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## Asylum Rights and Wrongs: What the Proposed Refugee Protection Act Will Do and What More Will Need to Be Done

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# **ASYLUM RIGHTS AND WRONGS: WHAT THE PROPOSED REFUGEE PROTECTION ACT WILL DO AND WHAT MORE WILL NEED TO BE DONE**

*Michele R. Pistone\**

## **ABSTRACT**

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) added major new restrictions to U.S. asylum law. Several other laws passed in the wake of 9/11 produced additional restrictions. Various proposals to modify or even eliminate the changes made by IIRIRA and the post-9/11 laws have been introduced over the years; the Refugee Protection Act of 2010 (RPA) is the most prominent recent example of these efforts. As this Article details, the RPA has much to commend within it, especially its proposed elimination of the one year deadline for asylum applications that was originally imposed by IIRIRA.

The most pressing problem not substantively addressed by the RPA concerns the expansion of expedited removal, a central innovation of IIRIRA. Expedited removal authorizes Customs and Border Patrol officers to apprehend and deport persons without appropriate travel documents and to bar them from reentry for five years. For persons caught up in the expedited removal process, deportation typically occurs less than forty-eight hours after arrival at the U.S. border. The process is able to work so quickly because the deportation decision typically is made by a front-line border patrol worker and his or her supervisor, with the possibility of judicial review either completely barred or extremely limited, depending on the circumstances.

Although various government studies, as well as reports by other groups, have shown that expedited removal results in many improper deportations, the process nonetheless has been expanded step-by-step in recent years

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beyond its original limitation to U.S. ports of entry, and now applies to all locations within 100 miles of a U.S. border (expansively defined to include all international waters). This Article argues that the RPA's failure to curtail this expansion is a significant and unwelcome omission; indeed, the most recent expansions have greatly increased the risk of deporting U.S. citizens and legal permanent residents. The risk of improper deportation is not likely to be appreciably lessened by the RPA's authorization of one additional government study of expedited removal. As the Article points out, while prior studies with a similar charge and duration have revealed much wrongdoing, they also have been mainly ignored by immigration authorities. However, the inadequacy of past studies to bring about concrete reform is in no small part due to limitations placed upon them by Congress or by immigration administrators. The Article asserts that, in order to overcome the bureaucratic biases of the Customs and Border Patrol and to ensure the proper implementation of the law, these limitations must be revised or eliminated. The Article accordingly concludes with a number of specific recommendations for enabling future studies to achieve the dual objectives of shedding light *and* bringing about reform.

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#### INTRODUCTION

International law establishing the rights of refugees derives from the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.<sup>1</sup> Nations signing onto these treaties promise to adhere to the policy of non-refoulement, a duty not to return refugees to countries in which they fear persecution. The United States agreed to be bound by the 1951 Convention

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1. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

and its Protocol in 1968.<sup>2</sup> The Refugee Act of 1980 codified the treaty obligations and established a system for adjudicating claims for asylum in the United States.<sup>3</sup> Under the Refugee Act of 1980, a refugee is eligible for asylum if he or she can establish that he or she is “unable or unwilling to avail himself or herself of the protection of [his or her] country [of nationality] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>4</sup>

Criticism of the system established in 1980 gained momentum throughout the 1980s and early 1990s. Detractors of the asylum process argued that its large backlogs and long delays had become a magnet for illegitimate applicants intent on using the system simply to obtain work authorization and remain in the country for years pending adjudication of fraudulent applications in immigration court at which they had no intention of ever appearing.<sup>5</sup> Others linked abuse of the asylum system to terrorists, including participants in the 1993 World Trade Center bombing.<sup>6</sup>

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>7</sup> was enacted in response to concerns that the asylum system was being abused by fraudulent applicants. IIRIRA attempted to address this problem by imposing procedural hurdles on refugees seeking asylum in the United States. New provisions included a process of “expedited removal,”<sup>8</sup> a mandate for pre-hearing detention of asylum seekers identified through expedited removal,<sup>9</sup> and a one year filing deadline on all asylum applications.<sup>10</sup> All of these intended solutions have endangered legitimate asylum seekers.

The asylum system again came under attack after 9/11. The anti-terrorism legislation that was enacted into law in the aftermath of 9/11, in

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2. The Protocol provides that, by ratifying it, all signatory nations are also bound by Articles 2 through 34 of the 1951 Convention. Protocol Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6224, 606 U.N.T.S. at 267-68 art. I (1).

3. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. Prior to the implementation of the Refugee Act of 1980, refugees were admitted to the United States on an ad hoc basis.

4. Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

5. Michele R. Pistone, *The New Asylum Laws: Undermining an American Ideal* 6-8 (CATO, Policy Analysis No. 299, 1998).

6. *60 Minutes* (CBS News television broadcast Jan. 14, 1993).

7. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 100 Stat. 3009 (codified at various sections of 8 U.S.C.).

8. Immigration and Nationality Act § 235(b)(1)(B)(iii), 8 U.S.C. § 1225(b)(1)(B)(iii) (2006).

9. *Id.*

10. Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006).

particular the PATRIOT Act<sup>11</sup> and the REAL ID Act,<sup>12</sup> imposed additional substantive and procedural hurdles on asylum seekers that further eroded asylum protection.

The proposed Refugee Protection Act (RPA),<sup>13</sup> recently introduced by Senators Leahy, Levin, Durbin, Akaka, and Burris, addresses some of the problems created by IIRIRA and the PATRIOT and REAL ID Acts. Unfortunately, many problems will remain even upon passage of the RPA. This Article outlines the changes made by IIRIRA and post-9/11 legislation, discusses and assesses the likely effectiveness of the main provisions of the RPA should it be passed by Congress, and makes several additional suggestions for future legislation. In particular, my additional suggestions focus on expedited removal, with my primary recommendations calling for a scaling back of the geographic range of expedited removal and an expanded external examination of the process, significantly beyond the more limited examination contemplated by the RPA.

### I. ASYLUM PRE- AND POST-IIRIRA

Asylum claims are assessed in two different procedural contexts—affirmative and defensive. Affirmative application procedures apply when the applicant has entered the United States and applies affirmatively for asylum with the Asylum Office of Citizenship and Immigration Services (CIS) before removal proceedings are initiated against him or her. For example, a person may be admitted to the United States under a student or a visitor visa and then apply for asylum. Affirmative application procedures would apply in these cases, even if the particular visa had expired at the time of application. Indeed, even those who enter the country without inspection and who are present in the United States without authorization are eligible to apply affirmatively for asylum. All of these persons, if they apply affirmatively for asylum, are interviewed by a specially trained asylum officer in a non-adversarial interview. The officer can either grant asylum or refer the case to removal proceedings in immigration court.<sup>14</sup>

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11. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (PATRIOT Act); 8 U.S.C. § 1182.

12. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 (2005) (REAL ID Act).

13. Refugee Protection Act of 2010, S. 3113, 111th Cong. (2nd Sess.).

14. A third option, to deny the case, is reserved for applicants in lawful status whose applications for asylum are not granted after review by the Asylum Office.

