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**Counterproductive and Counterintuitive Counterterrorism: The Post-September
11 Treatment of Refugees and Asylum-Seekers**

COUNTERPRODUCTIVE AND COUNTERINTUITIVE COUNTERTERRORISM: THE POST-SEPTEMBER 11 TREATMENT OF REFUGEES AND ASYLUM-SEEKERS

MARISA SILENZI CIANCIARULO[†]

INTRODUCTION

The United States has a long and rich history of protecting individuals fleeing persecution. The country was founded as a haven from religious persecution, and became home to Quakers, Puritans, Catholics, Huguenots and other religious denominations unwelcome in England and other parts of Europe in the seventeenth and eighteenth centuries.¹ This tradition has survived several periods of intense xenophobia, racially-based exclusionary policies, national security threats, and war.

The United States currently offers protection to individuals and families fleeing persecution through two programs: the overseas refugee resettlement program and the asylum system. The refugee resettlement program is available for refugees residing outside the United States; the asylum system is for those who apply for refugee protection on U.S. soil. The most recent assault on the U.S. tradition and obligation to provide protection to those fleeing persecution has affected both of these programs.

When recalling the United States' first major anti-terrorism effort in response to the September 11 terrorist attacks, the October 7, 2001 invasion of Afghanistan is in the foremost action in the nation's collective memory. Even before invading Afghanistan, however, the U.S. government had begun implementing anti-terrorism measures in another arena: the refugee resettlement program. Approximately two weeks after the attacks, the federal government imposed a moratorium on refugee admis-

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1. See WILLIAM CARLSON SMITH, AMERICANS IN THE MAKING: THE NATURAL HISTORY OF THE ASSIMILATION OF IMMIGRANTS 4-5 (1939) (noting that the United States was "vaunted as a land not only of economic opportunity but also of religious freedom . . ."); see also International Religious Freedom Act of 1998, 22 U.S.C.A. § 6401(a)(1) (West 2007) (noting that "[m]any of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom"). See generally ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 94-95 (1990).

sions, stranding thousands of refugees and creating a backlog from which the refugee resettlement program still has not recovered.²

Considered in a vacuum, the fact that the United States might choose to target U.S.-bound refugee populations for its anti-terrorism measures may not seem terribly surprising. However, additional facts call into question the wisdom and efficacy of imposing a refugee resettlement moratorium: first, none of the nineteen September 11 hijackers were refugees; and second, the mechanism through which several of the September 11 hijackers actually were able to enter the United States, known as Visa Express, continued to operate for almost a year after the attacks.³

Likewise, the asylum system, which also had not been utilized by any of the September 11 hijackers, did not escape retribution. On May 11, 2005, Congress passed the Real ID Act,⁴ which included a section entitled "Preventing Terrorists from Obtaining Relief from Removal"⁵ that purported to reform the asylum system. Again, at first glance, particularly if one is persuaded by the title of the section, such legislation seems prudent and perhaps even urgently necessary. A careful perusal of the asylum section of the Real ID Act, however, reveals that the legisla-

2. See DAVID A. MARTIN, *THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT* 153 (2004) available at <http://www.state.gov/documents/organization/36495.pdf> [hereinafter MARTIN, REFORMS]:

All refugee movements had been suspended in the immediate aftermath of the September 11 attacks, a halt that lasted approximately two months. In the meantime, the new security and anti-fraud steps that were introduced beginning in November 2001 were applied not just to the consideration of new refugee applicants but also to any refugees who had not yet traveled. Given the confusion and enormous backlogs resulting from problems at many steps of the process, many thousands of refugees who thought they had been approved and were ready to fly to the United States languished for months or years without a final decision on their cases.

Id. The new security screening procedures introduced after September 11 led to "many months of confusion, inefficiency, and delays . . ." *Id.* at 154.

All P-3 cases that had not yet traveled to the United States as of September 11, 2001, were subjected to the new verification process. This meant that a significant number of persons who thought that they had been approved for admission saw their cases reopened and their approvals suspended. Notifications of discrepancies were sometimes delayed, as were notifications of final revocation of admission approval. Therefore many refugees who thought they had been fully approved for resettlement in the United States found themselves in limbo for months, and a great many for years.

Id. at 86; see also Ralston H. Deffenbaugh, Jr., President, Lutheran Immigration and Refugee Service, *Continuing Crisis in the U.S. Refugee Resettlement Program*, Jan. 2002, available at <http://www.lirs.org/news/PresDesk/RD200201.htm>.

3. See George Gedda, *Official Inquiry Ordered for All Visa-Issuing Foreign Posts*, ASSOCIATED PRESS WORLDSTREAM, July 17, 2002, <http://www.freerepublic.com/focus/f-news/717317/posts> (reporting that 64% of 36,028 visas issued to Saudis between June 1, 2001 through Sept. 10, 2001 – 64% through Visa Express, only 3% of 64% interviewed; Senator Chuck Grassley and Rep. Dave Weldon said that 3 out of 15 hijackers obtained visa through Visa Express); Ben Barber, *Visa Express Discontinued in Saudi Arabia; State Bows to Critics on Hill*, WASH. TIMES, July 20, 2002, at 1 (shut down Visa Express on July 20).

4. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (Real ID Act), Pub. L. No. 109-13, 119 Stat. 231, 302 (2005).

5. *Id.* § 101.

tion does nothing more than clumsily codify existing asylum case law. The vague and awkwardly worded provisions of the Real ID Act thereby increase the likelihood that bona fide asylum claims will fail while doing little or nothing to prevent fraudulent claims from succeeding.

This Article critiques the anti-terrorism measures of the United States that directly target refugees and asylum-seekers. Part I briefly discusses the history of refugee protection in the United States. Parts II and III describe the processes and security measures which all applicants for refugee and asylee status must undergo in order to gain protection from the United States. Parts II and III also explain the inefficacy and counter-productivity of the post-September 11 anti-terrorism measures targeting refugees and asylum seekers, and conclude that those measures were counterproductive and counterintuitive.

I. HISTORY OF U.S. ASYLUM AND REFUGEE LAW: 1939-1980

The United States' long history of providing protection to those fleeing persecution abroad has been tempered by periodic xenophobia, political bias, and lack of uniformity. Although the tradition of refugee protection predates the official birth of the nation, statutory refugee protection in the form of asylum and the overseas refugee resettlement program did not exist prior to 1980. Even with a statute in place, the admission of refugees and adjudication of asylum claims have not always operated smoothly, and both forms of protection have remained in constant flux.

A. *Pre-World War II: The S.S. St. Louis*

Prior to onset of the Cold War, the United States did not have laws specifically permitting refugee admissions. Immigration occurred primarily through a nationality-based quota system; when the allotted number of visas ran out for a particular country or region, applicants had to wait until a visa became available in order to immigrate.⁶ The first intimation that this system was inadequate surfaced shortly before World War II began, when Nazi persecution was compelling many Jews and other minorities to flee Europe.

