DIFFICULTIES FACING REFUGEES AND ASYLUM SEEKERS MULTIPLY

Refugees and asylum seekers who seek protection in the United States faced new hurdles after the September 11 attacks, which occurred after years of already severely restricted access to asylum in the United States. A 1996 immigration law imposed a one-year filing deadline on asylum claims and created a summary deportation process, called "expedited removal." Asylum seekers subject to this expedited process face mandatory detention, and cannot appeal the decision to detain them to an independent authority. They are held in jails and detention facilities across the country.

Overlaying this legal labyrinth is a raft of new policies that make seeking refuge in America even harder today. These policies include new limits on the immigration appellate process, a "safe third country" agreement with Canada, the increased use of detention, and the transfer on March 1 of all immigration service and enforcement functions to a new Department of Homeland Security.

Because of blanket suspicion based on nationality, many asylum seekers who otherwise would be eligible for release from jail now face prolonged detention because of delays in security clearance procedures. Even Haitian boat refugees have been labeled a "threat to national security" in order to justify a new policy which targets them for lengthy detention and expedited removal.

At the same time, the drastic decline in U.S. refugee resettlement, which began with the suspension of all resettlement immediately after September 11, has continued, leaving thousands of refugees stranded and in danger. This slowdown has resulted in extreme hardship for refugees and their families, and weakening of the infrastructure of U.S. organizations whose mission is to care for and integrate refugees into American society.

DRAMATIC DECLINE IN REFUGEE RESETTLEMENT CONTINUES

The United States' humanitarian program to bring in refugees from around the world who cannot return safely to their home countries has long been a source of pride for Americans and a reminder of the country's founding as a haven for the persecuted. Held up as a model for other countries, the program has provided a new life in safety and dignity for hundreds of thousands of refugees over the last two decades. Faith-based and other resettlement groups work with the U.S. government to welcome these refugees into the American community in a unique private-public partnership.

But since September 11, this humanitarian lifeline has frayed to a thread, dwindling from an average of 90,000 refugees resettled annually to around a tenth of that number who are expected this year. Although President Bush authorized the resettlement of 70,000 refugees from overseas during the last fiscal year (which ended September 30, 2002), a three-month suspension of the program immediately after September 11 and continued delays due to new security procedures, meant that only 27,058 refugees came in last year. In October 2002, the President again authorized resettlement of 70,000

refugees; but instead of investing in the staff and infrastructure needed to reach this number, the Administration announced that it actually intended to resettle only 50,000 refugees during this fiscal year.

So far, even that number seems completely out of reach. As of early February 2003, refugee resettlement groups estimated that, if the refugee processing rate did not improve, only 13,000 refugees would be resettled this year. In November 2002, Senator Samuel Brownback (R-KS), noted that the decline was occurring even while many were "suffering terrible persecution." "[W]e need to get those new refugees," he said, "and we need to speak out for them and educate people about them."[1] Rep. Christopher H. Smith (R-NJ) also expressed concern over the low numbers of refugees admitted. In a letter signed by a bi-partisan group of 40 members of the House and Senate, Smith wrote to President Bush in September 2002. The signatories "urged the President to continue the United States' long and proud tradition of being a safe haven for those fleeing persecution and tyranny."[2]

The current numbers mean that terribly vulnerable refugees, languishing in camps or in situations of great insecurity, are needlessly put at risk. Families are forced to endure prolonged separation; mothers who have waited years to reunite with their children are told they must continue to wait. And a noble humanitarian program, a lifeboat for those in danger, is dissipating to non-existence. The important work of faith-based and other resettlement organizations likewise is dissipating, as fewer refugee arrivals mean budget and staffing cuts, decimating the infrastructure and severely reducing their capacity to integrate refugees into host communities should the resettlement program be reinvigorated in the future.

In addition to the withering of the humanitarian resettlement program generally, there have been several instances in recent months when the administration has abruptly halted the admission of particular groups of refugees, apparently because of security concerns. Most recently, on January 10, 2003, the State Department announced a blanket suspension of resettlement of Iraqi refugees. The refugees awaiting resettlement had already been determined by U.S. officials to have a well-founded fear of persecution and had already passed security clearance under enhanced post-September 11 procedures. The decision was later reversed, but the incident reinforced the sense that refugees, even

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[1] Radio Free Europe/Radio Liberty, Press Release, Robert McMahon, "U.N.: Humanitarian Group Awards Karzai, Presses U.S. On Refugee Policy," available at http://www.rferl.org/nca/features/2002/11/14112002172346.asp (accessed March 6, 2003).

