
NOTES

ASYLUM AND THE AMERICAN SPIRIT: THE SHIFT FROM FOREIGN POLICY-BASED BIAS IN FAVOR OF APPLICANTS FROM ENEMY COUNTRIES TO A DOMESTIC POLICY-BASED BIAS AGAINST APPLICANTS FROM “HIGH RISK” COUNTRIES

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I. INTRODUCTION AND BACKGROUND

Asylum law represents a peculiar turning point in American history. Less than a century before its inception, if international travel had been as today, fleeing African slaves could have met the modern American standard for an asylum grant by showing not merely a well-founded fear of persecution¹ but actual persecution in its purest form—a complete deprivation of freedom to those who differ in a way regarded as offensive. Nevertheless, the abolitionist movement ignited a sense of pride in humanitarianism alongside national righteousness. Then, the rising of Corporal Hitler from obscurity, as well as a Nazi regime that promoted religious cleansing and eugenics, again perhaps invoking the embarrassing self-reflection of American history,² dis-

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¹ The Board of Immigration Appeals defined persecution as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

² American states themselves had practiced eugenics in the form of forced sterilization. *See Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding a state law allowing sterilization at a women’s hospital, as long as a hearing was provided first, to prevent a nation “swamped with incompetence”); *see also Skinner v. Oklahoma*, 316 U.S. 535, 537, 541 (1942) (holding that forced sterilization of individuals convicted of three or more crimes of moral turpitude violated the Equal Protection Clause only because it ex-

played a paramount evil that encouraged America to open its national borders to those seeking a safe haven.

Large migrations of people fled in the aftermath of and during the reconstruction era after the fall of Nazi Germany. This led to several international agreements providing protection to those fleeing from persecution. The first was the 1951 Convention of the United Nations wherein a standard definition of “refugees” was first articulated.³ Although the United States was a late member to any international standard recognizing asylum, not fully in compliance with the United Nations High Commissioner for Refugees (“UNHCR”) and the 1951 Convention until 1980, the United States has recognized the right of asylum since the end of World War II.⁴ Furthermore, the United States has cumulatively accepted more refugees than any other country since World War II.⁵ The United States initially recognized asylum on a case-by-case basis.⁶ Ironically, the case-by-case admission of refugees up until 1952 was generally not based on humanitarianism or a social policy against Nazi racism but instead rooted in military and foreign policy goals, as more refugees were admitted from liberated areas in Europe or were Christians forced into labor by the German regime than were Jewish refugees.⁷ It took a specific congressional directive to reform the post-World War II immigration quotas and entry requirements that discriminated against Jewish refugees.⁸

II. THE REFUGEE REVOLUTION

The conception of modern asylum law was a result of a wave of migration at the end of World War II and during reconstruction, as

cluded white collar crimes while nevertheless hinting that procreation may be a fundamental right).

³ *Asylum Law Basics: A Brief History*, IMMIGR. EQUALITY, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigrationequality-asylum-manual/1-asylum-law-basics-a-brief-history/> (last visited Apr. 8, 2015) [hereinafter *Asylum Law Basics*].

⁴ *Id.*

⁵ *Educating About Immigration*, CONST. RTS. FOUND., <http://crfimmigrationed.org/index.php/lessons-for-teachers/145-h16> (last visited Apr. 8, 2015).

⁶ Daniel L. Swanwick, *Foreign Policy and Humanitarianism in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror*, 21 GEO. IMMIGR. L.J. 129, 131 n.4 (2007), available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1003&context=spps_papers (“[The] two procedures were conditional entry and the Attorney General’s parole power.”).

⁷ *United States Policy Toward Jewish Refugees, 1941–1952*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007094> (last updated June 20, 2014).

⁸ *Id.*

well as the internationally shocking atrocities committed by the Nazi regime. Therefore, the 1951 Convention applied only to individuals who were refugees on the basis of events occurring before the beginning of 1951.⁹ It was not until 1967 that the United Nations expanded the initial convention's scope to cover future refugees.¹⁰ The United States technically "acceded" to the treaty in 1968 but, in effect, only became a practicing participant to the treaty in 1980 when it enacted the Refugee Act of 1980.¹¹ On its face, the Refugee Act of 1980 should have removed any policy-based bias from asylum decisions in the United States. It has been concluded that international asylum standards are completely policy neutral.¹²

However, the early 1980s and the Reagan administration were marked by the most overt foreign policy-based asylum program, as well as by having the most discriminatory foreign policy-based asylum outcomes since the post-World War II decade.¹³ Despite the United States' adoption of standards compliant with international law and corresponding policy-neutral refugee definitions, the administrative design of the United States immigration system and its discretionary nature allowed the Executive Branch to wield its discretion and to influence the asylum program in favor of foreign policy agendas for years. It was not until the late 1980s, after several influential lawsuits, that the United States fully accepted and utilized humanitarianism as the predominant factor in its asylum program.¹⁴

This Note discusses the first wave of foreign policy-based asylum decisions during the Cold War, and how, after the Refugee Act, passed in the midst of the Cold War hangover, foreign policy was stronger and more overtly impressed on asylum decisions than ever before. It explains how the aforementioned lawsuits finally purged foreign policy from the asylum program and humanitarianism found its rightful

⁹ *Asylum Law Basics*, *supra* note 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² Evan George, U.S. Refugee Policy: A Comparison of Haiti and Cuba During the Cold War and Post-Cold War Periods 111 (May 2004) (unpublished M.A. thesis, University of Florida), available at http://etd.fcla.edu/UF/UFE0004761/george_e.pdf ("International law clearly prohibited the use of ideological and political considerations in the application of refugee law."); see also *Doherty v. U.S. Dep't of Justice*, 908 F.2d 1108, 1119 (1990), *rev'd on other grounds*, 502 U.S. 314 (1992).