On June 6, 1939, the S.S. St. Louis, a German transatlantic liner carrying more than 900 European Jews fleeing Nazi persecution, petitioned the United States for permission to enter its territory.⁷ By this

6. See Immigration Act of 1924, ch. 190, 43 Stat. 153, 159-60 (repealed 1952).

7. U.S. Holocaust Memorial Museum, *Voyage of the "St. Louis,"* in HOLOCAUST ENCYCLOPEDIA, available at <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005267> (last visited Apr. 8, 2007) [hereinafter U.S. Holocaust Memorial Museum, *Voyage of the "St. Louis"*]. The refugees were originally en route to Cuba, but the Cuban government revoked their landing passes and denied them entry. *Id.*; see also U.S. Holocaust Memorial Museum, *Wartime Fate of the Passengers of the "St. Louis,"* in HOLOCAUST ENCYCLOPEDIA, available at <http://www1.ushmm.org/wlc/article.php?lang=en&ModuleId=10005431> (last visited Apr. 8, 2007) [hereinafter U.S. Holocaust Memorial Museum, *Wartime Fate of the Passengers of the "St. Louis"*].

time, the German-Austrian quota for U.S. immigration had not only been filled but had a waiting list of several years.⁸ Entry to the United States would have required an executive order from President Roosevelt, who declined to issue one.⁹

While the *St. Louis* made its way back to Europe, Jewish organizations secured admission for most of the refugees to western European countries. The passengers arrived in Antwerp, Belgium after five weeks at sea. They settled in Belgium, France, Great Britain, and the Netherlands to await their turn to enter the United States through the backlogged quota system. Approximately four months later, World War II broke out. Eventually, all of the countries to which the *St. Louis* passengers were sent, with the exception of Great Britain, came under Nazi control. "Thus, in the end, the former 'St. Louis' passengers underwent experiences similar to those of other Jews in Nazi-occupied western Europe. The Germans murdered many of them in the killing centers and the concentration camps. Others went into hiding or survived years of forced labor."¹⁰

B. Post-World War II: The 1967 Protocol Relating to the Status of Refugees

In the aftermath of the Nazi atrocities of World War II, refugee protection gained prominence in the international community. The United Nations General Assembly promulgated the Convention Relating to the Status of Refugees in 1951¹¹ to provide protection to refugees displaced as a result of World War II. In 1967, the United Nations updated the 1951 Convention with the Protocol Relating to the Status of Refugees¹² to address a refugee flow that had arisen out of incidents other than World War II.¹³

In 1968, the United States signed and ratified the 1967 Protocol.¹⁴ In acceding to the 1967 Protocol, the United States agreed to grant protection to persons who meet the international legal definition of a refugee:

(describing the various fates of the passengers returned to Germany, many of whom were placed in internment camps, transported to Nazi death camps, or forced to live in hiding for the remainder of the war).

8. U.S. Holocaust Memorial Museum, *Voyage of the "St. Louis," supra note 7.*

9. *Id.*

10. U.S. Holocaust Memorial Museum, *Wartime Fate of the Passengers of the "St. Louis," supra note 7.* It is estimated that 250 of the *St. Louis* passengers died in the Holocaust. See U.S. Holocaust Memorial Museum, *Voyage of the "St. Louis," supra note 7.*

11. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force July 28, 1951) [hereinafter 1951 Convention].

12. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter 1967 Protocol].

13. See *id.*, Preamble (stating that because the scope of the 1951 Convention is limited to persons who became refugees as a result of incidents prior to 1951, the Convention should be broadened to address refugee populations that have emerged after 1951).

14. See 1967 Protocol, *supra note 12*, at 1.

Any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁵

Prior to signing the Protocol, the United States' policy on granting refugee status reflected its Cold War political concerns. The Immigration Act of 1952¹⁶ and the 1965 amendments to the Immigration Act¹⁷ allowed only refugees from either communist countries or countries in the Middle East to qualify for asylum.¹⁸ Asylum seekers who did fall within these narrow parameters still had to demonstrate a "clear probability" of persecution (a higher standard than the "reasonable possibility" standard that exists today) before being accepted as refugees.¹⁹ They were also subject to strict numerical limitations.²⁰

The United States' assent to the Protocol did not have a significant effect on asylum processing. The United States relied on the portion of the 1952 Act that authorized the Attorney General "to withhold the deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reasons."²¹ From 1968 to 1980, the United States continued to enforce the narrow parameters, low ceiling on approvals,

15. See *id.*, art. 1, ¶ 2 (adopting the 1951 Convention's definition of "refugee" with modifications to eliminate the 1951 Convention's exclusive application to World War II refugees); see also 1951 Convention *supra* note 11, art. 1, ¶ A(2) (defining a "refugee").

16. See Immigration and Nationality Act of 1952 § 203(a)(7), 8 U.S.C.A. § 1153(a)(7), *repealed by* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 108 (1980) [hereinafter INA].

17. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, 913 (1965) [hereinafter 1965 Amendments].

18. *Id.* at 913. The general area of the Middle East included western Libya, northern Turkey, eastern Pakistan, southern Ethiopia, and Saudi Arabia. *Id.*

19. See *Cisternas-Estay v. INS*, 531 F.2d 155, 159 (3d Cir. 1976) (sustaining denial of asylum where applicants failed to demonstrate a "clear probability" of persecution); *Pierre v. U.S.*, 547 F.2d 1281, 1289 (5th Cir. 1977) (holding that the burden was on the asylum seeker to show that she was a refugee by a "clear probability" standard of proof); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977) (holding that in order to prove a well-founded fear of persecution, an asylum applicant must demonstrate a "clear probability" of persecution).

20. See INA § 201(a) (codified as amended at 8 U.S.C.A. §§ 1101-1503 (West 2007)) (setting an annual refugee quota based on nationality); Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 § 1(a) (1953), *amended by* Act of Aug. 31, 1954, Pub. L. No. 83-751, 68 Stat. 1044 (making available 209,000 refugee visas exempt from the 1952 nationality based quota); see also Deborah E. Anker & Michael J. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 13-14 (1981) (remarking that Congress' exceptions to immigration policy were strictly responses to Soviet expansionism, and should not be viewed as humanitarian commitments).

21. INA § 243(h), 8 U.S.C. § 1253(h) (Supp. V. 1970) (now INA § 241(b)(3), 8 U.S.C.A. § 1231(b)(3) (West 2007)).

and strict burden of proof mandated by the 1952 Act and the courts.²² It was not until 1980 that Congress passed legislation implementing the United States' obligations under the 1967 Protocol by codifying the 1951 Convention definition of a refugee and establishing a legal right to apply for asylum.

C. *The Refugee Act of 1980*

In 1980, Congress for the first time passed a law specifically addressing refugees and asylum seekers: the Refugee Act of 1980.²³ In enacting the Refugee Act, Congress sought to give "statutory meaning to our national commitment to human rights and humanitarian concerns."²⁴ The Refugee Act removed the geographical and political limitations from the asylum process,²⁵ explicitly adopted the Protocol's definition of a "refugee,"²⁶ formulated a legal right to seek asylum in the United States,²⁷ and lifted the numerical caps on yearly grants of asylum.²⁸ In addition, the Refugee Act mandated that the Attorney General establish procedures for asylum processing.²⁹

22. KAREN MUSALO, *REFUGEE LAW AND POLICY: CASES AND MATERIALS* 64 (1997); see *INS v. Stevic*, 467 U.S. 407, 413, 429-30 (1984) (articulating the standard for eligibility for withholding of removal).

23. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C.A. §§ 1157-1159 (West 2007) [hereinafter Refugee Act]).

24. S. REP. NO. 96-256, at 1 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 141.

25. The Refugee Act repealed INA § 203(a)(7), 8 U.S.C. § 1153(a)(7), which had reserved refugee protection primarily for individuals fleeing Communist and certain Middle Eastern countries.

26. See INA § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (West 2007). The INA defines a refugee as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

See *id.*

27. See INA § 208(a)(1), 8 U.S.C.A. § 1158(a)(1) (West 2007) (authorizing "[a]ny alien who is physically present in the United States or who arrives in the United States" to apply for asylum). The Refugee Act provided a new discretionary form of relief for asylum seekers. Relief under section 243(h) of the INA, which provided for mandatory withholding of removal, remained available for refugees who did not warrant a favorable exercise of discretion or who were statutorily barred from qualifying for asylum. See INA § 241(b)(3)(A), 8 U.S.C.A. 1231 (b)(3)(A) (West 2007) (prohibiting the removal of certain noncitizens who face persecution on account of race, religion, nationality, membership in a particular social group, or political opinion). The Supreme Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987), differentiated between the burden of proof for those seeking asylum and those seeking withholding, holding that asylum seekers must prove a reasonable possibility of persecution, whereas individuals seeking withholding must still meet the pre-Refugee Act standard of "clear probability." See *id.* at 430.

28. See INA § 208(b)(1)(A), 8 U.S.C.A. § 1158(b)(1)(A) (West 2007) (authorizing the Attorney General to grant asylum to an alien who meets the definition of refugee, without any numerical restrictions).

