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## **Refugee and Asylum Policy: National Passion versus National Interest**

by **David Simcox and Rosemary Jenks**

*Our national enthusiasm for welcoming refugees springs from humanitarian and generous motives, and at first glance it would seem above reproach. However, like many other well-intentioned activities, it has side effects. Refugee movement is a significant part of migration to the United States, and immigration levels, along with fertility, largely dictate the rate of growth of the U.S. population. Anybody concerned about unemployment and the fate of the poor, or about our long term ecological future, would do well to learn more about refugee policy, the pressures under which it operates, and the impact it has on immigration and population growth.*

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— Lindsey Grant, Editor

For most of its history, the United States considered itself a haven for refugees but did not do much about it. With increasing third world population growth and turmoil in many countries, however, provisions for refugee admissions have become increasingly generous. Part of this has reflected conscious policy; more of it has been more or less accidental, resulting from an accretion of specific concessions won by interest groups through Congress or the courts.

The flow of refugees and other humanitarian admissions now approximates 1.6 million each decade, or some 15.6 percent of total immigration. Immigration, in turn, constitutes a major element in U.S. population growth. At current fertility levels, with immigration at the level set by present law and continued illegal immigration, the United States population will pass 400 million around 2050.

If this prospect daunts the reader, as it does the authors, there are humane ways to bring some degree of order to refugee and humanitarian admissions, which presently are not numerically limited by statute.

### **The American "Mission"**

Few public concerns have engaged America's sense of humanitarianism, generosity, and openness to the world more than the needs of refugees. In 1783 George Washington called

America a land whose "bosom is open to receive the persecuted and oppressed of all nations." Washington was one of the first of many national leaders to proclaim acceptance of refugees as a redemptive national mission in which the best instincts of American society are manifest. Immigration historian John Higham notes that early in America's history ". . . the idea of America's mission to provide a home for the oppressed became a cliché, an incantation."<sup>1</sup>

Republican Presidential candidate Ronald Reagan repeated the incantation 200 years later in his acceptance speech at the 1980 Republican Party Convention:

Can we doubt that only a Divine Providence placed this land, this island of freedom, here as a refuge for all those people who yearn to breathe free? Jews and Christians enduring persecution behind the Iron Curtain; the boat people of Southeast Asia, Cuba, and of Haiti; the victims of drought and famine in Africa; the freedom fighters in Afghanistan....<sup>2</sup>

When George Washington welcomed the world's persecuted and oppressed, the newly independent United States was home to fewer than four million people. The planet Earth's population was estimated at about 800 million, one seventh of its present total. Three quarters of the world's people were in Europe and Asia, then separated from the United States by forbidding

oceans. Latin America, now the major source of migrants to this country, had fewer than 20 million people, most of whom had no awareness of George Washington's offer or the means to act on it in any event.

The numbers of those perceived as "persecuted and oppressed" have grown even more rapidly than world population since Washington's time. The United Nations High Commission for Refugees (UNHCR) estimates there are now 15 million persons who could be classified as refugees in the world — uprooted Afghans in Pakistan, fugitives from conflicts in a wide swath of East African states, displaced Central Americans and Middle Eastern minorities, those fleeing Southeast Asia's interminable wars, and those reeling from the social and economic upheaval in the former Eastern Bloc nations.

But the UNHCR far understates the rising pressures for resettlement of restless people in the United States and other stable western industrial countries. As population growth has spiraled in the third world, and the mass media have presented migration as an option, demand for immigration to the United States by whatever means and in whatever categories has intensified. Cheap and easily available transportation makes large scale transfers of population a practical option. In the scramble for admission, distinctions between refugees and ordinary immigrants have blurred.

## The Widening Gate

As demand for entry has risen — and in part because it has risen — law makers and jurists in United States have responded by expanding the pool of potential humanitarian entrants by easing the criteria for refugee and asylum status and by creating new humanitarian admission categories. In 1989, for example, the Bush Administration created a new class of "reproductive refugees" by ordering "enhanced consideration" for the asylum claims of pregnant Chinese women and their spouses claiming to flee mandatory abortion or sterilization in the Peoples Republic of China.<sup>3</sup> 1990 immigration legislation provides a new "temporary protected status" for aliens in the U.S. either illegally or temporarily, whose countries are experiencing generalized violence or environmental disaster (PL 101-649, Sec.302).

