a seaman and while on board ship he heard that his father had been killed by death squads; he did not return.[289] The judge was respectful of the applicant and went out of his way to grant him voluntary departure,[290] but he did not ask questions in order to clarify the applicant's testimony or to explore the basis of his claim. The applicant was denied asylum and did not appeal.

During testimony in many hearings, the judges did attempt at some points to clarify statements or to help the applicant reconcile apparent incon-

285. Hearing No. 226. In the previous hearing in the same case, the applicant had brought untranslated documents to court which she said supported her claim. The applicant's representative, although he had not read the documents, told the court that he did not think they were relevant and that the applicant was at fault for not producing them in time to have them translated. The judge granted a continuance so the documents could be translated and explained to the applicant the importance of presenting translations of the documents. *See* Hearing No. 3.

286. Hearing No. 198.

287. *See also* Hearing No. 193 and accompanying text (refusing to reinstate hearing when lawyer arrived late after attending social service agency meeting; the judge said that he was sympathetic but was under pressure to start all cases on time and would entertain a motion to reopen only if the trial attorney consented, which he refused to do); *supra* note 258.

288. Hearing No. 48.

289. *Id.* He had testified that in Guatemala when one family member is "disappeared," other family members are disappeared.

290. *Id.* The applicant had been convicted of illegal possession of a shotgun and therefore was not eligible for the discretionary relief of voluntary departure. *See* 8 U.S.C. § 1254(e) (1988) (repealed 1990), precluding from eligibility aliens deportable *inter alia* under 8 U.S.C. § 1251 (a)(14) (1989) (repealed 1988) (conviction of possession of sawed-off shotgun and other weapons). However, the judge argued to the trial attorney that the applicant had been "a lot more truthful than most of the people who come before me" and persuaded the trial attorney not to appeal the decision.

sistencies.[291] However, in several cases, decisions denying asylum cited inconsistencies in testimony that the court had never raised with the applicant nor attempted to clarify.[292]

As discussed above, the judges' basic conception of the hearing and of their role was to "test" — not to help establish — the applicant's credibility. One judge commented to an observer that he wanted to require lawyers to give "opening statements" stating the basic facts of the case. He said that with opening statements, "if he says he has five brothers and later says four, you can test his credibility."[293] The judges' questioning frequently had the quality of cross-examination, focusing on the applicants' ability to remember specific details, particularly numbers, dates, and locations.[294] Some questions focused on the applicants' character, violation of the immigration laws, or other details that were not central to the applicants' persecution claims.[295] As in the case of the trial attorneys' cross-examinations, this type of questioning resulted in an emphasis on the applicant's behavior rather than on political conditions in the applicant's home country. On some occasions, the judge's questioning was outwardly hostile and intimidating.[296]

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291. *See, e.g.*, Hearing No. 15.1.

292. *See, e.g.*, Hearing No. 211; *see also supra* notes 240-41 and accompanying text; *infra* note 419 and accompanying text.

293. Hearing No. 1.

294. *See, e.g.*, Hearing No. 35. The Haitian applicant testified to his family's involvement with an opposition newspaper. The judge questioned him closely about the dimensions, in inches, of the newspaper and the exact number of people who participated in a street demonstration.

295. *See, e.g.*, Hearing No. 7A. Following questioning by the lawyer and the trial attorney, the judge asked a series of questions focusing on details in the applicant's story, particularly dates and locations in Sri Lanka. The judge asked the applicant why he had changed jobs and residences within Sri Lanka. He also asked a rapid series of personal questions: "have you ever been married?"; "do you suffer from any health problems?"; "do you have difficulties recalling past events?"

296. The conduct of one of the judges in the immigration court studied in an Afghanistani case, which became something of a *cause celebre*, was described as follows by an obviously shocked newspaper reporter:

> [The applicant] broke down and wept after yesterday's court hearing before an immigration judge who had smiled, chuckled, shaken his head and rolled his eyes during portions of [the applicant's] testimony . . . . [The judge] suddenly interrupted [the cross-examining government attorney] and, for more than 30 minutes, questioned [the applicant] himself, often yelling, and ask-ing [sic] the same question repeatedly. [The judge] suggested that [the applicant] was being 'evasive' and not 'responsive' to questions designed to determine whether his testimony was believable. During the hearing, [the judge], who . . . serves the U.S. Justice Department, interrupted the proceedings on several occasions to scold either the translator . . . or the attorney representing the Afghans.
>
> [The attorney], through the translator, had asked [the applicant] how many passengers were aboard the TWA flight last November. [The government attorney], whose immigration agency is also a branch of the Justice Department, did not object. [The judge] intervened and did [object].
>
> "We'll never get to resolve whether your clients will get asylum at the rate you're going," he told [the lawyer] during an argument about the relevance of the question . . . . The judge warned [the lawyer] not to "lecture' him about immigration . . . .
>
> Newspaper article, Apr. 25, 1986, at 17 (name of newspaper withheld in order to

In addition to challenging the applicants' ability to remember details of their stories, the judges sometimes acted to limit the scope or importance of evidence or witnesses the applicants introduced. The judges regularly admonished applicants or witnesses to limit their testimony by directing them to "answer the question,"[297] to use the "translator,"[298] by preventing a witness from speaking,[299] or by criticizing the lawyer for asking several questions on the same topic.[300] Although in some cases judges ruled against trial attorneys as well,[301] the impact of the judges' limiting strategies was felt primarily by the applicants.[302] For example, judges often played a more passive role where a relatively inexperienced or unaggressive lawyer engaged in only brief questioning of the applicant.[303]

In some cases, the judges more explicitly adopted the cross-examination stance of the trial attorney. In one case, for example, the judge prevented the applicant's lawyer from questioning her own witness, but then proceeded to ask the witness a series of questions.[304] In another case, when the trial attorney did not cross-examine an expert witness, the judge proceeded to question him on his own using a style of questioning resembling cross-examination. The judge's questioning emphasized, for example, possible economic motivations in the applicant's flight.[305] In some cases, judges even took the

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preserve the anonymity of the location of the court and participants. Copy of article with identifying information deleted available from author.)

297. Hearing Nos. 5, 19.

298. Hearing Nos. 123, 9.

299. Hearing No. 19.

300. Hearing Nos. 123, 7A.

301. *See, e.g.*, Hearing No. 163.

302. One judge from another court said that he experienced a great deal of pressure from the Office of the Chief Immigration Judge to move cases forward and that this led to procedurally flawed hearings and possibly erroneous denials of asylum. The interviewer asked him why efficiency pressures that were on their face "result neutral" led to denials on the merits. He answered that if he started granting a large number of cases, "the trial attorney would start fighting back and engaging in lengthy cross-examinations." Interview with Immigration Judge, American Immigration Lawyers Association Annual Convention in Philadelphia, Pa. (June 18, 1987).

303. *See, e.g.*, Hearing No. 5A. In contrast, one judge seemed to play a more passive role where applicants were represented by counsel who appeared experienced and competent. Hearing No. 43.3.

304. Hearing No. 19.

305. Hearing No. 36. The applicant, a former Ethiopian government official called the witness, an anthropology professor specializing in Ethiopian cultures. On the issue of expert qualifications, the trial attorney asked a series of questions challenging the witness as "not an expert on governmental structure in Ethiopia." The judge, while accepting him as an "expert," limited the scope and weight of his testimony. The applicant's lawyer examined him, and the witness testified as to the poor human rights record of the Ethiopian government and the treatment of dissidents in that country; he also testified that a former government employee who returned would be considered a traitor and would be "in deep trouble."

After the trial attorney declined to cross-examine the expert (presumably thinking him completely discredited by the showing that he knew the applicant and his family), the judge questioned him. The judge asked a series of questions designed to elicit the witness's opinion that the applicant could not have obtained a job in the Ethiopian government if he had been a dissident ("wouldn't former government officials be welcomed back"), that he might have had

prosecutorial lead; in several cases they "moved to strike" an applicant's testimony *sua sponte*.[306]

The judges appeared sensitive to the constraints faced by trial attorneys in several ways. For example, when applicants attempted to introduce affidavits of experts or other witnesses, judges refused to admit them if the trial attorney asserted that the government's "right to cross-examine" was being violated.[307] The court did not allow expert witnesses appearing on behalf of applicants on a volunteer basis to testify "out of turn" (although this meant that they would have to come back to court on another day), because it would interfere with the trial attorney's ability to cross-examine immediately, while direct examination was fresh in her mind.[308]

In several cases, whenever a judge had decided or was inclined to grant asylum, he asked, off the record, for the trial attorney's position;[309] occasionally, when the trial attorney was opposed, the judge attempted to persuade her to concede.[310] In some cases, asylum was granted without the trial attorney's consent, but the judge was reluctant to have the INS appeal a decision and risk reversal.[311] One lawyer stated that a judge told her that he would never grant asylum if the INS was opposed.[312] However, this position is not universal; judges did grant asylum despite trial attorney opposition and in some cases overruled trial attorney objections and limited their cross-examinations.

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an economic motivation for leaving (eliciting testimony that Ethiopia's economic situation is among the worst in the world and asking "wouldn't the U.S. be attractive to anyone from Ethiopia"), and that the applicant was now in danger only because he was refusing to return. *Id.*

306. *See, e.g.*, Hearing No. 155. The judge frequently interrupted at the beginning of the applicant's direct examination to say that the information was in the petitioner's affidavit. After this had occurred a number of times, the trial attorney began to object to the applicant's mentioning events that had appeared in the affidavit.

307. Hearing No. 160. In this case, involving a Polish applicant whose claim had received a positive State Department opinion, the judge denied the pro bono counsel's request for a continuance based on the fact that the applicant had not been aware of the hearing date and had moved out of town. The applicant had testified and presented all his evidence. The judge denied the application on the ground of lack of prosecution because of violation of the trial attorney's right to cross-examine.

308. Hearing No. 161.

309. *See, e.g.*, Hearing No. 165.

310. *Id.* In this case, the judge seemed particularly interested in the trial attorney's opinion and guidance. The case involved an Iranian doctor, whose claim was based on his Kurdish minority status, his family members' participation in the Kurdish opposition movement, the execution of several family members, and his own arrest and torture; his family had also worked for the Shah. The judge first asked the trial attorney for his opinion. The trial attorney answered that he opposed a grant of asylum. When the judge asked specifically about a "discretionary grant," the trial attorney elaborated his reasons for opposing asylum. The judge asked the trial attorney how he regarded the applicant's testimony that the Khomeini government was still looking for him; the trial attorney continued to express his opposition, and the judge denied asylum.

311. As noted, the trial attorneys did agree to the granting of asylum in the sense that they did not pursue appeals in six out of the seven cases in which the immigration judge granted asylum. *See supra* note 259.

312. American Immigration Lawyers Association, Local Chapter, Meeting with immigration judges (Nov. 17, 1988).

But with respect to many issues and practices in the immigration court studied, the judges' independence from the INS and its prosecutorial role remained problematic.

