SYSTEMIC DETERRENCE AGAINST PROSPECTIVE ASYLUM SEEKERS: A STUDY OF THE SOUTH TEXAS IMMIGRATION DISTRICT

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INTRODUCTION

In May of 1992, the Bush Administration initiated a policy of intercepting thousands of Haitian refugees en route to Florida and returning them to Haiti, and likely death, without providing any determination of their political asylum claims.[1] This episode publicly brought into question the United States' commitment to the United Nations Protocol on Political Refugees, which states that political refugee status should be determined on a fact-specific and non-ideological basis.[2] The author has spent several years on the

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1. Michael Wines, *Switching Policy, U.S. Will Return Refugees to Haiti*, N.Y. TIMES, May 25, 1992, at A1.

2. Refugee Act, Pub. L. No. 96-22, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.) (adopting the United Nations Protocol). The Refugee Act tracks the UN

Texas/Mexico border in South Texas watching the Immigration and Naturalization Service (INS) and its sister agencies police the border and operate the political asylum application process. The author has observed first-hand that the careless disregard of potential political asylum claims is not limited to the waters south of Florida. In South Texas the INS and its sister agencies are seemingly uninterested in determining whether each refugee applying for political asylum has been persecuted in the past or has a well-founded fear of persecution in her country of origin, the legal standard for political asylum.[3] Furthermore, this problem is not isolated to any part of the political asylum process; it is systemic.

In the South Texas immigration district (the District), the INS maintains a system of coercion and deterrence that has, in effect, turned the entire lower Rio Grande Valley into a detention zone. Aliens generally are not free to leave;[4] they receive no government funds and must pay all their own expenses.[5] Even when the INS lifts travel restrictions, aliens are often required to post high bonds.[6] This requirement effectively restricts travel even when it is permitted, and causes great hardship for asylum applicants.

South Texas is the closest district to Mexico City and Central America and is the United States' sole immigration detention zone. The District encompasses seven counties and is located north of the Rio Grande.[7] The river forms an international boundary that stretches two thousand miles from the Continental Divide in southern Colorado to the Gulf of Mexico. While it is a

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Protocol's definition of a "refugee": a refugee no longer needs to be fleeing from a Communist government or from the government of a specific geographical area.

3. 8 C.F.R. § 208.3 (1992).

4. Arthur Helton writes that countries often call this type of policy "humane deterrence." Helton argues that "confining refugees for the purpose of deterring other[ ]" aliens has long been an ingredient in immigration detention policies. Arthur Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 353 (1986). Helton contends that with humane deterrence, "[l]ittle attention was paid to the entitlements of refugees, particularly the right to apply for asylum, the right not to be penalized or unnecessarily restrained in one's movements, and the right not to be returned to territories where persecution awaits." *Id.*

5. Before 1980, most undocumented aliens apprehended by the Border Patrol come from Mexico and routinely were driven back to the border. Suspected criminal aliens were taken to local jails and then processed for deportation. Since 1980, the Border Patrol has continued to return undocumented Mexicans to Mexico. Apprehended undocumented aliens from Central America generally are taken to a detention facility to be processed for deportation or voluntary departure, or are incarcerated. Since 1986, an increasing number of undocumented aliens have been released from custody but detained in the District at their own expense. *See* AMERICAN FRIENDS SERV. COMM., REPORT ON CENT. AM. REFUGEES 1 (1982) [hereinafter AMERICAN FRIENDS SERV. COMM.]; ABA COORDINATING COMMITTEE ON IMMIGRATION LAW, LIVES ON THE LINE: SEEKING ASYLUM IN SOUTH TEXAS (1989) [hereinafter LIVES ON THE LINE]; WILLIAM FRELICK, RUNNING THE GAUNTLET: THE CENTRAL AMERICAN JOURNEY THROUGH MEXICO (1991); A REPORT OF THE RIO GRANDE VALLEY WATCH COMMITTEE, REFUGEE CRISIS IN THE RIO GRANDE VALLEY OF SOUTH TEXAS 15 (1989).

6. 8 C.F.R. § 213 (1992).

7. The District extends from Zapata County in the West, along the United States-Mexico border, to Brownsville, Texas, at the southeastern tip of Texas. To the north, the District reaches as far as Kingsville. "South Texas" is not the official name of the District.

mighty torrent further west, the river meanders along the border in the District. Consequently, the border is porous. However, the "border" between the District and the rest of the United States is anything but porous. Only two roads lead out of South Texas, and they are both guarded by checkpoints.

While the river provides aliens with easy access to the United States, the conditions in the Valley make it difficult for those who intend to stay. It is among the most impoverished regions in the country,[8] there are few immigration lawyers to provide counsel,[9] and there is little support in the community for entering refugees.[10] Further, no-work riders on bond conditions[11] and restrictive work authorization policies[12] literally starve out applicants who are forced to wait a year or more for their scheduled deportation hearings. In order to survive during the long wait, asylum applicants often beg for the food and money they need to survive.[13] Thus, the detention zone has more in common with a penal camp than a region of a free nation.

Applying for asylum in the District is like a game of tag. Aliens who get to the INS district office before they are caught by the United States Border Patrol may apply "affirmatively" for political asylum — that is, they can voluntarily present themselves to have their claim heard by an INS asylum examiner, who is not an attorney.[14] The standard for political asylum is set out in 8 C.F.R. § 208. To meet it, the applicant must prove that she has been persecuted in the past or has a well-founded fear of persecution.[15] This test is both subjective (the individual's fear) and objective (a reasonable possibility of per-

8. In 1980, nearly 40% of all Latinos in the Valley had incomes below the national poverty line. ROBERT L. MARIL, POOREST OF AMERICANS: THE MEXICAN-AMERICANS OF THE LOWER RIO GRANDE VALLEY 4-18 (1989).

9. LIVES ON THE LINE, *supra* note 5, at 15. During the time the author spent in the South Texas district, there were about 10 immigration attorneys in the District who provided legal services for more than 30,000 aliens who were applying for asylum.

10. *Id.* at 5. Asylum applicants increasingly depend on handouts or support themselves with money from relatives who reside elsewhere in the United States.

11. Beginning in 1986, the Immigration & Naturalization Service (INS) created no-work riders which made it illegal for individuals released on recognizance to work. *See* Hector F. Garza-Trejo, *Aliens Applying for Bond Release*, BROWNSVILLE HERALD, Oct. 1, 1986, at 1A [hereinafter Garza-Trejo, *Aliens Applying*]. Other circuits do not allow this type of restriction. *See, e.g.*, National Ctr. for Immigrants Rights, Inc. (NCIR) v. INS, 743 F.2d 1365 (9th Cir. 1984) (enjoining enforcement of INS regulations allowing no-work riders).

12. The author can find no INS record of work authorization grants in South Texas prior to 1987. Since 1987, the author has observed the INS consistently violate 8 C.F.R. § 208.7(a) (1992), the statutory work authorization requirement which states that non-frivolous asylum applicants should be granted work authorization within 60 days of their application.

13. Jane Juffer, *South Texas Bound: You Can Check in Any Time You Like But You Can Never Leave*, TEXAS OBSERVER, Mar. 11, 1988, at 1.

14. While the affirmative asylum process provides an informal, non-adversarial adjudication of asylum claims, these claims often fail, and the alien then winds up in deportation proceedings, which is the same fate of aliens who are arrested by the Border Patrol before reaching the INS office.

15. 8 C.F.R. § 208.13 (1992). An alien is entitled to apply for asylum under INA 208(a), which directs the Attorney General to establish the procedure; asylum may be granted if it is determined the alien is a refugee within the meaning of section 101(a)(42)(A) of the INA.

secution).[16] The persecution she fears must be on account of race, religion, nationality, membership in a particular social group, or political opinion.[17] The alien must be unable or unwilling to return because of that well-founded fear.[18] However, the immigration judge has the discretion to deny the applicant political asylum even if she meets the well-founded fear standard.[19]

If, however, an alien is apprehended by the Border Patrol before reaching the INS office, she will either be offered a ride back to the border[20] or will find herself in deportation proceedings. The pre-relief stages of this process include: initial government processing; the master calendar plead-in in the immigration court; INS custody determinations of detention and release; Office of the Immigration Judge (OIJ) redetermination of bond; and finally, for non-detained aliens, procedures for notification of hearing, change of venue, and employment authorization.

In the detention zone, these pre-relief procedures not only pressure applicants who have been detained and released on recognizance to submit to voluntary deportation, but also encourage applicants who are not detained to exit the system and thus become "illegal aliens." Oppressive detention, notification procedures which fail to notify non-detained aliens of their hearings, long bureaucratic delays and continuances in proceedings, and the absence of counsel are the primary reasons why most applicants never make it to the stage of the asylum process in which an asylum request is formally adjudicated.

The conclusions offered in this Article are the product of extended, systematic observation of the asylum application process in South Texas. During several study periods between September 1988 and May 1991, the author observed dozens of Executive Office of Immigration Review (EOIR)[21] and INS proceedings. The author also interviewed and conducted informal discussions with participants in the asylum process, including immigration judges, court personnel, lawyers, and aliens. The author had access to the case files, including all court papers, for hundreds of political asylum applicants represented by Proyecto Libertad, a local non-profit law office. Finally, the author received docket sheets reporting the decisions of the immigration court for a representative month (September 1989) through a Freedom of Information Act request.

This Article tracks the sequence of events that a political asylum applicant would experience upon entering the United States through the South

16. Guevara Flores v. INS, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).

17. 8 C.F.R. § 208.13.

18. 8 C.F.R. § 208.13.

19. 8 C.F.R. § 208.14(a) (1992).

20. This option to leave is called "voluntary return" or "voluntary departure." *See infra* notes 137-38 and accompanying text.

21. The Executive Office for Immigration Review (EOIR) has two constituent parts: immigration court, or the Office of the Immigration Judge, and the Board of Immigration Appeals (BIA). *See* 8 C.F.R. § 3.1(a)(1) (1992). This Article will center on the adjudicating function of immigration court.

Texas immigration district. The author examines the entire process, from INS detention of potential applicants as they cross the United States-Mexico border to appellate review of immigration court hearings. In this respect, the author examines the interactions of the immigration system with potential applicants from a broader perspective than previous studies. The author finds that the immigration bureaucracy has extremely low standards of due process and appears to have the goal of making it difficult — if not impossible — for refugees to file for political asylum. This results in forcing refugees who enter this country with the desire to apply for political asylum to exit the system during its earliest stages, or to choose not to enter the asylum process in the first place.

Part I presents a history of asylum policy in the District and contextualizes the current conditions in the detention zone. Part II explains the relationship between the extremely broad arrest and search powers of the Border Patrol to the systemic deterrence argument. Parts III, IV and V lead the reader through the steps taken by an asylum applicant in the initial processing, affirmative asylum, and deportation stages, respectively. Parts VI, VII and VIII explain how features inherent in the current system combine to deter potential asylum applicants by pointing out difficulties in the bond determination process, the procedures for change of venue, and the mechanisms available for obtaining effective counsel. Even where the INS and the immigration court do not patently violate immigration law in their treatment of refugees, they stretch their discretion to such a great extent that the spirit of the law is frustrated. Refugees are given few rights or protection while they are waiting for their asylum claims to be adjudicated, and the adjudication itself is often arbitrary. While the political asylum application mechanism currently in place in South Texas purports to serve the needs of political asylum applicants and afford them a legitimate chance to have their case heard, the very structure of the system provides few incentives for refugees to enter into or remain in the asylum process.

I
EVOLUTION OF THE DETENTION ZONE

Refugees who make it across the river into the South Texas District have little chance of securing political asylum even when their claims appear meritorious. Historically, the United States government has not been sincere in its conviction that an alien with a well-founded fear of persecution in her country of origin merits a grant of asylum. The last ten years are replete with examples of an immigration bureaucracy that has done everything in its power to force aliens back over the border. As one South Texas immigration attorney reflected on the immigration system as she has experienced it, "The procedural labyrinth resembles a strategy in a war of attrition against Central

American asylum seekers."[22] Furthermore, as the following historical background suggests, the challenges faced by political asylum applicants are in many ways the legacy of past immigration policies.

A. *Overview of INS Policy in the District*

The South Texas District is an impossible place to live for an alien seeking political asylum in the United States and has been so for many years. The Central American refugee movement began with the political upheavals of the Sandinista revolution in Nicaragua in July 1979,[23] and the Salvadoran coup d'etat of October 1979.[24] Thousands of refugees from these two countries eventually sought protection in the South Texas District.

The Salvadoran and Nicaraguan refugees faced particular hardships in that Central Americans were "voluntarily departed" to Mexico, not their home country[25] and they were strangers in Mexico just as they had been in the United States. As a result, by November 1981 more and more Central American aliens (mostly Salvadorans and Guatemalans) did not opt for "voluntary departure" and requested political asylum instead.[26] Consequently, with the general unrest in Central America the population of detained aliens in South Texas exploded.[27]

As the detention population rose, bonding companies started to post bonds for Central Americans who had sponsors in the United States;[28] their rates were often usurious.[29] Those aliens who could not post bond were placed in INS detention centers and subjected to oppressive living conditions. Many non-profit organizations and aliens have described the beatings, inadequate health care, poor nutrition, and unsanitary conditions in the detention centers.[30]

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22. Interview with Vicky Stifter, Esq., Proyecto Adelante, in Dallas, Tex. (June 7, 1989).

23. ELIZABETH G. HARRIS, *Regional Response to Central American Refugees, in* REFUGEES AND WORLD POLITICS 187, 195 (1985).

24. ROBERT ARMSTRONG & JANET SCHENK, EL SALVADOR: THE FACE OF REVOLUTION 115-18 (1982). Salvadoran asylum seekers started entering the District shortly after the coup.

25. Edwin Harwood, *Can Immigration Laws Be Enforced?*, 72 PUB. INTEREST 107, 109-16 (1983).

26. *Refugee Makes Plea for Asylum During Meeting*, BROWNSVILLE HERALD, Aug. 16, 1981, at 14A; AMERICAN FRIENDS SERV. COMM., *supra* note 5, at 1.

27. From 1981 to 1982, the INS detained aliens on average between three and ten months. As the number of applicants increased and the backlog of cases grew, aliens were detained for longer and longer periods; delays "grew from unmanageable to absurd." AMERICAN FRIENDS SERV. COMM., *supra* note 5, at 3. Long term detention in South Texas also coincided with the Reagan Administration's new policy of using detention as a deterrent to asylum seekers. GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 188 (1986).