Even though harboring the oppressed has become virtually a secular religion, for many years U.S. immigration laws made no special concessions for persons fleeing oppression. They came as ordinary immigrants, were admitted under the same conditions, and received no government resettlement assistance. Since the U.S. had no quota limits on immigration until 1921, those claiming to flee turmoil or oppression had no need for priority admission. But with the adoption of quotas, refugees began competing with ordinary immigrants for a finite pool of visas.

Beginning in the post World War II period, the government devised a series of special measures to speed the admission of a variety of troubled groups such as holocaust survivors, displaced Europeans, Hungarian freedom fighters, anti-communist Cubans, and war-scarred Indochinese. Since 1945 the United States

has admitted over 2.8 million people for humanitarian reasons outside the normal immigration stream.

### The 1980 Refugee Act: Seeking an Elusive Discipline.

Congress passed the 1980 Refugee Act to consolidate the profusion of special and ad hoc arrangements, to bring U.S. criteria and procedures for granting refugee status into line with international law, and to grant resettlement assistance. The Act (8 USC 1101 (a)(42)) defines refugees as persons who are persecuted or who have

"... a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

The Act anticipated a "normal flow" of refugees into the United States of 50,000 a year. One of its goals was to establish political and geographic neutrality in judging refugee status, ending the then-existing presumption that all those leaving communist lands were refugees.

After a decade of rising demands for refugee admissions, how successful has the Refugee Act been in imposing restraint, consistency, discipline and political neutrality in granting refugee status?

The record for the decade since the Act is unpromising. It highlights the unrelenting pressures on Congress and the Executive to bend the existing rules or devise new ones when admission of those backed by powerful constituencies would otherwise be delayed or denied. The political pliability displayed by Congress and the Executive Branch, and the insensitivity of the Courts on questions of asylum law to the broader public interest in immigration control, don't augur well for discipline in the years ahead. The uneven record of the recent past points to the problems of management likely in the near future:

**"Ad Hococracy" over Consistency.** Scarcely a month after the Refugee Act was passed in March 1980, the Carter Administration faced a major mass asylum situation when 125,000 Cuban boat people and several thousand Haitians landed in South Florida over several months. Washington declined to use the refugee machinery or apply the criteria and adjudications procedures in the Act, but instead created a new, ad hoc blanket immigration category for the Cubans: "entrant, status pending." (Since then Cuban and Haitian entrants have been awarded permanent resident status.) There was no effort to make a case by case determination of the extent of individual persecution of the boat people or to return those found not at risk.

The Refugee Act also aimed at curbing the Attorney General's use of his sweeping "parole" authority, which had been used in the 1970s for emergency admissions of hundreds of thousands of Southeast Asian Refugees. But "paroles" continue to be handed out, exceeding 18,000 in 1989, mostly for high priority refugee applicants, such as Eastern Europeans and Soviet minorities, who did not fit within the numerical limits or failed to meet the definition of refugees.

Congress itself has legislated special exceptions when application of the criteria in the Refugee Act would have turned

# MIGRATION TO THE U.S. BY DECADES

	1951-1960	1961-1970	1971-1980	1981-1990
Humanitarian Immigration	492,371	212,843	539,447	1,608,389
Total Immigration*	4,515,479	5,321,677	6,993,314	9,871,059
Humanitarian as a % of Total Immigration	10.9%	4.0%	7.7%	16.3%

**SOURCE: Immigration and Naturalization Service**

\* Total Immigration for 1951-1970 includes an estimated 200,000 illegal entrants each year, while Total Immigration for 1971-1990 includes an estimated 250,000 illegal entrants each year (except 1981 and 1982 since illegal entrants from that period were later legalized by IRCA and counted in total immigration figures for 1989 and 1990).