C. *The Role of the Lawyer*

Since judges in practice often may impose an exaggerated burden of proof, and judges and trial attorneys both may play a prosecutorial role, access to representation may unfairly skew outcomes of asylum cases.[313] The *presence* of counsel certainly is not sufficient for a fair process and outcome in meritorious cases, but the *absence* of counsel in most cases may be determinative of a negative outcome irrespective of the merits of the claim. Even though in the immigration court studied only seven applicants were granted asylum, in those and other cases counsel played a critical role in presenting the applicant's case as well as in creating a record for appeal. In many cases involving inappropriate denials, the Board of Immigration Appeals has sustained appeals by asylum applicants,[314] and federal courts also have reversed the Board.[315]

In every case in this study in which asylum was granted, the applicant was represented[316] vigorously by experienced counsel who had thoroughly prepared the applicant and gathered and presented corroborative documentation.[317] For example, the substantial and facially meritorious claim of the un-

313. In the vast majority of the cases observed during this study, the applicant was represented by counsel. According to data gathered in the course of the study, of the 193 hearings observed, pro bono projects represented 37 applicants, legal and refugee services agencies represented 64, private immigration practioners represented 68, other lawyers represented 10; in 14 hearings lawyer affiliation information was recorded as inapplicable or unknown. It is important to note that in many parts of the country where asylum hearings are held, access to attorneys is limited and many asylum applicants are not represented. *See generally supra* notes 87-88.

314. *See, e.g.*, Hearing No. 49 (immigration judge decision denying Afghanistani application reversed by the Board).

315. *See generally* Carolyn P. Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327 (1986); *supra* notes 100-02 and accompanying text.

316. Even for the two petitions which succeeded irrespective of their merits or the Board's legal standards, the fact and even the quality of representation was critical. In the Nicaraguan's case, the lawyer had prepared a detailed affidavit which was sent to the State Department which issued the determinative favorable advisory opinion. *See* Hearing No. 65B, *supra* notes 113-15. In the Ghanaian's case, the applicant's lawyer first raised the connection to the CIA and initiated that agency's contact with the trial attorney. *See* Hearing Nos. 46, 46B, *supra* notes 116-20.

317. The fact of representation and the depth and quality of the representation may be most critical in cases of certain nationalities. In the one Salvadoran case that resulted in a favorable decision, the lawyer had done an extraordinary amount of work, including contacting and obtaining affidavits from witnesses in El Salvador. *See* Hearing No. 213, *supra* notes 139-47. It seems unlikely that that case would have resulted in a favorable outcome (or that the applicant would have received a favorable State Department opinion) without that quality of representation. (Indeed, one judge commented that he paid particular attention to positive State Department opinions in Salvadoran cases, because they were so rare.) *See supra* note 149.

represented Guatemalan student activist[318] (one of the few hearings in this study involving an unrepresented applicant) was left entirely unexplored by the judge; this demonstrates that judges, protective as they sometimes may be of the applicants' procedural rights, are not an effective substitute for counsel. This conclusion is consistent with the findings of the Government Accounting Office, which, in studying a broad national sample of asylum cases, found a very strong statistical correlation between representation and favorable decisions.[319] Indeed, it simply may not be reasonable to expect an immigration judge or other adjudicator to be in a position to assist the asylum applicant in developing her claim, particularly given the judge's primary role as adjudicator.[320]

Counsel's role is also critical because of the time required for and the difficulties inherent in preparing asylum claims. In the cases observed, materials submitted in advance of the hearing commonly consisted of the application form, an affidavit, additional supporting documentation and in some cases, applicants presented the testimony of expert witnesses at hearings.[321] Lawyers reported that it took at least forty hours to prepare the written application and the asylum applicant for her hearing, especially since immigration judges cited inconsistencies between the oral testimony and written applications as well as in the oral testimony itself as central bases for negative decisions.[322] Lawyers also played an essential role in correcting problems that arose in the course of the proceedings. Bilingual lawyers who corrected interpretation errors and resisted judicial pressure not to interfere with the interpretation process salvaged testimony that in many cases was critical to their clients' claims.[323] The emphasis on subjective fear in the legal standard, the necessary reliance on testimonial proof, the informal imposition of *ad hoc* and restrictive evidentiary rules, and the prevailing requirement of corroborative documentation also make it critical that applicants receive assistance in the preparation of their claims and during the hearing.

Despite these indications of the importance of the role of counsel, the adversarial nature of these proceedings and the applicant's statutory right to be represented, judges were ambivalent about the lawyer's role. As noted, judges believed that asylum claims are "straightforward" cases to be adjudicated on the basis of written applications.[324] They often did not believe that there was any need for the applicant to present her oral testimony; the most important function of the hearing was to subject the applicant's claim and

318. Hearing No. 48; *see supra* notes 288-90, and accompanying text.

319. GAO, ASYLUM STUDY APPROVAL RATES, *supra* note 9.

320. *See supra* notes 57-60 & 89 and accompanying text.

321. Although the data were not systematically recorded to the case files, records indicate that expert witnesses and/or affidavits were presented in at least 25 cases.

322. *See, e.g.*, Interview with lawyer (Dec. 14, 1988).

323. *See infra* Part V & notes 349 & 365.

324. *See supra* text accompanying note 196.

testimony to trial attorney cross-examination and examination by the judge.[325] The judges viewed most of what lawyers do (e.g., the presentation of expert witness testimony and even the presentation of the applicant's own testimony) as dilatory and unnecessary.[326] One judge was convinced that cases could be much more quickly and justly resolved if judges actively took over hearings and questioned the applicant with little interference from lawyers.[327]

The question of delay and dilatory tactics is obviously an important one. Assessment of whether lawyers "stretched out" testimony (in order to have a case continued to another day) depends on a judgment of what is relevant to the resolution of an asylum claim.[328] For example, lawyers frequently requested continuances to permit the presentation of expert testimony.[329] If an understanding of human rights and persecutory practices is fundamental to an evaluation of claims, such evidence is critical. Indeed, at a national meeting of the American Immigration Lawyers Association, a BIA member chastised lawyers for not presenting country condition information and was incredulous when lawyers protested that immigration judges either prevented or strongly discouraged the introduction of that kind of proof.[330]

Moreover, lawyers were not the major cause of delay in the process. In less than one percent of the continued cases were those continuances attributable to the lawyer's or the applicant's failure to appear. In the majority of cases continued for further hearing, the immigration court had not allocated a sufficient amount of time for the completion of testimony.[331] Judges routinely calendared cases for one to three hours;[332] almost inevitably, direct and/or cross-examination was not completed in the amount of time allotted. Had whole

325. *See supra* notes 231-41 and accompanying text.

326. *See generally supra* Part II.

327. One judge stated that he thought lawyers generally obstructed the adjudicatory process by presenting expert witnesses and attempting to elicit testimony from applicants that did not relate to the "factual basis of the claim." He believed in the inquisitorial model and in "keeping the lawyer out of it." Interview with judge (June 10, 1987).

328. One lawyer, however, stated that he deliberately engaged the judge in arguments about the law in order to have the case continued to another day. The judge in these cases also permitted the strategy to work. He commented during an interview that with time, asylum applicants become eligible for other benefits. To put it briefly, the judge said, "Same tune, different lyrics." Hearing No. 24.

329. *See* Hearing Nos. 51, 86, 109; *supra* notes 191-95 and accompanying text. Lawyers also requested continuances in order to obtain new State Department opinions. These were requested on several occasions following the Supreme Court's decision in *Cardoza-Fonseca*. *See, e.g.*, Hearing No. 132. Lawyers argued that a new opinion letter was necessary because the State Department opinion was based on the wrong legal standard. Lawyers also requested new State Department opinions in which the applicant's particular circumstances had changed, e.g., a close relative had been killed or where general political conditions in the home country had changed. Immigration judges almost invariably denied requests for continuances on these grounds. *See, e.g.*, Hearing No. 169.

330. 1989 American Immigration Lawyers Association Annual Convention in Washington, D.C. (June 7-11, 1989), Asylum and Refugee Panel (June 7) (tape available from the Association).

331. *See supra* Table 8, notes 80-83 and accompanying text.

332. *See supra* Table 9.

days been scheduled, almost all of the cases could have been resolved in one day, or perhaps with one or two continuances if an expert was not immediately available. When immigration judges granted continuances, the long period of time before the next hearing usually resulted from backlogs in the court's calendar, not from the lawyers' request for an extended period of time.

Lawyers did experience a high level of frustration in their representation of clients in asylum hearings. Clients could not recount the facts of their claims in a linear manner. Counsel rarely was able to conduct a complete examination; trial attorneys vigorously objected to the form of questions, and judges took over the questioning of the applicant for lengthy intervals. Rulings were *ad hoc*; for instance, it was difficult to know in advance whether or not the immigration judge would allow the testimony of an expert witness, admit an expert affidavit into evidence, or allow an applicant to testify about critical facts not included in the affidavit.

Moreover lawyers felt that the results were preordained in most cases;[333] the immigration court granted few asylum claims. Two troubling consequences flow from the great difficulty of success at the hearing level. First, some lawyers were discouraged from asserting and protecting their clients' rights. While many lawyers provided excellent quality representation,[334] many who believed in the merits of their clients' claims fell victim to a certain defeatism. For example, many lawyers neglected to make formal objections to the qualifications of interpreters or (to a lesser extent) to the State Department opinion, even though lawyers could have made these objections in virtually every case.[335] Similarly, in all the hearings observed, only one lawyer[336] objected to the judge's implicitly deprecating characterization of documentary evidence regarding human rights practices and political conditions as "background," although many lawyers introduced this documentation into evidence and clearly believed it was relevant. Over other more particular matters —

333. Trial attorneys characterized lawyers for asylum applicants as "merchants of time." Hearing No. 9 (comment by trial attorney after the hearing). Lawyers clearly did know that the possibility of establishing a successful claim was extremely remote. The comments of many lawyers indicated that more often than not they were going through the motions of presenting a case to create a record with the hope of ultimate vindication in federal court. *See infra* note 339.

334. Although relevant quantitative data were not maintained, many observers noted that the most consistent quality of effective representation was provided by legal services and pro bono attorneys. The quality of representation by private attorneys varied considerably. Some provided excellent representation; others appeared to be unfamiliar with their clients' claims and in some cases hostile to them. There were hearings in which law student observers noted that direct examination sounded like cross-examination (e.g., it was hostile and undermining of the applicant). *See supra* Table 8. For examples of poor quality representation, see Hearing Nos. 17, 18, 45.1.

335. For the types of objections lawyers could make to State Department opinion letters, see, e.g., Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976) (finding that State Department opinion letters too often communicate a conclusion of an "adjudicative fact"; such a conclusion, given undue weight, is inappropriate and unfair to the applicant who has no right to cross-examination). *See generally supra* note 73.

336. Hearing No. 157.

pursuing a line of questioning or objecting to trial attorney questioning, improper judicial conduct or interference in the presentation of testimony — even the lawyers who appeared most committed to their clients' interests often acquiesced.[337] One supervising attorney of a *pro bono* project commented that it was hard to sustain the involvement of volunteer counsel; the virtual impossibility of success caused *pro bono* counsel to become easily discouraged.[338]

The second consequence is the flip side of defeatism; the process encourages lawyers to treat their clients' cases and the court's processes cynically.[339] Ironically, lawyers who deliberately did not prepare or present a credible case behaved in exactly the manner the court seemed to prefer. They presented a bare-bones application, questioned their clients minimally, if at all, and made few objections during cross-examination. The hearings were completed in an hour, possibly two, and an appeal was filed. The court's narrow and restrictive view of eligibility rewarded cynicism and condemned vigorous and professional representation.

V

THE DETERMINATION OF CREDIBILITY

A. Language Interpretation Issues

Many asylum applicants are recent arrivals to the United States and do not speak or understand English well enough to participate in their hearings without the assistance of an interpreter. Commentators,[340] federal courts,[341] and the BIA[342] have recognized the importance of an interpreter in ensuring the fundamental fairness of the hearing in deportation and asylum cases. In

337. *See, e.g.*, Hearing No. 150 in which a lawyer who, the observer noted, was doing an excellent job examining her client, asked the study observer during the break whether she should pursue a line of questioning relating to the applicant's fears about returning. She answered her own question: "Why bother, they'll just get all over me."