28. AMERICAN FRIENDS SERV. COMM., *supra* note 5, at 1.

29. Juffer, *supra* note 13, at 10. The non-refundable fee on a $3,000 bond is $1,625.00, and on a $4,000 bond, the fee is $1,940.00. Refugee lawyers say that these rates are higher than anywhere else in the United States. *Id.*

30. *Refugee Makes Plea for Asylum During Meeting*, *supra* note 26, at 14A; AMERICAN FRIENDS SERV. COMM., *supra* note 5, at 2; PROYECTO LIBERTAD, REPORT ON CENTRAL

In November 1981, the INS responded to the rising number of detained refugees with a "shakedown" of the detained population. The INS prohibited detainees from possessing a whole series of materials including pencils, pens, writing paper, legal materials, and even scraps of paper with addresses of contacts and family in the United States.[31] The INS contended that these writing utensils were potential weapons and could also be used to deface the detention facility, and that the papers created a potential fire hazard.[32] One detainee, Noe Castillo Nuñez, insisted that the detainees had the right to possess these materials, and soon found his bond taken away because he was labeled a trouble maker.[33]

The shakedown was followed in 1982 by litigation in two federal courts. In *Nuñez v. Boldin*[34] and *Orantes-Hernandez v. Smith*,[35] the courts ordered preliminary injunctions against the INS. In *Nuñez*, the court addressed the effects of the shakedown, and forbade the INS to prohibit paralegals from visiting detainees, to curtail visiting hours to counsel, and to intrude upon the private communications between detainees and their counsel.[36] The court ordered the INS to expand visitation hours, to notify counsel prior to deportation or "voluntary departure," and to provide notice to detainees of the right to apply for asylum.[37]

The *Nuñez* court went beyond the enumerated rights of 8 U.S.C. §§ 1101 *et seq.*, and awarded special procedural rights to prospective Salvadoran and Guatemalan asylum seekers in order to help them wade through the coercive conditions of detention.[38] Subsequently, the *Orantes* court enjoined the INS from intimidating and coercing Salvadorans into signing voluntary agreement forms.[39] The court ordered the INS to advise the refugees of the right to apply for asylum before granting requests for voluntary departure.[40]

The courts' criticism of INS detention practices had little immediate effect on the treatment of detainees in South Texas.[41] While the *Nuñez* court

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AMERICAN REFUGEES IN THE RIO GRANDE VALLEY OF TEXAS 4-6 (1985); Dudley Q. Althus, *Refugees Find a Ray of Hope*, TEXAS OBSERVER, Apr. 22, 1983, at 15.

31. AMERICAN FRIENDS SERV. COMM., *supra* note 5, at 2-3.

32. *Id.*

33. *Id.*

34. 537 F. Supp. 578 (S.D. Tex. 1982), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982). The preliminary injunction issued by Judge Vela in 1982 remains in force.

35. 541 F. Supp. 351 (C.D. Cal. 1982). The preliminary injunction was made permanent in Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom.* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

36. *Nuñez*, 541 F. Supp. at 580.

37. *Id.*

38. *Id.*; *see also* Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982).

39. *Id.* at 385.

40. *Id.*

41. The INS insisted at every juncture that the implementation of reforms to safeguard the rights of refugees would obstruct the INS's mission of expediting the removal of illegal aliens. Such changes in policy, the INS believed, would invite "floods" of "illegal" Central American aliens into the United States. That their predictions never materialized did not discourage the INS's restrictionist and xenophobic anti-asylum rhetoric. During the *Nuñez* trial in 1982, INS

had prescribed visitation hours, the American Friends Service Committee observed that the INS scheduled institutional procedures such as roll calls during those hours. Other problems, such as the difficulty in locating detainees and overcrowded visitation areas, further reduced court-ordered visitation hours. Attorneys and paralegals often spent up to fifty percent of the prescribed visitation period waiting for the refugee.[42] The INS began advising detainees of their right to apply for asylum, but agents had most prospective applicants sign documents stating that the applicant had been informed of her rights but did not wish to apply for asylum.[43]

The INS continued its bureaucratic and coercive behavior throughout the early to mid-eighties. Until 1982, the INS District Director denied all affirmative asylum applications from non-detained applicants.[44] Between approximately 1982 and 1986, in blatant violation of the 1980 Refugee Act,[45] the INS stopped accepting affirmative applications from virtually all aliens;[46] aliens in

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spokesman, Duke Austin, said, "If we become even more liberal in our acceptance of El Salvadorans, we should provoke even larger numbers to attempt to enter this country." Juan Montoya, *Asylum Requests Called Frivolous*, BROWNSVILLE HERALD, Oct. 14, 1983, at 10A.

42. AMERICAN FRIENDS SERV. COMM., *supra* note 5, at 3. Furthermore, the INS was adamant that there should be no visitors during periods not prescribed by the court, even when it would cause little or no disruption of INS procedures.

43. While the applicants were told of their right to apply for asylum, they were also told that if they did not pay the $4,000 bond, the applicant would be detained for many months and subsequently would be deported, since they would not qualify anyway. *Id.* at 3, 6. Affidavits are on file at Proyecto Libertad.

44. In 1984, INS District Director, Hal Boldin, revealed that although affirmative asylum applications were received sporadically from January 1982 through February 1984, none were granted. Boldin's statements were made under oath during the trial of Stacey Lynn Merkt. Trial Tr. at 779, 782, United States v. Merkt, Crim. No. B-84-219 (S.D. Tex. 1984).

45. The statutory and regulatory scheme created a right to apply for asylum to the INS District Director (under pre-1990 law, it was codified in 8 U.S.C. § 1158, 8 C.F.R. § 208.1(a), 208.3(a)(2) (1989)).

46. In 1989, Alfonso De Leon, Assistant District Director for Examinations, revealed that the INS stopped accepting affirmative asylum applications for undocumented applicants in 1982 and that this continued until 1986. Plaintiffs' Brief in Support of TRO, Decl. of Alfonso De Leon, Morazan v. Thornburg, No. B-89-002 (S.D. Tex. 1989).

According to Hal Boldin, after February 1984, no asylum applications were processed by the INS in South Texas. Trial Tr. at 782, United States v. Merkt, Crim. No. B-84-219. Ostensibly, he confused the duty to process affirmative applications for asylum with the discretion in granting or denying such applications. *Id.* Four years later, this misconception was repeated by a second INS official, George Somerville, who stated that the District Director "is empowered with discretion to refuse to even accept applications." Juffer, *supra* note 13, at 10.

Finding this situation unacceptable, some citizens took the law into their own hands. In 1984 and 1985, the refusal of the INS to grant asylum claims in South Texas led to the sanctuary trials of Jack Elder and Stacey Merkt. Sanctuary was a politico-religious movement whose members alleged that United States immigration laws operated as an extension of United States foreign policy in Central America, favoring refugees from countries ideologically hostile to the interests of the United States, such as Cuba and Nicaragua. *See, e.g.*, American Baptist Churches in the U.S.A. v. Meese, 666 F. Supp. 1358 (N.D. Cal. 1987); American Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756 (N.D. Cal. 1989); American Broadcast Corp. v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991). Merkt was prosecuted for illegally transporting Salvadoran refugees to an immigration district north of the checkpoint, which was accepting affirmative applications for asylum. United States v. Merkt, 764 F.2d 266 (5th Cir.

the United States were either deported or detained.

Until 1985, whenever the detention center was full, the INS arrested and then released on recognizance potential applicants for asylum. After 1985, the number of arrested Central Americans had so increased that the INS detention centers were filled beyond their capacity and the INS' budget was depleted. The INS then introduced a policy of using the entire South Texas District as a detention zone, allowing aliens to remain only within the borders of the District.[47]

In August 1986, refugees released "on recognizance" were allowed to leave the District if they posted a travel bond of $1,000[48] or if they went through a lengthy change of venue proceeding. In 1987, the bond requirement was raised to $3,000.[49] In the fall of 1987, the INS resumed its practice of accepting affirmative applications for asylum, but only from Nicaraguans.[50]

After an alien submitted a completed political asylum application, she could travel freely and have her claim heard in the INS district nearest her ultimate destination. By November 1988, the INS had received approximately 30,000 applications, since people were submitting them in order to get permission to travel.[51]

On December 16, 1988, the INS abruptly rescinded the recent travel policy, and initiated new travel restrictions prohibiting asylum applicants from leaving their district of entry.[52] The INS also instituted a new policy to expedite the adjudication of affirmative asylum claims and to restrict employment authorization.[53] Applicants were told that they could not leave the district

1985), *reh'g denied*, 772 F.2d 904 (1985); United States v. Merkt, 794 F.2d 950 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); *see also* RENNY GOLDEN & MICHAEL MCCONNELL, SANCTUARY: THE NEW UNDERGROUND RAILROAD (1986).

47. For example, during the month of August 1986, the Border Patrol apprehended 1,511 non-Mexican undocumented aliens, the overwhelming majority of whom were from Central America. Of these, 180 were detained in the detention facility and 1,331 were released on recognizance but restricted to the Valley. BORDER ASSOCIATION FOR REFUGEES FROM CENTRAL AMERICA (BARCA), STATISTICS ON U.S. BORDER PATROL APPREHENSIONS (1991).

48. According to INS figures, more than 7,500 applicants were allowed to leave the Valley after posting a $1,000 bond between January and August 1986. To post bonds, aliens first had to fill out a six-page typewritten form in English and agree to return to the District for their deportation hearings, since the venue remained in South Texas. It has been the author's experience that most aliens do not understand this requirement. As a result of this policy, many aliens subsequently missed their hearings and deportation was ordered in absentia. *See* Ed Asher, *Groups Protest Central Americans Draining Valley*, BROWNSVILLE HERALD, Sept. 22, 1986, at 1A. These numbers were estimated by then-INS Deputy Director David Turner.

49. Juffer, *supra* note 13, at 1.

50. According to INS Assistant District Director for Examinations, George Somerville, the decision to accept applications selectively in 1987 was made pursuant to the July 1987 "directive" issued by Attorney General Edwin Meese declaring that Nicaraguan applicants for asylum should be given preference over other aliens. Juffer, *supra* note 13, at 10.

51. Peter Applebome, *South Texans Fear An Influx of Aliens*, N.Y. TIMES, Dec. 16, 1988, at A22.

52. *Id.*

53. *ACLU Angry Over INS Change in Asylum*, VALLEY MORNING STAR, Dec. 15, 1988, at A1.

until their asylum applications were processed. They were told that if they attempted to leave the area, they would be arrested at the checkpoint, detained, and placed in deportation proceedings. Applicants were then required to return to the INS office in thirty days to receive the decision on their asylum claims.[54]

Within days of the implementation of this policy, thousands of Central American applicants became homeless.[55] The policy served to trap thousands of additional applicants in the District. They slept in makeshift tents of cardboard and plastic, condemned motels,[56] open fields, and on the streets of South Texas.[57]

On January 9, 1989, a federal court in South Texas issued a temporary restraining order against the INS travel restriction policy.[58] Almost instantly, thousands of Central Americans migrated into the country's interior.[59] In extending the temporary restraining order to February 20, the judge strongly advised "the agency to spend the next three weeks re-evaluating the policy in an attempt to prevent the 'kind of distress and kind of problems that were created' when the policy was put into effect."[60]

On February 20, 1989, the Commissioner of the INS, Alan Nelson, announced the "Enhancement Plan for the Southern Border,"[61] a detention plan that satisfied the court.[62] The plan was designed to stem the tide of frivolous political asylum claims[63] and involved a practice of same day review and on-the-spot decisions. New asylum examiners[64] acted as though refugees' access to counsel was interfering with the INS mission of expediting adjudications

54. *Id.* Based on the author's observation, this was a pro forma denial in almost every instance.

55. Tony Vindell, *Refugees Ordered Off Property*, BROWNSVILLE HERALD, Jan. 9, 1989, at 1A. Refugees were ordered off a vacant lot in Brownsville, Texas.

56. Hector F. Garza-Trejo, *City Stymied on Amber Motel*, BROWNSVILLE HERALD, Dec. 14, 1988, at 1A; Maggie Rivas, *Asylum Seekers Live in Quiet Resignation*, DALLAS MORNING NEWS, Jan. 7, 1989, at A1. Refugees gathered at the abandoned Amber Motel in Brownsville, Texas, where there was no heat or running water, and where gaping holes in the outer walls replaced picture windows and air conditioners. Hector F. Garza-Trejo, *City Officials Stymied in Effort to Rid Old Motel of Immigrants*, VALLEY MORNING STAR, Oct. 3, 1988, at A11.

57. Rivas, *supra* note 56, at A12.

58. Morazan v. Thornburgh, No. B-89-002, slip op. at 2 (S.D. Tex. Jan. 9, 1989) (describing the "squalid, substandard living conditions" and "grave health and safety concerns" for refugees); *see also* Peter Applebome, *Judge Halts Rule Stranding Aliens in Rio Grande Valley*, N.Y. TIMES, Jan. 10, 1989, at A14; Maggie Rivas, *INS Ordered to Let Refugees Leave the Valley*, DALLAS MORNING NEWS, Jan. 10, 1989, at A1.

59. Lisa Belkin, *Aliens Flee Border Area While Rules are Lifted*, N.Y. TIMES, Jan. 11, 1989, at A12.

60. Lisa Belkin, *Judge Leans to Allowing Rule that Trapped Aliens in Texas*, N.Y. TIMES, Feb. 1, 1989, at A12.

61. IMMIGRATION & NATURALIZATION SERVICE, ENHANCEMENT PLAN FOR THE SOUTHERN BORDER (1989) [hereinafter ENHANCEMENT PLAN].

62. *Id.*

63. *Id.* at 2.