Suppose, however, that the student or visitor visa had expired and the student or visitor was then apprehended by immigration officers and placed into removal proceedings before an application for asylum had been filed. Or that an individual who entered without inspection was later arrested or otherwise identified by immigration officers. In these cases, defensive application procedures would apply with the asylum claim being considered for the first time, essentially as an affirmative defense to removal, in an adversarial hearing before an immigration judge in which a trial attorney from Immigration and Customs Enforcement (ICE) opposes the claim.<sup>15</sup> If the applicant receives an unfavorable decision, the judge's decision is subject first to administrative review by the Board of Immigration Appeals (BIA)<sup>16</sup> and then to judicial review in the federal circuit court system.<sup>17</sup>

In the 1990s, claims that both types of applications were being widely abused began to resonate politically. Abuse of the affirmative application process would occur when, as sometimes happened, weak or fraudulent claims would be filed solely to gain the work authorization that, at the time, was routinely granted upon the filing of an application for asylum. Because the adjudication process was severely backlogged, the work authorization benefit of filing a frivolous claim could last for years.

Moreover, when an affirmative applicant's asylum claim was denied by an asylum officer, and the case was referred to an immigration judge for deportation, the cases could languish in court for years before a final order of deportation was issued. Until that final order, the work authorization benefit would remain. Finally, abuse of the process could be continued simply by failing to appear for one's removal hearing.

Absconding was of particular concern with regard to individuals who arrived at airports and seaports without properly issued visas or passports. In the 1980s and early 1990s, even these individuals were usually released into the general public after being given notices telling them to appear in immigration court for a removal hearing.<sup>18</sup> Rates of absconding were high, particularly among those without valid claims for asylum, and the likelihood that those who absconded would be detected was minimal.<sup>19</sup> To notable political effect, detractors of the asylum system claimed on national television that "every single person on the planet Earth, if he gets into this

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15. Immigration and Nationality Act § 240, 8 U.S.C. § 1229a (2006).

16. 8 C.F.R. § 1003.1(b) (2010).

17. Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (2006).

18. Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 226 (1999).

19. *Id.*; see also *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1029 n.11 (5th Cir. Unit B 1982).

country, can stay indefinitely by saying two magic words: political asylum.”<sup>20</sup>

With Congress motivated by these concerns, IIRIRA—“the harshest, most procrustean immigration control measure in [the twentieth] century”<sup>21</sup>—changed the system in several important respects. The incentive to file a frivolous asylum claim was lessened by limiting the availability of work authorization; post-IIRIRA, such authorization is available only after an application for asylum is pending before an asylum officer or immigration court without resolution for more than 180 days (which deadline is tolled for any delays caused by the applicant).<sup>22</sup> And a one year filing deadline was imposed on all applications for asylum, whether affirmative or defensive.<sup>23</sup> Thus, under current law, asylum is barred unless the applicant can prove that the application was filed within one year of the applicant’s last arrival in the United States, or that one of the two exceptions to the one year deadline applies.<sup>24</sup>

IIRIRA’s biggest change concerned the treatment of persons apprehended, most commonly at a designated port of entry, without proper travel documents. Previously, such persons would be placed into exclusion proceedings before an immigration judge, during which they could file defensive asylum applications, just as the student discussed above could.<sup>25</sup> Unfavorable decisions by an asylum officer would similarly be subject to administrative and judicial review.<sup>26</sup> Further, while waiting for their removal hearing, persons apprehended without proper travel documents would often be free from detention.

In order to lessen the backlog of removal claims and to lessen the incentive for coming to the United States without appropriate travel documents, IIRIRA introduced a system called expedited removal.<sup>27</sup> Expedited removal was designed to “stymie unauthorized migration by restricting the hear-

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20. *60 Minutes*, *supra* note 6.

21. Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL’Y 367, 371 (1999).

22. Immigration and Nationality Act § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2004).

23. Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006).

24. The one year deadline is extended when extraordinary or changed circumstances excuse the delay. 8 C.F.R. § 208.4(a)(4) (2010).

25. Pre-IIRIRA, exclusion procedures governed the removal of individuals who had not entered the United States. 8 U.S.C. § 1226. Deportation proceedings governed the removal of individuals who had crossed the border into the United States. *See id.* § 1252b.

26. *Id.* § 1105a (referring to judicial review of exclusion and deportation orders; IIRIRA consolidated exclusion and deportation proceedings into removal proceedings).

27. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 100 Stat. 3009 (expedited removal codified at Immigration and Nationality Act § 235, 8 U.S.C. § 1125).

ing, review, and appeal process for aliens arriving without proper documents at ports of entry.”<sup>28</sup>

At ports of entry, the expedited removal process works as follows. Persons seeking admission to the United States at border crossings, airports and seaports, must pass through an inspections process administered by Customs and Border Protection (CBP), a part of the Department of Homeland Security (DHS) and, along with ICE and CIS, one of the successor agencies to the Immigration and Naturalization Service (INS).<sup>29</sup> Everyone—citizens and non-citizens alike—who has traveled to the United States has experienced the first part of this process, i.e., the primary interview. At the primary interview, CBP officers inspect travel and identity documents, and question non-citizens about their travel purposes and intentions. For approximately ninety-seven percent of the persons trying to gain admission to the United States through official entry points, the primary interview will be a short and final hurdle to entry.<sup>30</sup>

The remaining three percent will be sent to a secondary inspection area for a secondary interview.<sup>31</sup> For the majority of this smaller group, secondary inspections will closely resemble the primary interview; additional scrutiny is mainly provided by processing the applicant’s name through various computer databases. Whether because the electronic security check yielded adverse information, or for some other reason, a person subject to secondary inspection will, about ten percent of the time, be selected for a substantially more probing interview.<sup>32</sup>

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28. ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS, at CRS-3 (2005).

29. The Homeland Security Act of 2002 both established the Department of Homeland Security and, as of March 2003, abolished the Immigration and Naturalization Service. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

30. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 1 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS AND RECOMMENDATIONS 32 (2005) [hereinafter USCIRF REPORT, vol. 1] (reporting 332 million primary inspections in 2001, and 265 million in 2003); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-176, OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS 20 (2000) [hereinafter OPPORTUNITIES EXIST] (noting 28.3 million primary inspections per month from April 1, 1997 to September 30, 1999).

31. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 6 (2005) [hereinafter USCIRF REPORT, vol. 2] (“[T]he number of aliens sent to Secondary Inspection per year approximate 10 million, and 90 percent of these individuals are ultimately allowed to enter the U.S. after being processed through an initial triage . . .”); OPPORTUNITIES EXIST, *supra* note 30 (noting that from April 1, 1997 to September 30, 1999, a monthly average of 601,000 individuals were sent to secondary inspection).

32. See USCIRF REPORT, vol. 2, *supra* note 31; OPPORTUNITIES EXIST, *supra* note 30, at 18-19.



The more extensive interview will sometimes be preceded by the handcuffing of an applicant. It will take place with only the questioner present, unless an interpreter is necessary, available, and called upon. Three options are available to an inspector at the conclusion of the secondary interview: admit the applicant, order the individual removed, or send the applicant to a “credible fear” interview.<sup>33</sup> The credible fear option is available only for potential asylum applicants.<sup>34</sup> The removal option is likely for persons who do not possess proper travel documents<sup>35</sup> or who carry documents that CBP officials suspect have been procured through fraud.<sup>36</sup> A person ordered removed by a secondary inspector cannot appeal the order to a court;<sup>37</sup> the only subsequent review will be conducted by the secondary inspector’s supervisor.<sup>38</sup> If the supervisor approves the inspector’s order, removal will take place within days.<sup>39</sup> All individuals who are removed are barred from reentering the United States for five years.<sup>40</sup>

The third option—to neither admit nor deny entry, but instead to refer the applicant for a credible fear interview—is an appropriate choice when the applicant has indicated, during the secondary inspection interview, a fear of returning to his or her home country or an intent to apply for asylum.<sup>41</sup> In an effort to identify genuine asylum seekers during this process, immigration inspectors are required during secondary inspections to read aloud a statement that includes information about how “U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country” and that any expressions of fear will be

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33. See Immigration and Nationality Act § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (2006).