338. Interview with lawyer following Hearing No. 164.

339. One such lawyer frankly described his view of asylum: "[A]sylum cases are buy-time-in-order-to-get-a-labor-certification" proceedings. Hearing No. 169.

340. *See* Marilyn R. Tayler, *Interpretation/Translation Assistance in Immigration Proceedings, in* 2 IMMIGRATION AND NATIONALITY LAW 9 (Edwin R. Rubin & Robert E. Juceam eds., 1988); Deborah E. Anker & Roberta Rubin, *The Right to Adequate Translation in Asylum Proceedings*, 9 IMMIGR. J. 10 (July/Sept. 1986); Walter Kalin, *Troubled Communication: Cross Cultural Misunderstandings in the Asylum Hearing*, 20 INT'L MIGRATION REV. 230, 233 (1986). *See generally* SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS (1990); JUDITH N. LEVI & ANNE G. WALKER, LANGUAGE IN THE JUDICIAL PROCESS (1990).

341. *See* Augustin v. Sava 735 F.2d 32 (2d Cir. 1984) (holding that asylum applicant was denied procedural rights protected by statute and regulations; where interpretation of asylum hearing was nonsensical, the accuracy and scope of the hearing translation were subject to grave doubt; applicant misunderstood the nature and finality of proceedings, and a credible claim which developed following interpretation was not reviewed); *see also* Haitian Refugee Ctr. Inc. v. Nelson, 872 F.2d 1555 (11th Cir. 1989), *aff'd*, 111 S. Ct. 888 (1991) (upholding federal court jurisdiction in a class action alleging INS violation of Haitian applicants' due process rights through *inter alia* its failure to provide competent interpretation in its implementation of the farm workers legalization program).

342. *See, e.g., In re* Tomas, 19 I. & N. Dec. 464, 465 (BIA 1987) (holding that an inter-

136 of the 193 hearings, the immigration court required the participation of a foreign language interpreter.[343]

The foreign language interpretation provided in the asylum hearings raised two major issues. First, the immigration court provided poor quality foreign language interpretation for the majority of applicants. In most cases where a bilingual observer was present, the observer noted substantial deficiencies in the quality of interpretation.[344] Second, the immigration court did not provide applicants with simultaneous or complete interpretation of the proceedings.[345] Although the BIA sometimes has articulated the purpose of interpretation in participatory due process terms,[346] the goals of facilitating the court's processes and assisting the immigration judge seemed to take priority over promotion of applicants' participation.[347] The position of the EOIR is that the applicant is entitled only to interpretation of questions directed to her and her responses.[348] In several cases, lawyers attempted to use their own interpreters to provide complete interpretation to the applicant, to monitor the quality of the court's interpreter, and to correct inaccurate interpretations. This was sometimes allowed,[349] but often discouraged.[350] Such assistance,

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preter is necessary for non-English speaking respondents to "meaningful[ly] participat[e] in certain phases of the hearing and to insure the fundamental fairness of the proceedings").

343. Interpreters of 15 different foreign languages were used in 136 out of the 193 hearings observed. *See supra* Table 3.

344. Bilingual observers measured interpreter quality based on 14 types of interpreter errors. These were: misinterpretations of specific words; skipped words; skipped testimony; cutting off an applicant's testimony; inarticulate speech (interpretation correct but compromised by bad delivery); incoherence (caused by interpreters' choppiness); improved testimony; diluted testimony; lengthened testimony; shortened testimony; hyperliteral but idiomatically incorrect interpretation; use of false cognates; misinterpretation based on cultural assumptions of interpreter; testimony modified to conform to interpreter's expectations of what would be said next. Bilingual observers who were not certified court interpreters recorded these errors. *See supra* Table 5.

345. *See supra* note 61.

346. *See In re* Tomas, 19 I. & N. Dec. 464 (BIA 1987); *supra* note 342.

347. *See* Hearing No. 230. Responding to a lawyer's motion for simultaneous interpretation of the proceedings for the applicant, the judge ruled that "It is not the function of the interpreter to answer questions of the respondent." This is the official position of the EOIR. *See* El Rescate Legal Services, Inc. v. EOIR, 727 F. Supp. 557, 560 (C.D. Cal. 1989), *rev'd*, 959 F.2d 742 (9th Cir. 1991). The court quoted the EOIR's response to an interrogatory:

> Our policy is that the portions of the proceeding that are related to a witness, whether it be a respondent or another witness needing language translation, will be interpreted consecutively for the record, and their primary purpose is to assure that the official record will be available for review in English.

Id.

The EOIR explained that the same policy of non-interpretation applied to a witness's English testimony for the benefit of the alien, argument of counsel, and objections of counsel because "[i]t is not necessary in order to have the official record be in English so that the decision-makers can adequately review it in making their decision." *Id.*

348. *See supra* note 61.

349. The court allowed bilingual attorneys to participate actively in correcting interpreter errors in several cases which the court appeared to view as strong because of a positive State Department opinion or related reason. *See, e.g.*, Hearing Nos. 208, 227.

350. In one hearing, a Spanish-speaking lawyer who attempted to object to interpretation errors made by the court interpreter was sharply admonished by the immigration judge, "If you

which provided simultaneous interpretation at no expense to the court, in most cases was permitted only on the condition that it not interfere with the recording process and the court interpreter's predominant role.[351]

The immigration court has two sources of interpreters: staff interpreters, having clerical responsibilities who generally interpret for Spanish-speaking applicants, and interpreters obtained through a contract with Berlitz.[352] There was no standard selection or training system for staff interpreters. Staff interpreters appeared to appreciate the importance of their interpreting duties, but during interviews[353] they complained of their lack of training and status.[354] One stated frankly that, due to lack of training, she did not believe

want to translate go to Berlitz." Hearing No. 201. In *El Rescate*, 727 F. Supp. at 563, the government argued that full interpretation was not necessary if an alien is represented by counsel, particularly if counsel speaks the client's language. In the study sample, the lawyer appeared to understand the applicant's native language in only 36 out of 152 hearings in which observers recorded data or considered the lawyer's knowledge of the applicant's native language relevant or applicable there were few attorneys who spoke their clients' language fluently.

351. For example, after the conclusion of one hearing, the lead attorney in a refugee advocacy agency asked the judge if in the future bilingual paralegals from her agency could sit next to the applicant and provide simultaneous interpretation. The judge stated he did not object, but also did not want to encourage a "war between the translators." Hearing No. 13. Another judge did not permit volunteer simultaneous interpretation and in some cases did not permit bilingual attorneys to correct interpretation errors. *See supra* note 350.

The court's predominant concern with the recording of the proceedings resulted in an informal norm of monolingualism in these proceedings. In several cases, for example, the applicant could speak some English and would occasionally answer in English. However, the immigration judges frequently warned applicants not to speak in English, because doing so would "disrupt the record." *See, e.g.*, Hearing No. 162.

352. Information obtained from the Office of the Chief Immigration Judge, EOIR (Apr. 6, 1988).

353. Interviews were conducted with three of the staff interpreters at the court. (The fourth was only employed at the beginning of the study period and was not interviewed concerning his interpreter role.) One had graduated high school and was native Spanish-speaking. Another studied Spanish throughout high school and for two years in college and studied in Spain. The third also had studied Spanish in high school and in Spain and was married to a native Spanish speaker.

354. Interviews were conducted on May 16, 1988 and June 22, 1988. Two of the staff interpreters expressed significant frustration concerning the lack of training, support (other than from the local judges, whom they felt were respectful of them and supportive), and criteria for selection. One criticized the hiring process: she was interviewed in Spanish for "five minutes" by someone who spoke poor Spanish, by someone else in Spanish for another five minutes, and then did some typing. Another described a process involving a mock hearing in which she was asked to play the role of interpreter and was evaluated by the other two. Interview with interpreters (May 16, 1988).

As indicated, all three interpreters interviewed expressed a strong appreciation for the importance of their jobs. They felt, however, that their work was undervalued and they were underpaid (they stated that the highest salary they could obtain was $15,000 — "We make a salary less than most secretaries do in the Department of Justice. . . . We're like the lowest of the low.") *Id.* One commented: "We should have professional interpreters, not just people who [are] really just [receiving] on-the-job training." *Id.*

The interpreters were frustrated in part by the pressure created by what they characterized as clerical understaffing which resulted in significant clerical duties for each. One described the allocation of responsibilities as "30% interpreting and 70% clerical." Interview with interpreter (June 22, 1988). They also alluded to problems they experienced in their dual positions as court employees and as interpreters. One clerk described an important element of interpreting as

herself competent to interpret.[355] The competency of the Berlitz interpreters was not ascertained in advance nor monitored.[356] The immigration court generally did not give interpreters instructions[357] before or during the proceedings.[358]

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remaining "neutral . . . I don't want to be looked at as Department of Justice, but as an interpreter for this person. At the same time, I don't want the Department of Justice to think I'm there to work for the alien." Interview with interpreter (June 22, 1988). *See* Tayler, *supra* note 340: "The degree of professionalism required of court interpreters cannot be overstressed. The qualified interpreter must be adept at working with multilingual attorneys, judges, witnesses, and parties. The interpreter must be continually alert to cultural differences and dissimilar legal systems which may lead to differences in thought patterns and responses." *Id.* at 14. Two of the interpreters complained that the dictionaries with which they were provided were inadequate, noting that during hearings they often could not find the words they needed. Interview with interpreters (May 16, 1988).

355. Interview with interpreters (May 16, 1988).

356. *See* Hearing Nos. 6, 224, 307. Although bilingual observers noted errors in hearings interpreted by both staff and contract interpreters, contract interpreters had some difficulties which apparently related to their lack of experience with the court and its procedures. For example, judges often reminded them to interpret everything the applicant said. *See* Hearing No. 224. Contract interpreters often conversed with the applicant before a response was interpreted into English, although they were at times admonished not to do so by the judges. *See, e.g.*, Hearing No. 307. In several hearings, when asked about the content of such a conversation, the interpreter responded that she was trying to "verify" what the respondent had said. *See* Hearing Nos. 151, 154. Contract interpreters frequently used the third person ("she said . . .") when interpreting the applicant's testimony. Hearing No. 307. For specific problems relating to interpreters from the same country as the applicant, see Hearing Nos. 6, 224.

357. The only regulation that governs interpreters in immigration hearings is general and directed exclusively at contract interpreters; court interpreters who are not federal employees must swear "to interpret and translate accurately." 8 C.F.R. § 3.21 (1992).

358. Although the court did not formally instruct interpreters, judges did seem to have an implicit conception of the interpreter's role. Judges would correct interpreters when they deviated from this unstated norm. For example, judges told interpreters to interpret "word for word" and not to add or change anything. Judges also told interpreters not to conduct conversations with the applicant which were uninterpreted to the court, although they were at times permitted to converse for short periods of time. In most cases, immigration judges corrected interpreters when they used the third person in interpreting an applicant's response. *See, e.g.*, Hearing No. 59.