64. *Id.*

and removing frivolous claimants from the system.[65] Forty-five new asylum examiners issued pro forma denials to virtually all affirmative political asylum applicants,[66] and then issued orders to show cause.[67] The INS ordered the immediate detention of applicants whose asylum requests were denied;[68] they also urged the early deportation of all aliens who did not qualify for asylum.[69] A year later, in February 1990, the INS Commissioner, Gene McNary, came to South Texas and foreshadowed the coming of a new crackdown against refugees by raising the detention capacity in South Texas from 5,000 to 10,000.[70]

B. Conditions in the Detention Centers

Conditions in the detention centers make them little better than jails. Separated from friends and family, victims of persecution often find themselves sharing barracks with members of groups responsible for the persecution from which they were fleeing in their countries of origin. Pervasive boredom and overcrowding exacerbate the tensions of confinement. Aside from religious services and an aerobics exercise class led by nuns who visit female detainees, there are no organized events for detainees. Men spend their days playing soccer in the hot Texas sun, sharing the field with red ants and gnats. A library in one facility is stocked only with torn romance novels and a few copies of the New Testament, most of which are in English.[71] The library in the Port Isabel facility, for example, contains only one immigration law book in Spanish, and it was published before 1980.[72] There are also few ways for a refugee to gain independence or knowledge of the system into which she has been thrust.

A federal judge examined these detention conditions in *Orantes-Hernandez v. Smith*[73] and found that INS coercion took several forms. For example, the INS effectively restricted aliens' access to court and counsel by failing to provide a sufficient number of telephones and by curtailing attorney-client

65. The author was present at a detention site on February 22, 1989, and witnessed an interaction in which the District Director told Mr. Flynn (a Proyecto Libertad lawyer) that his presence at the detention site interfered with the aliens.

66. UNITED STATES BORDER PATROL, MCALLEN SECTOR OPERATIONS BRIEF, BLUE SHEET REPORT (1991) [hereinafter MCALLEN SECTOR OPERATIONS BRIEF].

67. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT. OF JUSTICE, COMMISSIONER NELSON ANNOUNCES ASYLUM PLAN PRESS RELEASE 5 (Feb. 20, 1989) [hereinafter COMMISSIONER NELSON ANOUNCES ASYLUM PLAN].

68. *Id.* at 7.

69. ENHANCEMENT PLAN, *supra* note 61, at 14.

70. Rebecca Thatcher, *INS Cracks Down, Bayview Center Capacity Raised to 10,000*, BROWNSVILLE HERALD, Feb. 8, 1990, at 1A. The Commissioner stated: "The message for Central America is, don't just drop in on our doors unannounced. . . . We are prepared and the message is clear."

71. Observations of the author at the Port Isabel Detention Center Library, (Dec. 5, 1988); *see also* Dep. of Cecilio L. Ruiz, Jr., Assistant Director for Detention and Deportation, at 158 (May 4, 1989), Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

72. DAVID CARLINER, DERECHOS DE LOS EXTRANJEROS (1977).

73. 541 F. Supp. 351 (C.D. Cal. 1982).

visitation hours and privacy in communications.[74] Furthermore, by banning written materials, including those explaining aliens' legal rights, certain INS detention centers had unduly restricted access to courts.[75] Thus, the *Orantes* court ordered the INS to cease obstruction of aliens' efforts to obtain counsel and asylum.[76]

The INS in South Texas, however, ignored the court order for most of the decade. After six years of litigation, the INS had merely provided a few telephones,[77] still regularly delayed meetings between attorneys and paralegals and their clients for several hours, and had not made available a sufficient amount of written legal materials on the rights of detainees.[78]

Most troubling is the INS practice of ignoring, or worse still, participating in and then stalling, investigations into reports of physical mistreatment of detained refugees. Reports and confirmed incidents of neglectful behavior and physical mistreatment of Central American detainees are common. Nevertheless, on the whole, the INS abuses have not been dealt with seriously; in the three years since contempt proceedings in *Orantes*,[79] the INS in South Texas has continued to treat detainees with indifference, neglect, abuse, and punishment with little or no provocation.

In particular, illegal drug use and sexual abuse instigated by INS guards have permeated the detention facility. For example, on March 17, 1989, a Honduran inmate was left a quadriplegic in a drug-related accident in the detention center.[80] In August 1989, a former INS detention guard was put on trial for selling cocaine to an undercover informant at the INS detention camp near Bayview, Texas.[81] A year later, in September 1990, the INS sent reports to the United States Inspector General's Office at the Justice Department alleging that detention guards at the Bayview detention center had sexually harassed women guards and detainees. Female guards filed complaints with the Equal Employment Opportunity Commission claiming that they had been dismissed from their jobs for resisting the sexual advances of male supervisors.[82] An even more egregious incident became public in August 1989, when

74. *Id.* at 384-85.

75. *Id.*

76. *Id.* at 384-87

77. Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (D.C. Cal. 1988), *aff'd sub nom.* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990). The court ordered the INS to "provide at least one telephone per twenty-five (25) detainees at detention centers." *Id.* at 1513.

78. As the author observed, as of May 1989, attorneys and paralegals had to wait several hours to see clients. *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549; Letter from Linton Joaquin, Counsel for the Plaintiffs, to Allen W. Haussman, Counsel for the U.S. Dep't of Justice 1-2 (March 24, 1989) (on file with author).

79. Orantes-Hernandez v. Thornburgh, 919 F.2d 549.

80. Robert Kahn, *Injured Honduran Puffed Pot at Camp*, BROWNSVILLE HERALD, June 21, 1989, at 1A.

81. Lisa Baker, *Fate of INS Guard in Camp Drug Case*, BROWNSVILLE HERALD, Aug. 30, 1989, at 8A.

82. Robert Kahn, *INS Investigates Alleged Sexual Harassment*, BROWNSVILLE HERALD, Sept. 27, 1990, at 1A; *see* Rebecca Thatcher, *Investigation of Bayview Harassment Charges*

an INS guard pleaded guilty to violating the civil rights of two teen-age male detainees whom he had sexually molested.[83] Similar allegations of sexual abuse have been leveled at the International Educational Services, Inc., the INS contract facility for the detention of minors in Harlingen, Texas. There, shelter officials have allegedly solicited sex from underage males.[84]

Case files at Proyecto Libertad reveal a pattern of physical mistreatment against detainees for minor in-house infractions and for showing disrespect to INS guards.[85] Proyecto Libertad has collected several affidavits from detainees which suggest that abuse and intolerance persist. These reports include allegations that detention officials withheld food from detainees for three days,[86] physically mistreated male detainees by kicking them in the groin area,[87] and sexually abused female detainees.[88]

In April 1990, a Dominican detainee filed a one million dollar lawsuit against three INS detention officials. The complaint alleged that the INS officials had rammed him into a door and had left him bleeding and unconscious on a bus.[89] The plaintiff alleged that the beating was racially motivated.[90] A year later, in a separate incident, a Honduran detainee alleged that he was the victim of a severe beating by INS detention officials.[91] According to the de-

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Stalls, BROWNSVILLE HERALD, Aug. 15, 1991, at 8. While these reports were forwarded to the Inspector General's Office, no report or follow-up in these incidents had been issued seven months later.

83. Lisa Baker, *INS Guard Pleads Guilty to Molesting Two Teen-Agers*, BROWNSVILLE HERALD, Aug. 31, 1989, at 1B.

84. Kahn, *supra* note 82, at 1A.

85. These case files originated in 1987-88. The Proyecto Libertad case worker, Jim Cushman, was responsible for collecting data on physical mistreatment at the INS's Port Isabel Service Processing Center at Los Fresnos, Texas (PISPC). Aff. of Jim Cushman, Paralegal at Proyecto Libertad 1, Harlingen, Tex. (Aug. 27, 1989). Mr. Cushman stated:

> I have been told of and seen evidence of widespread abuse of detained Central Americans, including verbal abuse, humiliation and contemptuous treatment by INS and private guards; deliberate misinformation by guards or officials as to the asylum process, bonding process and rights available to detainees, including telling them that Proyecto Libertad lawyers and legal workers are communists, and faggots; physical abuse including blows, kicks, and beatings administered by two, three, or more guards; use of solitary confinement as punishment without any kind of a hearing process; inadequate medical attention, especially with persons with chronic health problems.

86. Decl. of Giovani Urguia Rose, Proyecto Libertad trans. (May 21, 1988) (on file with Proyecto Libertad, Harlingen, Tex.).

87. Decl. of Luis Alfredo Gallardo-Berrolls, Proyecto Libertad trans. (Mar. 2, 1988) (on file with Proyecto Libertad, Harlingen, Tex.).

88. Decl. of Berta Garcia, Proyecto Libertad trans. (June 8, 1989) (on file with Proyecto Libertad, Harlingen, Tex.).

89. Rebecca Thatcher, *Detainee Files $1 Million Suit Against 3 INS Officials*, BROWNSVILLE HERALD, Apr. 16, 1990, at 8A.

90. For an illustrative example, see Alien Affidavit, *reprinted in* PROYECTO LIBERTAD NEWSLETTER, June/July 1987 (alleging that the INS encouraged Latinos to "beat up on the Africans"). In one incident, according to the affidavit, INS guards beat up and then isolated African detainees after one detainee had made inquiries about mail that was missing.

91. *See* Rebecca Thatcher, *Honduran Detainee Allegedly Beaten*, BROWNSVILLE HERALD, Aug. 8, 1991, at 11 [hereinafter Thatcher, *Honduran Detainee*].

tainee's sworn statement, a guard had used his hands and knees to beat the refugee on the head, chest, and stomach. During the beating, the detainee lost consciousness.[92]

Frustration over mistreatment, boredom, and overcrowding has fueled complaints, protests, and hunger strikes. Protests erupted in 1985 when detainees complained that they had to sleep on the floor, and that they received only aspirin regardless of the seriousness of their medical complaints. In 1986, the detainees protested their high bonds.[93] In March 1989, barely three weeks into the new INS detention policy, inmates peeled up a section of the ten-foot fence surrounding the recreation yard and began shouting for freedom.[94] One hundred and thirty border patrol officers, twenty INS investigators, and several local law enforcement officials responded to the protests. The detention center had become a tinder box of rising tension caused by overcrowded conditions, reduced food rations, and mounting fear regarding the INS's newly expedited deportation process.[95]

The INS has responded to these events with harsh crackdowns.[96] For example, on March 5, 1990, guards with riot gear, black helmets, and clubs were called in to quash a peaceful hunger strike orchestrated by approximately fifteen male Nicaraguan detainees who actually wished to return to Nicaragua after the election of the United National Opposition (UNO) government during the February 25, 1990 elections.[97] The mistreatment of detainees did not end. On January 8, 1991, detainees again began a hunger strike to protest abuses which they felt were particularly inappropriate because, in the words of

92. *Id.* Paralegal Lia Felker of Proyecto Libertad subsequently reported that the detainee was throwing up blood days after the alleged attack. The case was subsequently referred to the Justice Department's Internal Affairs Department, the Office of the Inspector General. According to the detainee's counsel, the detainee sustained severe bruises on his chest, could not keep food down, and has suffered from hyperventilation and headaches since the incident. After repeated urging of counsel, the respondent was subsequently released from detention. *See* Thatcher, *Honduran Detainee*, *supra* note 91, at 11. As of December 13, 1991, according to Proyecto Libertad, the officer in question remains on the job and there has been no resolution of this case.

93. Garza-Trejo, *Aliens Applying*, *supra* note 11, at 1A.

94. ENHANCEMENT PLAN, *supra* note 61.

95. Lisa Baker, *Immigration Camp Disturbance Quelled*, BROWNSVILLE HERALD, Mar. 17, 1989, at 1B. The Chief Border Patrol Agent, Silvestre Reyes, stated that the disturbance began when 1,621 male inmates who were crowded into the recreation area banded together against the fence. Duke Austin, the INS spokesperson, declared that 350 detainees had been deported since the inception of the Border Enhancement Plan three weeks earlier.

96. In 1984, INS added an elite component to its law enforcement efforts. The Border Patrol Tactical Team (BORTAC) was a force of officers trained in riot control and anti-terrorism, similar to FBI Special Weapons and Training (SWAT) teams. BORTAC responds as the need arises to special emergency situations.

97. Tony Vindell, *INS Detainees on Hunger Strike*, BROWNSVILLE HERALD, Mar. 6, 1990, at 1A; Mary Valdez, *'Removal of Agitators' Thwart Protest*, BROWNSVILLE HERALD, Mar. 7, 1990, at 1B; Rebecca Thatcher, *Charges of Racism, Brutal Treatment Emerge from Camp*, BROWNSVILLE HERALD, Mar. 16, 1990, at 1B (detailing detainee's claim that he had been thrown to the ground by detention guards: "One put his foot on my neck, the other tied my hands").

one detainee, "We are not robbers or delinquents."[98] Honduran women began this hunger strike to protest "mistreatment and general miserable conditions," and inadequate prenatal health care that allegedly caused two Honduran women to have miscarriages.[99]

Finally, in addition to mistreatment and inadequate medical care, procedural delays intensify the burden of detention forcing aliens to stay in detention for incredibly long periods of time. Aliens who refuse to accept voluntary deportation must remain in detention pending a final decision on their cases. In cases where the process has included an appeal to the Board of Immigration Appeals, aliens may spend a year or more in detention.

Detaining potential political asylum claimants significantly affects those claimants' chances of reaching a hearing on the merits of their case. In the data received from the September 1989 FOIA request, 477 out of a total of 722 detained aliens (66%) received deportation orders or were "voluntarily" deported at the plead-in stage. (In this Article, "voluntary" deportation means the alien requested to be deported.) During the same month, only 262 of 743 non-detained aliens (35.3%) bailed out of the system at this early stage. Clearly, detention has a deterrent effect on an alien's chances of reaching an asylum merits hearing. Inasmuch as life in the detention centers can be crowded, unsanitary, and sometimes even life-threatening, it is not surprising that many detained aliens decide not to remain in the system.

II
EXPANSIVE ARREST AND SEARCH POWERS

The Border Patrol agents in the District are authorized to operate as if they are maintaining a police state. Aliens who cross the border seeking asylum are immediately subject to broad arrest and search powers, giving aliens their first indications of the coercive system they must negotiate to gain a hearing on their asylum claim. More importantly, these powers make life very difficult for aliens who are trying to survive in the District while awaiting a hearing, and contribute to the pressure placed on aliens to simply exit the system.

An officer may search a subject without a warrant if she is within twenty-five miles of the border.[100] An officer may extend this special provision to one hundred air miles of the boundary if the subject is in a plane or boat.[101] A fixed checkpoint search is not an illegal seizure under the Fourth Amendment.[102] An officer may stop[103] or search[104] a person if she has reasonable

98. Rebecca Thatcher, *Miscarriages Prompt Women to Launch Hunger Strike at INS Bayview Center*, BROWNSVILLE HERALD, Jan. 9, 1991, at 1A.