[2] *See* "IRSA Applauds Congress' Appeal to President Bush for Increased Refugee Admissions," September 27, 2002, available at http://www.refugees.org/news/crisis/resettlement/092702.cfm (accessed March 6, 2003). In a December 31, 2002 letter to Special Assistant to the President Elliot Abrams, Representative Smith again called for action "to ensure that our nation maintains its role as a beacon of freedom through maintaining a strong refugee program." Letter, Representative Christopher H. Smith to Special Assistant to the President Elliot Abrams, December 31, 2002, available at http://www.refugeesusa.org/help_abrams_admissions.pdf, (accessed March 6, 2003).

those fleeing the repression of Saddam Hussein, are considered suspect and potential threats.[3]

DISCRIMINATION AGAINST HAITIAN ASYLUM SEEKERS

In October 2001, the INS issued regulations granting its trial attorneys (the prosecutors in immigration proceedings) the power to overrule an immigration judge who decides, over INS objections, to order the release on bond of an INS detainee.[4] The regulations, issued without notice and comment, were said by the Justice Department to be necessary in order "to prevent the release of aliens who may pose a threat to national security." This new power was not limited to cases in which a detainee was suspected of terrorist or criminal activity. It was applied to many Arab and Muslim non-citizens detained in the wake of September 11, leading to prolonged detention. This "national security" regulation is now being invoked, at the direction of the White House, to prevent the court-ordered release of Haitian asylum seekers.

Political violence in Haiti began to rise in 2001. Following the arrival in South Florida in December 2001 of a boat bearing nearly 200 Haitian men, women, and children, the INS instituted a blanket policy of denying parole to all Haitian asylum seekers. Asylum claims filed by these Haitians were processed so quickly that many were unable to find legal representation. Haitian families were separated; women were held in a maximum security prison for eight months in poor conditions.[5] The INS initially denied it had adopted a special Haitian detention policy, but was eventually forced to concede its existence after a federal lawsuit was filed by the Florida Immigrant Advocacy Center on behalf of the Haitians.[6]

In late October 2002, a second boat of Haitian asylum seekers arrived in Florida. Because this group made it to shore before encountering the INS, they were entitled (unlike most detained asylum seekers, including the prior boatload of Haitians) to seek a

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[3] On January 16, 2003, the Hebrew Immigrant Aid Society, writing on behalf of the Refugee Council USA, a coalition of faith-based and non-sectarian agencies (which includes the Lawyers Committee), wrote to Secretary of State Colin Powell to express concern about the attempted freeze on the admission of Iraqi refugees: "America's founding father, George Washington, wrote that the United States gives bigotry no sanction and persecution no assistance. Racial and ethnic-based policies such as outright bans on certain nationalities irrespective of the merit of their refugee claims demonstrate a failure to heed Washington's words."

[4] *See* 66 Fed. Reg. 54909-54912. *See also* Lawyers Committee for Human Rights, "A Year of Loss: Reexamining Civil Liberties since September 11," p. 18, available at http://www.lchr.org/us_law/loss/loss_ch3a.htm (accessed March 6, 2003).

[5] *See* Women's Commission for Refugee Women & Children, *Refugee Policy Adrift: The Unites States and Dominican Republic Deny Haitians Protection*, January 2003; *Innocents in Jail: INS Moves Refugee Women from Krome to Turner Guilford Knight Correction Center, Miami,* June 2001; Alfonso Chady, "Activists Accused the INS of Mistreating Female Refugees at the TGK Center," *Miami Herald,* February 8, 2001.

[6] The Lawyers Committee has filed two amicus briefs in this case, arguing that the detention policy – targeted specifically at Haitians – violates international law. (On file with the Lawyers Committee for Human Rights).

bond hearing in front of an immigration judge. At that point, the INS began invoking the October 2001 regulation to prevent the court-ordered release on bond of Haitians.