The judges repeated the standard of "word for word" interpretation, and it led to substantial difficulties, including hyperliteral interpretations, particularly of regional terms, resulting in misinterpretations in some hearings in which the interpreter apparently was familiar with the term's regional or contextual meaning. For example, one interpreter described a hearing in which a dispute arose regarding the interpretation of the word "*fracaso*," which she said literally meant "failure." The interpreter had rendered the applicant's statement as "I left my canton because I didn't want to have a failure . . . [*fracaso*]." The lawyer claimed the correct interpretation was "physical harm." The interpreter said she knew this is what the applicant meant but in the dictionary the word is translated as failure. She felt the lawyer should have instructed the applicant to use a different word. "You have to translate exactly what he is saying even if you feel he means something else. Otherwise you might guess wrong. . . . You must use the same exact word he uses, what he says, not what he means to say. Most of the time, the respondents are not well-educated. They don't say what they want to say or in the order that they want to say it. I knew the guy . . . wanted to say physical harm, but that's not what he was saying." Interview with interpreter (June 22, 1988).

The same interpreter described another dispute at a hearing involving the interpretation of the word "*cuartel*." She interpreted it as "the police station, or the barracks." This rendition — providing two alternative words — among other problems, appeared to observers to make the applicant's testimony seem vague and uncertain. The lawyer corrected her and said the

Language interpretation problems can affect substantially the accuracy of oral testimony and the assessment of the applicant's credibility.[359] There are inherent problems in the interpretation enterprise which may be exacerbated by untrained interpreters.[360] Interpretation results in the applicant's removal from direct participation and communication with the judge. The interpreter's words become those of the applicant, her voice becomes that of the applicant, and interpreter errors may be attributed to the applicant.[361] The interpretation process required the applicant to testify in short segments; interpreters frequently interrupted the applicant to use dictionaries to find the meaning of words; and judges also frequently interrupted during direct examination. These obstacles were exacerbated when the interpreter was on the telephone, a procedure followed in some cases.[362] As a result of these difficulties, the applicant's testimony became fragmented or lost.[363]

Bilingual observers noted that foreign language interpretation regularly suffered from inaccuracy, and other problems which affected the applicant's ability to convey subjective fear, or to recount the basic facts of her case in intelligible form. In many cases interpretation errors had a clear and substantial effect on a judge's decision to deny asylum.[364]

1. Common Interpreting Errors

Among the most common errors was the failure to interpret or misinterpretation of regional terms.[365] In two Haitian cases, the applicants testified

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word meant "army barracks." "The problem was the respondent didn't specify, so I said either . . . I have to translate the exact words, [and] words that are regional are difficult." *Id.*

This understanding of the interpreter's role is not necessarily consistent with that of professionals in the field. *See, e.g.*, Tayler, *supra* note 340.

> The interpreter does not simply look for word-for-word equivalence. In fact, the term "word-for-word translation" is a misnomer. Rather, the interpreter must accurately convey meaning, viewed in terms of units of thought. Geographical variations, dialect, educational level, register, specialized terminology, untranslatable words or phrases, and style are all integral components in the choice of expression. This level of specialized knowledge is necessary if the precise meaning of what is said is to survive the language barrier.

Tayler, *supra* note 340, at 13.

359. *See generally* Tayler, *supra* note 340, at 7; Kalin, *supra* note 340, at 233.

360. *See* Tayler, *supra* note 340, at 57.

361. *See* Hearing Nos. 10, 13, 197A (involving an interpreter's apparent inexperience and insecurity which resulted in her ending sentences with a questioning, upward inflection).

362. *See, e.g.*, Hearing Nos. 16, 96, 154.

363. *See* Hearing No. 161.

364. *See, e.g.*, Hearing Nos. 5, 152, 154.

365. Judges frequently encouraged interpreters who were having difficulty to continue interpreting despite their uncertainty. As a result they would attempt some interpretation, even if it was incorrect. Two examples from Hearing No. 54 are illustrative. In this case, the lawyer was fluent in Spanish, knew her Salvadoran client's case, and was confident enough to make corrections.

The case was based on the involvement of the applicant's husband in *Orden*, a right-wing organization in El Salvador associated with death squad activity. The husband was an abusive alcoholic and threatened to denounce her as a guerrilla supporter. One day, when he was away, the guerrillas came to their house and scared her into giving them food.

that they and their families had been accused of being "*kamoke*," which in the Haitian language, Creole, means traitor or enemy of the state. The interpreter (a Haitian) repeated the word without interpreting it. In one case, the interpreter asked the judge if he knew what it meant. The judge responded, "Don't worry, just translate," and the interpreter consequently continued to use the term without interpreting it. The meaning of "*kamoke*," although critical to the applicants' asylum claims, both of which were denied, was left unexplained throughout the hearings.[366]

Although they recurred frequently, many regional terms were misinterpreted.[367] For example, interpreters repeatedly missed a series of six or seven terms that Central Americans used in describing their cases, among them such key words as "*cuartel*" (army barracks, misinterpreted as "police station"), "*alcaldia*" (city hall, often left uninterpreted), "*oreja*" (government informant), "*monte*" (the wild, where the guerrillas or others go to hide, interpreted hyperliterally as "mountains"),[368] and "*vigilante*" (pollwatcher, misinterpreted as "vigilante").[369] These misinterpretations created important gaps in

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Lawyer: Did he [the applicant's husband] hold any public office?
Applicant: No.
Lawyer: (repeats the question) Did he hold any public office?
Interpreter: I don't know how to translate this. (The lawyer then suggests an interpretation.)
Applicant: Oh yes, he was a member of the Orden [first interpreted as the regular noun "order," until the lawyer corrected the interpretation to the proper noun "*Orden*."]

Note that if the lawyer had not provided the interpretation, the applicant would have answered "no' to a factual question — that her husband held a position with Orden — which was the essential basis for her claim. Although the interpreter in this case communicated the fact that she did not understand the meaning of the words, 'public office', in many cases interpreters, sometimes because of pressure to continue, interpreted an uncertain or inaccurate meaning.

Later in the same hearing:
Lawyer: Why did you leave El Salvador in March 1983?
Applicant: I did not feel safe for my life because of the "charges" [*cargos*] that he [her husband] had.
Lawyer: *Cargos* are public [civil or religious] positions.
Interpreter: Oh sorry . . . .

If the lawyer had not made the correction, the interpretation of the applicant's statement would have been unintelligible, i.e., "I did not feel safe because of the charges my husband had." In many cases, judges hearing such an interpretation did not attempt to clarify or explore its meaning with the applicant or instruct the interpreter to do so, although the applicant's testimony was nonsensical and an interpretation problem seemed apparent. *See, e.g.*, Hearing No. 228.

366. Hearing Nos. 7, 23. The word "*kamoke*" was used by former Haitian dictator Franxcois Duvalier ("Papa Doc") to refer to his enemies. The word now is commonly used in Haiti to mean enemy of the government.

367. *See, e.g.*, Hearing No. 151. The applicant's answer referred to recruitment by the guerrillas as being taken to "the mountains." With a hyperliteral interpretation, his answers sounded incoherent and nonsensical. The court did not direct any questions at clarifying his response, but cited incoherency and implausibility as bases for its decision denying asylum.

368. *See, e.g., id.*

369. Several claims were based on the applicants' testimony that they acted as "pollwatchers" during elections. They alleged that pollwatching was, at various times, a dangerous occupation in El Salvador. In some cases this claim became incomprehensible and implausible since the applicants, through the court's interpreters, appeared to be asserting that they feared perse-

applicants' testimony. Problems with regional terms also caused frequent breaks in the testimony for dictionary searches which, combined with the interpreters' apparent frustration, in many cases created the false impression that the applicant was evasive or speaking substandard or incoherent Spanish.[370]

One common error was the use of false cognates[371] and substitutions.[372] For example, the interpreter in a Polish case stated that the applicant was "released" from his job when he actually said that he was "fired," a misinterpretation that was a factor in the judge's decision.[373] Some interpreters eliminated testimony which they could not remember or thought unimportant;[374] others interpreted in anticipation of what they expected to hear rather than what was said (one interpreter in an interview volunteered that she often committed this error, and felt badly about it);[375] or gave hyperliteral interpreta-

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cution because they were "vigilantes for city hall." *See, e.g.*, Hearing No. 70. *See generally* Robert J. McCartney, *Salvadoran Death Threats Reported*, WASHINGTON POST, Apr. 19, 1984 (describing threats against a United States official and a security guard for Salvadoran election officials attributed to a right-wing death squad opposed to voter registration reform). For examples of violence against pollwatchers, see, e.g., Washington Center for Central American Studies, *El Salvador on Line*, Apr. 3, 1989, at 2 (describing seizure by the army of five pollwatchers from their homes); Douglas Farah, *Campaigner's Death Stirs El Salvador*, WASHINGTON POST, Dec. 13, 1988, at 27 (describing resignations of most election officials in eleven Salvadoran towns because of threats of death from leftist rebels).

370. *See, e.g.*, Hearing No. 152. Cross-cultural communication problems may be exacerbated by interpretation errors. *See generally* Kalin, *supra* note 340, at 233. Particularly in hearings involving uneducated and rural applicants, misinterpretations may further complicate problems resulting from applicants' use of third-person euphemisms and differing concepts of time. For example, one Salvadoran claimed that his landlady refused to rent to him, a nonlanded peasant, because of his involvement with agrarian reform. A significant portion of the applicant's detailed testimony was lost due to confusion regarding the dates, seasons, and times when particular incidents occurred. Although the confusion was based partially on the judge's and the trial attorney's failure to understand or account for the applicant's contextual and less linear concept of time, much of the problem resulted from the interpreter's conversion of the lawyer's question about "time" into a question about "seasons" and her misinterpretation of the applicant's reply. Hearing No. 128.

371. An example of a related error was an interpreter's confusion of two words which sound similar in Spanish, *mayoria* (majority) and *mayor* (major) so that she interpreted "the majority of the town" as the "major part of the town." Hearing No. 141. In another case the applicant testified that he was seeking "freedom for the people" (of El Salvador) which was nonsensically interpreted as "freedom for the town." (The word *pueblo* in Spanish can mean "the people" or "the town," depending on the context.) Hearing No. 70. In many cases, the judges did not attempt to clarify this kind of incomprehensible testimony.

372. Examples include "*padres*" (parents, misinterpreted as "father"); "*hermanos*" (siblings, misinterpreted as "brothers"). These types of errors were significant since questions by trial attorneys and judges often were directed at the precision of the applicant's memory, particularly with reference to relationships, times, and locations. *See infra* note 445 and accompanying text. *See generally supra* Part III.

373. Hearing No. 5.

374. For example, one applicant testified that relatives of her husband, with whom she was living for a period in the United States, had plotted by telephone with relatives in El Salvador to denounce her once she returned there. They believed she had turned her husband, a member of a right-wing death squad, over to the guerrillas. The interpreter omitted relating her testimony that she knew about the plot by listening on the extension phone. Hearing No. 54.

375. Interview with court interpreter following Hearing No. 150 (Oct. 20, 1987).

tions that failed to communicate the applicant's meaning.[376] Contract interpreters in particular made decisions not to interpret portions of questions or responses. As one Lebanese interpreter explained, "I don't want to bother the judge with so many names."[377] In that case, by failing to interpret fully, he had omitted elements that were potentially directly relevant to the applicant's claim.[378]

As already noted, bilingual observers recorded many instances of inaccurate interpretations which affected testimony central to the applicants' claims. For example, in an Ethiopian case, the applicant was asked if any of her family members had been killed. She answered that her grandfather was killed, but the interpreter misinterpreted her response as "uncle." Later, during cross-examination, the interpreter correctly gave her response as "grandfather."[379] In his decision the judge found that the applicant lacked credibility, citing, among other things, that she had first testified that her uncle had been

376. *See, e.g.*, Hearing No. 54.