# MIGRATION TO THE U.S., 1981 – 1990

	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990
Refugees <sup>1</sup>	182,802	112,986	68,077	75,448	82,499	92,728	96,414	116,843	123,881	141,857
Asylees <sup>2</sup>	49,254	26,636	20,873	19,436	13,298	15,111	20,886	48,588	81,343	58,910
Parolees	15,756	48,826	13,409	7,157	6,715	6,342	7,864	11,522	18,475	20,975
Total Humanitarian Immigration <sup>3</sup>	247,812	188,448	102,359	102,041	102,512	114,181	125,164	176,953	223,699	225,220
Refugee Ceiling	217,000	140,000	90,000	72,000	70,000	67,000	70,000	87,500	116,500	125,000
Total Immigration <sup>4</sup>	737,169	625,981	809,438	804,317	827,481	861,506	880,206	958,939	1,468,930	1,897,092
Humanitarian as a % of Total Immigration	33.6%	30.1%	12.6%	12.7%	12.4%	13.3%	14.2%	18.5%	15.2%	11.9%

**SOURCE: Immigration and Naturalization Service and US Department of State/Bureau for Refugee Programs**

1. Refugees include program refugees (1980 Refugee Act), Indochinese Refugees (1977 Act), Cuban Refugees (1966 Act), Amerasians (P.L. 100-202) and Cuban/Haitian Entrants (1986 Act).
2. Experienced INS officials estimate that 80 percent of all asylum applicants stay in the U.S. even if they are denied asylum. Thus, the number of asylees in the table above is equal to 80 percent of all asylum applications filed with the INS.
3. Total Humanitarian Immigration does not include entrants granted Extended Voluntary Departure (EVD), except in 1990 when INS annual immigration statistics showed 3,478 Blanket EVD migrants.
4. Total Immigration includes an estimated 250,000 illegal entrants for each year except 1981 and 1982 since many of the illegal entrants from those years were legalized by IRCA, and therefore counted in total immigration figures for 1989 and 1990.

away too many. Political liberalization in the Soviet Union in 1989 opened wider the gates for the emigration of thousands of Soviet Jews, but at the same time made it more difficult to prove a well founded fear of persecution. In the 1989 Morrison-Lautenberg Act, Congress legislated a "presumption of eligibility for Soviet Jews." Certain other groups at risk were also granted the presumption in the legislative logrolling: Soviet Pentacostals, Ukrainian Christians, and certain Southeast Asians.<sup>4</sup> (Congress began feeling similar pressures in early 1991 to legislate a special humanitarian admission program for some of the nearly half-million non-minority Soviets expected to take advantage of free emigration from the former-USSR in the coming years. Mostly ethnic Russians, the Soviets will not qualify as refugees and lack the family connections in the United States for regular immigration.)

In creating a presumption of persecution, Congress was just following a precedent set by the Executive. After the Refugee Act came into force in 1980, Immigration and Naturalization Service (INS) interviewers in Southeast Asia began rejecting large numbers of applicants under the new and tighter criteria. Led by the State Department, a displeased Washington changed the INS leadership in the area and issued a directive that INS presume any alien who left an Indo-Chinese country to be a refugee, without further inquiry<sup>5</sup>

Creation of favorable "presumptions" for preferred groups abroad has had costs. One of those costs has been the undermining of the Executive's position in trying to hold the line against special preferential arrangements for other applicants for refugee or asylum status.

**The Loophole Created by Political Bias.** Before the 1980 Act U.S. refugee policy was designed largely to benefit fugitives from communism. But a decade after the Act established the principle of ideological neutrality in determining refugee status, refugees continue to come overwhelmingly from communist or communist-influenced states unfriendly to the U.S. 1990 was a typical year. Refugees were admitted predominantly from the former-USSR, Vietnam, Laos, Cambodia, Poland, Romania, Afghanistan and Cuba, all now — or until recently — communist or communist-controlled. Asylum seekers from those same countries also were approved at rates significantly above the worldwide average. Non-Communist countries with repressive governments, but which are friendly to the United States, such as those of Central America, have asylum approval rates markedly below the worldwide average. Soviet asylum seekers were approved at a rate of 82.4 percent in 1990, while only 2.6 percent of those from El Salvador were approved. This seeming lack of evenhandedness has made the U.S. government vulnerable in litigation. Refugee advocates successfully used this revealing data on asylum approvals to prove government bias against Central Americans in a negotiated settlement in 1990 of *American Baptist Churches v. Thornburgh*.<sup>6</sup>

**The Law's Delay: Asylum as a Mass Immigration Channel.** Although they are like refugees in many respects and are judged under the same criteria, asylum seekers differ under the 1980 Act because they are persons already in the U.S., or at

a port of entry, who seek to remain here by proving a well founded fear of persecution.