29. INA § 208(d)(1), 8 U.S.C.A. § 1158(d)(1) (West 2007). The Attorney General issued regulations in 1990 that created a professional corps of asylum officers; vested initial jurisdiction of affirmative asylum claims with the Office of Refugees, Asylum and Parole; established filing procedures for applications for asylum; established interview procedures; set forth eligibility require-

The passage of the Refugee Act ushered in a new era of refugee protection. The Supreme Court recognized the implications of the Refugee Act in the ground-breaking case of *INS v. Cardoza-Fonseca*,³⁰ which articulated a new, lower standard of proof for asylum eligibility, differentiating it from that of withholding of removal.³¹ In 1990, reacting to allegations of persistent geopolitical bias within the asylum system,³² the INS promulgated new regulations for the prompt and politically neutral adjudication of asylum claims.³³ Finally, in response to allegations that the asylum system was becoming a haven for terrorists and others seeking to abuse the U.S. immigration system, Congress passed immigration reform legislation in 1996, discussed in detail in Section III.A.2, *infra*, that made significant changes to the asylum system.³⁴

Despite the developments and reforms of the 1990s, and the inhospitality of both systems to individuals seeking to abuse the U.S. immigration system, both the overseas refugee resettlement program and the asylum system have been targets of counterterrorism policies and legislation.

II. OVERSEAS REFUGEE RESETTLEMENT PROGRAM

The U.S. refugee resettlement program is likely the least hospitable avenue for entering the United States for an individual seeking to carry out terrorism. Only 70,000 refugees per year out of thirteen million refugees worldwide are selected to resettle in the United States. Selection is based on a complex priority system and often dependent on one's membership in a group of individuals identified by the U.S. government as particularly at risk due to their religion, ethnicity, tribe, and/or other factors. Many refugees live for years in dirty, violent, disease-ridden camps, with no guarantee of resettling elsewhere.

A. *The Refugee Resettlement Process Pre-September 11*

In order to resettle in the United States, applicants must (1) meet the definition of a refugee,³⁵ (2) be among those refugees whom the Presi-

ments; and established procedures for granting derivative status to immediate family members. See Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208 (2007).

30. 480 U.S. 421 (1987).

31. *Cardoza-Fonseca*, 480 U.S. at 430-33.

32. See U.S. GEN. ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN 22 (1987) (reporting discrepancies among asylum seekers claiming similar levels and forms of persecution, with applicants from countries with regimes the United States opposed, such as Iran, having much higher approval rates than applicants from countries with U.S.-supported regimes, such as El Salvador).

33. Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674 (Immigration and Naturalization Service July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, 253).

34. See *infra* note 73 and accompanying text.

35. See INA § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (West 2007); see also *supra* note 26.

dent determines to be of special humanitarian concern,³⁶ (3) be otherwise admissible under U.S. law,³⁷ and (4) not be “firmly resettled”³⁸ in another country.³⁹ Once an individual is selected for resettlement, he or she must undergo a rigorous screening process administered by the Bureau of Populations, Refugees and Migration (“PRM”) of the Department of State in conjunction with the Department of Homeland Security⁴⁰ and the Office of Refugee Resettlement (“ORR”) of the Department of Health and Human Services (“HHS”) for resettlement processing.⁴¹

Upon receiving a referral from the United Nations High Commissioner for Refugees or a non-governmental organization, applicants for resettlement in the United States must proceed through several more levels of adjudication. First, the U.S. Department of State evaluates the cases based on the applicants’ situation in the country of first asylum, the conditions from which they have fled, U.S. national interest, and other humanitarian considerations.⁴² Second, applicants who appear to have suffered persecution or to have a well-founded fear of future persecution,⁴³ and who otherwise fall within the United States’ resettlement priorities must then meet with a U.S. immigration official to determine whether they qualify for admission as a refugee.⁴⁴ Once the immigration

36. See 8 U.S.C.A. § 1157(a)(3) (“Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination by the President after appropriate consultation.”).

37. See INA § 212, 8 U.S.C.A. § 1182 (classifying groups of aliens ineligible for visas or admission).

38. INA § 208(b)(2)(A)(vi), 8 U.S.C.A. § 1158(b)(2)(A)(vi); see also 8 C.F.R. § 208.15 (2007) (providing guidance on determining whether an applicant for asylum was firmly resettled in another country).

39. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, RESETTLEMENT HANDBOOK: COUNTRY CHAPTERS: UNITED STATES OF AMERICA 2 (2004), available at <http://www.unhcr.org/protect/PROTECTION/3c5e5a764.pdf> [hereinafter UNHCR, COUNTRY CHAPTERS: USA] (describing resettlement policies and procedures in United States).

40. Formerly the Immigration and Naturalization Service (INS). See Dep’t of Homeland Security, History: Who Became Part of the Department?, Sep. 13, 2006, http://www.dhs.gov/xabout/history/editorial_0133.shtm.

41. See UNHCR, COUNTRY CHAPTERS: USA, *supra* note 39, at 1 (noting four key criteria for refugee admission in United States).

42. See *id.* at 4 (noting procedures which the United States uses to determine whether to accept refugees).

43. See *Matter of Mogharabbi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (holding that an individual’s fear of persecution is well-founded if he or she “(1) possesses a characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could . . . become aware, that the [individual] possesses this belief or characteristic; (3) the persecutor has the capability of punishing the [individual]; and (4) the persecutor has the inclination to punish the [person].” (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 226 (B.I.A. 1985))).

44. See 8 C.F.R. § 208.13(a) (2007) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”). The situation of refugees often makes it difficult for them to provide documentary or third party testimonial corroboration of their claims, but U.S. regulations governing asylum, in conformity with U.N. recommendations, specify that an applicant’s credible testimony is sufficient to establish eligibility. See *id.*; see also UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 196, HCR/IP/4/Eng/REV.1 (1992) [hereinafter UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA] (“In most cases a person fleeing from persecution will

authorities approve an applicant for resettlement, the applicant must undergo a medical examination and security checks before travel arrangements to the United States can be made. This process can take several years, during which time many refugees must live in precarious situations, often living in refugee camps plagued by disease, violence, and overcrowding.⁴⁵

B. Post-September 11 Refugee Resettlement Moratorium

Despite the procedures and security checks described in Part II.A, *supra*, and despite the fact that none of the September 11 hijackers were refugees,⁴⁶ the United States immediately suspended refugee resettlement for several months as part of its response to the September 11 terrorist attacks.⁴⁷ During that time, the U.S. government carried out new background checks and investigations of family relationships.⁴⁸ When the U.S. refugee resettlement program did resume in February 2002, it was with the implementation of new, far stricter security mechanisms that apply even to the highest priority refugees.

First, refugees, including those already accepted for resettlement, now have to undergo new security checks prior to gaining admission to the United States.⁴⁹ Even prior to September 11, the U.S. State Department checked all applicants for resettlement against the Refugee Information Entry Sub-system of the Consular Lookout and Support System ("CLASS"), a database searched using names and dates of birth.⁵⁰

have arrived with the barest necessities and very frequently even without documents. . . . [I]f the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt."

45. See generally U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 2004, available at <http://www.refugees.org/article.aspx?id=1156> (containing various articles and reports describing the conditions in which the majority of the world's refugees live).

46. See THOMAS R. ELDRIDGE ET AL., 9/11 AND TERRORIST TRAVEL: STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 7-31 (2004) (detailing each of the September 11 hijackers' visa application processes and encounters with U.S. immigration personnel). Most of the hijackers applied for and received tourist visas. See *id.* One applied for and received a student visa after being denied a tourist visa. See *id.* at 13-14.

47. See U.S. DEP'T OF STATE, BUREAU OF POPULATION, REFUGEES AND MIGRATION, SUMMARY OF REFUGEE ADMISSIONS: FISCAL YEAR 2003 (illustrating drop in refugee admissions during this time) [hereinafter U.S. DEP'T OF STATE, REFUGEE ADMISSIONS 2003]; see also T. T. Nhu, *Refugee Backlog Remains Sizable; Resettlement Program Resuming After Sept. 11*, SAN JOSE MERCURY NEWS, Feb. 27, 2002.