99. *Id.*

100. 8 U.S.C. § 1357(a)(3) (1992).

101. 8 U.S.C. § 1357(a)(3); 8 C.F.R. § 287.1(a)(2) (1992).

102. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

103. 8 U.S.C. § 1357(a)(1) (1992).

104. 8 U.S.C. § 1357(c) (1992); *see, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

suspicion to believe that the person is in the United States illegally. The law enforcement officer must determine whether there is reasonable suspicion by weighing the totality of the circumstances.[105] Immigration officers have the right to stop and question a person solely to determine whether she has a right to be in or remain in the United States.[106] The officer's determination that she has reasonable suspicion may not be based solely on race or alienage;[107] however, the reasonableness of the stop is applied within the context of what conclusions a trained INS officer might reasonably draw.[108]

A law enforcement official can arrest any person if she has reason to believe that the subject is within United States boundaries in violation of the law or regulation and the subject is likely to escape before a warrant can be obtained.[109] The Supreme Court has interpreted the "reason to believe" standard to mean probable cause.[110] The probable cause standard can be met when a person fails to produce an alien resident card or other proof that she is a legal resident.[111]

The geographical location of the South Texas District greatly enhances the power of the INS. Much of the seven-county region of the South Texas District is sealed off from the country's interior by two permanent border patrol checkpoints, which serve as the District's "second border."[112] These checkpoints are located on the two main roads which flow in and out of the Valley[113] about sixty miles north of the Texas-Mexico border on the Rio Grande. In Valley towns, signs of expansive law enforcement power are manifested every day in searches of airports,[114] bus and railroad stations,[115] raids of area factories,[116] the activities of INS informants or "intelligence sources,"[117]

105. United States v. Cortez, 449 U.S. 411, 418 (1981).

106. 8 U.S.C. § 1357(a)(1); Lau v. INS, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971).

107. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

108. *Cortez*, 449 U.S. at 421.

109. 8 U.S.C. § 1357(a).

110. *Cortez*, 449 U.S. 411.

111. United States v. Wright, 706 F. Supp. 1268, 1274 (N.D. Tex. 1989).

112. Edward R. F. Sheehan, *The Open Border*, N.Y. REV. OF BOOKS, Mar. 15, 1990, at 34 (stating that "[m]any Texans and most illegal aliens consider [the checkpoint] the real border of the United States").

113. One checkpoint, located on Interstate 77, is at Sarita, Texas; the second, on Route 83, is positioned in Falfurrias, Texas.

114. *More Aliens Being Apprehended at Airports*, THE VALLEY MORNING STAR, Aug. 16, 1985, at A12 (quoting Border Patrol Agent Richard Marroquin saying, "We are catching so many [aliens at valley airports] that we don't have any place to keep them").

115. During the summer of 1991, the INS launched Operation Ironhorse II which centered on arresting undocumented aliens at the railroad arteries heading north from the border. Clara German, *"Operation Ironhorse" Traps Stowaways*, CHRISTIAN SCIENCE MONITOR, Aug. 26, 1991, at 12.

116. *See* INS v. Delgado, 466 U.S. 210, 216 (1984) (holding that brief questioning during a factory raid does not constitute a Fourth Amendment search and seizure of the individual). The INS has the authority to conduct factory surveys of employees for the purpose of determining whether or not they are illegal aliens.

117. *See* IMMIGRATION & NATURALIZATION SERVICE U.S. BORDER PATROL OPERA-

and the presence of helicopters and other aircraft[118] and road blocks.[119]

The police make investigatory stops of vehicles largely on the basis of the apparent Latino ancestry of the vehicles' occupants.[120] At the checkpoint, police dogs stand guard with Border patrol agents.[121] Furthermore, seismic sensors planted in the ground for miles around the checkpoint trigger a beep on a computer whenever an individual tries to evade the checkpoint.[122] The INS establishes its presence on virtually every path which leads out of the Valley.

Consequently, aliens and non-aliens alike are always looking over their shoulders in fear, since the Border Patrol has difficulty in identifying undocumented aliens in the overwhelmingly Latino South Texas District without subjecting the community at large to indiscriminate interrogation. Border Patrol officers insist that they can distinguish undocumented aliens by their appearance and demeanor. In practice, however, Latinos regardless of their alienage are made to show identification justifying their legal status in this country before they are allowed to leave the District. This practice places all Latinos, regardless of their legal status, under suspicion.

Passengers at bus stations and on transit buses in the District who are headed northward are subject to INS scrutiny, which ranges from being watched by patrol officers to being questioned about legal status and destination.[123] The Border Patrol also regularly surveys the Missouri-Pacific railroad cars.[124] Border Patrol vans surround and explore railroad freight cars, and officers shine flash-light beams into the faces of unsuspecting passers-by. The ritual of monitoring individuals is repeated in the waiting areas in Valley airports,[125] where virtually all passengers are surveyed, some are questioned, and others are detained by uniformed or plain-clothes immigration officials.

TIONS BRIEF MCALLEN SECTOR 3 (1991), [hereinafter U.S. BORDER PATROL OPERATIONS BRIEF] (illustrating that the INS calls informants "intelligence sources").

118. *Id.* Helicopters served the function of deterrence and intimidation. In addition to facilitating detention and apprehension efforts, aerial spot-lights and loudspeakers frighten and deter refugees crossing the river, reminding them of the traumas of war which they had just fled. The Border Patrol employs five aircraft assigned to the District: two Piper PA-18 Cubs, one Cessna 182, and two ASTAR helicopters.

119. *INS Draws Criticism for Texas Raids on Illegal Aliens*, BROWNSVILLE HERALD, June 8, 1986, at 3A.

120. *Border Patrol Agents Busy at Sarita Checkpoint*, VALLEY MORNING STAR, Aug. 18, 1985, at A1.

121. *See* U.S. BORDER PATROL OPERATIONS BRIEF, *supra* note 117, at 3. The Border Patrol K-9 Program was initiated in April 1987. There are twelve dogs assigned to duty at the border patrol checkpoints in the District.

122. Sheehan, *supra* note 112, at 34.

123. U.S. BORDER PATROL OPERATIONS BRIEF, *supra* note 117, at 2. According to the border patrol, the movement of aliens out of the District is by vehicles — northward via U.S. Highway 767 through Kingsville, and northward via U.S. Highway 281, through Falfurias, Texas.

124. The Missouri-Pacific runs northward through Kingsville, Texas. Kingsville is located just north of the checkpoint at Sarita.

125. Ronald J. Ostrow, *U.S. to Add 300 Agents Along Mexican Border*, L.A. TIMES, Feb. 9, 1992, at A1.

III
INITIAL IMMIGRATION PROCESSING

Standing wet and often virtually naked,[126] the immigrant climbs out of the river and the first question she hears may be, "Where were you born?"[127] One refugee told the author that immigrants are surprised by the initial confrontation with the Border Patrol. The refugees often pay guides (Coyotes) for assistance and protection in crossing the river, and believe that once they cross the river they are home free. In response to the question put to them by the Border Patrol officer, the alien generally concedes her country of origin and is subsequently arrested.

The moments after a refugee crosses the Rio Grande River and faces the prospect of arrest by immigration authorities are some of the most frightening and confusing moments she is likely to face; she is totally vulnerable.[128] The actual sight of armed and uniformed officers causes varied reactions, which range from trauma to relief. One woman from El Salvador was convinced that the persecution she endured in El Salvador would be repeated in the United States. "I was afraid I'd be beaten [by the Border Patrol] because they had the same uniform and gun as the military in El Salvador."[129] For another refugee, the sight of the Border Patrol brought home the connection between the United States government policies and its support over the years for the Salvadoran military:

> Their purpose is to deport us. . . . The U.S. government supports El Salvador and the Salvadoran military is looking for me. This makes the U.S. government an enemy of mine . . . I'm sure the information taken by INS will get back to El Salvador so I hope I don't get deported.[130]

For yet another, the initial confrontation with the border patrol was less frightening: "At least I wasn't caught by immigration in Mexico. They don't shoot you here."[131]

The United States-Mexico border is a busy juncture for undocumented aliens and the United States Border Patrol. United States Border Patrol agents stationed along the United States-Mexico border account for about

126. This description explains the origin of the pejorative term "wetback" for Latinos in this country.

127. EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 56 (1986) [hereinafter HARWOOD: IN LIBERTY'S SHADOW]. The more appropriate question would be, "Are you a United States citizen?" which would directly address the issue of alienage.

128. *See One Alien Dies Every Four Days Crossing Border*, LAREDO MORNING TIMES, Mar. 15, 1991, at A1; FRELICK, *supra* note 5.

129. Interview with Maura, a Salvadoran refugee, in Harlingen, Tex. (Feb. 12, 1989). Maura was apprehended by the Border Patrol and released and restricted to the District.

130. Interview with Fidel, a university student from El Salvador, in Harlingen, Tex. (Jan. 12, 1989). After he was apprehended, Fidel was released and restricted to the District.

131. Interview with Rolando, a journalist, in Harlingen, Tex. (Jan. 17, 1989). Rolando was restricted to the District after his arrest.

eighty-five percent of all Border Patrol agents in the United States, and they perform about ninety-five percent of all Border Patrol apprehensions.[132] The INS Border Patrol in South Texas apprehended 438,509 undocumented aliens from 1986-90.[133] Officers believe that for every apprehension, at least two or three aliens escape detention.[134]

After a refugee is arrested, she is taken to the Border Patrol station for initial processing. Processing consists of an interrogation by an enforcement agency official and the completion of two forms: Form I-213, "Record of Deportable Alien"; and Form I-274, "Request for Voluntary Departure."[135] While the inquisitorial nature of the arrest procedure resembles the criminal process, deportation is a civil, not a criminal proceeding, and so undocumented aliens do not have the same Constitutional protections at the early stages of the process that arrestees have in criminal proceedings.[136]

Thus, without the Sixth Amendment right to counsel, processing occurs in an administrative black box. There is virtually no review of the interactions between the detainee and INS officials during this process. These interactions often result in "voluntary return,"[137] "voluntary departure,"[138] or requests for deportation shortly thereafter. If the alien agrees to voluntary departure or return, she will leave the system and the United States at this point.

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132. HARWOOD: IN LIBERTY'S SHADOW, *supra* note 127, at 49.

133. MCALLEN SECTOR OPERATIONS BRIEF, *supra* note 66.

134. Telephone interview with a Border Patrol Officer (name confidential) (Feb. 7, 1992).

135. The use of these forms and the provisions made for notification of the right to asylum are the subject of the proposed settlement agreement in Lopez v. INS, No. CV78-1912-WMB (C.D. Cal. June 4, 1992). Under the proposed terms of the settlement, aliens who indicate that they would like to speak to an attorney are to be given access to a phone and at least two hours to obtain counsel. In addition, aliens must be provided with clear information regarding their right to apply for political asylum. *See* 69 INTERPRETER REL. 739 (June 22, 1992).

136. Aliens who are arrested do not enjoy the same constitutional protections an accused criminal would. Barthold v. INS, 517 F.2d 689 (5th Cir. 1975). This is because aliens are charged with violating a civil statute. Since it is a civil proceeding, an alien need not be given Miranda warnings, and has no right to counsel at government expense or to a jury trial. *Id.* Hearsay evidence is admissible, 8 C.F.R. § 242(14)(c) (1992), and involuntary testimony by the alien can be compelled. CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 137.06(7)(u) (1992).

In Bridges v. Wixon, the Supreme Court conceded: "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual. . . . That deportation is a penalty . . . cannot be doubted." 326 U.S. 135, 154 (1945); *see also* Edwin Harwood, *Arrests Without Warrants: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 512 (1974) [hereinafter Harwood, *Arrests Without Warrants*]. Harwood argues that the most important reason for civil, rather than criminal proceedings, is the nonviolent nature of immigration regulations combined with the lack of criminal resources available to handle the large number of potential defendants.

137. Voluntary return is not considered a form of relief. It is used in South Texas for Mexican nationals who can be persuaded to return to Mexico without a formal deportation hearing. *See* Harwood, *Arrests Without Warrants*, *supra* note 136, at 511 n.26.

138. To be eligible for voluntary departure, the alien must have been a person of good moral character for at least five preceding years, she must be willing to depart the United States, and she must be able to leave at her own expense. 8 U.S.C. § 1254(e) (Supp. 1992).

IV
AFFIRMATIVE ASYLUM

Some aliens are not subjected to the INS's broad search and arrest powers; those who reach the INS office before being apprehended by Border Patrol may choose the non-adversarial affirmative asylum process.[139] However, until December 1988, there was only one asylum examiner in the South Texas District, and she had little training in asylum law.[140] She had virtually no guidance from the district director, who knew even less than she about asylum,[141] nor from the INS trial attorneys who represented the law enforcement objectives of the INS.[142] The examiner worked out of a small isolated office in the INS district office, had little contact with colleagues, and interviewed fewer than fifty applicants per week.[143]

After 1988, the INS provided more asylum examiners to process refugees who were applying affirmatively for political asylum. However, these examiners were neither trained nor did they possess the skills necessary to communicate with applicants. As one INS officer related, the asylum examiners knew nothing about asylum. They had been transferred from sanction or naturalization units within the INS, and had no training in asylum law or policy. At most, they received one day of training upon arrival.[144] The official also stated that:

> The examiners didn't know how to speak to the people on the other side of the desk, and that's so important for what we're supposed to do. Some didn't even speak Spanish. They didn't know how to elicit information, nor were they sensitive to these peoples' needs. The aliens were frightened yet they were not handled with care nor treated with respect.[145]

As the author observed, the outcome of affirmative asylum interviews was not based on individual merit. In many instances, applications were denied because their applications were not written in English. Often, as the author observed, asylum applications were written by taxi drivers, ice cream vendors, and others trying to make a buck off of a refugee's misfortune. Moreover, the

139. 8 C.F.R. § 208 (1992) (stating that if an alien has not been previously apprehended, she may file an application for asylum and withholding of deportation directly with the INS).

140. Dep. of Tommie Philips Berrios, Berrios v. Meese, Civil Action No. H-88-398, slip op. at 5-7 (Mar. 10, 1988) [hereinafter Dep. of Philips]. The examiner's asylum education consisted of a seminar in Arlington, Virginia, a book on asylum, and "access to a list of phone numbers from the Department of State Bureau of Human Rights . . . [so that] I may contact them." *Id.* at 7.