The right of aliens to apply for asylum, which was strengthened in the 1980 Act, has become a powerful magnet for illegal immigration and a major obstacle to quick and consistent removal of illegal entrants. Aliens applying for asylum can pursue a chain of tedious and time-consuming hearings and appeals through the INS adjudication machinery, the Department of Justice's immigration courts, and the Federal court system — a process that can easily take several years. Deportation of the alien claimant must await resolution of this process, which provides time for the alien affected to marry an American, have U.S. citizen children or gain other "equities" in the U.S. that will make him deportation-proof. Decisions in Federal court have steadily increased the procedural safeguards for alien claimants or eased their burden of proof. INS, as a deterrent to frivolous asylum claims, has denied work authorization to some asylum claimants. This practice is now also under attack in the courts, in addition to its not being fully implemented because of INS's lack of staff.

The 1990 court settlement in *American Baptist Churches v. Thornburgh* required the U.S. Government to grant rehearings or new hearings under more lenient ground rules to more than three hundred thousand illegal aliens from El Salvador and Guatemala who have applied for asylum. The decision will grant work authorization to those aliens and in most cases provide an additional three years in the United States, whatever the outcome.

Most of those claimants denied formal asylum remain here underground or in some temporary status. In fact, an estimated 80 percent of all asylum claimants will remain in the U.S., even though the current (1990) approval rate is less than 20 percent. Ultimately, those who stay illegally or in temporary status are likely to be the beneficiaries of special legalization arrangements. Awareness abroad of the asylum system's lenience and ease of manipulation is a powerful incentive to thousands of other hopeful migrants abroad to try their luck.

**Temporary Protected Status: How Temporary?** Until 1990, the Department of Justice had used a special administrative authority of the Attorney General, "Extended Voluntary Departure," to stay temporarily the deportation of aliens from troubled countries who did not qualify as refugees. Since the 1960s some sixteen countries had been designated for this status. While this form of protection was considered temporary, many of its beneficiaries have eventually become permanent residents through amnesty, marriage or special legislative arrangements.

In the Immigration Act of 1990 Congress refined and expanded the concept of "Extended Voluntary Departure" into "Temporary Protected Status (TPS)," an arrangement for ostensibly temporary refuge for aliens from troubled countries. The legislation significantly expands the coverage of American refugee policy, extending potential eligibility for safe haven in the United States to hundreds of millions of those threatened in their home countries by generalized violence or environmental disasters such as famines, earthquakes and floods.

The law specifically designated migrants from El Salvador, in the U.S. by September 1990, as eligible for Temporary Protected Status for at least 18 months, requiring no test of individual risk. Estimates of eligible Salvadoran illegal aliens run as high as 350,000. Subsequently, the Attorney General has used his authority under the statute to give similar safe haven to aliens from Liberia, Lebanon, Kuwait and Somalia. As of December 1991, 196,335 migrants had been granted TPS, of whom almost 95 percent were Salvadoran.

Immigrant advocates have been pressing for similar status for Guatemalans and for more than 50,000 Nicaraguans in irregular status who can no longer hope for asylum because of the restoration of democratic government in Managua in 1990. The chronic poverty and instability of most of the Third World ensures a continuing abundance of candidate nations for designation for temporary protected status.

## The Rising Numbers

All indicators point to a migrant intake system near overload. Net legal and illegal immigration to the United States has surpassed one million annually. Some 2.5 million are on waiting lists abroad for visas. A recent study by the Census Bureau found that there are 20 million immediate relatives of American citizens and resident aliens living abroad potentially eligible for entry with an immigration preference. A 1989 *Los Angeles Times* poll in Mexico found that 4.7 million Mexicans — about 7 percent of the total population of 67 million — intended to emigrate to the United States. More than 100 thousand persons applied for asylum in 1989 and 75,000 in 1990 — 25 times the numbers of the yearly applications in the 1970s. And after some decline between 1987 and 1989, arrests of illegal entrants by immigration officials have since risen sharply, breaking one million in 1990.