48. See generally MARTIN, REFORMS, *supra* note 2, at 84-95 (describing the delays in refugee processing, particularly those resettling on the basis of family relationships).

49. U.S. DEP'T OF STATE, DEP'T OF HOMELAND SECURITY, DEP'T OF HEALTH & HUMAN SERVICES, PROPOSED REFUGEE ADMISSIONS FOR FY 2004 - REPORT TO THE CONGRESS iv, available at <http://www.state.gov/documents/organization/44529.pdf> [hereinafter U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSIONS FY 2004] (stating CLASS checks are based on name and date of birth). A CLASS check is now done efficiently via WRAPS, triggered as soon as the OPE has acquired the basic individual information needed to perform the check, and the result is also recorded in automated fashion. See *id.* Most cases clear this check and can then be scheduled for the remainder of the process).

50. See MARTIN, REFORMS, *supra* note 2, at 119-20 (citing U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM app. D § 201 (2007)).

CLASS contains the names of persons for whom the State Department has information, usually derogatory, pertaining to the individuals' application for entry into the United States.⁵¹ In the post-September 11 era, the results of the CLASS check must now be completed and documented before resettlement offices may proceed any further on the case.⁵² Although the U.S. State Department claims that the security checks now only take forty-five days to process, they took several months when these changes first came into effect.⁵³

Other post-September 11 security measures, while not particularly time consuming compared to the CLASS check, have delayed travel in another respect: they have caused the amount of available flights for refugees to decrease significantly.⁵⁴ As of November 2001, all refugees who are fourteen-years-old or older at the time of their entry into the United States must undergo full fingerprinting upon arrival in the United States.⁵⁵ This process is so cumbersome that the government initially imposed a thirty-person per flight limit on refugees,⁵⁶ a limit which improvements in fingerprinting efficiency have allowed to increase only to thirty-five refugees per flight.⁵⁷ Adding to the need for a per flight limit on refugees is the 2002 Enhanced Border Security and Visa Entry Reform Act⁵⁸ requirement that all refugees receive an employment authorization document "immediately upon the[ir] arrival in the United States" and that the document contain a photograph and fingerprint.⁵⁹

The cumulative result of these measures is that thousands of refugees selected for resettlement, who have been anticipating imminent departure and the start of a new life, have reverted to the anxious waiting and uncertainty that had characterized the last several years of their lives. The United States, although it authorized the admission of 70,000 refu-

51. See U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM app. D § 200 (2007) (explaining CLASS, Consular Lookout and Support System).

52. See MARTIN, REFORMS, *supra* note 2, at 119-20 ("New security measures adopted in November 2001 strictly require documentation in refugee files that such checks have been completed before the case can proceed."). Furthermore, the State Department has, since 9/11, been adding additional names and information to the CLASS database. See *id.* at 120.

53. Arthur E. Dewey, Assistant Secretary of State for Population, Refugees and Migration, Remarks at the 2004 Annual Conference of State Coordinators of Refugee Resettlement (SCORR) (July 13, 2004), available at <http://www.state.gov/g/prm/rls/37912.htm>; Arthur E. Dewey, Assistant Secretary for Population, Refugees and Migration, Remarks to the 2004 Annual Conference of Lutheran Immigration and Refugee Services (LIRS) (June 18, 2004), available at <http://www.state.gov/g/prm/rls/37914.htm>; U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSIONS FY 2004, *supra* note 49, at 5.

54. See MARTIN, REFORMS, *supra* note 2, at 130 (discussing the effect of fingerprinting and other post 9/11 security refugee flights).

55. See *id.* (noting a November 2001 decision to do full fingerprinting of all refugees 14 and older upon arrival).

56. See *id.* ("INS imposed a 30 person per flight refugee limitation on refugee arrivals").

57. See *id.* (explaining that after the government was able to transfer the fingerprint work to a subcontractor they raised the per flight quota to thirty-five).

58. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (codified as amended in scattered sections of 8 U.S.C.A.).

59. *Id.* § 309.

gees,⁶⁰ only admitted 27,029 refugees in fiscal year 2002.⁶¹ Fiscal year 2003 saw almost the same low number of refugee entries.⁶² In fiscal year 2004, the United States fell short of its refugee admission ceiling by 17,125.⁶³

The global insecurity and threats against the United States, upon which President Bush based his refusal to increase the refugee resettlement quota, have indeed posed a significant challenge to refugee processing. Attacks by combatants in volatile areas against aid workers,⁶⁴ volunteer medical personnel,⁶⁵ and foreign officials⁶⁶ combined with U.S. security measures to slow the process considerably.⁶⁷ Moreover, the very situations from which refugees are trying to escape present enormous obstacles to their goal. Forced displacement, violence, lack of infrastructure, illness, and lack of stability are not ideal conditions for preserving formal identity documents such as passports, birth certificates, marriage certificates, and the like. Many refugees thus commence the resettlement process with two substantial strikes against them: (1) the

60. Presidential Determ. No. 2-04, 66 FR 63,487 (Nov. 21, 2001) (Presidential Determination on FY 2002 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), Respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended); *Regional Refugee Ceilings and Admissions to the United States, FY 1991-2004*, REFUGEE REPS. (Immigration and Refugee Services of America, Wash., D.C.), Dec. 31, 2003, at 9, available at http://www.refugees.org/data/refugee_reports/archives/2003/RRDec.pdf (showing that prior to 2001, the United States imposed refugee admission ceilings ranging from 78,000 to 142,000 and the actual number of refugees admitted to the United States ranged from 70,000 to over 132,000 each year).

61. See George Gedda, *Admission of Refugees into U.S. Down*, ASSOCIATED PRESS, Oct. 3, 2003, available at <http://www.highbeam.com/doc/1P1-85198340.html>.

62. See U.S. DEP'T OF STATE, REFUGEE ADMISSIONS 2003, *supra* note 47, at 5 (stating that the United States admitted 28,422 refugees in fiscal year 2003, 41,578 short of its ceiling).

63. See Press Release, Adam Erel, Deputy Spokesman, U.S. Dep't of State, Refugee Admissions for Fiscal Year 2004 (Oct. 4, 2004), available at <http://www.state.gov/r/pa/prs/ps/2004/36717.htm> (stating that the United States admitted 52,875 refugees in fiscal year 2004).

64. See *UN Refugee Agency Halts Operations in Troubled Parts of Afghanistan*, AGENCE FRANCE PRESSE, Nov. 18, 2003, available at http://www.publicinternationallaw.org/docs/PNW/PNW.24Nov_03.htm#Afghanistan (stating in November 2003, alleged Taliban gunmen shot and killed 29-year-old UNHCR aid worker Bettina Goislard in Afghanistan; she was the twelfth aid worker to be killed in Afghanistan since March 2003); see also U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. 03-663, HUMANITARIAN ASSISTANCE: PROTECTING REFUGEE WOMEN AND GIRLS REMAINS A SIGNIFICANT CHALLENGE 6 (2003), available at <http://www.gao.gov/new.items/d03663.pdf> ("[F]rom 1997 through 2001, 106 relief workers were killed in the line of duty in Afghanistan, Angola, Rwanda, and Sudan.").

65. Amir Shah, *Taliban Claims Responsibility for Foreign Workers' Deaths*, OAKLAND TRIB., June 3, 2004, available at http://www.findarticles.com/p/articles/mi_qn4176/is_20040603/ai_n14575526 (stating that in June 2004, Taliban militants claimed responsibility for murdering three members of a volunteer medical team in Afghanistan).

66. See U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSIONS FY 2004, *supra* note 49, at 15 (indicating that direct threats to U.S. personnel at the Kakuma refugee camp in Kenya delayed resettlement processing).