141. Dep. of Dist. Dir. Omer Sewell, Berrios v. Meese, Civil Action No. H-88-398, slip op. at 58-59 (Mar. 10, 1988).

142. Interview with INS trial attorney (name confidential), in Harlingen, Tex. (July 10, 1989); interview with INS Asylum examiner (name confidential), in Harlingen, Tex. (Aug. 10, 1989).

143. Dep. of Philips, *supra* note 140.

144. Interview with INS official (name confidential), in Harlingen, Tex. (June 13, 1989).

145. Interview with INS official (name confidential), in Harlingen, Tex. (June 18, 1989).

asylum interviews generally lasted less than twenty minutes, and some lasted as few as five minutes. Even in instances where the INS and the applicant both spoke Spanish, the interviewers seemed uninterested in the applicants' responses.[146] Generally, the overall atmosphere made applicants feel like criminals. For example, Aura Lila Fornos Real said she "felt that I was being treated like a criminal . . . the INS officers were unfriendly and treated us rudely."[147]

In the hearings the author observed, the INS officials sometimes did not give applicants an opportunity to present evidence about either their subjective fears, nor about their objective basis for those fears, and rejected applicants' offers to provide corroborating witnesses in support of their claims.[148] In other instances, INS officials insisted that applicants provide separate corroborating evidence of their fears.[149]

In summary, each alien only wants to tell her story of how she was persecuted, or of the basis for her fear of persecution in her country of origin. Even in the early stages of the political asylum application process, the INS frustrates this simple goal. While the INS's bureaucratic process plays itself out, refugees are trapped in the South Texas District.

When an applicant applies for asylum affirmatively, she can request employment authorization at the same time. Employment authorization is essential to the survival of asylum applicants who must reside in the District while

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146. As one applicant stated:

> [The interviewer] was not interested in long answers or explanations, and he would ask me another question once I began to answer one. When he asked if I had any political problems, I answered that I belonged to the Partido Nacional. He then asked rapidly if there was anything else, before I could give further explanation.

Decl. of Reyna Victoria Mejia Herrera, Proyecto Libertad trans. (Mar. 5, 1989) (on file with Proyecto Libertad, Harlingen, Tex.). Another applicant stated: "The interviewer did not ask many follow-up questions and did not seem very interested in knowing the reasons why I feared returning to El Salvador." Decl. of Jose Rolando Romero Diaz, Proyecto Libertad trans. (Mar. 5, 1989) (on file with Proyecto Libertad, Harlingen, Tex.).

147. Decl. of Aura Lila Fornos Real, Proyecto Libertad trans. (Mar. 5, 1989) (on file with Proyecto Libertad, Harlingen, Tex.); *see also* Decl. of Guillermo Jose Jaime-Miranda, Proyecto Libertad trans. (Mar. 5, 1989) (on file with Proyecto Libertad, Harlingen, Tex.); Decl. of Jose Rolando Romero Diaz, Proyecto Libertad trans. (Mar. 5, 1989) (on file with Proyecto Libertad, Harlingen, Tex.) (stating that the interviewer "seemed very hurried and was most interested in finishing the interview very quickly, making me very nervous because I was expected to answer her questions quickly").

148. Decl. of Jose Carlos Alvarez, Proyecto Libertad trans. (Mar. 5, 1989) (on file with Proyecto Libertad, Harlingen, Tex.) (telling INS interviewer that his wife was also being interviewed and she was available to corroborate his story, "but the interviewer didn't seem interested"); Decl. of Maria Imelda Diaz Proyecto Libertad trans. (Mar. 5, 1989) (on file with Proyecto Libertad, Harlingen, Tex.) (offering to provide her brother to confirm her story, but the interviewer refused her offer and asked no more questions).

149. Decl. of Mario Arnoldo Vega Lazaro, Proyecto Libertad trans. (Mar. 24, 1989) (on file with Proyecto Libertad, Harlingen, Tex.). After relating his persecution claim, the interviewer told Mario Lazaro that he would have to submit independent proof to support his claim. *Id.* "I did not have copies of the threatening letters I had received and was not given the time or opportunity to collect any documents from my brother or our hometown to support my claim." *Id.*

their claims are pending; it is the only available legal avenue for employment.[150] When an applicant submits a non-frivolous asylum application to the district director, she is entitled to apply for work authorization within sixty days of the application.[151] The regulations give no discretion to the INS when considering employment authorization requests from an asylum applicant.[152] As there is no consistent definition of non-frivolousness, however, applicants have been dependent largely upon United States foreign policy considerations and the whims of the District office.

As the author observed, the INS has denied work authorization requests where the applicant's claims were non-frivolous. In cases where responses were delayed for more than sixty days, the INS failed to grant automatic interim employment authorization.[153] The INS also denied employment authorization to persons later granted asylum or even to those who had already been granted asylum.[154] In one such case, the INS denial alleged that the applicant had "failed to establish a non-frivolous claim for asylum."[155] As the author observed, in several instances, the INS never responded to applications at all.

However, a restrictive and inconsistent employment authorization process can destroy an applicant since she will have no money to eat or live. Because they are so poor, asylum seekers without employment are usually forced to leave the system at this point. Without work, applicants have little choice but to abandon their claims.

V
DEPORTATION PROCEEDINGS

Aliens whose affirmative asylum claims fail or who are arrested after

150. The Immigration and Control Act (IRCA), 8 U.S.C. § 1324(a) (1992), imposes severe civil and criminal sanctions on employers that hire aliens who do not have employment authorization. This places the asylum applicant in the position of having to break the law in order to earn money to survive.

151. A refugee may request employment authorization with an affirmative asylum application. 8 C.F.R. § 274a.12(c)(8) (1992). A refugee may also apply for work authorization with an asylum application in immigration court while the decision is pending. 8 C.F.R. § 274a.12(c)(8).

152. *See* 8 C.F.R. § 208.7(a)(c) (1992).

153. Dep. of Philips, *supra* note 140, at 17, 18-19. The examiner described an interview saying, "It's just one piece of work, I'm going to talk to [the applicant] . . . interview [the applicant] . . . entertain [her] application for work and . . . be through with all of this right now." When asked how decisions are made to grant or deny work authorization applications, Ms. Berrios replied that it depends what kind of country they come from, and what the instructions may be for that particular country. As an example, she mentioned special instructions for Nicaraguans, to grant work authorization.

154. In June 1989, the INS denied work authorization to two asylum applicants, a husband and wife who sought to support their three young children accompanying them. Employment authorization was denied to each of them in separate letters in late June. Eight weeks earlier, on May 3, 1989, an immigration judge in Harlingen had granted asylum to both the husband and wife. *See, e.g.*, Ramos v. Thornburgh, Civ. No. TY-89-42-CA (May 3, 1989).

155. *Id.*

crossing the border are put in deportation proceedings. In other words, potential applicants can be placed in deportation proceedings and detained on the grounds that they have made a suspected undocumented entry into the United States.[156] In deportation proceedings, the INS must prove the alien's deportability[157] by "clear, unequivocal and convincing evidence."

An alien who elects to stay in the United States (i.e., does not take a voluntary departure) is served with an order to show cause (OSC) why she should not be deported. The government initiates deportation or exclusion proceedings by issuing the OSC, which describes the nature of and the legal authority for the proceedings, and sets forth a concise statement of factual allegations supporting the charges against the respondent.[158] Further, it notifies the respondent of her right to be represented by counsel at her own expense. She is given a fourteen-day period to obtain counsel and a current list of legal services.[159]

However, the processing of the OSC indicates an attitude of careless disregard for the rights and well-being of the alien. For example, the OSC was written only in English prior to the Immigration Act of 1990 which mandates that the OSC must be written in both English and Spanish.[160] Moreover, in addition to the requirements established by regulations, the OSC document includes additional administrative provisions which the INS has largely ignored. One of the document's provisions provides for an alien's expedited hearing before an immigration judge. Compliance with this provision has been selective; in September 1989, the author observed that of 161 orders to show cause in which the alien was told of her right to have an expedited hearing, almost twenty percent of the aliens requested expedited hearings. All were ordered deported at their initial plead-in appearance before an immigration judge.

A. The Master Calendar Hearing

If an OSC is issued, the applicant is in the same situation as a detained applicant in deportation proceedings; she has the opportunity to present her case in a formal hearing on the merits before an immigration judge.[161] A master calendar hearing initiates the proceedings in immigration court, just as an arraignment initiates a criminal case, or a calendar call initiates a civil case. The applicant is informed of her right to counsel at no expense to the government and is given a list of available legal services.[162] The applicant is advised

156. 8 U.S.C. § 1251(a)(1)(B) (Supp. 1992).

157. Woodby v. INS, 385 U.S. 276 (1966); Gameros-Hernandez v. INS, 883 F.2d 839 (9th Cir. 1989).

158. 8 C.F.R. § 242.1(b) (1992).

159. 8 U.S.C. § 1252b(b)(2) (Supp. 1992) (additional notice requirements); 8 C.F.R. § 242.16(a).

160. 8 U.S.C. § 1252b(a)(3)(A) (Supp. 1992).

161. 8 C.F.R. § 3.14(b); 8 C.F.R. § 208.2(b).

162. 8 U.S.C. § 1252b(b)(2); 8 C.F.R. § 242.16(a).

that she will have the opportunity to examine and object to the evidence against her, to cross examine witnesses, and to present evidence on her own behalf.[163]

In the second step of the proceedings, called the plead-in, the immigration judge is required to read and explain, in non-technical language, the factual charges printed on the order to show cause.[164] The alien is placed under oath and is required to answer the charges, and must plead to the allegations.[165] At this point, an alien may request an asylum application. If the alien decides to apply for political asylum, a subsequent calendar call date is set. This calendar call date usually occurs after the immigration court has received an advisory opinion from the State Department Bureau for Human Rights and Humanitarian Affairs (BHRHA). After receipt of the advisory opinion, a date is set for a formal hearing on the merits.

The initial appearance before an immigration judge can be quite intimidating, particularly for aliens who are unfamiliar with the courtroom setting and with the English language. Asylum applicants are not alone in the perception that immigration law is a labyrinth of legal formalities; courts have generally considered immigration law to be particularly complex and confusing. One federal court held that some of the laws of the Immigration and Naturalization Act bear a "striking resemblance [to] King Minos' labyrinth in ancient Crete."[166] An immigration judge in South Texas suggested a purpose behind such complexities when he commented, "We don't want to draw a roadmap for aliens in Central America telling them how to get asylum."[167]

Because these proceedings have such a profound effect on the alien's life, it is particularly shocking that the immigration court is not an Article I or Article III court and only has to meet the sketchy standards of an administrative hearing.[168] Virtually all procedural errors are considered harmless. The court has a fair amount of discretion to decide how it prepares the case record, including the transcript for appeal,[169] to determine what is proper court etiquette, and to decide what evidence it will hear. For example, in ruling on the admissibility of evidence,[170] the immigration judge is not required to hear extended argument, to permit the filing of a brief before rendering a decision,[171]

163. *Id.*
164. *Id.*
165. *Id.* § 242.16(b).
166. Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).
167. Interview with IJ #5, in Harlingen, Tex. (May 23, 1991) To preserve their anonymity, immigration judges will be identified in this article as IJ #1, IJ #2, etc. The author observed and interviewed five of seven South Texas immigration judges.
168. For a detailed analysis of making immigration court into an Article I court, see Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980); Robert E. Juceam & Stephen Jacobs, *Constitutional and Policy Considerations of an Article One Court*, 18 SAN DIEGO L. REV. 29 (1980).
169. GORDON & MAILMAN, *supra* note 136, § 72.04(4)(a) (the testimony of a hearing is generally not transcribed unless there is an appeal or a transcript is requested).
170. 8 C.F.R. § 242.14 (1992).
171. *In re* P., 5 I. & N. Dec. 651 (BIA 1954).

or to permit closing arguments.[172] The immigration judge may permit hearsay and exclude from the record arguments in connection with motions, applications, requests, or objections.[173]

The discretion afforded to immigration judges can work for or against applicants. For example, while an alien can give hearsay testimony, inconsistent procedures coupled with the arbitrariness of mass calendar hearings tend to hurt asylum applicants. After a myriad of conversations with court personnel, INS and Proyecto Libertad attorneys, it became clear to the author that *pro se* respondents rarely object to evidence, cross-examine witnesses, or request additional time to have evidence explained. On the rare occasions when an alien does attempt to enter documents into evidence, the judges which the author observed arbitrarily decided whether or not to allow them to do so.

A top priority of the court in master calendar hearings is efficiency, which gets translated into clearing the docket expeditiously. Regrettably, fairness to the applicant is often sacrificed. On one occasion, the author observed thirty-nine aliens jammed shoulder-to-shoulder in the courtroom for an initial mass master calendar appearance. The immigration judge commenced the session by bragging in English that he could complete a mass deportation hearing for forty respondents in the time it took other judges "to order deported" six or seven. While the judge assured the court that the refugees would be extended their due process, it quickly became obvious that due process was whatever process he said was due. Instead of advising the prospective asylum applicants of their right to apply for asylum, the immigration judge gave them the option to "remain detained or be set free, and at government expense." The judge did not recommend a bond hearing for aliens who sought release from detention. It was clear to the author that this day, the vehicle for release was deportation. Twenty minutes after the refugees had entered, the courtroom was cleared; the judge had registered twenty-seven orders of deportation and twelve requests for a lawyer. The immigration judge peered at his watch and said, "There you have it."[174]

The mass calendar hearing operates in an assembly line fashion. The repetitive nature of the hearing and its focus on mass outcomes have a deleterious effect on the refugee's ability to make a knowing and informed decision. Up to forty aliens appear at a time before the judge. The mass hearing makes it virtually impossible for the immigration judge to make an individualized decision and, in the author's observation, the court often confuses one case with another. As an example, one master calendar respondent was mistakenly scheduled to appear twice on the same immigration judge's court docket. In his first appearance, the alien was ordered deported, but at the second appearance, he was ordered released from custody and the deportation proceedings

172. Yap v. INS, 318 F.2d 839 (7th Cir. 1963).

173. 8 C.F.R. § 242.15 (1992).

174. Observation of the author, 9:00 a.m. Master Calendar Deportation Hearing, Harlingen, Tex., Mar. 9, 1989.

against him were terminated.[175] In this case, the bureaucracy worked in the refugee's favor, but in my experience, more often than not it does the opposite.