In opposing the release of individual Haitian asylum seekers, the INS argued that "the detention of these aliens has significant implications for national security." Furthermore, it said, "in the post-September 11 atmosphere of homeland security, there are serious concerns that the United States government needs to know more about the people who reach our borders, including our sea border."[7] In an extraordinary step, the U.S. Coast Guard, Department of State, and Department of Defense all submitted declarations in immigration court which reportedly claim that Haitian migration constitutes a threat to U.S. national security. Among the justifications for this conclusion was the contention that a mass migration from Haiti would require the diversion of U.S. Coast Guard and military resources.[8]

The harsh and discriminatory treatment of black Haitian asylum seekers, who seemed unlikely to have any connection to terrorism, prompted widespread protests in Florida[9] and expressions of concern from members of Congress.[10] In response, President Bush expressed his concern that "Haitians and everybody else ought to be treated the same way."

But instead of improving treatment of Haitian asylum seekers, Attorney General Ashcroft took the discriminatory policy one step further. Having first implemented a blanket detention policy against the Haitians, and then ensuring continued detention even for those eligible for release on bond, the Justice Department then sought to prevent any future Haitian asylum seekers from being able even to seek release from detention by an immigration judge. On November 13, 2002, one week after the President's expressions of "concern" about the treatment of Haitians, the Department of Justice and the INS issued a notice in the Federal Register authorizing for the first time the use of summary "expedited removal" procedures for Haitian and other migrants who arrive by sea—with the exception of Cubans.[11] Under this new policy, future sea arrivals will not only be ineligible to seek release on bond from an immigration judge, but will face an increased risk of mistaken deportation under the flawed expedited removal process.[12]

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[7] Women's Commission for Refugee Women & Children, *Refugee Policy Adrift: The Unites States and Dominican Republic Deny Haitians Protection*, January 2003*,* p. 31, n.229 (citing INS brief in bond hearing).

[8] Ibid, p. 31, n.233 (citing Declarations of Captain Kenneth Ward, U.S. Coast Guard; Memorandum to Stephen E. Biegun, National Security Council, from Maura Harty, Department of State; Declaration of Joseph J. Collins, Department of State).

[9] Jacqueline Charles, "Marchers Demand Release of Haitians," *Miami Herald,* November 22, 2002; Tim Reid, "Crisis over Refugees Threatens Jeb Bush," *Times,* p. 21, November 1, 2002.

[10] Mary Jacoby and Steve Bousquet, "Democrat Confronts Bush: Set Haitians Free," *St. Petersburg Times*, October 31, 2002; Charles Rabin, "Rally Follows Deportation of Haitian Migrants," *Miami Herald*, October 27, 2002.

[11] Department of Justice, "Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act," (Order No. 2243-02), November 13, 2002, available at http://www.immigration.gov/graphics/lawsregs/fr111302.pdf (accessed March 7, 2003).

[12] *See* Lawyers Committee for Human Rights, "Comments on INS No. 2243-02 Notice of Designation Expansion of Expedited Removal to Sea Arrivals," (Order No. 2243-02, Fed. Reg. 68924-26, November

In what has become a common refrain, the Justice Department relied on concern for "national security" to justify the move. In particular, the department argued that "a surge in illegal migration by sea threatens national security by diverting valuable United States Coast Guard and other resources from counter-terrorism and homeland security responsibilities."[13]

In addition to the national security justification, the Justice Department offered a humanitarian argument for its Haitian policy: universal detention would discourage other Haitian would-be refugees from embarking on a dangerous sea journey. Finally, and inexplicably, the Justice Department asserted that subjecting asylum seekers to expedited proceedings and extended detention would be "protecting the rights of the individuals affected."[14] In reality, the Bush Administration's Haitian policy will violate the rights of asylum seekers by subjecting them to unfair procedures and prolonged detention.

INSCRUTABLE "CLEARANCE" PROCESS AND SECURITY CHECKS LEAD TO LENGTHY DETENTION OF ASYLUM SEEKERS AND OTHERS

Asylum seekers with credible claims for asylum, even those whose claims have been verified by the INS, are rarely released from detention. But under a new government policy, those who have been found eligible for release by the INS or by immigration judges now face lengthy and unnecessary detention, in some cases for months or even longer. The government has refused to provide the policy in writing, but it impacts asylum seekers and others from specific countries, including Somalia, Pakistan, Saudi Arabia, Iran, and Iraq. In effect, it seems to require that a presumed connection to terrorism be disproved before final release is approved. This policy, initiated after September 11, has resulted in children, sick people and the elderly, as well as many others, languishing in jail.