34. *Id.*

35. See *id.* § 1182(a)(7).

36. See *id.* § 1182(a)(6)(C).

37. See *id.* § 1225(b)(1)(C).

38. See 8 C.F.R. § 235.3(b)(7) (2010) (“[A]ny removal order entered by a [secondary inspector] must be reviewed and approved by the appropriate supervisor before the order is considered final. . . . The supervisory review shall include a review of the sworn statement and any answers and statements made by the alien regarding a fear of removal or return.”).

39. See Immigration and Nationality Act § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2006); see also U.S. GEN. ACCOUNTING OFFICE, GAO/GCD-98-81, ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES (1998) (indicating that at most locations, at least ninety-five percent of the people deported via expedited removal are removed on the day that they attempted to enter the United States or on the next day).

40. Immigration and Nationality Act § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2006).

41. *Id.* § 1225(b)(1)(A)(ii).

treated privately and confidentially.<sup>42</sup> The officers are also required to ask each individual three questions designed to elicit information relevant to whether a credible fear referral is warranted. The three “fear” questions are:

“Why did you leave your home country or country of last residence?”

“Do you have any fear or concern about being returned to your home country or being removed from the United States?”

“Would you be harmed if you returned to your home country or country of last residence?”<sup>43</sup>

A positive response to any of these three questions, or any other indication of fear, whether verbal or non-verbal, should warrant a referral of the applicant to a credible fear interview. An asylum officer from CIS conducts this interview, to determine whether the individual has a credible fear of persecution.<sup>44</sup> The credible fear standard is a less demanding version of the requirements for establishing asylum.<sup>45</sup>

Those who do not establish a credible fear of persecution to the satisfaction of the CIS asylum officer are entitled to an extremely limited review of whether they meet the credible fear standard by an immigration judge.<sup>46</sup> Affirmation of the asylum officer’s negative credible fear determination will subject the applicant to removal, in most cases within a few days,<sup>47</sup> just as people denied admission by secondary inspectors are similarly removed. Those individuals who are found by an asylum officer to have a credible fear of persecution, on the other hand, are placed in removal proceedings in immigration court where they are eligible to apply for asylum as a defense to removal.<sup>48</sup> Since IIRIRA took effect in 1997, most individ-

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42. USCIRF REPORT, vol. 2, *supra* note 31, at 252 (Form I-867A). CBP training materials require all officers to use this form “in every case in which an alien is determined to be subject to Expedited Removal.” *Id.*, at 13.

43. *Id.* at 253 (Form I-867B), available at [http://www.uscirf.gov/images/stories/pdf/asylum\\_seekers/ERS\\_RptVolII.pdf](http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf). CBP training materials require all officers to use this form “in every case in which an alien is determined to be subject to Expedited Removal.” *Id.* at 13. Form I-867B also contains a fourth question: “Do you have any questions or is there anything else you would like to add.” This fourth question is sometimes characterized as a “fear” question, but its intended scope—to make sure that the applicant understands the process—is broader.

44. Immigration and Nationality Act § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (2006).

45. The term credible fear of persecution “means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claims and such other facts as are known to the officer, that the alien could establish eligibility for asylum.” *Id.* § 1225(b)(1)(B)(v).

46. *Id.* § 1225(b)(1)(B)(iii)(III).

47. *Id.* § 1225(b)(1)(B)(iii)(I).

48. *Id.* § 1225(b)(1)(B)(ii).

uals subject to this process have been detained from the time of their secondary inspections interview to the final adjudication of their cases.<sup>49</sup>

The REAL ID and the PATRIOT Acts, both enacted in the wake of the September 11th terrorist attacks in New York, Washington D.C., and Pennsylvania also have eroded asylum protection. The PATRIOT Act bars asylum protection to anyone who provided “material support” to terrorists, even if the applicant acted under duress or coercion.<sup>50</sup> Thus, a “fisherman who after refusing to turn over his boat to guerillas, was abducted by them and forced to pay 50,000 rupees for his own ransom,” was barred from asylum protection by an immigration judge, even though the judge recognized that the man acted under duress.<sup>51</sup> The REAL ID Act authorizes triers of

49. *Id.* § 1225(b)(1)(B)(iii)(IV). A recent internal DHS policy directive indicates an easing by the Obama administration of the strict interpretation of the detention mandate for those who establish a credible fear of persecution. See ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (DHS 2009), available at [http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_aliens\\_found\\_credible\\_fear.pdf](http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf). In particular, the policy provides that individuals who have been found to have a credible fear of persecution shall be interviewed for potential parole from detention. It states that

when an arriving alien found to have a credible fear establishes to the satisfaction of [Detention and Removal personnel] his or her identity and that he or she presents neither a flight risk nor danger to the community, [the Detention and Removal Office] should, absent additional factors . . . parole the alien on the basis that his or her continued detention is not in the public interest.

*Id.* § 6.2. The additional factors that may be considered are “serious adverse foreign policy consequences that may result if the alien is released or overriding law enforcement interests.” *Id.* § 8.3. It remains to be seen whether this new policy results in a substantially more liberal parole practice; a predecessor program meant to encourage release, the Asylum Pre-Screening Office Program (APSO), brought disappointing results, with wide discrepancies between INS offices and a parole rate generally much lower than had been expected. Pistone, *supra* note 18, at 201-03, 239-43 (attributing the APSO program’s performance—which fell “far short of expectations” and operated “inefficient[ly], inconsistent[ly] from district to district” and “unevenly around the country”—to the persistent bureaucratic biases of the INS’s enforcement culture).

50. Immigration and Nationality Act § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006).

51. Human Rights First, Brief *Amicus Curiae* of Human Rights First in support of Respondent R-K-, *In re R-K-*, \_\_\_ I. & N. Dec. \_\_\_ (BIA Aug. 17, 2006), available at <http://www.humanrightsfirst.info/pdf/06926-asy-r-k-bia-ami-brief.pdf>; see also *Hearing on the Refugee Protection Act of 2010 Before the S. Committee on the Judiciary*, 111<sup>th</sup> Cong., at 3 (May 19, 2010) (written statement of the ACLU). Human Rights First has noted that the exclusionary provisions of the PATRIOT Act are being applied to “minimal contributions, to people who were forced to pay ransom to armed groups, to doctors who provided medical care to the wounded in accordance with their medical obligations, and to persons who engaged in other forms of lawful activity.” *Renewing America’s Commitment to the Refugee Convention: The Refugee Protection Act of 2010, Hearing on the Refugee Protection Act of 2010 Before the S. Committee on the Judiciary*, 111<sup>th</sup> Cong. (May 19, 2010) (statement of Human Rights First), available at <http://www.humanrightsfirst.org/asylum/pdf/hrf-testimony-may-2010.pdf>.

fact to require applicants to provide evidence to corroborate their otherwise credible testimony—a task which can be impossible when the events recounted took place in far away, isolated areas.<sup>52</sup> In addition, the REAL ID Act authorizes adjudicators, in assessing the credibility of an asylum applicant, to base their decisions on any inconsistencies, inaccuracies, or falsehoods in the applicant’s testimony or other evidence, regardless of whether the inconsistency, inaccuracy, or falsehood “goes to the heart of the applicant’s claim, or any other relevant factor.”<sup>53</sup> Also, as to the legal standard to establish asylum eligibility, the REAL ID Act requires that, to establish persecution on account of one of the protected grounds, applicants for asylum must prove that one of the five protected grounds was “at least one central reason for persecuting the applicant.”<sup>54</sup>

## II. THE CHANGES PROPOSED BY THE RPA

The erosion of asylum protection that has occurred over the past fifteen years would be partially reversed by the RPA. In particular, the RPA would amend IIRIRA, the PATRIOT Act, and the REAL ID Act, as well as add to the law several other provisions that would have the likely effect of enhancing the rights of asylum seekers.<sup>55</sup>

### A. Changes to Provisions Introduced by IIRIRA

The RPA would amend IIRIRA by eliminating the one year filing deadline imposed on all applications for asylum, and by changing, in four significant ways, the expedited removal process as it is applied to asylum seekers. The first change to the expedited removal system is that detention

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52. For an insightful and thorough overview of how the REAL ID Act changes asylum law, see Marisa Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101 (2006).