377. Hearing No. 18A. The interpreter also said he had not interpreted for the applicant what he believed were some of the lawyer's more hurtful questions.

Contract interpreters, often native speakers of the applicant's language, committed a series of common errors. In addition to some problems expressing themselves in English (see Hearing No. 6, where it became apparent that the applicant spoke better English than the interpreter), these interpreters often became over-involved in the cases, attempting to improve on the applicant's testimony and to give advice concerning an appropriate course of action. In one Polish case, when the trial attorney asked if the applicant risked criminal prosecution in Poland for overstaying his visa, the interpreter rephrased the question in order to obtain a more favorable answer. Knowing that no one is prosecuted in Poland for overstaying a visa, she asked if the applicant would "have difficulties" in Poland as a consequence of overstaying. Hearing No. 5. One Ethiopian interpreter, who described himself as a leader in the local Ethiopian community, frequently elaborated or edited questions and answers, explained the context of answers without being asked, added to and omitted parts that he felt were unnecessary, and summarized testimony. *See, e.g.*, Hearing No. 6; *see* Kalin, *supra* note 340, at 233.

378. Hearing No. 18A. This Lebanese man based his claim on his involvement in the factional fights among various Christian militias in Lebanon. The interpreter had failed to interpret the applicant's testimony that he feared he would be harmed by Samir Geagea, head of the Lebanese Forces, if he returned. The applicant fled Lebanon in January 1986, a period coinciding with the power struggle between Elie Hobeika and Samir Geagea over the signing of a peace treaty with Moslem militia leaders which was sponsored by the Syrian government. Geagea opposed the pact and drove out Hobeika; his supporters fled or were killed. *See* Xinhua General Overseas News Service, *Armed Clash Within Christian Militia in East Beirut*, Jan. 7, 1986 (describing outbreak of fighting between Hobeika's and Geagea's forces); *Lebanon Erupts Despite Treaty*, CHICAGO TRIBUNE, Jan. 9, 1986, at 16 (describing the intensified fighting and quoting a militia source as commenting that "Hobeika's men cannot go into areas under Geagea's control, and Geagea's men cannot go into Hobeika territory"). If the applicant was involved in that conflict, he might have been able to defeat the INS' contention that he could return to the Christian enclave in Lebanon. If he went to the Moslem-controlled area, he would be killed as a member of the Christian Phalangists; if he went to the Christian section, he would be killed as a Hobeika supporter. Thus, this omission had potentially far-reaching consequences for the applicant's claim.

379. Hearing No. 154; *see also* Hearing No. 39 (involving a conscientious objector case in which the interpreter omitted testimony that the applicant's mother, to help her son avoid his military service, had bribed an official; his claim also was based on fear of the guerrillas, but the interpreter's use of the same word for 'military' and 'guerrillas' rendered his testimony unintelligible).

killed, but later stated that it was her grandfather.[380] One Salvadoran woman, who based her claim on the killing of her brother and threats against her and her family, testified that her brother's *cedula* (identification card) listed his occupation as "fireworks maker," a family occupation and traditional art form in Latin America, and other cultures.[381] "Fireworks maker" (*"pirotecnico"*) was misinterpreted as "gunpowder maker."[382] Had this interpretation remained uncorrected, the judge could have assumed that the government was acting rationally and well within the bounds of legitimate criminal law enforcement in at least suspecting her brother of violent activities. Fortunately, the lawyer in this case understood Spanish and was able to correct the misinterpretation. In another example, a Cuban applicant's claim as a former political prisoner appeared as a case of criminal prosecution when the applicant testified that he was jailed for *"pelogrosidad"* (a Cuban euphemism for a political crime) which the interpreter rendered literally as "dangerousness," (not a basis for an asylum claim).[383]

2. *Credibility and Interpretation*

Interpreter errors, including omissions, dilutions, or other distortions of the applicant's testimony, affected applicants' credibility. In some cases, the interpreter's rendition of the applicant's testimony communicated a fundamentally different story in English than that which the applicant had told in her native language. This new story often was less consistent than the original, and lacked coherence and plausibility.

One recurring problem was the dilution of an applicant's testimony, resulting in her claim appearing unsubstantiated or even frivolous. In one Guatemalan case, when the applicant testified that he took a risk (*"aventura"*) in coming to the United States, the interpreter distorted the applicant's description by using the false cognate, "adventure," making it sound as if he had come looking for excitement and fun.[384] Bilingual observers noted many other examples of awkward interpretations that diminished the force of serious testimony. For example, "When a member of your family is killed you feel nervous" was the interpretation given for a Salvadoran's statement which actually meant "you feel mentally unstable, fearful."[385] Interpreters who failed to interpret parts of testimony often diluted the force of a case. For example, a Salvadoran woman, when asked if her husband reported her to the military as a guerrilla, replied, "No, but he threatened to," however, her answer was re-

380. Hearing No. 154.

381. For interpretations and analyses of the ethnic and national symbolism involved in the important Latin American tradition of fireworks, see generally OCTAVIO PAZ, THE LABYRINTH OF SOLITUDE (1961); JEREMY BOISSEVAN, SAINTS AND FIREWORKS (1965); DAVID MCCLELLAND, POWER: THE INNER EXPERIENCE (1975).

382. Hearing No. 2.

383. Hearing No. 91.

384. Hearing No. 10.

385. Hearing No. 30.

duced to a simple (and misleading) "no" by the interpreter.[386]

Judges indicated that the most serious problem with testimony in asylum cases was that applicants were nonresponsive and evasive. In many instances, apparently nonresponsive answers were attributable to interpreter errors. Judges found applicants nonresponsive when they had addressed the misinterpreted question asked of them.[387] For example, a judge asked one Salvadoran applicant how he knew that the landlady was responsible for burning down the houses of others who, like himself, had participated in land reform. The applicant's answer in Spanish was "because the man who burned down the house told me." It was interpreted as "because the man who had his house burned down told me." The applicant must then have seemed evasive or stupid, because when in response to the judge's question the judge asked "but how did he know?" the applicant answered "because he was the one."[388]

Interpreters also caused applicants' testimony to be fragmented, which intensified whatever tendencies applicants had to wander and not to finish sentences.[389] The judges, who often became impatient with the interpretation process, in some cases did try to clarify testimony. Yet in many cases, in which it was clear that the interpreter was experiencing a great deal of difficulty in interpreting the applicant's testimony, the judge placed the responsibility on the applicant. In one case, a judge threatened to strike the applicant's answers and told him not to run his words together.[390] When one lawyer in a Salvadoran case complained that the interpreter continually misinterpreted the lawyer's questions, thereby eliciting the same response over and over, the judge attributed the problem to the applicant and ordered the interpreter to continue.[391] The judges sometimes seemed to believe that it was the applicant's burden to make herself understood, irrespective of obstacles that were

386. Hearing No. 54. In some cases, interpreters rendered testimony only marginally coherent: "They found themselves in the place where they were fighting" (Hearing No. 15A); "In the moment of being there they demand we kill each other" (Hearing No. 152); "The guerrillas oblige people to leave and often they kill you." (Hearing No. 45B).

387. In Hearing No. 123, for example, the applicant was explaining an incident involving a "bus" stopped by the guerrillas. (He had actually been describing a truck ("*camion*"), but this was not apparent since "*camion*" consistently was misinterpreted.) At one point in his testimony, the applicant referred to the bus/truck as the "vehicle" which is "*carro*" in Spanish. The interpreter used a false cognate and interpreted "carro" as "car." The judge was understandably confused; the applicant now sounded as if he was starting on a tangential story about a car rather than, as was the case, answering the question. Further confusion was caused by other interpreter errors during the same segment of testimony: the applicant stated that "they (the guerrillas) took a body off the truck" which was interpreted as "I saw the body underneath the bus." The applicant's claim began to sound fundamentally implausible, and the judge lost patience.

388. Hearing No. 70.

389. In one Nicaraguan case, the judge frequently ordered the applicant to break his answers down to aid the interpreter. As a result, the applicant was interrupted frequently which made his story much harder to follow, and apparently harder to believe. In his decision, the judge stated that the applicant's story was not "coherent and plausible." Hearing No. 152.

390. Hearing No. 228. "I'm telling the translator to tell the respondent not to run his words together. I understand some Spanish and he is running his words together."

391. Hearing No. 68.

beyond her control.[392] In yet another Salvadoran case, the applicant admitted after the hearing that he found the interpreter unintelligible, although he had been embarrassed to admit it to the judge. As a result, both the trial attorney and even the judge had repeatedly accused him of being unresponsive during the hearing.[393] In general, the court viewed a "nonresponsive" applicant as telling lies or as having nothing important to say; by contrast, it viewed applicants who testified "well" as truthful.[394]

B. Credibility: Culture and Politics

> The biggest problem with the respondents is their unresponsiveness to questions. I know they are not educated, but . . . . [p]art of the problem is that they are not prepared by the lawyers. If so, and it is important to rehearse, sometimes they will surprise the lawyers. . . . False documents and false evidence [are] big issue[s] in all these cases.[395]

The results of this study confirm that the assessment of credibility is one of the most critical elements in the asylum determination process.[396] Immigration judges cited credibility as a factor explicitly in negative asylum rulings in forty-eight percent of the decisions rendered in the course of this study.[397] Judges shared a strong belief that applicants generally testify evasively and nonresponsively. As indicated, this perception is attributable, in part, to interpreter errors which, in many cases, made applicants appear nonresponsive or even unintelligible.

In addition, however, the different cultural and political experiences of judges and applicants, and the structure of the hearing itself, contributed to the major communication problems that characterized these asylum hearings. First, judges viewed applicants' stories in terms of their own culture and often did not consider the applicants' cultural and political experience relevant to the assessment of the merits of their claims or to the credibility of their testimony. Second, the simultaneously ambiguous and rigid structure of the hearing and the judges perceived need to control and limit the scope of the hearing, in many instances made it difficult for applicants to communicate intelligibly the essential facts that formed the basis of their claims.

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392. *See* Hearing No. 207, in which the judge instructed the applicant, "You have to speak up to be heard. It's your case; if I can't hear you, I can't grant your case."

393. Hearing No. 40.

394. *See generally* Kalin, *supra* note 340, at 231-33.

395. Interview with judge (June 10, 1987).

396. *See* Kalin, *supra* note 340, at 234.

397. *See supra* note 67; Table 4; David A. Martin, *Refugee Act of 1980: Its Past and Future in Transnational Legal Problems of Refugees*, 1982 MICH. Y.B. INT'L L. STUD. 91, 115. *See generally* ANKER, U.S. ASYLUM LAW, *supra* note 19, at 109-115.