Furthermore, INS officials and attorneys representing the refugees receive disparate treatment. For example, INS officials have greater access to the administrative offices of the immigration court than do attorneys who represent the refugees. Ostensibly, this is because the INS officials are fellow Justice Department employees. Whatever the reason, this access enables the INS trial attorneys to use the office's phones and socialize with courtroom personnel.[176] Counsel for the respondent, on the other hand, do not share this privilege and are left to use the pay phone outside. The INS officials' access privileges give them the opportunity for ex parte communications with immigration judges. At the very least, INS officials have the opportunity to overhear information. The picture that emerges is one in which the INS has unfair access to information and consequently, an unfair advantage in the court.

The few rights to which applicants in immigration court are entitled are rendered almost meaningless because applicants are unable to exercise them. In effect, the inability to exercise rights during the master calendar proceedings prematurely closes the door on gaining asylum. Without counsel, respondents receive little reliable information about the deportation process and asylum, and no one is available to correct misconceptions or clarify matters not easily understood.[177]

Because of the needless complexity of the master calendar plead-in, it is not uncommon for immigrants to walk into court wanting to apply for asylum but to exit with orders of deportation. To make matters worse, they often do not comprehend the finality of that order. Two asylum candidates complained to the author that the immigration judge discouraged their application and confused them during their master calendar hearing. The first applicant said, "[The immigration judge] told us if we asked for political asylum we would be detained for another four to six months." For this reason he did not pursue his claim for relief.[178]

A second alien verbally expressed his desire to seek asylum at the outset

175. *In re* Efrain Martinez Cabrera, No. A70288-787 (BIA filed Apr. 15, 1989).

176. In conversations with several immigration judges, the author learned that they are aware of this practice and also are concerned that uneven access to telephones might be construed as an indicator that the immigration court is biased in favor of the INS. Interviews with IJ #2, in Harlingen, Tex. (May 8, 1991); Interview with IJ #4, in Harlingen, Tex. (May 17, 1991).

177. In 1981, immigration attorney Linda Yanez reported the coercive nature of proceedings in immigration court: "aliens are often ordered deported after mass deportation hearings where the proceedings and legal possibilities are inadequately explained by the immigration judge and in which most of those deported are unrepresented by counsel." The report was given during a panel discussion sponsored by the South Texas Civil Liberties Union, Aug. 15, 1981. *See Refugee Makes Plea for Asylum During Meeting*, BROWNSVILLE HERALD, Aug. 16, 1981, at 14A.

178. Decl. of Saul Enrique Chavez Aldana, from Mem. of P. & A. in Supp. of Mot. for Order Compelling Compliance and Mot. for Civil Contempt 1 (Mar. 22, 1989), Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

of the hearing but later withdrew his request. During the hearing, the immigration judge repeatedly emphasized the hardship of detention on applicants pending delays in asylum processing. The immigration judge told the alien that applying for asylum was a long and arduous process. Although he had a right to a hearing before an immigration judge, he was told that such a hearing would not take place for at least several months. Because of this warning, the alien believed that an asylum application would entail "indefinite imprisonment," and he left with an order of deportation.[179]

In another example, a *pro se* minor applicant from Guatemala left his master calendar hearing believing that his asylum application would not be accepted by the court. In this instance the judge refused to provide the opportunity for the minor to adequately prepare an asylum application and ignored his request for the application form (I-589). Instead, in an unprecedented decision, the judge held an on-the-spot summary asylum hearing at the end of the respondent's master calendar hearing. Saying that "everyone says they want to stay," the judge told the minor, "It's up to you to prove that you should not be deported . . . you have to show me (now)." The minor later recounted the inquiry:

> When I tried to answer his questions with my reasons for fleeing my country [the judge] said my reasons were not sufficient and took away the political asylum papers that I had just been handed. He said that there was no war in Guatemala, that he had been there and there was no war. I got more scared. I felt he wanted me to back down from my statement . . . I started to tell the judge some of the particular incidents causing me to flee my country but the judge did not want to hear my story. He said my case was closed.[180]

After a few minutes the immigration judge closed the proceedings and issued the following statement, "There is no tolerable or arguable claim for asylum. . . . There is no purpose to continue these proceedings further."[181] The applicant exited the hearing room without asylum and without an application and believed he stood no chance at all of receiving asylum.

The lack of formal requirements at the master calendar hearing to notify aliens of the right to apply for asylum often reinforces the alien's misconceptions about the asylum process. The inaccessibility of pertinent information effectively removes any meaningful right to make an application. In the following example, the judge failed to explain the right to apply for asylum to a Salvadoran respondent who was confused about his rights and subsequently

179. Decl. of Ricardo Antonio Cabrero from Mem. of P. & A. in Supp. of Mot. for Order Compelling Compliance and Mot. for Civil Contempt 1 (March 23, 1989), Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

180. Decl. of Francisco Duqne-Lorenzana, Proyecto Libertad trans. (July 13, 1989) (on file with Proyecto Libertad, Harlingen, Tex.).

181. *Id.*

agreed to deportation instead of applying for asylum. According to the young man:

> At the hearing the immigration judge asked if we wanted to be deported or if we wanted more time to find a lawyer. . . . I understood that political asylum would be available to me if I had killed someone in El Salvador, or if someone wanted to kill me. . . . I haven't killed anyone in El Salvador. The problem I have is that I want to remain politically neutral and not kill anyone on either side of the war in El Salvador. I did not understand, and the judge did not help me understand, that my opinion to remain neutral and pacifist, and that my fear of returning on account of my resistance to taking up arms, were grounds for a political asylum claim. I also learned [from the immigration judge] . . . that if I did apply for asylum I would not be allowed to return to El Salvador for five years. My parents are elderly and I was afraid that I would not be able to see them for many years if I applied for asylum.[182]

Although the deportation was technically in compliance with the rules guiding applications for asylum in deportation hearings, the judge's failure to ensure that the young man understood the meaning of asylum indicates a disdain for the principle of asylum.

The technical terminology of immigration law further impedes aliens' understanding of and participation in immigration court. Applicants are hesitant to concede deportability because they believe this eliminates their right to apply for asylum.[183] Furthermore, many applicants incorrectly assume that if they admit and concede deportability they will in fact be deported. One alien said:

> At my hearing . . . I said I wanted deportation because I believed I had no alternative except to stay in detention. I do not want to stay in detention any longer. A lot of the hearing was in English so I did not really know what was happening. . . .[184]

At this point in the process, absent luck or the ability to verbalize certain legal buzz words, deportation is inevitable. For respondents who are not represented by counsel, the combination of fear, intimidation, and ignorance of

182. Decl. of Jose Ascencio Barcenas Diaz, Proyecto Libertad trans. (Mar. 17, 1989) (on file with Proyecto Libertad, Harlingen, Tex.). The deportation hearing was held on March 15, 1989.

183. An applicant must concede deportability before applying for political asylum. 8 C.F.R. § 242.17(c) (1992).

184. Decl. of Saul Enrique Chavez Aldana, Proyecto Libertad trans. (Mar. 22, 1989) (on file with Proyecto Libertad, Harlingen, Tex.). The use of technical language confuses the aliens. If the alien does not speak English, moreover, the courts may not have all of the aspects of the proceedings translated by an interpreter, unless the alien can prove that she cannot provide her own translator or that she has been prevented from doing so. The alien may not know of the possibility of translation. El Rescate Legal Services, Inc. v. EOIR, 941 F.2d 950 (9th Cir. 1991).

government requirements causes them to select their own country for deportation, which effectively means they waive their right to apply for asylum.[185] This accounts for the exit of eighty percent of the aliens from the system at this point in the process.[186] Evidently, intimidation and ignorance often play a more telling role in the outcome of possible asylum claims than do the merits of each claim.

In instances in which asylum is not requested, once deportability is established, the immigration judge determines whether the alien will take voluntary departure or deportation.[187] An order of deportation is more severe than an alien's voluntary departure. Aliens returning voluntarily are not barred from re-entering this country at a later date. If deported, the alien is barred from re-entering this country for five years.[188] Inquiries into the alien's financial equities strongly influence the immigration judge's decision. Aliens with financial means of support are granted voluntary departure, while those without are deported.[189] For example, the author often observed immigration judges ask if the refugee had any money to pay her fare to her country of origin. If the refugee answered in the negative, the judge would order her deported from the United States. In summary, aliens who were better off financially received the less severe method of return.

At the master calendar hearing, the refugee receives a copy of the "Notice of Appeal Rights."[190] The refugee is read her right to appeal at the conclusion of her hearing. The appeal process highlights the unsympathetic structure of the master calendar process in immigration court. These appeal rights are often explained in a manner which is not easily understood. It is difficult for many refugees to reserve appeal because they have difficulty contradicting an authority figure.[191] After rendering her decision, the immigration judge typically stares down at the applicant and in effect states, "If you feel this decision is incorrect, you may appeal to the BIA in Washington D.C. Do you accept my order and waive appeal, or do you reserve appeal?" Few applicants understand their choice. According to the author's observations, many aliens believed they would actually have to go to Washington, D.C. to file the appeal. In light of such circumstances, it is understandable that few aliens voice their objection to the decision and reserve appeal.

The INS regulations also require the court to give the alien an appeal

185. GORDON & MAILMAN, *supra* note 136, § 72.04(10)(b).

186. *See* Freedom of Information Request for EXECUTIVE OFFICE OF IMMIGRATION REVIEW, STATISTICAL REPORT FISCAL YEAR '88 (1988) (on file with author).

187. *Id.* § 72.06(1-3).

188. 8 C.F.R. § 212.2(a) (1992); 8 U.S.C. § 1182(a)(6)(B) (Supp. 1992).

189. *In re* Chouliaris, 16 I. & N. Dec. 168 (BIA 1977).

190. 8 C.F.R. § 242.16.

191. *See* Jennifer Shirmer, *A Different Reality: The Central American Refugee and the Lawyer*, IMMIGRATION NEWSLETTER 6-9 (Sept.-Oct. 1985); Walter Kalin, *Troubled Communications: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INT'L. MIGRATION REV. 230 (1986).

advisement at the conclusion of the deportation hearing.[192] While the advisement is intended to assist in the mechanics of making an appeal, it doesn't achieve this goal. The immigration judge recites the advisement to the alien and hands her a copy in written form. The oral advisement merely mimics the technical language of the written form. Both are difficult for the lay person to understand and provide only a skeletal explanation written in bureaucratic and formal legal terminology.[193] Further, while the advisement is written in English and Spanish, the appeal must be written in English. This language requirement puts yet another obstacle in front of the *pro se* applicant.

B. The Court Record and Translation Concerns

The chances for a fair hearing in immigration court are further impeded by the preparation of the court record. The immigration judge controls the court transcript, which is only comprised of "on the record" proceedings spoken directly into a tape recorder.[194] By starting and stopping the recording device, the judge can include or omit testimony as she sees fit. In one remarkable instance, the author observed an immigration judge instruct the transcriber to disregard parts of a deportation hearing. Frequently the judge backtracks and replays the recording to ensure that the testimony was recorded. Applicants thus hear statements repeated, but in my experience, the judge rarely offers an explanation. Judges sometimes ask questions more than once if the answer was not recorded in its entirety, and so applicants find themselves responding to the same questions for a second or even a third time. They become confused, and fearing they made a mistake, sometimes change their responses in the hope that they will please the judge or their attorney.

Since deportation hearings are held for an overwhelmingly Spanish-speaking clientele in South Texas, it is imperative that hearings be translated into Spanish. While neither statute nor regulations require hearings to be translated into the language spoken by alien applicants, the Board of Immigration Appeals (BIA)[195] and federal courts[196] have recognized the importance

192. 8 C.F.R. § 242.21 (1992).

193. At each hearing I attended, the judge announced:

> You will have a hearing by an immigration judge who will enter a decision after the hearing is completed. If you are not satisfied with that decision, you have the right to appeal . . . unless you waive your right to appeal . . . you must complete and file a Form EOIR-26, in triplicate, in order to appeal your case . . . . You must pay a $110.00 fee when filing the Form EOIR-26 unless you cannot afford the fee. Then you may apply for a fee waiver under 8 C.F.R. sections 3.3(b) and 103.7(c). In order to get a fee waiver you must file an affidavit asking for permission to file your appeal without a fee payment and stating why you believe you are entitled to this waiver and the reasons for your inability to pay the fee.

194. 8 C.F.R. § 242.15.

195. *See In re* Tomas, Interim Dec. 3032 (BIA 1987) (stating that an interpreter is necessary in order for the alien to participate meaningfully in the proceedings and for the proceedings to be fundamentally fair).

196. *See, e.g.*, Niarchos v. INS, 393 F.2d 509, 511 (7th Cir. 1968) (finding that the absence of an interpreter was "contrary to the aim of our law to provide fundamental fairness in admin-

and fundamental fairness of having an interpreter. However, court requirements on the competency of the translator have been less than strict.[197]

A poor translation of the hearing can obstruct an applicant's comprehension of the asylum process. In one case, an applicant's political asylum hearing was so poorly translated that the BIA concluded that it had prevented the applicant from adequately presenting his asylum claim. The BIA stated that the meaning of the word "persecute," an indispensable term in any asylum claim, was incorrectly translated throughout the proceeding.[198] In South Texas, the interpreters are generally court employees who have grown up locally in the bilingual border towns, but even when the translation is generally correct, problems arise when meanings of words and phrases in "Tex-Mex" Spanish differ from the nuances of Salvadoran or Guatemalan dialects.

Many of the proceedings through which refugees wade are not even translated into Spanish. In South Texas immigration courts, only on the record dialogue in which the respondent directly participates is translated. Further, many on the record exchanges between the judge, INS attorneys, and counsel for the respondent which are later transcribed for appeal are not translated for the respondent. Consequently, the refugee is excluded from much of the courtroom proceeding.

At times, it seemed to this author that the INS intended to confuse the alien. In one instance, for example, a government attorney registered an objection during a court hearing on the grounds that an asylum applicant actually did comprehend some of the proceedings going on around him. This absurdity came to light when the author observed an asylum applicant with a basic understanding of English react to an off the record discussion between the judge and opposing attorneys about a procedural objection to the government's cross-examination. The INS attorney said, "He understands what we are talking about," and tried to have the alien removed from the courtroom for the remainder of the discussion.[199]

VI
REPRESENTATION

Without a lawyer, refugees with meritorious political asylum claims have virtually no chance of succeeding. Like any field of law, immigration law contains complicated procedural and substantive rules. Based on the author's ob-

istrative proceedings"); Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1980) (recognizing the "importance of an interpreter to the fundamental fairness of such a hearing is the alien cannot speak English fluently").