53. Immigration and Nationality Act § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

54. *Id.* § 1158(b)(1)(B)(i).

55. In addition to the provisions discussed in this section, the RPA would make important additional improvements to asylum and immigration law. Among the most significant are: (1) the establishment of a secure alternative to detention, Refugee Protection Act of 2010, S. 3113, 111th Cong. § 9; (2) the promulgation of regulations governing minimally-acceptable conditions of detention, *id.* § 10; (3) the authorization for the Attorney General to “appoint counsel to represent an alien if the fair resolution or effective adjudication of the proceedings would be served by appointment of counsel,” *id.* § 6; (4) the elimination of the one year waiting period for asylees to adjust to legal permanent residency, making them eligible for Legal Permanent Resident status immediately upon a grant of asylum protection, *id.* § 14(b)(2)(C); and (5) the imposition of a bar on the removal of persons during the thirty-day period that they have to file a Petition to Review their case with a federal circuit court, *id.* § 7(1).

after a credible fear interview would be discretionary, not mandatory under the RPA.<sup>56</sup> Second, the RPA would for the first time authorize asylum officers to grant asylum to applicants who were processed through expedited removal and found to have a credible fear of persecution.<sup>57</sup> Third, the RPA would mandate the use of professional language interpreters during all expedited removal interviews unless the interviewing officer or another “Federal Government employee” speaks the applicant’s language and is available to interpret “effectively, accurately, and impartially.”<sup>58</sup> Fourth, the RPA would require the CBP to record “the interview which served as a basis for” a sworn statement taken as part of the expedited removal process, including “a reading of the entire written statement to the alien in a language that the alien claims to understand; and [either] [a] verbal affirmation by the alien of . . . the written statement” or a corrected version of the written statement.<sup>59</sup>

#### B. Changes to Provisions Introduced by the PATRIOT Act

The RPA would amend the PATRIOT Act so that individuals who are forced to provide support to terrorist groups under duress would not automatically be barred from asylum protection. The RPA recognizes that asylum seekers may be forcibly coerced into providing support to terrorists, and that such coerced cooperation does not mean that asylum seekers support or believe in the terrorists’ objectives—and hence that mere support should not necessarily be sufficient to bar protection. Thus, the RPA would exempt individuals from the material support bar if they can prove that their actions were motivated by knowledge of “serious harm, including restraint against any person, or any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to, or restraint against, any person.”<sup>60</sup> Similarly, the RPA would exempt from the “persecutor of others” bar those who acted as a result of coercion.<sup>61</sup>

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56. *Id.* § 8(a).

57. *Id.*

58. *Id.* § 12(d).

59. *Id.* § 12(b).

60. *Id.* § 4. This provision would also repeal the so-called Tier III terrorist group definition. This definition, originally introduced by the PATRIOT Act, includes as a terrorist group any “group of two or more persons, whether organized or not, that engages in terrorist activity” including all armed activity without any exception for *de minimus* activity. 8 U.S.C. § 1182(G)(vi)(III) (2006).

61. Longstanding asylum law bars someone from asylum protection if the individual “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opi-

### C. Changes to Provisions Introduced by the REAL ID Act

Applicants for asylum must establish a connection between one of the five protected grounds for asylum and the motivation of the persecutor. To establish that the persecution an applicant suffered or fears is “on account of” one of the protected grounds, the REAL ID Act required applicants for asylum to prove that one of the five protected grounds was “at least one central reason for persecuting the applicant.”<sup>62</sup> The RPA lessens this requirement, so that the “on account of” nexus requirement would be satisfied if one of the five grounds is “a factor in the applicant’s persecution or fear of persecution.”<sup>63</sup>

Under other provisions introduced by the REAL ID Act, the trier of fact may deny an application for asylum if he or she finds any inconsistencies, inaccuracies, or falsehoods in any statements or evidence regardless of whether the inconsistencies, inaccuracies, or falsehoods “go [] to the heart of the applicant’s claim, or any other relevant factor.”<sup>64</sup> The RPA would amend this standard by giving an applicant the opportunity to “explain and to provide support or evidence to clarify” any inconsistencies or omissions that the trier of fact determines to exist.<sup>65</sup>

Finally, under the REAL ID Act, the trier of fact can require corroborating evidence of an asylum applicant’s otherwise credible testimony without also providing notice or opportunity to supplement the record.<sup>66</sup> The RPA would require triers of fact to “provide notice and allow the applicant a reasonable opportunity to file such evidence[,] unless the applicant does not have the evidence and cannot reasonably obtain” it.<sup>67</sup>

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nion.” Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006). The Supreme Court recently considered this provision and found that the lower court (in this case the BIA) erred in not considering whether the “persecutor of others” bar contained an exception for those who acted under duress or were coerced to act, remanding the case back to the lower court. *See generally* Negusie v. Holder, 129 S. Ct. 1159 (2009). The RPA would clarify the statutory language by exempting those who acted as a result of coercion from the persecutor of others bar. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 5.

62. Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

63. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 5.

64. Immigration and Nationality Act § 208(b)(1)(B)(iii); 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

65. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 5.

66. Immigration and Nationality Act § 208(b)(1)(B)(ii); 8 U.S.C. § 1158(b)(1)(B)(ii) (2006); *see, e.g.*, *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008) (holding that the failure to warn an alien that she must produce corroborative evidence of her identity before issuing an adverse ruling does not violate the alien’s due process rights in asylum proceeding).

67. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 5.

#### D. Other Provisions

In addition to restoring protections that have been eroded by Congress over the last fifteen years, some of the changes that the RPA proposes would add clarity to the most elusive of the five enumerated grounds for protection: “membership in a particular social group.”<sup>68</sup> The issue of what constitutes membership in a particular social group has long been one of the most unsettled areas of asylum law. The unsettled nature of this protected category has adversely impacted many persons, but perhaps most of all those fleeing gender based persecution, such as female genital mutilation, “honor” crimes, domestic violence, rape, human trafficking, forced marriage, and crimes directed at the LGBT community. Unlike persecution on account of the other four protected categories—race, religion, nationality, and political opinion—gender based human rights abuses usually are not committed by government actors in public places. Rather the abuses are committed more often in the privacy of the home by private actors, such as family members, and are tolerated by the government as belonging to the private realm, thus leaving the victims without effective recourse in their home countries.<sup>69</sup>

Two provisions of the RPA would address the uncertainty in the substantive law surrounding gender based social group claims. First, the RPA would codify the definition of social group provided by the BIA’s decision in *In re Acosta*.<sup>70</sup> In particular, the RPA would amend the INA to read: “any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person’s human rights such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirement.”<sup>71</sup> This definition of social group would provide clarity to the law surrounding gender based claims and eliminate a judicially-imposed requirement that social groups be “socially visible.”<sup>72</sup> As Seventh Circuit Court of Appeals Judge Richard Posner has recognized, in opposition to the requirement of

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68. *Id.*

69. See Audrey Macklin, *Cross-Border Shopping Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Based Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 28 (1998) (noting that violence against women is ignored by law enforcement authorities in many countries because it is seen as a domestic matter not warranting public attention); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 137-39 (2007) (noting that less than ten percent of the femicides in Guatemala have been investigated with as many as one-third thought to be the result of domestic violence).