1. The Asylum Standard in Practice: "A Reasonable Person in the Circumstances of the Immigration Judge"

The asylum standard requires the adjudicator to evaluate the asylum claim from the perspective of the applicant's experience.[398] The Supreme Court's decision in *INS v. Cardoza-Fonseca*[399] and the Board's decision in *In re Mogharrabi*[400] established the principle that the determination of "well-founded fear" should be based on whether a "reasonable person in the circumstances of the respondent" would fear persecution.[401] Immigration judges have been advised in asylum cases "to avoid assumptions about the way other societies operate."[402] In the cases observed, however, immigration judges tended to project their own political and cultural experiences onto the applicant. Thus, one judge, in an interview, described his view of the "reasonable person" standard. "The way I think about it, I think I'm a reasonable person and how would I react to that situation."[403] He described a situation in which a person tells a story that:

> [T]hey are afraid of the military. They say that they leave their house because they are afraid the military is after them. They say then that they come back at night when the military is not there. I don't think this story has the "ring of truth" since the person wouldn't know whether or not the military was going to come back at night. . . . It just doesn't make sense to me that somebody would feel safe to come back at night. That indicates to me that the person doesn't have a real fear of the military.[404]

Immigration judges believed that cases "turn on their [individual] facts";[405] they did not consider the political and sociological context of the events important or relevant in the evaluation of the asylum claim. As a re-

398. *See* Perez-Alvarez v. INS, 857 F.2d 23, 24 (1st Cir. 1988).

399. 480 U.S. 421 (1987); *see supra* notes 166-73 and accompanying text.

400. 19 I. & N. Dec. 439 (BIA 1987); *see supra* notes 177-80 and accompanying text.

401. *In re* Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987).

402. Perez-Alvarez v. INS, 857 F.2d 23, 24 (1st Cir. 1988) (adopting the position of a dissenting Board member that the immigration judge's exclusion of ten-year old evidence of trade union membership as stale was improper where "there is nothing in the record to sustain [that] . . . assumption . . . except perhaps [the immigration judge's] general perception of life or political conditions in El Salvador which may or may not be grounded in fact"). The dissenting Board member, whose opinion was incorporated by the court, also commented that "[i]t is difficult enough to assess persecution claims where the applicant has been allowed to fully present his testimony and evidence" and that "[t]ime and again this Board has considered appeals in which assumptions of this nature have been proven to be totally wrong, once the applicant has been given a full hearing." *Id.*; *see also* Kalin, *supra* note 340, at 236 (describing problems in asylum hearings resulting from assumptions that "common sense" and "common experience" are universal and not culture-specific).

403. Interview with judge (May 25, 1988); *see* Kalin, *supra* note 340, at 234 (describing this kind of adjudicator perspective as the neglect of " 'cultural hermeneutics' namely of trying to find out how the meaning in the asylum-seeker's system of expression can be translated into [the adjudicator's] own" (citing CLIFFORD GEERTZ, LOCAL KNOWLEDGE 151 (1983)).

404. Interview with judge (May 25, 1988).

405. *See supra* notes 197-209 and accompanying text

sult, the aforementioned judge had no frame of reference for imagining life in the midst of a guerrilla war. He did not seem to consider the possibility that people in El Salvador may be able to predict, with a certain degree of accuracy, the patterns of movements of military forces, or that they can make rational judgments about when it is relatively safe to return to a particular area. On a deeper level, the judge was not able to comprehend living in an environment of limited choices, of taking risks which no rational, middle-class North American would assume. In a case very similar to the one the judge described, an applicant who had returned home after having deserted the national guard out of fear of his commander, was asked by a judge why he returned to a zone of danger. He answered that, although he felt he was in danger and intended to leave, he returned simply "because [I] had nowhere else to go."[406]

Trial attorneys and judges tended to use their own experiences as frames of references in questioning. This perspective made some testimony unintelligible and limited applicants' ability to describe their claims. For example, many Salvadoran and some Nicaraguan claims were based upon military or guerrilla recruitment and related practices. Applicants testified that they had been the victims of forced or illegal recruitments, or that they morally opposed military practices.[407] Several Salvadorans testified that they unwillingly joined the "*patrullas*," the civilian patrol.[408] The trial attorney and judge, however, did not transcend their own cultural conceptions of military recruitment practices; they also understood the concept of choice as involving unambiguous alternatives, freely adopted. Neither the judges nor the trial attorneys appeared to be able to understand that a duty could be imposed extra-legally, that an individual could involuntarily comply with a non-legally compulsory obligation.

Thus, in attempting to determine whether in fact membership in the civilian patrol was voluntary or compelled, trial attorneys often asked whether the applicant was paid.[409] In one case,[410] when asked whether his service had

406. Hearing No. 150.

407. Some had morally-based conscientious objector claims, although these were often not recognized or clearly articulated as such. One Salvadoran, for example, explained why he did not want to be recruited by the military. "In the military they give you very ugly orders to kill children and older children and if not you get killed." Hearing No. 120. In this case as in some others, because of the applicant's lack of verbal sophistication, the conscientious objector basis for the claim was not recognized by the court or developed by the applicant's attorney. *See generally* ANKER, U.S. ASYLUM LAW, *supra* note 19, at 138-46 (describing United States caselaw on asylum claims based on resistance to military and guerrilla conscription practices and religious and other conscientious objection to military service). *See also* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (holding evidence of flight based on forced recruitment by guerrillas forces not sufficient in and of itself to prove politically-based persecution); Anker, Blum & Johnson, *The US Supreme Court Decision in* INS v. Elias Zacarias, *supra* note 105.

408. *See, e.g.*, Hearing Nos. 150, 201, 215, *supra* note 186 (discussing the role of civilian patrol in the conflict in El Salvador).

409. In several cases, forced recruitment was characterized as voluntary because it was not paid. Hearing Nos. 94, 197A, 215.

410. Hearing No. 201.

been voluntary the applicant first answered no; the trial attorney followed up by asking whether he had been paid, to which the applicant again answered, "no." The trial attorney then asked, "It was voluntary, then?" The applicant, (apparently recognizing that the trial attorney thought this the "wrong" answer, and now seeking to comply),[411] said, "yes." As a result of this line of questioning, the applicant, who based his claim on his desire to remain neutral and the impossibility of maintaining that position in El Salvador, appeared to have chosen sides voluntarily; he also appeared as someone quite willing to change his story.[412]

There were other examples of this parochialism. In one case, an applicant testified that he had been married in the Catholic church in his village.[413] (The fact of being married to the woman with whom the applicant lived and/or had children was considered relevant to credibility, at least by many trial attorneys,[414] and marriage is a formal act usually reified on paper which seemed to fit the court's "real/documentary fact" perspective.[415]) The judge interrupted the applicant's testimony, wanting to know the name of the church. Reflecting the situation in many small towns in Central America where there may be only one church and where local institutions may not have proper names, or the names simply are not important, the applicant responded that the church had no name. The judge rhetorically dismissed this answer: "All Catholic churches have names — don't you know that?"[416] In another case, the credibility of an applicant's graphic description of torture was challenged because he could not remember the day of the week of his marriage. After all, the judge commented, both were "dramatic experiences," yet he could remember details of his torture, but not the day of the week of his marriage.[417]

411. *See* Jennifer G. Schirmer, *A Different Reality: The Central American Refugee and the Lawyer*, 14 IMMIGRATION NEWSLETTER 6,7 (Sept.-Oct. 1985) (describing how, for Central Americans, "[w]ith authority figures — one's patron, landowner, lawyer, policeman, immigration official, anyone but your peers — one does not speak too loudly, and sometimes one is even supplicant; you never disagree or argue with authority figures . . .").

412. Another applicant, after testifying that he worked from 7 a.m. to 4 p.m. on the farm, was challenged when he stated that he had also been forced to join the civil patrol: how could (why would) someone work full-time and then "volunteer" time for the patrols? Hearing No. 215. In this and many other cases, the nature of the patrols was lost; members are forced to perform a duty that is not convenient, not willingly undertaken and added to a person's workload.

413. Hearing No. 133.

414. *See, e.g.*, Hearing No. 174.

415. *Id.*; *see supra* notes 189-209 and accompanying text.

416. *Id.*

417. Hearing No. 85.

Judge: What day of the week was July 16, 1983 [the day the applicant had testified that he was married]?
Applicant: I don't remember.
Judge: Was it a dramatic experience?
Applicant: Yes, but I don't like to give facts when I'm in doubt.
Judge: Yes, but you testified very in depth about your apprehension.
Applicant: Yes.

In another case,[418] a judge grounded his denial of asylum on the fact that the Sikh applicant had testified that he escaped prison by giving a gold bracelet to a guard as a bribe. The judge found it inherently incredible that a guard would risk his job for, in the judge's eyes, a small bribe.

In other cases, judges and trial attorneys seemed unfamiliar with the nature of political activism itself. One Tamil applicant was denied asylum in part because he testified that he was employed full-time and also was devoted "full-time" to the Tamil United Liberation Front. The judge found this inherently contradictory; he apparently could not believe that people may be employed and simultaneously work for a political cause.[419] An applicant who testified he was a leader in organizing a demonstration was sharply questioned by a trial attorney, because his name did not appear on the publicity leaflet and he could not name the people who participated in the demonstration.[420] It is doubtful whether many who have organized public protests in the United States would pass this credibility test.

A major source of misunderstanding was judges' and trial attorneys' perspectives on governmental authority as presumptively legitimate and benevolent. They were skeptical of applicants who testified that they did not report mistreatment to the authorities, although the applicants' claims specifically alleged ubiquitous terror and violence at all levels of state authority. Thus, an applicant whose claim was based on ongoing sexual abuse, including rape, by a Salvadoran army corporal was challenged by a judge because she did not report the corporal's behavior to the police;[421] a Salvadoran youth claiming to have been held for two days by the military was challenged because his mother did not call the police to report him missing;[422] one Salvadoran, afraid of the military because he had been forcibly recruited by the guerrillas and then deserted, was questioned as to why he did not simply explain the forced nature

418. Hearing No. 19A.

419. Hearing No. 211. The judge found the applicant incredible for the additional reason that he stated he worked and also testified that he had had a broken arm. During the course of the hearing, the judge did not ask for a clarification of this apparent inconsistency. Similarly, in a Haitian case, the judge cited as a reason for denial of asylum that the applicant had been employed. The judge felt that he could not have a reasonable fear of persecution from the Ton Ton Macoutes and still have been able to work. Hearing No. 71. These views of the judges resulted in part from their very demanding interpretation of the asylum standard.

420. Hearing No. 229; *see also* Hearing No. 208 (lengthy questioning of applicant by trial attorney regarding exactly when a university opened and why the applicant "entered" late, was based on the unstated norm of peacetime United States university practices); Kalin, *supra* note 340, at 237 (describing dilemmas for some asylum applicants who belong to political organizations illegal in their home countries which may require them not to reveal details about activities and participants); Schirmer, *A Different Reality*, *supra* note 411, at 6 ("In general, it might be said that the level of politeness and reticence and the sense of privacy of one's family and community history to an outsider — that is, often anyone outside one's community or neighborhood — is much higher in Central America that [sic] in the U.S. One does not *tell all* to a complete stranger." (emphasis in original)).

421. Hearing No. 38.

422. Hearing No. 31C.

of his involvement to the government.[423] One Nicaraguan whose claim was based on the government's forcible attempts to recruit him although he was underage and his religious beliefs prohibited participation, repeatedly explained in court that because of his large size, the recruiters thought he was lying about his age and that, in any case, he should fight.[424] The trial attorney ignored this repeated testimony and discounted the problem.

Trial Attorney: [Is it possible] they were looking for you for failure to serve in the military?

Applicant: Yes, it was for this, but I'm not old enough.

Trial Attorney: So you should have no problem.[425]

The judge denied the claim, finding his fear "not well-founded."[426] In another case, the judge could not understand why the applicant, who worked for the civilian patrol, did not fully accept his responsibility to defend the government and turn in neighbors whom he testified were guerrilla supporters.[427] In the judge's mind, if a person worked for the government, she fully adopted its position; the judge's idea of conflict appeared to involve clear positions and clear sides. The difficulties and ambiguities of village life, of the position of a peasant who participates involuntarily, certainly without enthusiasm, minimally, and tries to avoid fully taking sides, was not merely rejected as the basis for an asylum claim; the judges seemed to find such a claim inherently unbelievable.