67. U.S. DEP'T. OF STATE, BUREAU OF POPULATION, REFUGEES AND MIGRATION, FACT SHEET: U.S. GOVERNMENT TO EXPEDITE REFUGEE PROCESSING SINCE SEPTEMBER 11, 2001 (2003), available at <http://www.state.gov/g/prm/rls/fs/2003/23356.htm> ("[I]nitial overseas security concerns severely limited Immigration and Naturalization Service (INS) adjudications in the field. INS (now Department of Homeland Security/Bureau of Citizenship and Immigration Services DHS/CIS) interviews overseas resumed in force in February 2002, but then were constrained again by security threats in East Africa, civil unrest in West Africa, and the war in Iraq.").

inability to prove conclusively who they are and why they are refugees, and (2) the presumption that they are involved with terrorism.

III. THE UNITED STATES ASYLUM SYSTEM

Next to the refugee resettlement program, the asylum system is arguably the least hospitable means to secure lawful status for an individual seeking to infiltrate the United States for terrorism-related activities. A strict one-year filing deadline, restrictions on employment authorization, face-to-face interviews with immigration officers, numerous background and identity checks, and the possibility of detention combine to create a less-than-ideal environment for an individual seeking to defraud the United States.

A. *The U.S. Asylum System Pre-September 11*

1. Security measures

Asylum applicants must undergo identity verification and background checks before being eligible for asylum.⁶⁸ The government issues each asylum applicant a file number, or “alien number,” which is entered into the Refugees, Asylum and Parole System (“RAPS”) database.⁶⁹ RAPS interfaces with the Computer Linked Applicant Information System (“CLAIMS”) to identify and update asylum applicants’ address changes, and with the Receipt and Alien File Accountability Control System (“RAFACS”) to keep track of asylum applicants’ files.⁷⁰ The asylum office may not grant asylum without first checking the identity of the applicant against all appropriate government databases, including the State Department’s Consular Lookout and Support System (“CLASS”)⁷¹ and the DHS biometric identification system known as “IDENT.”⁷²

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

By the mid-1990’s, perceived flaws in the U.S. asylum system had come to the attention of lawmakers. Processing delays had led to a backlog of several years, allowing asylum applicants to remain in the United States legally for the duration of their cases.⁷³ The law also granted asylum applicants immediate work authorization, renewable on a yearly

68. 8 C.F.R. §§ 208.9(b), 208.10, 240.67 (2007).

69. U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, INS, REFUGEES, ASYLUM AND PAROLE SYSTEM, AUDIT REPORT 98-11 (1998), available at <http://www.usdoj.gov/oig/reports/INS/a9811.htm>.

70. *Id.*

71. IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 383 (9th ed. 2004).

72. *Id.* at 100.

73. See INS, U.S. DEP’T OF JUSTICE, ASYLUM REFORM: FIVE YEARS LATER 7 (2000), available at http://149.101.23.2/graphics/services/asylum%5C asylum_brochure.pdf [hereinafter INS, ASYLUM REFORM].

basis until the asylum adjudication was complete.⁷⁴ Concerns abounded that economic migrants, unscrupulous individuals, and terrorists were taking advantage of the asylum laws to avoid deportation and then to abscond while their applications were languishing in the backlog.⁷⁵

In response to these concerns, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").⁷⁶ IIRIRA put into effect a number of provisions designed to curtail abuse of the asylum system. The most significant limitations are a one-year deadline on applying for asylum, delay in work authorization eligibility, prompt adjudication of asylum applications, expedited removal, and detention of asylum seekers. With these provisions in place, the hurdles to obtaining asylum are so great that asylum has become an unlikely choice for an individual seeking an easy, low-profile way to gain lawful immigration status.

a. The One-Year Deadline

As of April 1, 1997, asylum seekers must file their applications for asylum within one year of their entry into the United States. An applicant's failure to prove by clear and convincing evidence that he or she filed within one year of entry bars the applicant from asylum eligibility.⁷⁷ Applicants may only overcome the bar if they demonstrate "changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application"⁷⁸ The goal of this provision was to ensure that individuals applying for asylum were doing so as the result of an urgent need for protection, rather than as a delay tactic to prolong an unauthorized stay in the United States.

b. Prompt adjudication of asylum claims and delay in work authorization eligibility

IIRIRA closed the loophole allegedly exploited by fraudulent asylum seekers to remain indefinitely in the United States with employment authorization by revoking employment authorization and mandating prompt adjudication of asylum claims. First, IIRIRA plainly states that "[a]n applicant for asylum is not entitled to employment authorization"⁷⁹ Congress authorized the Attorney General to provide for employment authorization via regulation, but stipulated that such authorization "shall not be granted . . . prior to 180 days after the date of filing of the

74. 8 C.F.R. § 208.7 (1993).

75. See INS, ASYLUM REFORM, *supra* note 73, at 7.

76. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. C, 110 Stat. 3009, at 3009-546 to -724 (1996).

77. INA § 208(a)(2)(B), 8 U.S.C.A. § 1158(a)(2)(B) (West 2007).

78. INA § 208(a)(2)(D), 8 U.S.C.A. § 1158(a)(2)(D).

79. INA § 208(d)(2), 8 U.S.C.A. § 1158(d)(2).

application for asylum.”⁸⁰ Second, IIRIRA mandates that asylum cases be adjudicated within one hundred eighty days of receipt of an asylum application.⁸¹

Given that asylum cases must be completed prior to the passing of one hundred eighty days, very few asylum seekers will qualify for employment authorization absent a final grant of asylum. The regulations stipulate that “[a]ny delay requested or caused by the applicant shall not be counted as part of” the 180-day employment authorization time period.⁸² Thus, asylum applicants whose cases are denied prior to the 180-day time period having elapsed remain ineligible for employment authorization while their cases are on appeal.

c. Expedited Removal

The expedited removal provisions of IIRIRA⁸³ authorize immigration officers at U.S. ports of entry to expel persons deemed inadmissible for failure to provide valid entry documents.⁸⁴ Expedited removal orders, though issued by fairly low-level immigration officers, are not reviewable by a judge.⁸⁵ An individual who receives an order of expedited removal is barred from reentering the United States for a minimum of five years.⁸⁶

Only those individuals who express a fear of returning to their home country receive an opportunity to avoid being summarily deported. IIRIRA provides that individuals who express a fear of returning to their home country be interviewed by an asylum officer to determine whether their expressed fear is credible.⁸⁷ If the asylum officer determines from the “credible fear” interview that the individual has a “significant possibility . . . [of] establish[ing] eligibility for asylum . . . ,”⁸⁸ the individual may remain in the United States to pursue asylum before an immigration judge.⁸⁹ If the asylum officer does not believe the individual has a credible fear of persecution, the individual may be summarily removed.⁹⁰

80. *Id.*

81. INA § 208(d)(5)(A)(iii), 8 U.S.C.A. § 1158(d)(5)(A)(iii).

82. 8 C.F.R. § 208.7(a)(2) (2007).

83. INA § 235(b)(1), 8 U.S.C.A. § 1225(b)(1)(A)(i).

84. *See* INA § 212(a)(6)(C), 8 U.S.C.A. § 1182(a)(6)(C) (rendering inadmissible persons who attempt to commit fraud to enter the United States); INA § 212(a)(7), 8 U.S.C.A. § 1182(a)(7) (rendering inadmissible persons who attempt to enter the United States without a visa).

85. INA §§ 235(b)(1)(A)(i), 242(a)(2)(A)(i), 8 U.S.C.A. §§ 1225(b)(1)(A)(i), 1252(a)(2)(A)(i).

86. INA § 212(a)(9)(A)(i), 8 U.S.C.A. § 1182(a)(9)(A)(i).

87. INA § 235(b)(1)(A)(ii), 8 U.S.C.A. § 1225(b)(1)(A)(ii).

88. INA § 235(b)(1)(B)(v), 8 U.S.C.A. § 1225(b)(1)(B)(v); 8 C.F.R. § 208.13(a) (2007).

89. 8 C.F.R. § 208.13 (b)(ii) (2007).