In one case, a thirteen year-old Iraqi girl spent more than five months in detention before being released to the care of her older brother, who was a legal resident of the United States. Her release, and that of other members of her family, was prolonged because of delays in the new "clearance" procedures. The girl's 62-year-old father, who was in poor health, was finally released in August 2002—eight months after the family came to the U.S. to seek asylum.[15]

13, 2002), December 13, 2002, available at http://www.lchr.org/media/2002_alerts/1112.htm (accessed December 20, 2002). The Notice authorizes the INS to place in expedited removal individuals arriving in the U.S. by sea, boat, or other means, who have not been admitted or paroled, and who have not been physically present in the U.S. for a continuous period of two years.

[13] *See* supra, note 11.

[14] Ibid.

[15] *See* Marisa Taylor, "Background Check for Asylum Seekers," *San Diego Union-Tribune,* August 15, 2002.

This "clearance" policy was challenged by human rights organizations, including the International Human Rights Law Group and the Center for Constitutional Rights, in a request for "precautionary measures" before the Inter-American Commission on Human Rights (IACHR). The IACHR is a seven-member panel of the Organization for American States (OAS) that monitors human rights abuses in the Americas.[16] The groups argued that U.S. policy violated international prohibitions on prolonged and arbitrary detention in both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. They asked the IACHR to order the United States either to release or to justify the detention of dozens of INS detainees, and to provide details on detainee names, nationalities and places of detention.[17]

On September 26, 2002, the IACHR granted this request and called on the United States to take urgent measures to protect the rights of detainees, including the right to personal liberty and security, the right to humane treatment and the right to resort to the courts for the protection of their rights.[18] In a letter to the U.S. government, the IACHR noted that "despite the Commission's specific request for information concerning the present circumstances of these detainees, the United States has failed to clarify or otherwise contradict the Petitioners' information" indicating violations of domestic and international law.[19] The U.S. government has ignored requests from the IACHR for information relating to the detainees and has not publicly revealed its position on the matter.

The United States Supreme Court heard oral arguments on January 15, 2003 in a case that, while not arising out of U.S. post-September 11 policies, will likely signal how willing the Court will be to place limits on the government's detention policies. The case, *Kim v. Demore*, challenges the constitutionality of a provision of the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (IIRIRA). The IIRIRA mandates the detention of any immigrant who is put in deportation proceedings based on a criminal conviction, including convictions for minor offenses (even for offenders not found to be a danger to the community or a flight risk). Many immigrants subject to this provision have been detained for months or years as they wait for their cases to be resolved. The ACLU, which represents the detainee, Mr. Kim, argued that detention must be based on an individualized finding that a person is either a danger to the community of a flight risk.[20] Unlike the Inter-American Commission order, the U.S. government is likely to be very attentive to the ruling in this case, as it likely will have important implications for

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[16] Request by the International Human Rights Law Group, et. al., "Request for Precautionary Measures Under Article 25 of the Commission's Regulations", June 20, 2002, available at http://www.hrlawgroup.org/resources/content/IACHRPrecautionaryMeasures.pdf (accessed January 26, 2003).

[17] Ibid.

[18] *See* Letter from the Inter-American Commission on Human Rights to Gay McDougall, International Human Rights Law Group, dated September 26, 2002, available at http://www.hrlawgroup.org/resources/content/IACHR_Award.pdf (accessed December 2, 2002).

[19] Ibid.

[20] *See* Warren Richey, "Court to Clarify the Rights of Noncitizens," *Christian Science Monitor*, January 14, 2003.

the Justice Department's authority to indefinitely detain immigrants and may set the tone for how the Court views the civil rights of non-citizens.

THE IMPACT OF JUSTICE DEPARTMENT RESTRICTIONS ON IMMIGRATION APPEALS BEGINS

In September 2002, the Justice Department issued a final regulation that fundamentally alters the process by which asylum seekers and other immigrants can appeal the decisions of INS judges.[21] The Board of Immigration Appeals (BIA), which is part of the Department of Justice and remains so even after other immigration functions are folded into the Department of Homeland Security, is the only administrative appellate body with authority to review decisions by immigration judges across the country. The BIA was created in 1940 to be a watchdog over immigration courts. The new regulation drastically curtails the authority of the BIA, and its impact on the fundamental fairness of immigration decision making is already apparent.