197. Ciannamea v. Neelly, 202 F.2d 289 (7th Cir. 1953); Pang v. INS, 368 F.2d 637 (3d Cir. 1966), *cert. denied*, 386 U.S. 1037 (1967). *But see* Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (finding due process violation where translation services are inadequate: "a hearing is of no value when the alien and the judge are not understood").

198. *In re* Juan Antonio Gutierrez-Hernandez, No. A26-955-679 (BIA Oct. 5, 1989).

199. The author observed the hearing of Luis Arsenio Corado, No. A21-210-539, on September 28, 1989.

servation, few refugees speak or read English or have college educations. They fled from countries where a fair trial does not exist. It has been my experience that refugees do not even understand how a legal system works. Moreover, as discussed above, there are virtually no law books at the detention centers. For refugees who have meritorious claims, the inability to obtain counsel may be tantamount to a death sentence. Looking at data obtained from the September 1989 sample, out of 722 detained cases, 551 (77%) were not represented by counsel at their initial plead-in appearance. Of these, almost three-fourths (394, or 72%) bailed out of the system at this stage. However, out of 171 aliens represented by counsel, only eighty-two (48%) left the process at the plead-in.

Since deportation is a civil process, the United States Supreme Court decision in *Hannah v. Larche* providing the right of counsel in the preliminary criminal process has no application in deportation proceedings.[200] Further, the immigration statute only creates a right of counsel during exclusion or deportation hearings before an immigration judge;[201] the Immigration and Nationality Act of 1952 grants the alien the right to counsel at the deportation hearing at no expense to the government.[202] The regulations require the INS to notify the alien of her right to representation by counsel at no expense to the government after it has been determined that formal deportation proceedings will be instituted.[203] The alien must be granted reasonable time to obtain counsel. The 1990 Act[204] provides that hearings will be scheduled at least fourteen days after service of the OSC, "in order that an alien be permitted the opportunity to secure counsel before the first hearing date. . . ."[205] The alien generally will be provided only one continuance thereafter to procure counsel.

Even if an alien wants to be represented, there is no guarantee that she will be able to retain an attorney during this time. Thus, aliens must often proceed without counsel.[206] In the absence of counsel, cases begin with mass hearings which divert attention from the particulars of individual claims. Refugees often get lost in the thicket of abstract legal jargon and are misled, intentionally or not, by the court's failure to notify them of their asylum rights. Because there are so few available pro bono attorneys in South Texas, the opportunity to obtain counsel is moot for most aliens.

Further, the INS sabotages the applicant's limited right to counsel by providing inaccurate lists of free legal services. During the course of this study, the free services list was distributed, rather remarkably, under the head-

200. 363 U.S. 420 (1960).

201. 8 U.S.C. § 1362 (Supp. 1992).

202. *Id.*

203. 8 C.F.R. § 287.3 (1992).

204. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

205. 8 U.S.C. § 1252b(b)(1) (Supp. 1992).

206. For examples of cases in which aliens wanted counsel but did not have it, see Villegas v. INS, 745 F.2d 950 (5th Cir. 1984); Ramirez-Osorio v. INS, 745 F.2d 937, *reh'g. denied en banc*, 751 F.2d 383 (5th Cir. 1984).

ing, "fee" legal services list. Furthermore, the list itself was outdated and inaccurate; it listed ten legal offices in the District, nine of which do not provide assistance for asylum cases. The list also included six legal assistance offices that are barred by law from assisting undocumented immigrants, a seventh listing provided an address of an office that often does not even respond, and an eighth listing provided a generalized lawyer referral service that does not respond and is all but meaningless to a detained applicant. It took six years for the INS to add the final law office, Proyecto Libertad. Proyecto provides virtually the sole, albeit remote, possibility of assistance. It has two staff attorneys who provide assistance to thousands of asylum applicants. Finally, even though Legal Aid was banned from representing undocumented aliens, the author observed that the INS continued to use inaccurate forms which listed Legal Aid until the existing supply of forms was depleted. Because it is so difficult for an alien to obtain counsel, the right to procure counsel is usually waived and the respondent must either proceed *pro se* or be deported.

In addition to INS activities which restrict access to counsel, an immigration judge's predisposition against legal representation can further limit the likelihood of a consistently fair and meaningful asylum process. In one instance, a detained asylum applicant was effectively denied access to counsel even after counsel had already been secured, because the attorney was excluded from the hearing room.[207] The problems facing detained aliens are generally compounded by the fact that aliens without counsel stand even less chance of reaching an asylum hearing than those who do have counsel. In the author's observation, detained aliens who are not represented by counsel are the group least likely to reach a hearing on the merits.

Even if an unrepresented alien's case is heard, the absence of counsel influences the outcome of deportation hearings.[208] A comparison of *pro se* cases and cases with counsel reveals that detained aliens who appear *pro se* are at a

207. During the week of April 7, 1989, an immigration attorney, Linda Yanez, was denied access to a hearing room in which two of her clients had just been seated. Prior to the commencement of the hearing, the attorney approached the bench and asked to speak with her clients; permission was denied. Minutes later as the judge was nearing an order of deportation, the attorney again approached the bench. The attorney later recounted the exchange that followed:

> IJ: Ms. Yanez, we are very annoyed at you coming in here and disrupting our proceedings . . . I am the sovereign here and these proceedings are not being conducted for your convenience.
>
> Yanez: Judge, it's not a matter of convenience. It's a question of you violating the attorney-client relationship. These are my clients and you are not letting me talk to them and now are conducting a hearing without my presence.
>
> IJ: Okay Ms. Yanez, I'm going to ask them if they want you to represent them.
>
> Yanez: You have my G-28 [notice of attorney appearance]. You cannot talk to my clients without my representing them.

Interview with Linda Yanez, Private Attorney, in Brownsville, Tex. (Apr. 12, 1989).

208. *See* Nuñez v. Boldin, 537 F. Supp. 578 (citing inadequate access to counsel as the primary injustice of detention in South Texas); *see also* Joe W. Pitts III & Marcos G. Ronquillo, *A Call to Action: A Crisis in the Valley*, 52 TEX. B.J. 686 (June 1989) (focusing on the grim truth that "access to counsel has been effectively denied to these refugees").

severe disadvantage. The overwhelming majority of aliens unrepresented by counsel leave the system at the initial master calendar appearance. The author observed that most detained aliens receive orders of deportation at their initial Immigration Court appearance.

The primary difference between aliens who proceed *pro se* and those who are represented by counsel is that while the former were usually ordered deported prior to the asylum merits, aliens with counsel remained in the country and, through a change of venue, pursued their claims elsewhere. In other words, lawyers increase the likelihood of reaching the asylum merits. Their presence may spell the difference between relief from deportation and death at the hands of persecutors.

VII
BOND DETERMINATIONS

Because many political refugees have little money, when an immigration judge sets even a low bond for a refugee's release, it frequently means that the refugee will either remain in jail until her hearing or return to her country of origin. Furthermore, bonds are often excessive, arbitrary, and difficult to appeal.

The INS wields authority over applicants in initial bond decisions and reviews, and may also determine whether or not to detain an alien.[209] The alien has the right to reapply to the immigration judge for a redetermination of bond at any time before deportation becomes final.[210] The INS has the authority to change custody requirements, revoke bond, or detain aliens even after their release from detention is ordered in immigration court.[211] The overriding principle of setting bond is to ensure an alien's presence at deportation proceedings.[212] In bond hearings, the burden officially rests upon the government to show that either the alien is a threat to national security or a poor bail risk.[213] Since there is little risk of refugees posing a threat to national security, the risk of an alien's disappearance has been determinative in setting bond in asylum cases.[214]

If the alien pays the full amount of the bond to the INS, the bond is canceled and the money returned upon the immigrant's compliance with its terms. However, many refugees pay a bonding company a large percentage of their bond — nearly fifty percent[215]—which the bonding company keeps as a

209. 8 C.F.R. § 242.2(d) (1992).

210. 8 C.F.R. § 242.2(b); *In re* Uluochoa, 20 I. & N. Dec. 3124 (BIA 1989); *In re* Chew, 18 I. & N. Dec. 262 (BIA 1982); *In re* Vea, 18 I. & N. Dec. 171, 172 (BIA 1981).

211. The INS District Director has the authority to revoke the court's release of an alien from detention. 8 C.F.R. § 242.2(e) (1992).

212. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, INS DELIVERY BONDS: STRONGER INCENTIVES NEEDED 2 (Mar. 1988) [hereinafter INS DELIVERY BONDS].

213. *In re* Patel, 15 I. & N. Dec. 666 (BIA 1976).

214. *Id.*

215. The rate is so high because refugees can provide no collateral and do not have jobs. Juffer, *supra* note 13, at 10.

fee. The alien forfeits her return on the bond, regardless of whether or not she appears at her hearing or shows for deportation. Thus, the alien has little incentive to comply with the terms of the bond and appear at hearings.

The BIA has directed the INS and OIJ to consider several factors in making its determination whether or not an alien is a favorable bond risk, including: the alien's apprehension record, strength of the claim, health, employment history, assets, family ties in the United States,[216] a record of nonappearance at court proceedings,[217] the nature of the applicant's immigration law history,[218] and the manner of her exit from her country of origin.[219] The BIA has also directed the INS and the immigration judge to consider negative equities[220] as a criterion for setting high bonds and rejecting requests for bond reduction.[221] In the author's observation, the INS also considers an alien's age and letters of support.[222]

Initial bond decisions by the INS appeared to be predetermined, and thus had little or nothing to do with BIA criteria, the alien's individual case, or the likelihood that she would disappear. In the author's observation, the INS sets bonds irrespective of the factors which the BIA directed it to consider. Rather, it has been the author's experience that the INS sets blanket bonds according to the alien's country of origin, and even according to the region within that country. The INS's decision has also been influenced by the capacity of the detention facility and district budgetary concerns.

For example, between 1988 and 1991, the author observed approximately 200 bond redetermination hearings. These hearings revealed that the INS set bond at $3,000 for virtually all aliens from Nicaragua, El Salvador, Guatemala, and Honduras. However, the INS set bonds at approximately $5,000 for aliens from other Hispanic countries and the Caribbean, even though they were charged with the same administrative offense. One explanation, suggested in conversations with court personnel, is that regardless of the charges, Latino aliens from the latter group are presumed to be potential drug

216. INS DELIVERY BONDS, *supra* note 208, at 15; *In re* Andrade, 19 I. & N. Dec. 488 (BIA 1987); *In re* Shaw, 17 I. & N. Dec. 177 (BIA 1979).

217. Janet A. Gilboy, *Administrative Review in a System of Conflicting Values*, 13 LAW & SOCIAL INQUIRY 515, 529 (1988).

218. *In re* Andrade, 19 I. & N. Dec. 488; *In re* Shaw, 17 I. & N. Dec. 177; *In re* Moise, 12 I. & N. Dec. 102 (BIA 1967); *In re* San Martin, 15 I. & N. Dec. 167 (BIA 1974); *In re* Patel, 15 I. & N. Dec. 666 (BIA 1976).

219. O'Rourke v. Warden of Metro. Correction Ctr., 539 F. Supp. 1131, 1136 (S.D.N.Y. 1982).

220. Negative equities include evidence of an alien's having been smuggled into this country by a "coyote," her previous illegal entries, or her criminal record. *See* Gilboy, *supra* note 217, at 529; *In re* Shaw, 17 I. & N. Dec. 177; *In re* Andrade, 19 I. & N. Dec. 488; GORDON & MAILMAN § 72.03(4)(c).

221. *See, e.g., In re* Shaw, 17 I. & N. Dec. 177; *In re* Andrade, 19 I. & N. Dec. 488.

222. The INS takes the position that the refugees most likely to fail to appear are single men between the ages of 18 and 25. Therefore these refugees receive the strictest bond decisions. Interview with Omer Sewell, INS District Director, in Harlingen, Tex. (Apr. 19, 1989).

smugglers.[223]

The overpowering consideration the INS gives race and nationality was made clear when the author observed the hearing of two black Jamaican men. The two entered the United States near Laredo, Texas in February 1989 and were apprehended by the Border Patrol and detained in the county jail. Bond was set for $75,000 each. The two men were led into an immigration courtroom with handcuffs and with shackles around their feet and waists. The author had never seen Central American refugees nor Mexican nationals in deportation proceedings so constrained. The two men appeared before an immigration judge during the first week of March 1989 for a bond and deportation hearing. The immigration judge attempted a joke, suggesting they were either basketball players or drug dealers. At the hearing, the trial attorney told the immigration judge that the INS was in possession of evidence that the respondents were wanted by federal law enforcement authorities in connection with a drug-related killing that had occurred in Los Angeles the previous month; however, the INS failed to present evidence in support of their allegation.

Despite the fact that there was no evidence against the two, the judge refused to lower their bond and reset the case for one week later. When the case resumed a week later, the trial attorney again failed to produce any evidence of criminal activity, but continued to assert his charge and requested another continuance at the same bond. This time, the immigration judge denied the request and reduced the refugees' bond. One of the prisoners declared that he believed he was the victim of discrimination and asked to be deported to Jamaica.[224]

In redetermination hearings, many of the factors that the immigration judge considers do not adequately predict whether or not the alien will attend her hearing. For example, the alien's employment history or length of residence in this country is irrelevant in determining whether the newly arrived alien is either a security risk or likely to appear at her hearing. Given realities of the refugee's situation, her manner of exit also has little bearing.

Many of the relevant factors are often applied inconsistently by the immigration judge in her redetermination of bond. For example, the author observed that although some applicants had family ties in this country, had no negative equities, and placed corroborating letters into evidence, judges did not consistently treat such evidence as dispositive. The author observed that an immigration judge reduced one alien's bond by more than half when he said that he hoped to be reunited with his cousin, a legal temporary resident, but refused to reduce the bond of a refugee who presented into evidence a letter of financial support from a closer relative with more permanent legal

223. Interview with immigration detention officer (name confidential), South Texas Immigration Court, in Harlingen, Tex. (June 15, 1989); interview with immigration court clerk (name confidential), South Texas Immigration Court, in Harlingen, Tex. (May 12, 1989).