90. INA § 235(b)(1)(B), 8 U.S.C.A. § 1225(b)(1)(B).

d. Detention of Asylum Seekers

Individuals subject to expedited removal for attempting to enter the United States without valid documentation, including those claiming asylum, are subject to mandatory detention under IIRIRA.⁹¹ This applies even after an individual claiming asylum establishes that he or she has a credible fear of persecution. DHS usually detains asylum seekers in immigration detention facilities, or, more commonly, in county jails from which the DHS rents bed space.⁹² An asylum seeker may be detained for the duration of the adjudication of his or her asylum claim, a process which often can take several years.

B. *The U.S. Asylum System Post-September 11: The Real ID Act of 2005*

The asylum system initially seemed to have escaped the fate of the refugee resettlement program. There was no suspension of asylum processing, and, other than some backlog-creating adjustments to the security checks, no significant disturbance to the asylum system. It was not until nearly four years after the attacks that legislation was passed targeting the asylum system in the name of counterterrorism.

1. Preventing Terrorists from Obtaining Relief from Removal

The Real ID Act of 2005 was passed as part of the Omnibus Iraq Appropriations Bill.⁹³ One section of the Real ID Act is entitled "Preventing Terrorists from Gaining Relief from Removal,"⁹⁴ and purports to reform an asylum system that had become an easy target for infiltration by terrorists. According to the principal sponsor of the legislation, then-Chairman of the House Judiciary Committee Representative James Sensenbrenner:

There is no one who is lying through their teeth that should be able to get relief from the courts, and I would just point out that this bill would give immigration judges the tool to get at the Blind Sheik who wanted to blow up landmarks in New York, the man who plotted and executed the bombing of the World Trade Center in New York, the man who shot up the entrance to the CIA headquarters in northern Virginia, and the man who shot up the El Al counter at Los Angeles International Airport. Every one of these non-9/11 terrorists who tried to kill or did kill honest, law-abiding Americans was an asylum

91. INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C.A. § 1225(b)(1)(B)(iii)(IV).

92. AM. BAR ASS'N COMM'N ON IMMIGRATION, IMMIGRATION DETAINEE PRO BONO OPPORTUNITIES GUIDE 1 (2004), available at <http://www.abanet.org/publicserv/immigration/probonoguidefinal.pdf>.

93. Real ID Act, Pub. L. No. 109-13, 119 Stat. 231, 302 (2005).

94. *Id.* § 101.

applicant. We ought to give our judges the opportunity to tell these people no and to pass the bill.⁹⁵

Representative Sensenbrenner's assertions regarding the efficacy of the Real ID Act are incorrect for two reasons. First, the terrorists cited by Representative Sensenbrenner applied for asylum prior to legislative and procedural changes to the asylum system, discussed above, that closed many of the loopholes that they exploited. Second, most of the asylum provisions in the Real ID Act already existed in case law, albeit in clearer, more thoughtful language.

2. Credibility, Corroboration and Centrality of Motive

The Real ID Act addresses several areas of asylum law⁹⁶: establishing credibility; corroborating the asylum claim; and proving the persecutor was motivated by one of the five grounds for asylum. There are two main problems with the Real ID Act's focus. First, well-established case law already thoroughly addressed these issues. Second, the Real ID Act's language obscures and confuses the legal principles contained in the case law.

a. Credibility

Credibility is arguably the most crucial aspect of any asylum case. Because specific corroboration is difficult, if not impossible, to obtain in many cases, an asylum applicant's testimony is often the most probative evidence available. The credibility of that testimony therefore becomes critical.

Courts have endeavored to strike a balance between protecting the asylum system from fraud and accepting that certain factors, such as trauma and cultural differences, may adversely impact credibility. Current case law stipulates that asylum adjudicators take into account the totality of the circumstances when making a credibility determination, including such factors as demeanor,⁹⁷ plausibility,⁹⁸ and factual inconsistencies and omissions.⁹⁹

95. 151 CONG. REC. H453 (2005); *see also* H.R. REP. NO. 109-72 at H2868 (2005) (Conf. Rep.) (referencing Sheikh Omar Abdul Rahman ("Blind Sheikh"), Ramzi Yousef (1993 World Trade Center bombing), Ahmad Ajaj (1993 World Trade Center bombing), Mir Aimal Kansi (CIA attack), and Hesham Mohamed Ali Hedayet (El Al Airlines murder)).

96. The Real ID Act addresses other immigration issues, including withholding of removal and judicial review. It also addresses border security and driver's license issuance. These provisions are beyond the scope of this Article.

97. *See Cordero-Trejo v. INS*, 40 F.3d 482, 487 (1st Cir. 1994) (holding that credibility findings based on demeanor deserve more deference than those based on testimonial analysis); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (holding that an immigration judge is in the unique position to observe the alien's tone and demeanor, to explore inconsistencies in the testimony, and to determine whether the testimony has "the ring of truth"); *Kokkinis v. Dist. Dir.*, 429 F.2d 938, 941-42 (2d Cir. 1970) (holding that "great weight" should be afforded to the findings of the special inquiry officer who conducted the deportation hearing, because, *inter alia*, he had the opportunity to observe the respondent's demeanor); *Matter of V-T-S-*, 21 I. & N. Dec. 792, 796

Immigration judges' credibility determinations receive a great deal of deference from reviewing courts.¹⁰⁰ The Immigration and Nationality Act authorizes Courts of Appeals to reject an immigration judge's credibility determination only if a "reasonable adjudicator would be compelled" to do so.¹⁰¹ Similarly, the Board of Immigration Appeals may only overturn an immigration judge's credibility determination if the decision is "clearly erroneous."¹⁰² In practice, so long as an adverse credibility determination is based on more than bare speculation,¹⁰³ the Courts of Appeals and the Board will generally uphold it.¹⁰⁴ Most Courts of Appeals, however, have held that discrepancies and omissions that do

(B.I.A. 1997) (recognizing the immigration judge's "advantage of observing the alien as he testifies").

98. See *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (holding that findings of implausibility cannot be based upon unsupported assumptions); *Matter of B-*, 21 I. & N. Dec. 66, 71 (B.I.A. 1995) (holding that consistent, sufficiently detailed, and unembellished testimony may provide a plausible and coherent account of the basis for the fear of persecution, without corroborating evidence); *Matter of Dass*, 20 I. & N. Dec. 120, 124 (B.I.A. 1989) (holding that the court is to determine whether the alien's testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his alleged fear); see also UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA, *supra* note 44, ¶ 204 (stating that "[t]he applicant's statements must be coherent and plausible, and must not run counter to generally known facts").

99. See *In re A-S-*, 21 I. & N. Dec. 1106, 1109 (B.I.A. 1998) (refusing to overturn an immigration judge's adverse credibility determination based on inconsistencies and omissions, because the record revealed that "(1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the respondent provided incredible testimony; and (3) the respondent has not provided a convincing explanation for the discrepancies and omissions").

100. Credibility determinations based on demeanor receive particular deference because of the immigration judge's opportunity to observe the applicant's testimony. See *Singh-Kaur v. INS*, 183 F.3d 1147, 1149-51 (9th Cir. 1999) (affording great deference to credibility determination based on observation of demeanor); *Kokkinis v. District Director*, 429 F.2d 938, 941-42 (2d Cir. 1970) (holding that "great weight" should be afforded to the adjudicator who conducted the hearing because he had the opportunity to observe the applicant's demeanor); *Matter of V-T-S-*, 21 I. & N. Dec. 792, 796 (B.I.A. 1997) (recognizing that an immigration judge has the advantage of observing an applicant as he or she testifies).

101. 8 U.S.C.A. § 1252(b)(4)(B) (West 2007).

102. 8 C.F.R. § 1003.1(d)(3)(i) (2007).

103. See, e.g., *Dia v. Ashcroft*, 353 F.3d 228, 249 (3d Cir. 2003) (en banc) (overturning an immigration judge's credibility determination based on "speculation and conjecture"); *Unase v. Ashcroft*, 349 F.3d 1039, 1042 (7th Cir. 2003) (finding that an immigration judge's adverse credibility determination was unsupported by the record when the immigration judge relied on speculation and tenuous logic).