The new regulation directs that the majority of cases reviewed by the BIA will be decided by a single board member, rather that by a three-judge panel. What this means is that under the new rules, a single board member can *uphold* an immigration judge's decision, but cannot *reverse* that decision unless reversal is plainly consistent with or required by intervening changes in the law. The regulation also expands the types of cases in which the BIA can issue a "summary affirmance," a kind of rubber stamp ruling that upholds the immigration judge's decision but does not provide any reasons for doing so. This result is possible even in cases where the Board believes that the immigration judge was wrong on the law. Finally, the rule also prohibits *de novo* review of an immigration judges' factual findings except where those findings are "clearly erroneous." This feature of the new rules will severely limit the ability of the BIA to exercise its responsibilities as an appellate body.

In addition to minimizing the review process itself, the rule required the BIA to eliminate the current backlog of thousands of cases by March 2003, after which time the number of board members will be reduced from 23 to 11. Attorney General Ashcroft has intimated that "productivity" will be one of the factors he will consider in determining who keeps their positions on the board.[22] On February 28, five judges on the Board were told they would be relieved of their duties.[23]

After these changes were announced in proposed rules in February 2002, the Lawyers Committee and other groups filed written comments with the Department of Justice detailing how, if finalized, the regulations would result in depriving asylum

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[21] Organization, jurisdiction, and powers of the Board of Immigration Appeals, 8 C.F.R. 3.1, 67 Fed. Reg. 54878 (2002).

[22] Lisa Getter and Jonathan Peterson, "Speedier Rate of Deportation Rulings Assailed," *Los Angeles Times*, January 5, 2003.

[23] George Lardner Jr., "Ashcroft Reconsiders Asylum Granted to Abused Guatemalan; New Regulations Could Affect Gender-Based Persecution," *Washington Post*, March 3, 2003.

seekers and other immigrants of meaningful appellate review and fundamental due process.[24]

These concerns have since proven to be valid. In fact, the BIA, faced with the threat of "downsizing," did not wait for the proposed rules to be made final. Immediately after Attorney General Ashcroft announced the proposed changes to the rules, judges began issuing one or two-sentence summary rulings, without explanation of their decisions. Recent press reports and available statistical information raise serious questions about the quality of judicial process under the new rules. Board members, for example, usually work in panels of three and rule after careful deliberation. A recent review conducted by the *Los Angeles Times* concluded that under the new rules, "board members are reviewing cases individually and are ruling within minutes, often issuing just two-line decisions," and that "as the number of cases decided by the board has soared, so has the rate at which board members have ruled against foreigners facing deportation." T. Alexander Aleinikoff, a former INS general counsel and professor of law at Georgetown University, said of the scaled back review process that "[m]any, many cases are decided at a speed that makes it impossible to believe they got the scrutiny a person who faces removal from the United States deserves."[25]

Statistics released under the Freedom of Information Act reveal a dramatic increase in the issuance of summary decisions, and a corresponding increase in denying immigrants' appeals. As a baseline, it is instructive to look at statistics prior to March 2002 when the BIA first began to respond to the attorney general's February 2002 announcement of the proposed changes. In the six months prior to March 2002, the board decided 14,285 cases. Of these, 1,157 (8 percent) were decided by summary decision, and 8,885 (62 percent) of the appeals were denied. Beginning in March, when the BIA began responding to the announcement, the number of cases decided by the board doubled (from 14,285 cases to 30,346), and the number of appeals in which summary decisions were issued sky-rocketed (from 1,157 (8 percent of appeals) to 14,495 (48 percent of appeals). The percentage of appeals that were granted dropped nearly 50 percent (from 38 percent to 20 percent). Cases receiving summary rulings rose from 9 percent in February 2002 to 38 percent in March 2002.[26] The denial rate of immigration appeals has risen from 59 percent in October 2001 to 86 percent in October 2002.[27]

The United States Court of Appeals for the First Circuit recently issued a decision declining, on the basis of the facts available to it, to find that the board's use of summary

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[24] Lawyers Committee for Human Rights, "A Year of Loss: Reexamining Civil Liberties since September 11," p. 36, available at www.lchr.org/us_law/loss/loss_ch3a.htm (accessed March 3, 2003); *See also* American Immigration Law Foundation News, Volume 4, Issue 3, March 2002, available at www.ailf.org (accessed March 5, 2003); Comments filed by the Lawyers Committee for Human Rights (on file with the Lawyers Committee).

[25] Lisa Getter and Jonathan Peterson, "Speedier Rate of Deportation Rulings Assailed; Ashcroft's Goal of Clearing Backlog of Immigration Appeals Has Board Members Deciding Cases in Minutes; Foreigners Are Losing," *Los Angeles Times,* January 5, 2003.