One case in particular highlights the court's and trial attorneys' perspective on governmental power and authority. The case involved a Salvadoran government employee who testified that he was stopped on a bus and tortured for six hours by the military the day after the assassination of Archbishop Romero, a time of intensified military investigation of and violence against the civilian population.[428] The judge could not understand why the applicant did not tell the army to call and check with his employer; after all, the judge reasoned, the soldiers worked for the government and so did his employer. After several answers which were only partially interpreted,[429] the interpreter

423. Hearing No. 208.

424. Hearing No. 171.

425. *Id.*

426. *Id.*

427. Hearing No. 123.

428. Hearing No. 149. Monsignor Anulfo Romero was the popular Catholic Archbishop of San Salvador who during his tenure increasingly spoke out against the death squads and entrenched oligarchy. *See* Jose Katigbak, *San Salvador*, REUTER'S, Mar. 26, 1980, AM/cycle International (Salvadoran military sends army into the streets immediately after the Archbishop was murdered); *Corps Target in El Salvador*, WASH. POST, Mar. 30, 1980, at A24 (a woman working for the judge in charge of finding Romero's assassin gravely wounded); *Why Play With Fire*, WASH. POST, Apr. 2, 1980, at A18 (gunmen fire into crowd of mourners at Romero's funeral; 30 left dead and hundreds injured); *El Salvador Extends Emergency*, WASH. POST, Apr. 3, 1980, at A27 (the military in El Salvador extends the state of siege for thirty days, giving the government broad powers of search and arrest and enabling it to restrict news reports).

429. Hearing No. 149. This case illustrates the way in which the interpreter, however inadvertently, can contribute to an applicant's appearing unresponsive in court as a result of

finally provided his initial answer: "the military doesn't understand reason . . . it wouldn't matter to him if I tell him to call my boss." The trial attorney persisted: "Don't you think it would have been in your favor to talk to your boss?" The applicant responded: "Yes, it would have been if he had understood." The applicant was trying to explain that in El Salvador under these circumstances, the applicant would not want his boss to know he had been accosted by the army. In the trial attorney's idealized, North American world an employer might have helped,[430] but in the context of El Salvador he might not have "understood" (reacted well), and indeed telling him would have made matters worse. The trial attorney continued this line of questioning, asking the applicant why he had not asked to see the policeman's superior, or filed a complaint with the national guard after the arrest. The immigration judge cited the applicant's failure to call his boss as a negative credibility factor in the final decision denying asylum.[431]

A major problem for judges was that they found applicants' testimony vague, unresponsive, and evasive; as one judge commented: "Many people in here are not answering questions; ask them the color of the sky, and they'll answer what kind of car they have."[432] Applicants often were vague, in the sense that they could not meet the court's requirements of individualized, direct proof. Often they could describe the identity of persecutors and their fears of retaliation only in contextual — which often meant political — terms.[433] But judges believed that determinations of eligibility should be made irrespective of political or sociological context. For example, in one hearing, an applicant described an incident in which he witnessed guerrillas attacking a

uninterpreted dialogues. The applicant had been asked, "Why [didn't you ask him to check with your boss]." As indicated, he answered, "you cannot reason with the military" ("*el ejercito no entenda razones*"). The interpreter never communicated this answer to the court and instead conversed with applicant, attempting to clarify or obtain what the interpreter regarded as an appropriate response. Finally, the interpreter stated in English one of the applicant's answers: "When he stopped me, he didn't ask about my boss." This answer was not responsive to the judge's question and the judge, frustrated, repeated the initial question. "The question was why didn't you ask them to verify with your boss." The applicant repeated his initial answer, which the interpreter finally stated in English to the court. The error, the failure to interpret, appeared as nonresponsiveness and was attributed to the applicant. It exacerbated the cultural misunderstandings which were reflected in, and in part created by, the trial attorney's questioning.

430. But even in that context the trial attorney's view arguably does not encompass the experiences of say, African American men accosted without cause by law enforcement officials.

431. Hearing No. 187.

432. Hearing No. 62B.

433. *See* Schirmer, *A Different Reality*, *supra* note 411, at 8 (describing the greater saliency of politics in Central America: "[O]ne must ask which activities are *not* considered political. . . . due to the broader spectrum of ideologies and political dimensions . . . . [and] the political systems presently in force in El Salvador and Guatemala: systems of anti-politics which, paradoxically, view *all* activity as possibly political," (emphasis in original); also describing the oral traditions of Central American, primarily agricultural, illiterate communities which result in asylum applicants from those cultures responding in court with "[l]ong stories . . . often told as indirect ways of talking *around* an incident; this has to do both with not wanting to be impolite . . . and with setting the social context which sometimes is viewed as more important than the act itself."). *Id.* at 9 (emphasis in original).

vehicle and removing passengers.[434] The judge asked the applicant how he knew that the attackers were guerrillas. The applicant, started to answer, "Because there are two forces in El Salvador, the guerrillas and the military." The judge, apparently concerned that he was about to receive a dissertation on Salvadoran politics, asked, "Did they have a uniform?" The applicant answered "No." The judge, more impatiently, asked, "How did you know they were guerrillas?" The applicant answered, "One doesn't make a mistake, the guerrilla is known." The judge, exasperated, said, "I'm going to start striking all answers that aren't responsive." Finally, after a series of questions (the judge asked "what's to say they weren't robbers?"), the applicant was able to translate his reality into the judge's terms, explaining that he knew they were guerrillas because the group consisted of men and women, because they yelled "Sandinistas," and because they had a red flag and crosses painted on their foreheads.[435]

Thus applicants sometimes appeared nonresponsive because they were trying to give meaningful answers to questions which did not appear to respond to or account for their different realities. For example, in one hearing an applicant was explaining as the basis of his fear that he had received a death threat and warning letter from a friend.[436] The judge wanted to know whether the letter was signed, and whether the applicant had ever seen the signature before. To the applicant, having previous knowledge of the signature was irrelevant to its authenticity; what was important was that the warning letter was from someone he knew who would have taken the risk of sending him a letter. When the judge asked whether the note was signed, the applicant answered by explaining who the friend was ("I had a friend; we used to play soccer . . . ."). The judge repeated his question ("the question to you is was the note signed?"); as a result, the applicant was not able to elaborate his answer. Having failed to answer the judge's specific question and within the judge's own terms, the judge found him to be unresponsive.[437]

Applicants' reliance on generalities in testimony also may be the product of a protective mechanism developed for survival in their home countries.[438] Central American applicants often referred to actors in the political and civil war conflict in the ambiguous, but safe, impersonal third person.[439] In the

434. Hearing No. 123.

435. *Id.*

436. *Id.*; *see supra* text accompanying notes 184-87.

437. Hearing No. 123.

438. *See id.*; Kalin, *supra* note 340, at 232 (describing one basis for such secrecy and the consequent credibility problems that may arise where former members of political parties and groups may have "deeply internalized the values of secrecy and suspicion towards outsiders . . . [and] have difficulty in communicating openly and revealing themselves, their feelings, beliefs and experiences").

439. *See also* Kalin, *supra* note 340, at 234 (describing how an asylum seeker may be prejudiced by emphasizing the similarity of her circumstances to that of others rather than giving individualized answers; whereas " '[t]he Western conception of the person [is of] a bounded, unique, more or less integrated motivational and cognitive universe'," in many non-Western societies " '[t]he selves . . . gain their definition from associative relations they are

same case, the applicant was describing notices of names of guerrilla supporters placed on walls. He explained, "They put up notices about the guerrilla members." The judge asked, "Who did?" and he answered, "Those people." The judge was frustrated; the applicant was being vague and not answering his question. To the applicant it may have been obvious that the only people who placed notices against the guerrillas are members of the death squads or the army. Moreover, specificity is dangerous in Salvadoran society; although everyone understands that you mean "death squads" when you say "those people," you can not be arrested for saying it.[440]

Another case involved a trucker for a coffee plantation who testified that he had been stopped many times on the road and forced to give material support to the guerrillas.[441] Later the military detained, tortured, and denounced him as a guerrilla supporter. He was able to escape (after which he left the country) only because of his family's connection to an infamous death squad. He tried to explain why he had given shoes and other material assistance to the guerrillas: "One feels obligated or forced to do that because you know your life is being put on the line." The coercion that the applicant felt was common knowledge and experience, embedded in the Salvadoran political and military conflict. From his perspective, a threat did not have to be made literally and directly for him to experience the coercion; the context made the threat real and palpable. The judge, however, could understand a threat, find it credible and find the fear that it generated reasonable, only if it was explicitly directed at the applicant. Thus he instructed the interpreter, "Tell him to tell us what happened and not what other people do. This is testimony . . . we want facts."[442]

From the judges' perspective, the applicants' lack of specificity including the use of euphemisms[443] and the impersonal third person[444] was a recurring

imputed to have with the society that surrounds them' " (citing CLIFFORD GEERTZ, LOCAL KNOWLEDGE 59, 66 (1983)).

440. Hearing No. 123. In many other cases, the applicants used euphemisms and the impersonal third person for similar reasons; for example the conflict in El Salvador was referred to as "the situation." *See id.* One applicant, asked why he joined the civilian patrol, answered: "One cannot disobey." Hearing No. 215.

441. Hearing No. 163.

442. *Id.*

> [T]he brutally repressive measures taken by the security forces in El Salvador and Guatemala, and the reality of terror for these refugees, should never be underestimated. This daily fear is difficult for North Americans to grasp, with village massacres, death squad hunts, mutilated bodies on the streets, wholesale bombings of villages and constant surveillance by thousands of "orejas" (spies) as *normal*, daily occurences for most of the population. This terror . . . permeates the consciousness of Central American refugees.

Schirmer, *A Different Reality*, *supra* note 411, at 8.

443. When asked why they left their countries or why they came to the United States, applicants often gave answers such as, "I was seeking peace and tranquility" (Hearing No. 150); this kind of answer may not have helped them in establishing the seriousness or substantiality of their subjective fear.

444. *See supra* note 439 and accompanying text.

problem. Applicants also had poor time and date recollection,[445] and in almost every case judges and trial attorneys harshly questioned them because of their inability to name or remember places and times.[446] In one case an applicant was asked to describe a particular instance of detention after he had testified that the military stopped him regularly — when forced to give a number, he stated "about eighty times." He tried to explain: "Understand that down there it's not a particular time that you're detained." The judge wanted him to describe in detail a single incident. For the applicant, being stopped was such a frequent and even routine occurrence that a specific instance was not

445. *See* Kalin, *supra* note 340, at 236-237 (describing how for asylum applicants "[t]ime related contradictions . . . may . . . be due to a fading memory, [or] . . . a non-Western . . . calendar . . . . Moreover, time is not universally perceived, but members of different cultures have varying conceptions of time and its relevance; in some non-Western cultures time-reckoning 'is clearly not durational but punctual . . . it is not used . . . to measure the rate at which time passes, [or] the amount which has passed since the occurrence of some event,' [instead people] 'think much more easily in terms of activities and of successions of activities and in terms of social structure and of structural difference than in pure units of time' and many Latin Americans or Middle Easterners adhere to time patterns which are directly opposed to the emphasis of Europeans and North Americans on schedules, promptness and segmentation of time units." (citing CLIFFORD GEERTZ, LOCAL KNOWLEDGE 393 (1983); E.E. EVANS-PICKARD, THE NUER 103-04 (1940); E.T. HALL, BEYOND CULTURE 17 (1977)).