224. The bond hearing took place on March 19, 1989.

status, his sister, a legal permanent resident of the United States. As another example, with other factors being equal, an immigration judge reduced the bond of a Salvadoran soldier who admitted that he had killed innocent villagers in Usulután, but refused to lower the bond of a Salvadoran respondent whose family had been brutally tortured and killed by the same military.

In a conversation with the author, an immigration judge stated that:

> I listen to [my] gut feelings first, and try to come up with something to rationalize my decision later. Really, there's no thread, rhyme, or reason for a $500 instead of a $1,000 reduction [in bond]. I try to look at the person and get a feeling, are they going to show up later on, and I act on that. Sure I ask questions . . . frankly, though, there is no difference, no reason why one day I reduce by one-third, and another day by two-thirds.[225]

Considering this attitude, it seems that an alien's bond determination and review is based mostly on the luck of the draw; the determination and review of bond is arbitrary and any bond is often tantamount to a sentence of time in prison.

VIII
OTHER PROCEDURAL DETERRENTS

A. Changes in Venue

The INS will release an alien on recognizance and allow her to leave the Valley for one of two reasons: either the alien paid her bond to the district director, or she got a written order for change of venue in immigration court. Many of the aliens processed through the South Texas District wish to relocate elsewhere in the United States, either to join family and friends or to relocate in a supportive community. The only way an alien who posted bond may pursue her case in a district other than the one in which she was detained is by getting a change of venue. Thus, aliens failing to receive a grant for a change of venue are forced to choose between remaining in the District to pursue their case or leaving for their intended destination and, in the process, becoming illegal aliens.[226]

The procedural labyrinth for obtaining a change of venue catches most applicants off-guard. Unaware of the procedures, many aliens fail to apply and consequently fail to appear at their deportation hearings. As a result, they lose their legal status as asylum applicants in deportation proceedings:

> [A]sylum seekers generally do not understand that they have been

225. Interview with IJ #3, in Harlingen, Tex. (June 13, 1989).

226. As noted *infra* Part I, oppressive conditions in the District often make the decision to stay "legal" a difficult one. Aliens may, of course, return to the District to have their claims heard, but economic realities and the INS' procedural incompetence (*see infra* Part VIII-B) often make this impossible. As a result, aliens remain in their destination districts, miss all of their hearings, and become illegal aliens.

> placed in deportation proceedings. . . . Once they are released from detention, they ordinarily must move to another area to find a place to live and work. Most do not realize that they need formally to change venue if they move. Thus, released detainees may inadvertently fail to appear at hearings in [the District].[227]

The principle behind changing venue is to streamline and facilitate asylum hearings. Under the standard established by federal courts, the judge has discretion whether to grant a request for a change of venue.[228] Procedural fairness would seem to require that a hearing be held in the most convenient location for the respondent. Ordinarily this would mean that an alien would have her application heard near a place of residence, where witnesses, attorneys, support, and employment are located.[229] However, since there are no precise statutory or regulatory rules which mandate where a hearing is to be held,[230] in practice, ad-hoc and arbitrary proceedings have been the norm. Some restrictive practices common to all judges in the District include: limiting eligibility for change of venue to non-detained aliens; requiring that aliens admit and concede deportability prior to requesting a change of venue; requiring motions to be accompanied by applications for asylum; and requiring that aliens are represented by counsel. These criteria unfairly restrict the pool of potential asylum applicants.

Limiting eligibility for a change of venue to non-detained aliens unnecessarily forces impoverished aliens to turn to the bonding companies.[231] Such a requirement is not necessary. Instead, immigration judges could redetermine custody, revoking bond as a condition of granting a successful change of venue application. Second, admitting and conceding deportability allows the government to avoid the potentially arduous task of presenting evidence to establish deportability. Third, ironically, the ministerial change of venue application and hearing is the only part in the system in which counsel is required by judges in their discretion, in virtually all instances. If counsel is not secured, the aliens must proceed in deportation proceedings. Fourth, a premature asylum application at this preliminary stage of the process may be used later to discredit the applicant's asylum claim if it fails to contain every argument later put forth.

Beyond such shared practices, as the author observed, the judges base their determinations on individualized factors including: ad hoc evaluations

227. Arthur Helton, *The Implementation of the Refugee Act of 1980: A Decade of Experience*, LAWYER'S COMMITTEE FOR HUMAN RIGHTS REFUGEE PROJECT BRIEFING PAPER (Mar. 1990) (on file with the Lawyer's Committee for Human Rights Refugee Project, New York, New York).

228. 8 C.F.R. § 3.19(b) (1992); Maldonado-Perez v. INS. 865 F.2d 328, 335 (D.C. Cir. 1989).

229. *See, e.g.*, Chlomos v. INS, 516 F.2d 310, 312 n.4 (3d Cir. 1975); LaFranca v. INS, 413 F.2d 686 (2d Cir. 1989).

230. 8 C.F.R. § 3.19(b); *Maldonado-Perez*, 865 F.2d at 335.

231. *See supra* note 221 and accompanying text.

of the merits of asylum claims; the presence of attorneys in the source district, in the destination district, or both; and the immigration status of relatives in the destination district. As a preliminary hearing, like bond, change of venue hearings place emphasis on the asylum merits at the risk of damaging the integrity of the asylum merits later on.

One judge emphasizes the traditional concern of family ties to the destination district. Still another judge uses change of venue as a tool of law enforcement, refusing to countenance changes of venue "merely as means of gaining travel permissions."[232] In such instances, a deterrent rationale for resolving change of venue motions is clear. According to one judge, venue denials in his court are intended to "send a message to Central America that the asylum system in this country is an expedited and quick moving process . . . to get word back to El Salvador and Guatemala that when you come to the U.S. and apply for asylum, you don't get much time."[233]

Denials of venue applications create a hardship for the aliens affected, both in terms of personal cost and case preparation. In personal terms, an order to return to the District for a hearing forces extended leave from employment and separation from family and community support during the ordeal of a hearing. Moreover, the costs of travel and accommodation are prohibitive for aliens having to travel from Los Angeles, Chicago, or New York. Obviously, the impact is greatest on impoverished aliens. Hearings scheduled in the South Texas District also deprive aliens of both witnesses and counsel. As a result, whether an alien succeeds in her change of venue application is often determinative of whether she will have an asylum hearing. Despite the consequences for the alien applicant, these proceedings are consistently ad hoc and arbitrary.

B. Notification and Delay

In addition to going through the procedural labyrinth, prospective asylum applicants have to contend with unexpected deficits in the system, including inadequate notification procedures and lengthy delays in awaiting immigration court hearings. The South Texas District is incredibly impoverished, and most prospective asylum applicants are transients within the detention zone and therefore do not have an address to which a notice can be sent. The immigration bureaucracy has not created procedures which make notice possible in the detention zone.[234] Due to the lack of effective mechanisms, prospective asylum applicants frequently miss their hearings.

An alien's uncertainty of her eventual destination makes compliance with the notice requirement difficult and interferes with the court's ability to maintain contact. The author has observed that immigrants ordinarily give an ad-

232. Personal observation of the author in Immigration Court, Harlingen, Tex. (Mar. 21, 1989).

233. IJ #3 resolving *In re* Jaime Manuel de Jesus Garcia, A24-346-399 (Mar. 21, 1989).

234. 8 U.S.C. § 1252b (Supp. 1992) (detailing deportation procedures relating to notice).

dress that is on their person at the time they are apprehended. It is common for the address to be of a friend or relative living in some part of the United States, or of an acquaintance the alien met during her journey to the United States. Because of the transient nature of most aliens upon their arrival in this country, these addresses are rarely reliable predictors of future residence. Nevertheless, the author observed several instances in which such an address was officially entered onto the order to show cause.

For example, Maria,[235] a Central American refugee, was apprehended and detained in South Texas in 1988. Upon her apprehension, Maria gave the Border Patrol officer the address of her brother and sister in San Francisco. The officer rejected the address, and instead entered the Los Angeles address of her friend, who was also apprehended, on the order to show cause. The officer did not inform Maria that the Los Angeles address would be used to mail the notice of her hearing date. The terms of Maria's bond required her to report to the INS in July 1988. When she reported, the INS did not ask her what her local address was, nor did it inform her that a hearing was scheduled for late July. Because Maria had no way to find out for what date her hearing was scheduled, she failed to appear, and was ordered deported in abstentia.

In summary, one key to any legal system is an effective mechanism for giving notice to the participants. Having observed the immigration bureaucracy's notification procedures and their effect on potential asylum applicants, this author can only conclude that the INS uses notice as a way to prevent aliens from applying for political asylum.

Even assuming that a potential applicant has received notice and appears for her hearing, delays caused by the government create additional hardship for the government and alien alike. The immigration court frequently takes months at every stage of the asylum process, expending tax dollars, and leaving many aliens with no choice but to leave the system, exit the country, or escape to the interior of the country as an "illegal alien." As an example, the author observed that the immigration court did not schedule a master calendar hearing for a three-month period during the first half of 1989. At a Master Calendar hearing, an alien usually admits that she is in the country illegally. She is then eligible to submit an application for political asylum which requires yet another hearing.[236] As one might expect, the three month hiatus bottled up the entire process and created delays that extended up to ten months. This three month hiatus was compounded by the fact that the immigration docket was already crowded. Many potential asylum applicants exited the system during this delay.

When a detained applicant manages to pay her bond and is released from

235. Decl. of Maria Isabel Alfaro-Navarrete, Proyecto Libertad trans. (Aug. 29, 1988) (on file with Proyecto Libertad, Harlingen, Tex.).

236. As the author observed, four of the five sitting South Texas immigration judges require an alien to appear at a "calendared Master Calendar hearing" to file an application for political asylum.

detention, South Texas immigration judges require an additional master calendar hearing to check on the applicant's whereabouts. Then, judges frequently grant a two week adjournment at the plead-in so that aslyum seekers can obtain counsel. After the master calendar hearing, the applicant is eligible to submit an application for political asylum which requires yet another hearing. The immigration court then waits several months for the State Department advisal.[237] Matters are made even worse when hearings reset by the bureaucracy are further delayed. In one example, an applicant's asylum hearing was delayed five times.[238] First, the State Department advisal had not arrived as scheduled. Subsequently, the hearing was reset repeatedly due to the court's crowded docket. After spending four months in detention awaiting an asylum hearing, the applicant requested deportation.

Finally, the immigration judge takes months and sometimes over a year to render a decision. Of fifty-five non-detained asylum cases for which Proyecto Libertad has records and which completed the asylum merits in 1988, very few oral decisions were rendered within five months after the plea.[239] The two cases that reached an oral decision in less than one month were a great rarity. At the other extreme were cases where the applicant waited over a year for a decision. In one case, the applicant waited thirteen months, a second waited sixteen months, and a third lasted twenty months until decisions were finally rendered. In one case, an asylum applicant waited five years to receive a written decision from the immigration judge concerning his claim for asylum.[240] The average delay for these fifty-five non-detained applicants was just over five months.

The delay was only slightly shorter for detained applicants. Of twenty-six detained applicants, the average wait was just under four months for a verdict in their asylum cases. Some detained applicants fell victim to delays stretching almost twice that long. Whereas one asylum applicant received a decision less than one month after her hearing was concluded, another remained detained eight months after her first court appearance awaiting the completion of her merits hearing, and a third waited seven months for a verdict in his asylum case. Although the Executive Office of Immigration Review (EOIR) has a practice of placing detained cases on a fast track through the asylum process, the implementation of that practice leaves much to be desired. The

237. 8 C.F.R. § 208.11 (1992). In many instances, the State Department Advisal does not arrive by the scheduled hearing date. A later hearing date is usually set when this occurs.

238. *In re* Daniel Perez-Amaya, No. A28-642-987 (PISPC Immigration Court June 27, 1988). Case on file with Proyecto Libertad.

239. The primary data source for delay in immigration court is Proyecto Libertad case files.

While the sample size of the statistics is relatively small, very few applicants made it to this stage of the asylum process. Further, in 1988, while 81 Proyecto Libertad clients (55 detained and 26 non-detained) reached asylum merits hearings, relatively few transcripts for appeal were received in that year.

240. *In re* Arsenio Velasquez, No. A24-846-836. Case on file with Proyecto Libertad, Harlingen, Tex.

average delay for detainees' cases (four months) is only one month less than that for nondetained cases.

Asylum applicants spend months waiting for the INS at every stage of the asylum merits hearing. As the author observed, the court's three month hiatus compounded the immigration court's already crowded docket.[241] In summary, needless court resets and wasteful delays exacerbate tensions in an already very different situation. These useless procedures only serve to drag out the process for poor unemployed applicants who have little money for food and shelter.

CONCLUSION

Congress' enactment of the Refugee Act of 1980 and subsequent court rulings were intended to strengthen procedures for asylum application and ensure access to the immigration courts for all potential asylum claimants. Even with such safeguards in place, asylum applicants are shunned by the INS and the immigration court at every turn. The ad hoc and arbitrary discretion of the INS and the EOIR has allowed these agencies to resist the substantive and procedural changes instituted to protect asylum applicants.

The difficulties faced by aliens in the South Texas District are particularly acute. Inadequate support services and housing, the shortage of legal job opportunities, and the constant harassment by Border Patrol officers make it extremely hard for asylum seekers to survive in the District while awaiting a hearing. Yet, restrictions on bond, change of venue, and employment authorization operate to trap aliens in the District and force a decision between struggling to survive on the streets, fleeing to the country's interior as illegal aliens, or accepting deportation to the countries from which they fled.

Given the consequences for political asylum applicants who are not notified of their right to apply for asylum or to have their claim heard expeditiously, the lack of government safeguards and the arbitrariness of notice and adjudication work a special injustice. The systemic nonresponsiveness of the INS in the face of the *Nuñez* and *Orantes* court orders, and the wide discretion afforded to immigration judges in courtroom procedures combine to give prospective applicants virtually no chance of receiving fair access to the asylum process. The difficulty in obtaining counsel and wasted delays make matters even worse. Thus, for many aliens in South Texas, the promise of a right to apply for political asylum is merely illusory.

241. As the author observed, morning master calendar hearings often run into afternoon sessions. This causes cases scheduled for the afternoon to be rescheduled, either for a later date, or for the following day, which makes that day's calendar even more crowded.