70. 19 I. & N. Dec. 211, 212 (BIA 1985).

71. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 5.

72. See *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008).

social visibility, members of a persecuted social group often go to great lengths to remain socially invisible.<sup>73</sup> The RPA also would provide that the “on account of” nexus—i.e., evidence of the persecutor’s motive—can be established when the applicant offers either “[d]irect or circumstantial evidence, including evidence that the State is unable to protect the applicant or that State legal or social norms tolerate such persecution against persons like the applicant.”<sup>74</sup>

Finally, the RPA would authorize the United States Commission on International Religious Freedom (USCIRF), which released an extensive study on expedited removal in 2005,<sup>75</sup> to study again the expedited removal process. In particular, the RPA would task USCIRF with determining whether and to what extent immigration officers: (a) improperly encourage asylum seekers “to withdraw or retract claims for asylum;” (b) incorrectly fail to refer asylum seekers for credible fear interviews; (c) incorrectly remove asylum seekers to countries in which they may be persecuted; and (d) detain asylum seekers “improperly or under inappropriate conditions.”<sup>76</sup>

### III. WHAT REMAINS TO BE DONE, BEYOND THE RPA

One can hack at the branches of injustice, or one can strike at the roots. The RPA demonstrates a decided preference for the former course of action. The results are commendable, but limited in some respects; for example, some of the changes would apply in a distinct minority of cases,<sup>77</sup> while others are likely to most benefit the minority of asylum applicants fortunate enough to be represented by counsel.<sup>78</sup> Concededly, the RPA’s bold and welcome call for the elimination of the one-year deadline for filing an asylum claim would constitute a major change of wide applicability, and might fairly be considered striking at (or at least very near to) the roots of injustice.<sup>79</sup> But that call—and I mean this as description rather than as criticism—is distinctly unrepresentative of the legislation as a whole.

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73. See *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (rejecting the “social visibility” criterion).

74. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 5.

75. See USCIRF REPORT, vol. 1, *supra* note 30; USCIRF REPORT, vol. 2, *supra* note 31.

76. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 13.

77. *E.g.*, *id.* § 4 (concerning a bar on asylum for those persons who have provided material support to terrorists).

78. *E.g.*, *id.* § 5 (amending the notoriously difficult to apply definition of “social group”).

79. See Philip G. Schrag et al., *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. (forthcoming Dec. 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1684231](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684231) (finding that fifty-nine percent of the applicants who filed for asylum more than one year after arriving in the Unit-



More typical are some of the changes concerning expedited removal. For many persons, the expedited removal process replaced a much lengthier and more considered deportation process that historically had been performed by immigration judges in court proceedings. During these court proceedings, applicants facing removal were granted numerous rights designed to increase the accuracy of decision-making, including the rights to offer evidence and witnesses, to cross-examine witnesses, to be represented by counsel (at no expense to the government),<sup>80</sup> and to appeal adverse decisions to administrative courts<sup>81</sup> and federal circuit courts.<sup>82</sup> Under expedited removal these rights were approximated rather than duplicated because duplication of the court proceedings and all its concomitant rights would destroy the distinct essence of the expedited removal process, i.e., its speed.<sup>83</sup> Thus, for example, rather than have the right to a lawyer and the lawyer's knowledge of the law, the expedited removal process allows for the reading of a short statement describing asylum protection.<sup>84</sup> And instead of a broad right to present witnesses and develop evidence, the expedited removal process allows applicants "to offer their own statements and whatever documentary evidence they happen[] to be carrying with them."<sup>85</sup>

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ed States were denied asylum protection by the DHS); HUMAN RIGHTS FIRST, THE ASYLUM FILING DEADLINE: DENYING PROTECTION TO THE PERSECUTED AND UNDERMINING GOVERNMENT EFFICIENCY (Sept. 2010), <http://www.humanrightsfirst.org/pdf/afd.pdf>.

80. Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4) (2006).

81. 8 C.F.R. § 1003.1(b) (2010).

82. See Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (2006).

83. For an insightful discussion on the history of the development of the expedited removal statutory provisions and implementing regulations, see PHILIP SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 193-224 (2000).

84. See USCIRF REPORT, vol. 2, *supra* note 31, at 13.

85. Michele R. Pistone & John J. Hoeffner, *Rules Are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 169 (2006). During the drafting of the regulations implementing expedited removal, efforts also were made to replace, to some extent, other rights traditionally granted during immigration hearings. For example:

[I]n place of giving the applicant or his or her lawyer time to develop the record, as well as the benefit of clarifying questions that were frequently posed by judges in deportation proceedings, immigration inspectors would be required to ask and record answers to three specific questions designed to elicit evidence of a possible claim for asylum. [Also], in place of a verified record established by court reporters or audiotaping, upon the completion of the interview, immigration inspectors would have the applicant read and sign the inspector's record of the meeting. Finally, instead of a right to appeal adverse decisions to the Board of Immigration Appeals and the federal courts, including the United States Supreme Court, the regulations provided for a single review by a second-line supervisor.

*Id.*

Two of the RPA's changes to the expedited removal process are in this vein: (1) the requirement that immigration officers use a professional language interpreter during secondary inspection interviews when no "Federal Government employee [is] available . . . to interpret effectively, accurately, and impartially,"<sup>86</sup> and (2) that CBP officers record their interviews, including both the reading of the sworn statement to the applicant and the applicant's affirmation of its contents.<sup>87</sup> Both of these changes would mimic protections available as a matter of course in hearings before immigration judges, which are in one form or another always recorded and during which professional interpreters are almost always used.<sup>88</sup> These two provisions of the RPA should improve the accuracy of fact-finding during the expedited removal process,<sup>89</sup> and are otherwise appropriate reforms, which should

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86. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 12(d). To some extent, this provision merely tracks an existing regulation, 8 C.F.R. § 235.3(b)(2)(i) (2010), which requires that interpretive assistance be used, if necessary, at secondary inspection. *See generally* Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J., 1, 54-58 (2001) (discussing the regulation requiring interpretive assistance, and suggesting problems with the regulation and improvements that might be made to it). Nonetheless, as several studies have confirmed that that regulation is sometimes ignored, *see* Pistone & Hoeffner, *supra* note 85, at 184 & nn. 82-83, it would be helpful to have Congress re-affirm the importance of utilizing interpreters. The main additional importance of the RPA provision stems from its limitation of appropriate interpreters to professional interpreters and Federal Government employees. Among other things, this limitation represents a worthy attempt to cure CBP's heavy reliance on airline employees for interpretive assistance. Those employees, although fluent in a required language, may be biased and likely will be untrained in proper techniques of interpretation, e.g., untrained interpreters often summarize rather than interpret and may attempt to resolve ambiguities on their own instead of through additional questioning. *See id.*, at 184.

87. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 12(b). For an early argument that secondary inspections interviews should be recorded, *see* Pistone & Hoeffner, *supra* note 85, at 169.