Just under one million refugees were admitted during the decade of the 1980s, and 1.5 million since 1975. Parole, grants of asylum, and "extended voluntary departure" ("EVD" — an administrative measure used to delay the deportation of persons from troubled countries) added more than 700,000 to those settling under humanitarian categories during the decade. Refugee admissions peaked in 1980, the first year of the Act, at 207,000, but by 1986 had declined to 62,000 a year because of budget pressures (in the 1980s, refugees received Federal and State cash grants or services that cost about \$7000 per person per year during their initial period of settlement) and concern in Congress that the outflow of Southeast Asians was evolving into a permanent migration stream. But in no year since the Act was passed have refugee admissions fallen to the 50,000 level "normal flow" envisioned by Congress.

Indeed, refugee admissions began climbing again in 1988 because of the Soviet government's looser emigration rules for minorities such as Jews and Armenians. By 1990 admissions of refugees and parolees were up to 143,000, 80 percent Soviets and Southeast Asians, and still climbing.

Worldwide demand for settlement in the United States is expected to continue surging in the 1990s: the growth of the

working age population of the Third World will accelerate; the expanded numbers of earlier immigrants now in the U. S. will strive to bring in family and friends by any available admissions channel; and political and social unrest will most likely continue to trouble much of Africa, Latin America, the Middle East, Eastern Europe and the former-Soviet Union. Admissions under refugee and other humanitarian provisions, which are unlimited by law, could become a much more important source of new settlers during the present decade, adding as many as two and a half million to three million newcomers.

Powerful humanitarian impulses within Congress, the prevalence of ethnic politics on Capitol Hill, overloaded machinery for intake of regular immigrants, and the magnetic pull of asylum could make humanitarian admissions the largest and most rapidly growing form of migration in the 1990s.

## Controlling the Growth of Humanitarian Admissions

What are the options for better control and management of this swelling flow?

**A Comprehensive Ceiling.** Basic to the return of discipline to an overtaxed immigration system is a comprehensive ceiling on all admissions, including refugees, that takes into account broader population and labor force considerations. This concept has surfaced occasionally in Congress and, in emasculated form, appears in the 1990 Immigration Act, though it exempts refugees. In a truly effective ceiling, refugee and mass asylum emergencies requiring higher admissions would be offset by lower admissions of other categories of entrants in that year, such as immediate family members and professionals and skilled workers. To cope with extraordinarily large and urgent refugee flows that could pre-empt all other immigration, the ceiling could provide for "borrowing" ceiling slots from subsequent years, to be fully repaid in the form of reduced admission in no less than three years. Those admitted in temporary protected status would be charged to the ceiling, but the ceiling numbers would be restored if they were to leave the United States within three years.

**Curbing Abuse of Asylum Claims.** Prolonged delays in making decisions on asylum claims are an opportunity for the determined illegal settler and a magnet for hopeful migrants abroad. Both the number of asylum claims accepted for adjudication and the time used to decide them need to be reduced. Just as the U.S. Government determines in advance the countries from which it will accept refugees, it should maintain a specific limited list, subject to periodic revisions, of countries whose residents would not be eligible to claim asylum. Included on this list would be a sizable number of the world's countries where human rights standards are adequate, where evidence of persecution is weak, or where sufficient alternative remedies for those problems are available to the aggrieved citizen at home. Asylum seekers from countries not listed as ineligible for asylum consideration would receive prompt and rigorous screening to determine their suitability for full asylum adjudication. Those found

in screening to have no arguable basis for pursuing asylum would be promptly repatriated to their home countries. The prospect of a rapid decision and quick repatriation would deter others seeking to immigrate through the asylum channel. All persons approved for asylum each year would be charged to the overall immigration ceiling.

Even with these prudent limitations, the United States would maintain a generous and flexible policy of humanitarian admissions by world standards. Failure to move now toward discipline and rational management of this emotion-laden immigration category means open-ended growth of admissions and continued decline in the integrity and efficacy of U.S. refugee and asylum programs.

## NOTES:

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