[26] Ibid.

[27] Ibid.

decisions without opinion violated due process. Notably, however, the court left open the possibility that it might reach a different conclusion if it were presented with evidence of systemic misuse of summary disposition procedures.[28] Several immigrants' rights groups have filed suit in federal district court in Washington as well, challenging the regulations as violations of the due process rights of immigrants. The attorney general, for his part, has stated in the preamble to the final regulations that, since most of the decisions appealed to the BIA are denials of asylum, relief that falls within the Attorney General's discretion, the government need not comply with due process requirements in making those decisions.

THE NEW "SAFE THIRD COUNTRY" AGREEMENT

On December 5, 2002, the United States and Canada signed a new "safe third country" agreement. Modeled on similar arrangements between states in Europe, Canadian officials claimed to seek the agreement in order to foreclose a perceived problem of "forum shopping," whereby asylum seekers denied protection in one country then try again to gain asylum across the border. Thus, the agreement bars asylum seekers at the northern border from seeking refuge in Canada if they have transited through the United States, and likewise bars asylum seekers from seeking refuge in the United States if they have transited through Canada. There are some exceptions to this scheme, but they are extremely limited. The agreement will go into effect as soon as operating procedures are agreed and implementing regulations are issued in the United States.

The agreement is likely to increase the asylum caseload in the United States, since far more asylum seekers transit this country on their way to Canada than the other way around.[29] The agreement was opposed by refugee rights groups *and* anti-immigration groups in the United States.

The "safe third country" agreement is one item in a larger "smart border agreement" between the United States and Canada intended both to increase security and to streamline border crossings. Of the many problems with immigration at the border, the process of ensuring that refugees bound for Canada are able to get there to present their claims, and that those who are destined for the United States are able to pursue claims here was one that, prior to the agreement with Canada, worked quite well. The impact of the agreement will be to terminate this existing orderly border process. As a result, it likely will undermine security by leaving refugees vulnerable to exploitation by smugglers.

INS IS FOLDED INTO THE NEW DEPARTMENT OF HOMELAND SECURITY

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[28] *Albathani v. INS,* No. 02-1541 (1st Cir., February 6 2003)

[29] In the year prior to the agreement, approximately 35 percent of asylum claims made in Canada (14, 807 claims) were filed by asylum seekers who had passed through the United States.

Effective March 1, 2003, the Immigration and Naturalization Service (INS) was dissolved, and the enforcement and services functions of that troubled agency were transferred to the new Department of Homeland Security (DHS). Although the INS is only one of 22 federal agencies and departments that will be folded into DHS, the transfer of immigration functions to a department that provides frontline defense against terrorism in the United States likely will have profound implications for how the country views — and treats — immigrants. As one commentator suggested, "Placing all of INS's functions into a department focused primarily on national security suggests that the United States no longer views immigrants as welcome contributors, but as potential threats viewed through a terrorist lens."[30]

The mission of DHS is set out in Section 101 of the Homeland Security Act and includes: preventing terrorist attacks in the United States, reducing the vulnerability of the United States to terrorism, and minimizing the damage from terrorist attacks. DHS is now the government agency that will issue work permits to immigrants, adjust their status to permanent resident, naturalize them as citizens, and grant asylum to those seeking protection from persecution. Yet these functions are not mentioned in the legislation as part of the mission of the department.

The rights of refugees seeking asylum in the United States are perhaps more at risk in the context of this transition than any other group. Refugees have rights under U.S. and international law, but with its bifurcated enforcement and services functions, adjudicating who is entitled to asylum has never been an easy task for the INS. Under current DHS plans, immigration responsibilities relating to asylum seekers and refugees will be transferred to three new bureaus: the Bureau of Citizenship and Immigration Services (which will handle asylum and refugee adjudications), the Bureau of Customs and Border Protection (which will handle secondary inspection), and the Bureau of Immigration and Customs Enforcement (which will have jurisdiction over detention).

Historically, the enforcement functions of the INS have been particularly ill-suited to respect the rights and accommodate the needs of refugees. Efforts to ensure that asylum seekers were treated fairly — for instance during secondary inspection and expedited removal or in connection with parole determinations — were at times undermined by the fact that the "enforcement" divisions of the INS, and in some cases local INS district officials, did not always fully understand the special needs of asylum seekers or the nature of United States obligations to this vulnerable population. This problem occurred even though the "enforcement" and "services" functions of the INS both reported to the INS Commissioner.