88. I have litigated asylum cases before immigration judges for twenty years, and in only one of those cases was a non-professional interpreter used.

89. Recording and professional interpretation will be especially useful to those persons who are not removed after the secondary inspection. Currently, the sworn statement provides the main record of what occurred at the secondary inspections interview and, accordingly, it is relied upon by adjudicators at later stages of the process. However, as the USCIRF study found, "sworn statements taken by officers are not verbatim, are not verifiable, often indicate that information was conveyed to the asylum seeker which was never, in fact, conveyed, and sometimes contain questions that were never asked. Sworn statements look like verbatim transcripts but are not." U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, EXPEDITED REMOVAL STUDY REPORT CARD: 2 YEARS LATER, at 4 (2007) [hereinafter USCIRF REPORT CARD]. A recording of the interview, thus, will provide the verbatim record that is now lacking, and stand as a corrective to both deliberate and inadvertent error, including mistakes of interpretation. *See also infra* note 131 and accompanying text (noting how recording of interviews could be used in conjunction with "testers" to identify problem employees).

find wide acceptance among lawmakers, because they would add needed protections to the process without imposing on its expedited character.<sup>90</sup>

This assessment assumes, of course, that the rules established by legislation or regulation can be expected to be followed. Sadly, prior government reports,<sup>91</sup> as well as reports by outside organizations,<sup>92</sup> indicate that this assumption is often unwarranted. USCIRF's 2005 report on expedited removal, for instance, states that even when they knew that they were being monitored by USCIRF representatives, "[i]n approximately half of inspections observed, [CBP] inspectors failed to inform the alien"—as the law requires—that "(s)he may ask for protection if (s)he has a fear of returning home."<sup>93</sup> The true failure rate, the report indicated, was very likely even higher, given the commonsense assumption that "inappropriate behaviors [by inspectors] would be fewer when observers were monitoring their interviews."<sup>94</sup> The same report indicates that, according to CBP files, up to fifteen percent of the time there was a failure to ask or record the answer to one of the three mandated "fear" questions earlier noted.<sup>95</sup> Moreover, the files underestimate, perhaps by a significant amount, the rate of noncompliance—the USCIRF "researchers found that the file often indicated that all . . . fear questions were asked of the alien, even when they were not."<sup>96</sup> Perhaps worst of all, constituting a clear violation of the treaty obligation of *non-refoulement*<sup>97</sup> as well as DHS regulations,<sup>98</sup> both USCIRF and GAO reports have found that even individuals who expressed fear were sometimes returned without any hearing via expedited removal,<sup>99</sup> indeed, US-

90. While the use of professional language interpreters can add to the length of an interview because each statement has to be spoken twice, interpreters also can speed up the process, as they can eliminate the confused back and forth that occurs between people who cannot easily understand each other. In all events, the accuracy that is gained through competent interpretation should offset concerns about *de minimus* additions to the length of the expedited removal process.

91. See USCIRF REPORT, vol. 1, *supra* note 30, at 50-62; USCIRF REPORT, vol. 2, *supra* note 31, at 91; OPPORTUNITIES EXIST, *supra* note 30.

92. See, e.g., HUMAN RIGHTS FIRST, IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN AMERICA (2000).

93. USCIRF REPORT, vol. 1, *supra* note 30, at 6.

94. USCIRF REPORT, vol. 2, *supra* note 31, at 30.

95. *Id.* at 14-16 (indicating, at Table 2.1, that a review of CBP files found a 95% compliance rate for each question, meaning that a minimum of 5% and a maximum of 15% of the time at least one fear question was left unasked or unanswered).

96. USCIRF REPORT, vol. 1, *supra* note 30, at 55 (the quoted material actually refers to "all four fear questions"; see *supra* note 43, for an explanation as to why I have referred to "three" fear questions).

97. Pistone & Hoeffner, *supra* note 85, at 180.

98. 8 C.F.R. § 235.3(b)(4) (2010).

99. Pistone & Hoeffner, *supra* note 85, at 179.

CIRF's report showed that "in nearly 15 percent of the cases [observed by USCIRF representatives], asylum seekers who expressed a fear of return were nevertheless removed without a referral to an Asylum Officer."<sup>100</sup> And, distressingly, but not surprisingly, the same GAO and USCIRF reports also have shown that the compliance of CBP supervisors with regulations often has been no better.<sup>101</sup>

Accordingly, although the RPA's proposed changes to the expedited removal process represent apparent improvements in the law, past practice suggests that—due to agency noncompliance—the theoretical effects of the changes are likely to far exceed the actual effects. The causes of noncompliance are varied, but the main problem is a dominant enforcement culture that emphasizes and rewards restricting entry into the United States over possible competing goals, such as maximizing legal immigration.<sup>102</sup> In such an environment, changes in the rules may not change on-the-ground practices. Legislators need to be aware of this and, in the case of DHS and its component agency, CBP, attempt to counteract the enforcement bias.

The RPA provides one mechanism for doing so, in its authorization of another study of expedited removal by USCIRF.<sup>103</sup> As a co-author and I noted in an earlier article, "to the extent that they uncover excesses of an enforcement culture, external studies can act as a type of counterforce" which, inside as well as outside of an agency, can "attract allies and disarm opponents of reform."<sup>104</sup> In the case of expedited removal and the CBP, it is crucial that such a counterforce be applied for—as we have seen—when that counterforce is lacking, even the clearest and most vital protections are at risk of being ignored. In this sense, the RPA's authorization of another USCIRF study is the most important provision in the entire Act; done correctly—an important caveat, as we shall see—such a study truly does provide for the possibility of striking at the roots of injustice by making it less likely that the many different injustices that flow from CBP's repeated and widespread violations of established protections will continue unabated.

Indeed, the case for utilizing outside studies to counterbalance the effects of the dominant enforcement culture of CBP on its administration of the expedited removal process could hardly be stronger. First, by design, expedited removal otherwise lacks oversight of almost any kind. It takes place out of public view, typically involving unreviewable decisions by only two persons—a lone CBP inspector and his or her supervisor—in a

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100. USCIRF REPORT CARD, *supra* note 89, at 4.

101. Pistone & Hoeffner, *supra* note 85, at 184-93 (detailing supervisory failures).

102. *Id.* at 198-200.

103. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 13.

104. Pistone & Hoeffner, *supra* note 85, at 200.

process “opaque not only to the outside world, but even within the [DHS].”<sup>105</sup> Given that the cost of mistakenly removing a genuine asylum seeker can be torture or death, the moments of transparency represented by the occasional outside report can hardly be considered an overreaction to minor difficulties or evidence of a bent toward micromanagement. Rather, to the contrary, the nature of the process and the possible deadly consequences of error make the occasional outside assessment a moral, if not a legal, necessity.

Second, as noted previously, prior studies have found serious problems with the administration of expedited removal.<sup>106</sup> Indeed, a conservative extrapolation from these studies suggests that—as of 2006—“approximately 20,000 genuine asylum seekers ha[d] been refused entry by the United States” solely due to CBP’s disregard of established regulations.<sup>107</sup> Further, there is no evidence that matters have improved since 2006. In fact, USCIRF’s 2005 recommendations to CBP appear to have been completely ignored; rating CBP’s implementation of those recommendations, a 2007 “Report Card” from USCIRF gave CBP an “F” in every category.<sup>108</sup> All other things remaining the same, then, with the additional passage of time since 2006, it is likely that 30,000 genuine asylum seekers have now been improperly denied entry into the United States due to the neglect and misfeasance of the CBP. The extent of the continuing problem and CBP’s evident intransigence suggests that outside reviews conducted at more than an occasional rate are a practical necessity. Under a system guided by the rule of law, an agency’s determination to let bad news “blow over,” so that it can continue to ignore established regulations,

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105. USCIRF REPORT, vol. 1, *supra* note 30, at 76.