104. See *Kalitani v. Ashcroft*, 340 F.3d 1, 4-5 (1st Cir. 2003) (upholding an immigration judge's credibility determination based upon discrepancies in the applicant's testimony regarding who procured the documents allowing her to enter the United States, inconsistencies regarding the applicant's identity, and perceived implausibility in the applicant's account); *Wu Biao Chen v. INS*, 344 F.3d 272, 274-75 (2d Cir. 2003) (upholding an adverse credibility determination based on the applicant's hesitant and unconvincing testimony as well as several inconsistencies in his testimony); *Krouchevski v. Ashcroft*, 344 F.3d 670, 673 (7th Cir. 2003) (finding that an applicant's assertions that the inconsistencies present in his testimony were the result of translation errors and misunderstandings were insufficient to overcome the "clearly erroneous" standard of review); *Matter of R-S-H-*, 23 I. & N. Dec. 629, 637 (B.I.A. 2003) (upholding an immigration judge's adverse credibility finding based on the "clearly erroneous" standard).

not go to the heart of the claim are not an appropriate basis for an adverse credibility determination.¹⁰⁵

In *Matter of A-S-*,¹⁰⁶ the Board of Immigration Appeals set out the criteria for determining whether an adverse credibility determination based on inconsistencies and omissions is supported by the record. First, the discrepancies and omissions must actually be present in the record.¹⁰⁷ Second, the discrepancies and omissions must provide specific and cogent reasons to conclude that the applicant provided incredible testimony.¹⁰⁸ Finally, the applicant must have had an opportunity to explain the discrepancies and omissions and must have failed to do so.¹⁰⁹

The Real ID Act codifies the long-established prescription that adjudicators weigh the totality of the circumstances when making credibility determinations.¹¹⁰ Yet, the Real ID Act departs from established case law, and even INS guidelines,¹¹¹ regarding whether adjudicators should take into account minor inconsistencies and omissions by stating that immigration judges may base a credibility determination on, *inter alia*, inconsistencies, inaccuracies, or falsehoods “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim”¹¹² This provision of the Real ID Act thus eviscerates an important safeguard against abuses of discretion and unjust denials of asylum. Moreover, it does nothing to protect the system from fraudulent, but well-memorized, claims.

b. Corroboration

Corroborating asylum claims presents significant challenges, especially in terms of logistics and authentication. Aside from the obvious difficulty of obtaining direct corroboration from a persecutor, many asy-

105. See *Kondakova v. Ashcroft*, 383 F.3d 792, 796 (8th Cir. 2004), *cert. denied*, 543 U.S. 1053 (2005) (“While minor inconsistencies and omissions will not support an adverse credibility determination, inconsistencies or omissions that relate to the basis of persecution are not minor but are at ‘the heart of the asylum claim.’”); *Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004) (“Minor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant’s fear for his safety are not an adequate basis for an adverse credibility finding.” (quoting *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1142 (9th Cir. 1988))); see also *Leia v. Ashcroft*, 393 F.3d 427, 436 (3d Cir. 2005); *Sylla v. INS*, 388 F.3d 924, 926 (6th Cir. 2004); *Capric v. Ashcroft*, 355 F.3d 1075 (7th Cir. 2004).

106. 21 I. & N. Dec. 1106, 1110 (B.I.A. 1998) (noting that an individual fleeing persecution may have difficulty “remembering exact dates when testifying before an immigration judge”).

107. *In re A-S-*, 21 I. & N. Dec. at 1109.

108. *Id.*

109. *Id.*

110. Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(iii), 119 Stat. 231, 303 (2005).

111. *INS Supplementary Refugee/Asylum Adjudication Guidelines*, reprinted in 67 INTERPRETER RELEASES 101, 102 (Jan. 22, 1990) [hereinafter *INS Supplementary Guidelines*] (“Minor inconsistencies, misrepresentations, or concealment in a claim should not lead to a finding of incredibility where the inconsistency, misrepresentation or concealment is not material to the claim.”).

112. Compare Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(iii), 119 Stat. 231, 303 (2005), with *INS Supplementary Guidelines*, *supra* note 111, at 102.

lum seekers arrive from countries that lack infrastructure, adequate communication systems, and sometimes even a functioning government.¹¹³ Obtaining documents, even ones as relatively common as a birth certificate or medical report, can therefore involve logistical impediments that often prove insurmountable. Additionally, persons escaping persecution may leave behind important documents (such as identity cards, birth certificates, medical records, etc.) when fleeing their countries, either in haste or in an attempt to conceal their identities from persecutors.¹¹⁴ By attempting to obtain the documents later, an asylum seeker risks interception of his or her mail, potentially exposing family and friends to harassment by the persecuting entity.¹¹⁵ Even documentation of physical trauma itself can be difficult to obtain, such as in rape cases, with often little, if any, physical evidence.¹¹⁶ In many cases, therefore, the more legitimate the persecution, the less likely it is that the asylum seeker will have the required proof.

Courts have recognized the unique challenges that asylum seekers face in corroborating their claims. In 1987, the Board of Immigration Appeals decided in *Matter of Mogharrabi*¹¹⁷ that, due to the difficulty asylum seekers often face in obtaining corroborating evidence, “the applicant’s testimony [alone] will suffice if it is credible, detailed and specific.”¹¹⁸ Several Courts of Appeals adopted this reasoning,¹¹⁹ and it eventually made its way into the Code of Federal Regulations.¹²⁰

113. See United Nations High Commissioner for Refugees, *Refugees: 2004 Year in Review*, REFUGEES MAGAZINE, Jan. 1, 2005, at 8-12 (describing conditions in refugee-producing countries around the world), available at <http://www.unhcr.org/publ/PUBL/41e3a9fc4.pdf>.

114. See Michele R. Pistone & Philip C. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 8 (2001) (explaining that “records may take months or years to compile because refugees usually leave them behind, and the documents may be available only in the country from which the refugee has fled”).

115. See *id.* (stating that “[e]ven if friends or family members can obtain copies of the documents, hostile governments may intercept international mail. Therefore, asylum applicants may hesitate for a long time before asking others to put themselves at risk by requesting corroborating records.”).

116. See PHYSICIANS FOR HUMAN RIGHTS, EXAMINING ASYLUM SEEKERS: A HEALTH PROFESSIONAL’S GUIDE TO MEDICAL AND PSYCHOLOGICAL EVALUATIONS OF TORTURE 54-57 (2001). The Guide states:

In the majority of political asylum applicants who allege sexual assault during torture, the traumatic event(s) will have occurred months or years before the medical examination. Therefore, most individuals will not have physical signs at the time of the examination. . . . Even on examination of the female genitalia immediately after rape there is identifiable damage in less than 50% of cases. Anal examination of males and females after anal rape shows lesions in less than 30% of cases.

See *id.*

117. 19 I. & N. 439 (B.I.A. 1987).

118. *Matter of Mogharrabi*, 19 I. & N. Dec. at 444 (relying on *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1458 (9th Cir. 1985)).