This problem will likely be exacerbated under the new structure. As currently envisioned, the immigration "enforcement" functions will be housed in two separate bureaus, both of which report to the head of the Border and Transportation Security Directorate; the immigration "services" functions are in a third bureau, with a completely separate reporting line, to Deputy Secretary Gordon England. If all asylum seekers fell only under the jurisdiction of this "service" bureau, the new structure would be a

[30] Lincoln Caplan, "Secret Affairs," *Legal Affairs*, November/December 2002.

welcome development. But because many asylum seekers arrive at the border without documents and are subject to detention, they will also likely fall under the authority of the two "enforcement" bureaus of DHS as well. The separate reporting lines of these enforcement bureaus may make it even more difficult than in the past to ensure that the protection needs of refugees are respected when they first arrive in the United States. Commenting on this, former INS Commissioner James Ziglar wrote that INS asylum officers are now concerned that "the beacon of hope we have made shine so brightly will be dimmed because of inadequate attention and resources."[31]

The Homeland Security Act does include provisions for a civil rights officer as well as an ombudsman. These offices could serve as mechanisms of oversight and accountability. But to serve this function, the offices need to be strengthened with additional legislation clarifying their roles and enhancing their authority. These positions must also be ensured proper funding to carry out their responsibilities.

There is one group of immigrants that neither stays within the jurisdiction of the Justice Department nor is transferred to DHS: unaccompanied minor children. As has long been sought by refugee rights groups, the care and placement of unaccompanied immigrant children will now be the responsibility of the Department of Health and Human Services. Although the Homeland Security Act failed to ensure that unaccompanied children will have legal counsel appointed for them, so they do not have to appear in court alone, moving jurisdiction for their oversight and care to HHS is certainly a welcome improvement.

JUSTICE DEPARTMENT POLICY OF CLOSING IMMIGRATION HEARINGS NOW RIPE FOR SUPREME COURT REVIEW

Less than two weeks after the September 11 attacks, the Justice Department instituted a new policy of holding certain "special interest" deportation hearings in secret. The policy was set out in a September 21, 2001 Memorandum from Chief Immigration Judge Michael Creppy, which instructed immigration judges to bar access by the public, the press, and family members to immigration courtrooms in cases of "special interest" to the Attorney General.

This policy was challenged in federal court by media and other groups. A three-judge panel of the U.S. Court of Appeals for the Sixth Circuit, saying that "democracies die behind closed doors,"[32] held that the blanket policy was unconstitutional. In a separate case challenging the same policy, the Third Circuit Court of Appeals ruled 2-1 in favor of the government.[33] The majority upheld the secret hearing policy because it

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[31] James W. Ziglar, "Let's Not Forget Our Immigration Duties," *Miami Herald,* March 4, 2003.
[32] *Detroit Free Press v. Ashcroft,* 303 F. 3d 681 (6th Cir. 2002).
[33] *North Jersey Media Group, Inc. v. Ashcroft*, 308 F. 3d 198 (3rd Cir. 2002).

found no constitutional right of access by the press to deportation hearings, especially in cases that implicate national security, as the government has alleged all so-called "special interest" cases do.[34] The courts did not address the issue, raised by plaintiffs in the case, of whether there were alternatives to the blanket closure policy that would adequately address the national security concerns. The dissenting opinion argued that a qualified right of access to deportation hearings, which have traditionally been public, is warranted, and cited the public good served by openness of such proceedings. The dissent recognized that national security concerns could be sufficiently safeguarded by the less intrusive practice of allowing immigration judges to decide on a case-by-case basis whether particular hearings needed to be closed.

This ruling creates a conflict between the Third and Sixth Circuits. The issue is likely to end up at the U.S. Supreme Court. On behalf of newspapers challenging the closed hearings policy, the American Civil Liberties Union filed a petition for certiorari on March 3, 2003, requesting the U.S. Supreme Court to review the Third Circuit case.[35]

[34] Henry Weinstein, "Secret Deportation Hearings Are Upheld," *Los Angeles Times*, October 9, 2002.
[35] American Civil Liberties Union, "Newspapers Ask High Court to Resolve Conflict Over Access to Secret Immigration Hearings," March 3, 2003, available at http://www.aclu.org/SafeandFree.cfm?ID=12001&c=206&Type=s (accessed March 5, 2003).