106. *See supra* notes 89-90 and accompanying text.

107. Pistone & Hoeffner, *supra* note 85, at 193-96. The estimate is a conservative one because it does not include as part of the calculation any deportations of genuine asylum seekers caused by the following demonstrated violations of the rules governing expedited removal:

(1) the inappropriate exertion of pressure on asylum seekers to withdraw their applications for admission; (2) the failure to use interpreters or the use of inadequate or inappropriate interpreters; (3) the conditions at secondary inspection, which are not conducive to full disclosure (e.g., the handcuffing and shackling of asylum seekers); (4) the reliance by judges on inaccurate or incomplete sworn statements as the basis for making adverse credibility findings and denying asylum protection; (5) the “push-back” of asylum seekers at primary inspection; (6) the failure of appropriate or sometimes any supervisors to review expedited removal orders and I-867s; and (7) mistakes made because of inadequate telephonic review of I-867 forms by supervisors.

*Id.* at 193-94 (footnotes omitted).

108. USCIRF REPORT CARD, *supra* note 89, at 4.

cannot be allowed to succeed, especially when the cost is as high as it is here.

Finally—and this is the third reason that the case for authorizing additional outside studies of expedited removal is especially strong—the threat expedited removal poses to genuine asylum seekers and others has grown as the use of expedited removal has expanded over the years. From its inception in 1997 until November 2002, expedited removal was used only for individuals arriving in the United States at ports of entry. However, IIRIRA actually authorized a more extensive power: the use of expedited removal in the interior of the country for individuals who have not been formally admitted or paroled into the United States and who cannot affirmatively show that they have been physically present in the United States continuously for two years.<sup>109</sup> The authority to expand the expedited removal power to these limits originally was placed in the “sole and unreviewable discretion of the Attorney General” and now rests with the Secretary of Homeland Security.<sup>110</sup> The Bush administration utilized a portion of this authority in November 2002 to expand expedited removal to non-Cuban migrants arriving by sea who had not been admitted or paroled into the United States.<sup>111</sup> In August 2004, the expedited removal power was expanded again to cover individuals who are encountered by an immigration officer within 100 miles of certain designated parts of the land borders with Mexico and Canada and who cannot establish to the “satisfaction of an immigration officer that they have been physically present in the United States continuously for the fourteen-day (14-day) period immediately prior the date of encounter.”<sup>112</sup> One year later, expedited removal was expanded

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109. Immigration and Nationality Act § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii) (2006). The burden lies with the apprehended individual to affirmatively prove the required continual presence. 8 C.F.R. § 235(b)(1)(ii) (2010).

110. Immigration and Nationality Act § 235(b)(1)(A)(iii)(I), 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (2006). Indeed, the regulations provide that the Secretary’s designation shall become effective upon publication of a notice in the Federal Register. However, if the [Secretary] determines, in the exercise of discretion, that the delay caused by publication would adversely affect the interests of the United States or the effective enforcement of the immigration laws, the [Secretary]’s designation shall become effective immediately upon issuance, and shall be published in the Federal Register as soon as practicable thereafter. 8 C.F.R. § 235.3(b)(1)(ii) (2010).

111. See Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002).

112. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877-81 (Aug. 11, 2004) (to be codified at 8 C.F.R. § 235.3(b)(1)(ii) (2010)); see also Shoba Sivaprasad Whadia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 391 (2007) (discussing expansion of expedited removal).

to the entire southern border.<sup>113</sup> A year later, in 2006, the fourth expansion of the expedited removal power extended its application to the entire U.S.-Canadian border and to all U.S. coastal areas.<sup>114</sup> Recently, calls have been made to extend expedited removal one more time, into the interior of the country, and apply it to the full extent permitted by law.<sup>115</sup> As a consequence of these expansions, expedited removal is now more likely to be applied in a more dispersed range of locations, to a greater number of people, and by inspectors with less experience and less training.

In sum, expedited removal is a process that by its nature is prone to abuse, by its record is likely to be abused, and by the combination of its expansion and CBP intransigence is likely to be abused to a greater extent in the years ahead. Indeed, recent events suggest that U.S. citizens and legal residents are now at a greatly heightened risk of being pulled into the process. For example, border patrol officers are now entering trains and buses traveling between Chicago and New York and asking everyone on board about their citizenship status.<sup>116</sup> The expansions of the expedited removal power are the apparent sources of authority for these stops; consistent with the 2004 and 2006 expansions, border patrol agents consider the stops legal if they take place within one-hundred miles from an international land border or within one-hundred miles from international waters.<sup>117</sup> As a result of the stops, legal residents are being “questioned and jailed, often because the patrol did not recognize their legal status.”<sup>118</sup> Indeed, it takes little imagination to understand that the favored targets of these stops will be persons, even citizens, whose accents suggest birth outside the United States.<sup>119</sup> The practice has been called “coercive, unconstitutional

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113. Press Release, Department of Homeland Security, DHS Expands Expedited Removal Authority Along Southwest Border (Sept. 14, 2005), available at <http://www.dhs.gov/dhs-public/display?content=4816>].

114. Press Release, Department of Homeland Security, DHS Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006) (on file with the author).

115. ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS, Summary Page (2005).

116. Nina Bernstein, *Border Sweeps in North Reach Miles Into U.S.*, N.Y. TIMES, Aug. 29, 2010, at A1.

117. *Id.*

118. *Id.*

119. This is true despite the cautionary tale of Sharon McKnight, a mentally disabled woman who, despite her U.S. birth and citizenship, speaks with a Jamaican accent. Although McKnight produced a valid U.S. passport for immigration agents at John F. Kennedy International Airport after arriving on a flight from Jamaica, she was deported to that country the next day via the expedited removal process. See John Moreno Gonzales, *McKnight Comes Home: INS Officials Apologize for Blunder*, NEWSDAY, June 19, 2000, at A7. McKnight's story also highlights that the mentally disabled, who often are capable of travel-

and tainted by racial profiling”;<sup>120</sup> it essentially replicates the dangers of the recent and controversial Arizona statute directed at undocumented immigrants, except that it is even without the safeguards built into that statute.<sup>121</sup> Should calls for further expansion of expedited removal be heeded, law enforcement activities of this kind might be expected everywhere in the country because that is where CBP’s jurisdiction would reach. As it is, however, two-thirds of the U.S. population already is within reach of the expanded expedited removal authority.

The post-9/11 expansions of the reach of expedited removal are an unfortunate trend; we should be moving in precisely the opposite direction. Perhaps it is a bow to political reality, but the absence of any provision in the recently proposed RPA to cut back on expedited removal provides a vivid contrast to a predecessor Refugee Protection Act,<sup>122</sup> introduced in the Senate in 1999, that would have “limit[ed] the use of expedited removal to times of immigration emergencies.”<sup>123</sup> I quibbled with the statutory language of the earlier Refugee Protection Act, considering it too open to manipulation by an unsympathetic executive branch,<sup>124</sup> but it surely would have kept expedited removal away from the train stations of Chicago and the bus stations of Rochester, New York. Whatever the merits of the new RPA—and there are many—it is to the 1999 version that we must look for a properly scaled back conception of expedited removal’s appropriate role. But even limiting expedited removal to ports of entry, as well as true immigration emergencies, would be a vast improvement over the current reality, which has seen expedited removal spread like kudzu across the land. Future Congresses must take care to ensure that this expansion does not mar permanently the legal landscape. As I sit writing these words on the ninth anniversary of 9/11, however, I acknowledge that it may take a few

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ing alone on public transportation, are likely to be disproportionately affected as expedited removal moves from airports to train and bus stations.