119. See *Cordon Garcia v. INS*, 204 F.3d 985, 992-93 (9th Cir. 2000) (holding that due to “the serious difficulty with which asylum applicants are faced in their attempts to prove persecution . . . this court does not require corroborative evidence” from asylum applicants who have testified credibly); *Gumbol v. INS*, 815 F.2d 406, 412 (6th Cir. 1987) (citing *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984)) (holding that an asylum seeker must “present some specific facts, either through objective evidence or through persuasive credible testimony, to show that his fear of persecution is

Two years later, in *Matter of Dass*,¹²¹ the Board clarified its holding in *Matter of Mogharrabi* and articulated a general rule for corroboration: where corroborating evidence is available, the applicant should present it; when unavailable, the applicant should explain why.¹²² The Board further refined this holding in *Matter of S-M-J*,¹²³ clarifying that in cases where corroborating evidence is *reasonably* expected, it *should* be provided.¹²⁴ The Board went on to say that if the applicant fails to present such evidence, it “*can* lead to a finding that [the] applicant has failed to meet her burden of proof.”¹²⁵ However, the Board noted that “specific documentary corroboration of an applicant’s particular experiences is not required unless the supporting documentation is of the type that would normally be created or available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers.”¹²⁶ *Matter of S-M-J* also provides examples of the types of facts “easily subject to verification”¹²⁷ for which adjudicators may reasonably expect corroborating evidence. Those examples include “evidence of [the applicant’s] place of birth, media accounts of large demonstrations, evidence of a publicly-held office, or documentation of medical treatment.”¹²⁸

The Real ID Act permits an asylum seeker to corroborate his or her claim solely with his or her own testimony, so long as the testimony is “credible . . . persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”¹²⁹ Even if that testimony is sufficient to establish asylum eligibility, the Real ID Act, like *Matter of S-M-J*, permits adjudicators to require corroborating evidence: “Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence *must be provided* unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”¹³⁰

‘well-founded’) (emphasis added)); *Ganjour v. INS*, 796 F.2d 832, 837 (5th Cir. 1986) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 576 (7th Cir. 1984)) (holding that an asylum applicant “must present *specific* facts, through objective evidence if possible, or through his or her own persuasive, credible testimony, showing actual persecution or detailing some other good reason to fear persecution . . .”).

120. 8 C.F.R. §§ 208.13(a), 208.16(b) (2007).

121. 20 I. & N. Dec. 120 (B.I.A. 1989).

122. *Id.* at 124–25.

123. 21 I. & N. Dec. 722 (B.I.A. 1997).

124. *See id.* at 725 (holding that “[u]nreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor). However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant’s claim, such evidence should be provided.”).

125. *Id.* at 726 (emphasis added).

126. *Id.*; *see also Matter of M-D-*, 21 I. & N. Dec. 1180 (B.I.A. 1998), *rev’d sub nom*, *Diallo v. INS*, 232 F.3d 279, 285 (2d. Cir. 2000) (upholding the BIA’s determination that asylum applicants should provide corroborating evidence when it is available).

127. *S-M-J-*, 21 I. & N. Dec. at 725.

128. *Id.*

129. Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(ii), 119 Stat. 231, 303 (2005).

130. *Id.* (emphasis added).

A close reading of this provision, however, demonstrates a significant and troubling deviation from *Matter of S-M-J*. Note that the statute does not state, “Where the trier of fact *reasonably* determines” that the applicant should provide corroborating evidence. This failure to hold adjudicators to a standard of reasonableness when determining whether corroboration is necessary or whether the corroboration provided is sufficient, could potentially lead to abuse of discretion, inconsistent application of the law, and the denial of valid asylum claims.¹³¹ Individuals intending to abuse the asylum system, however, would likely have the ability and resources to obtain falsified corroboration.

c. Centrality of Motive

An applicant for asylum must prove that the harm he or she suffered amounted to persecution. The test for whether harm rises to the level of persecution is threefold. First, the applicant must have suffered harm severe enough to rise to the level of persecution.¹³² Second, the harm must have been committed by a government or an entity that the government is unable or unwilling to control.¹³³ Third, the harm must have occurred on account of at least one of the five grounds of asylum: race, religion, nationality, political opinion, or membership in a particular social group.¹³⁴ The Real ID Act addresses the third component, stating that asylum applicants must prove that one of the five grounds for asylum was or will be “at least one central reason” for the persecution they endured.¹³⁵

Many asylum cases involve “mixed motives,” in which persecution may have occurred on account of one or more non-protected grounds, as well as one or more protected grounds. In 1992, the Supreme Court held in *INS v. Elias-Zacarias*,¹³⁶ that an applicant must provide “some evidence . . . direct or circumstantial” of the persecutor’s motive.¹³⁷ The Court further specified that establishing asylum eligibility does *not* require “direct proof of [the] persecutors’ motives.”¹³⁸ Moreover, “an ap-

131. See *Qiu v. Ashcroft*, 329 F.3d 140, 153–54 (2d Cir. 2003) (holding that “[u]nless the BIA anchors its demands for corroboration to evidence which indicates what the petitioner can reasonably be expected to provide, there is a serious risk that unreasonable demands will inadvertently be made. . . . What is (subjectively) natural to demand may not . . . be (objectively) reasonable.”).

132. See *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004) (holding that detention for ten days accompanied by daily beatings and hard labor constitutes persecution, even in the absence of serious physical injury); *Ouda v. INS*, 324 F.3d 445, 454 (6th Cir. 2003) (finding that threats and beatings combined with deprivation of livelihood and ability to leave home amount to persecution); *Andriasian v. INS*, 180 F.3d 1033, 1042 (9th Cir. 1999) (holding that persistent death threats and assaults on one’s family constitute persecution).

133. 8 U.S.C. § 1101(a)(42)(A) (West 2007); see also, e.g., *Galicía v. Ashcroft*, 396 F.3d 446, 448 (1st Cir. 2005); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 592 (3d Cir. 2003); *Llana-Castellon v. INS*, 16 F.3d 1093, 1097–98 (10th Cir. 1994).

134. 8 C.F.R. § 208.13 (b)(2)(A) (2007).

135. Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(i), 119 Stat. 231, 303 (2005).

136. 502 U.S. 478 (1992).

137. *Elias-Zacarias*, 502 U.S. at 483.

138. *Id.*

plicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible."¹³⁹ According to the Board of Immigration Appeals,¹⁴⁰ "[s]uch a rigorous standard would largely render nugatory the Supreme Court's decision in *INS v. Cardoza-Fonseca*, and be inconsistent with the 'well-founded fear' standard embodied in the 'refugee' definition."¹⁴¹

Despite this thorough, long-standing and well-reasoned analysis regarding persecutors' motives, the drafters of the Real ID Act saw fit to require asylum applicants to prove that "race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant."¹⁴² This language could be interpreted to impose exactly the unreasonable burden against which the courts have long cautioned. Persecutors generally do not provide their victims with evidence of, insights into, or discussion about the atrocities they commit.¹⁴³ Requiring asylum applicants to prove where in the mind of their persecutors the motive resided (center, left of center, clustered in the center with other non-protected grounds) is an impossible burden for applicants to meet.¹⁴⁴ An individual intending to abuse the asylum system, however, need only obtain falsified documents to satisfy this particular requirement.

CONCLUSION

The most deplorable aspect of the Real ID Act and the moratorium on refugee resettlement is that they have harmed innocent individuals while purporting to fight the war on terror. At best, the proposition that a terrorist would spend years in a disease-ridden refugee camp, hoping against all odds to be one of the one-half percent of refugees to be selected for resettlement in the United States, is absurd. Similarly, the provisions of the Real ID Act demonstrate a profound ignorance, or deliberate ignoring, of the reality of September 11: that today's terrorists have no need to navigate a burdensome asylum system in order to gain access

139. *Shoafra v. INS*, 228 F.3d 1070, 1076 (9th Cir. 2000) (quoting *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988)); *see also Romilus v. Ashcroft*, 385 F.3d 1, 7 (1st Cir. 2004) ("[N]or is [the asylum applicant] required to establish [the persecutors'] exact motivations.").

140. *Matter of S-P-*, 21 I. & N. Dec. 486, 489 (B.I.A. 1996).

141. *Id.*; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (holding that asylum seekers must prove only a reasonable possibility of persecution in order to establish a well-founded fear).

142. Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(i), 119 Stat. 231, 303 (2005) (emphasis added).

143. *See Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."). *See also generally* Virgil Wiebe et al., *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Cases*, 01-10 Immigr. Briefings 1 (Oct. 2001) (discussing in detail the corroboration requirements for asylum seekers).

144. *See, e.g., Zubeda v. Ashcroft*, 333 F.3d 463, 474 (3d Cir. 2003) ("[R]equiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles . . .").

to the United States—they need only apply for a nonimmigrant visa in the comfort of their own country.