446. There were many cases in which the applicant could not meet the court's expectations regarding date and time specificity. An example, excerpted below, is from Hearing No. 203.

(The applicant was being questioned as to his brother's age.)

Trial Attorney: How old is Antonio?

Applicant: Older than me.

Trial Attorney: How much older?

Applicant: I don't know, 1 or 2 years.

Applicants often appeared as if they were lying when in their testimony they were pressed to give specific answers; in many instances they contradicted themselves or their answers in their written applications or seemed evasive. Later in the same hearing:

Trial Attorney: How long did you attend school in El Salvador?

Applicant: For days, months.

(a few questions later)

Trial Attorney: Your application says you went to school from 1979-1982. Is that correct?

Applicant: Yes.

Trial Attorney: So you went to school for three years?

(Objections from the lawyer which are overruled; the Trial Attorney restates the question.)

Applicant: I don't remember.

In Salvadoran and other peasant cultures, places and events may be recalled contextually and relationally; proper names, which are important to the court, are less important in those cultures. *See generally* E.T. HALL, BEYOND CULTURE 17 (1977).

Judge: Your cousin [name omitted], where is he today, do you know?

Applicant: He's in the village.

Judge: What village?

Applicant: The village I'm from.

Judge (annoyed): *What's the name of the village?*

(The applicant finally names the village. It should be noted here that the applicant had previously given the name of his village so he may also have been confused as to the reason for the judge's question. To the judge, the reality of the village remained vague and the testimony less than credible, unless the village consistently was identified by its name.)

memorable.[447]

Although cultural differences in the values placed on time, date, and name specificity caused judges to perceive applicants as vague and unresponsive,[448] many times when applicants tried to answer questions fully and directly, immigration judges constrained them by requiring "yes" or "no" answers.[449] Other applicants tried to respond but their narratives were not sequential;[450] judges, focusing on specific details and preserving the record,

447. Hearing No. 163.

448. *See* Hearing No. 23. The applicant was a Haitian whom the judge challenged because he could not remember a specific date. The judge admonished the applicant: "You're wealthy and educated, you should remember dates."

449. *See* Hearing No. 92 (Libyan student testifying about his participation in a Libyan government-organized union of students in the United States).

Lawyer: Why did you have to form a union?

Applicant: To report on students.

Lawyer: Did you belong to the union?

Applicant: Yes, because otherwise [I] would have lost my scholarship.

Judge: Can you restrict your answer to the question asked?

See also Hearing No. 217. (Ghanaian applicant describing beatings and torture of himself and others in prison).

Lawyer: Were you hit again?

Applicant: Yes. On the face.

Lawyer: Did you receive medical treatment?

Applicant: No. They just let you die.

Judge: The question to you was, "Did you *receive* any medical treatment?"

Applicant: No.

Lawyer: Did you *need* medical attention?

Applicant: Yes.

Sometimes answers did not come out in orderly fashion; the applicant in trying to explain a situation could not always follow a line of questioning, producing annoyance on the part of the court.

Lawyer: Were you questioned by the government authorities while you were in prison?

Applicant: No. I tried to avoid the question.

Judge: *Were* you questioned by the officials?

(What followed was a repeated exchange between the judge and the applicant about beatings and questioning in jail. The applicant was trying to say that he did all he could to avoid the authorities so as not to be beaten. The judge was trying to find out whether there was an interrogation. The applicant finally said that when he was questioned he was beaten.) *See* Kalin, *supra* note 340, at 232, noting the observations of several authors that:

> [I]n certain non-Western societies it is important to let persons involved in legal procedures speak freely about issues which appear to be not directly relevant to the topic of the procedure . . . . Officials often tell the applicants to answer only questions asked and they intervene if the asylum-seeker starts to explain something which he or she feels is important, but is perceived as irrelevant by the official . . . . [This leads] to a situation in which "both speakers utterly fail in their efforts to negotiate a common frame in terms of which to decide on what is being focused on and where the argument is going at any one time . . . [and where they are] on parallel tracks which don't meet."

(citing J.J. GUMPERZ, DISCOURSE STRATEGIES 185 (1982)).

450. Hearing No. 150.

Lawyer: Did he [the commander in charge of your national guard unit] ever threaten you?

Applicant: [the answer came out in fragments, because the interpreter was interpreting piece by piece, making him stop after each sentence or two] There was a meeting

often missed critical parts of the applicant's story.[451]

Nonresponsiveness also appeared to result from confusion and fatigue. In a courtroom and adjudicatory environment which is inherently ambiguous and does not conform even to the North American norms,[452] applicants often appeared disoriented. One relatively sophisticated applicant (a university student from Guatemala), when asked by an interviewer to describe the role of the judge, answered "to operate the tape recorder so that someone in Washington can make a decision."[453] An uneducated Salvadoran during a break following a two hour examination at which an interpreter had been present, asked an observer whether the machine automatically converted his words from Spanish to English, who the trial attorney was, and whether his refugee agency lawyer worked for the government.[454]

Applicants appeared unaware of courtroom procedures and expectations. They were not able to follow their own train of thought to its logical conclusion; they often felt obliged to answer the question quickly, as asked. In addition, with significant portions of the hearing left uninterpreted, the applicants' sense of confusion was compounded, causing them to give answers they think are expected.[455] Thus, in one case the applicant was asked by his lawyer, "How did you feel about being in the Civil [Command]?" The applicant answered, "Pretty bad . . . I didn't feel good." The question was repeated, objections were made for several minutes; none of this was interpreted to the applicant. Finally, (the objections having been resolved), the judge repeated the original question: "The question to you was how you felt about being in

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and there were four guards . . . and one was more senior . . . and those people made up the directors . . . and so . . . he would put the new guards on one side and others on the other.

[The applicant was telling his story, but in a roundabout way, attempting to draw a concrete picture of what happened, what the room looked like, what people did. He was interrupted however, by the judge who wanted a direct yes or no answer.]

Judge: The question is did he ever threaten you?

Applicant: Yes, he arrived with a gun and said he was ready to fight . . . .

451. *See, e.g.*, Hearing No. 123. In this case, the applicant was able to give the kind of information the judge wanted — a clear "chain of evidence" answer — but the judge missed it. The applicant was explaining that he knew his brother was killed because he was told by a person who actually had been present when he was shot. The interpreter, however, did not know the word *baleraron* ("they shot"). The applicant explained in Spanish that this person was with his brother for two hours between the time he was shot and the time he died. This was never interpreted because the judge interrupted and asked for the details of how exactly the shooting had happened.

See also Hearing No. 152. The Nicaraguan applicant, whose claim was based partially on religious persecution, testified that he went to church three times a week. He explained that he was "sneaked into church," but the tape was being changed and the answer missed. (This answer never will appear in the official transcript.) The judge denied the asylum claim, citing among other things, that the applicant attended church regularly without interference.

452. As discussed *supra* Part III, immigration judges are part inquisitors, part passive adjudicators; evidentiary rules are made on an *ad hoc* basis; and hearing outcomes often appear to be preordained.

453. Hearing No. 13.

454. Hearing No. 123.

455. Hearing No. 215, *supra* note 408.

the Civil Command." The applicant finally complied with what he apparently thought was expected: "I felt good . . . it was an order."[456] So just as judges filtered testimony through their own cultural lenses, thereby distorting it, applicants were often overwhelmed by the unfamiliar and confusing atmosphere of the proceeding.

VI
EPILOGUE

Since the executive summary of this report was released and published in January of 1990,[457] a number of this study's recommendations formally have been adopted with the promulgation of final asylum regulations in July of 1990, and the implementing measures that followed. The new regulations *inter alia* mandate the creation of a human rights documentation center for use by INS asylum adjudicators, the consideration by adjudicators of non-governmental human rights reports in assessing asylum claims,[458] and a new and explicit emphasis on the importance — indeed necessity — of evaluating those claims and the credibility of the applicant's testimony "in light of general conditions in [her] country of nationality or last habitual residence."[459] The regulations state that the applicant's own testimony may be sufficient to meet the burden of proof on asylum.[460] For the first time, the regulations make clear that an applicant can introduce evidence of the treatment of others similarly situated and does not have to prove that she will be singled out for persecution.[461]

In addition to these changes, the Office of the Chief Immigration Judge has begun to implement some of the changes in the training and selection of immigration court interpreters recommended in this study.[462] The Office of

456. *Id.*
457. *See* ANKER, SUMMARY REPORT, *supra* note 6.
458. 8 C.F.R. § 208.12 (1992).
459. 8 C.F.R. § 208.13(a) (1992).
460. 8 C.F.R. § 208.13(a) (1992).
461. *Id.*
462. Although in El Rescate Legal Services, Inc. v. EOIR, the Circuit Court of Appeals found that EOIR's policy of partial interpretation did not on its face violate the statute or the Constitution, the parties in that case have entered into an agreement with respect to the competency issue. 959 F.2d 742 (9th Cir. 1991). *See El Rescate v. EOIR*, Joint Status Report, at 8 (on file with author) (describing EOIR's agreement to develop a certification examination for EOIR Spanish language interpreters; EOIR is "patterning the examination after the one developed for Spanish language federal court interpreters"). EOIR also has agreed to "institute new quality controls for contract interpreters." *Id.* at 9. EOIR has contracted with Berlitz Translation Services to provide these services and Berlitz has agreed to develop an interpreting exam for its employees as well as other quality control measures. *Id.* at 9.

In addition, EOIR has changed its policy with respect to the provision of interpretation at hearings in the cities covered by the lawsuit. *See* Letter of Chief Immigration Judge, William R. Robie, to immigration judges in Los Angeles and El Centro, California (May 1, 1992) (Joint Status Report, Exhibit A at 3-4) (instructing judges "to be sensitive to the confusion and anxiety experienced by a respondent/applicant whose future, to a large extent, is being determined by a proceeding conducted in a language he or she does not understand"). The letter also

the Chief Immigration Judge also has continued a concerted effort to appoint immigration judges who do not have a prior employment history with the INS.[463]

These developments are encouraging, but implementation should be monitored. This study and others demonstrate that what is written as the law and what is practiced by adjudicators often can diverge in significant respects. Moreover, important parts of the new regulations do not specifically apply to immigration judges. For example, the new documentation center is part of the INS, not the EOIR, and it is not clear the extent to which immigration judges will have access, or will be encouraged to use those resources.[464]

The regulations also present new challenges to the immigration court. As INS adjudicators — specially designated and trained as asylum officers — are perceived as more credible and expert, immigration judges will have to consider carefully the regulatory mandate that any asylum claim raised in the context of a deportation or exclusion proceeding must be considered *de novo* regardless of whether or not a previous application was filed and adjudicated by an asylum officer prior to the initiation of those proceedings.[465] Like the new corps of asylum officers, the immigration judges must have the confidence and ability to make reasoned and independent decisions. This was Congress' mandate in enacting the Refugee Act of 1980. The immigration court remains a critically important venue for asylum claimants, and the one place where their formal due process rights can be protected.

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provides for the interpretation of testimony of witnesses and at least summary interpretation of other parts of the proceeding for unrepresented applicants. *Id.*

463. *See supra* note 40.

464. 8 C.F.R. § 208.12 (1992).

465. 8 C.F.R. § 208.2 1(1992).