120. Bernstein, *supra* note 116.

121. S.B. 1070, 2010 Ariz. Sess. Laws, ch. 113 (Apr. 23, 2010). Seven days later, the Governor signed into law a set of amendments to S.B. 1070 under H.B. 2162, 2010 Ariz. Sess. Laws, ch. 211. For example, S.B. 1070 § 2, which adds ARIZ. REV. STAT. § 11-1051(B), authorizes law enforcement personnel, with reasonable suspicion, to attempt to determine the immigration status of a person if that person was identified after being stopped, detained, or arrested as part of an otherwise lawful stop, detention, or arrest. For an insightful analysis of the Arizona law, see Gabriel Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 24 GEO. IMMIGR. L.J. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1617440](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440).

122. Refugee Protection Act, S. 1940, 106th Cong. (1999).

123. 145 CONG. REC. S14702 (daily ed. Nov. 17, 1999) (statement of Sen. Patrick Leahy).

124. Michele R. Pistone, *Assessing the Proposed Refugee Protection Act: One Step in the Right Direction*, 14 GEO. IMMIGR. L.J. 815, 827-31 (2000).



more years, and the exposure of a few more outrageous deportations, before that argument will prevail.

In all events, the only tenable argument against subjecting to additional scrutiny a process that is, in several senses, so far-reaching is the resigned conclusion that resistance is futile—what, for example, did USCIRF’s devastating 2005 report achieve? USCIRF has admitted, in fact, that CBP essentially ignored that report.<sup>125</sup> The appropriate response, I think, is not that the dominant enforcement culture makes change impossible, but rather that isolated and limited reports are likely to be ineffective in producing change. Congress should ensure, therefore, that future reports do not suffer from or at least minimize these shortcomings. The provision of the RPA authorizing a report by USCIRF could achieve this objective if it included the following four requirements.

First, Congress should not be content with authorizing one or even two studies at a time, but instead should approve a longer series of comprehensive studies. The leadership of DHS and CBP must be made to understand that there will be no relief from outside review until substantial improvement is shown in complying with established policies.

Second, USCIRF’s 2005 report was “the first systematic evaluation of the Expedited Removal process utilizing direct observation of Secondary Inspection interviews with arriving aliens.”<sup>126</sup> GAO’s 2000 report, in contrast, was based mainly on an examination of paper case files.<sup>127</sup> Even so, however, USCIRF’s study still was limited by, for example, CBP’s prohibition on interviews with front-line CBP officers.<sup>128</sup> In authorizing a new report, Congress expressly should lift this prohibition. Indeed, Congress should consider authorizing each subsequent report to be increasingly intrusive, again with the idea of demonstrating that there will be no let up in scrutiny until substantial improvement is shown.<sup>129</sup>

Third, as noted, CBP ignored USCIRF’s 2005 study. Indeed, as USCIRF pointedly stated in its 2007 “Report Card,” CBP appears not only to

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125. USCIRF REPORT CARD, *supra* note 89.

126. USCIRF REPORT, vol. 2, *supra* note 31, at 28.

127. OPPORTUNITIES EXIST, *supra* note 30, at 4-5.

128. USCIRF REPORT, vol. 2, *supra* note 31, at 31-33 (noting additionally other limitations, such as restrictions on sample size).

129. It should be noted that the RPA contains the same grant of access to USCIRF—“unrestricted access to all stages of all proceedings”—along with the same exceptions, as was granted to USCIRF for the 2005 study that CBP limited in various ways. *Compare* Refugee Protection Act of 2010, S. 3113, 111th Cong. § 13(c)(3)(A)-(B), with International Religious Freedom Act of 1998, Pub. L. No. 105-292, § 605(c)(1)-(2). *See also supra* note 128 and accompanying text (noting limits imposed on USCIRF researchers during the 2005 study).

have made no changes in response to the 2005 report, neither it nor DHS even deemed it necessary to respond at all to USCIRF's post-report requests for information.<sup>130</sup> Congress must demonstrate that it will not permit such blatant disregard of a report it authorized; it should order DHS to respond formally and completely to all subsequent reports.

Finally, as a tool in service of the studies of expedited removal and to monitor and measure the implementation of recommended changes in between study periods, testers should be authorized by Congress for use by both CBP and whatever body undertakes an authorized study. Under various scenarios, the testers would pose as international travelers. Among the many benefits of testers,<sup>131</sup> their use could maximize the benefits of the RPA's proposed recording of interviews. One problem with universal recording (in general, a very good idea) is that the sheer volume of information makes identifying what is notable and what is not extremely difficult and inefficient. Based on their personal experiences, testers would be able to point supervisors, researchers, and investigators in the right direction, to individuals and offices that may be inclined to skirt the rules.

A series of studies conducted along these lines is far more likely than a single study to move a reluctant bureaucracy to do what it should, but too often does not: follow the law. The most recalcitrant agency will respond, eventually, when the ignoring of calls for change brings more trouble and disruption than change itself would. The RPA should therefore itself be amended so that the studies authorized by it can achieve the dual purposes of shedding light on the reality of expedited removal and moving CBP to respond to and try to remedy noted deficiencies. We have seen that conceiving studies only in terms of the first objective dooms them to practical irrelevance; CBP's enforcement culture is too strong. Insanity, they say, is doing the same thing over and over and expecting a different result. Congress should make sure that the next series of studies are different enough from past studies to bring about a different and more positive result. It is no easy task to work against a strong bureaucratic culture, but proceeding as if such a culture did not exist assures failure. In sum, done correctly, congressionally-authorized studies could hack at the roots of the injustices of the expedited removal process, but the single study authorized by the RPA is likely to fall short of achieving this ambitious and very desirable result.

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130. USCIRF REPORT CARD, *supra* note 89.

131. See Pistone & Hoeffner, *supra* note 85, at 202-03 (listing additional benefits of testers).

### CONCLUSION

The Refugee Protection Act would improve the asylum system in numerous ways. It should be adopted by Congress. Even assuming passage of the RPA, however, great challenges will remain, particularly with regard to expedited removal. That system still will be likely to reject legitimate asylum seekers at an alarming rate; moreover, the continued expansion of expedited removal has made it likely that matters will get worse—even to the point of endangering the freedoms of American citizens—before they get better. At the very least, future Congresses must rein in the post-9/11 expansions of expedited removal and, in the absence of a sudden onset mass influx emergency, limit expedited removal's applicability to persons newly-arrived at ports of entry. The temptation to expand the system of expedited removal to its statutory limits has proven too difficult to resist, as what was originally conceived as an exception to usual practice now threatens to become too much the rule.

While we wait for that opportune moment when a reversal of the past decade's expansions of expedited removal might become possible, the most pressing immediate challenge is to ensure that the expedited removal process at least provides in fact the individual protections promised by the applicable statutes and regulations. Utilizing outside investigators to conduct studies of the process is an appropriate and, given the particular characteristics of the CBP's bureaucratic culture, perhaps the best method to achieve this end. The RPA's authorization of a new study by USCIRF is therefore a good first step in the right direction. As this Article has argued, however, outside studies are unlikely to have a substantial impact unless they occur with more regularity and are less restricted than the studies that have been undertaken heretofore.