¹³ Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL'Y INST. (Apr. 1, 2006), <http://www.migrationinformation.org/usfocus/display.cfm?ID=384>.

¹⁴ *Id.*

place in the United States asylum regime for a brief period. In turn, this Note will address the pushback against humanitarian asylum that arose from the influx of asylum claims in the 1990s, as well as the pushback following the September 11th attacks. Finally, this Note examines how some commentators have incorrectly looked through a lens affected by September 11th and the Global War on Terror to find the reemergence of policy in asylum decisions.

This Note asserts that, with the recent political pressure in the wake of the Boston Marathon bombings, policy may rear its ugly head in asylum decisions once again. However, policy is more apt to play a role diametrical to the role it played during the Cold War era in that grant rates would be expected to be lower from so-called “enemy countries,” or what have been called “high-risk countries,” as opposed to higher grant rates in the Cold War era. The proposed reason for this phenomenon is that the policy pressures created by the War on Terror are less about admonishment of another form of government, i.e., foreign policy, and more about domestic policy by way of homeland security. In sum, if any policy bias should play a role in the asylum program, it should be related to domestic social policy, such as the growing approval of same-sex marriage. Such social policy bias would be manifested by a higher acceptance rate from countries whose governments criminalize homosexuality or acquiesce in violence against homosexuals.

III. THE COLD WAR HANGOVER AND THE LINGERING EFFECT OF FOREIGN POLICY IMPRESSED ON ASYLUM DIRECTIVES

Prior to 1968, the year the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees, the two primary ways an immigrant seeking asylum could be admitted into the United States were strongly biased in favor of persons fleeing from enemies of the United States.¹⁵ It is fairly common knowledge that, from the early 1950s into the late 1970s, an enemy of the United States was synonymous with the Soviet Union as well as other Communist nations during the period, such as China, North Korea, Cuba, and North Vietnam, which threatened to spread Communist ideologies. Therefore, one of the procedures by which immigrants could be granted asylum was explicitly limited to those fleeing from Communist countries.¹⁶ As one would expect, asylum grants were naturally higher for Communist

¹⁵ See Swanwick, *supra* note 6, at 131.

¹⁶ *Id.*

nations as a result of the United States foreign policy against Communist ideology.¹⁷ 1980 marked the first time the United States had made its adoption of the international treaty regarding asylum law part of domestic law, and it opened a decade of legal controversy over United States asylum law.¹⁸

The fact that the Refugee Act of 1980 was passed in the last few months of the Carter administration, while the first years of its implementation took place during the Reagan administration, was partially behind this tension and controversy.¹⁹ As was the case at the end of World War II, large migrations of people—this time from Central America—created a momentous need for asylum. Civil war, repression, and economic disaster caused hundreds of thousands of Salvadorans, Guatemalans, and Nicaraguans to travel northward.²⁰ The large migration from Central America during the Reagan administration in conjunction with the newly adopted Refugee Act led to nearly a decade of debate between immigrants' rights activists and others in opposition to the Reagan administration and the rest of the Executive Branch.²¹ The Reagan administration advocated for the traditional pre-1968 policy, which used asylum as a mechanism to implement Cold War foreign policy and to admonish Communist ideology.²² Immigrants' rights activists argued in favor of international asylum standards rooted in humanitarianism.²³

The Reagan administration pushed a policy whereby the degree of persecution was irrelevant and the type of persecution was supreme. With respect to the migrations from Central America, this policy was applied by denying asylum to Salvadorans and Guatemalans, whose persecution was inflicted by a corrupt military regime that happened to oppose Marxist-led popular movements, and granting asylum to Nicaraguans, who fled from a civil war that had precipitated the installation of socialist-led regime.²⁴ This was part of an overall foreign policy strategy because of the United States government's view that each ad-

¹⁷ *Id.* at 132.

¹⁸ Gzesh, *supra* note 13.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

mission of a refugee from a Communist nation represented a failure of the Communist system.²⁵

Modern United States asylum law and refugee rights activism were born against this backdrop. The Executive Branch was steadfast as members of Congress requested an extended voluntary departure for illegal Salvadorans and Guatemalans by the Department of Justice and the Attorney General. This request was denied.²⁶ Ironically, many activists claimed that their actions in defying United States immigration policy through a campaign to smuggle the slighted Salvadoran and Guatemalans were justified based on nineteenth century abolitionist principles.²⁷ The activists referred to the smuggling activities as the new “Underground Railroad.”²⁸

These noble proclamations by the activists only led to a stronger resistance from the Executive, including several successful prosecutions of activists in Arizona and Texas.²⁹ The prosecutions only served to publicize what was coined the “Sanctuary Movement,” which in turn inspired more activists and pro bono lawyers to fight and develop case law in the latter part of the decade now influencing the current interpretation of the Refugee Act.³⁰ The most significant case for the Salvadorans and Guatemalans was *American Baptist Churches v. Thornburgh*, which ended in a settlement granting essentially temporary amnesty for the class, a *de novo* review of their asylum claims, detention restrictions, and employment authorization.³¹ This settlement eventually evolved into a legislative act, the Nicaraguan Adjustment and Central American Relief Act, which allowed those protected by the decision to apply for permanent residency.³²

²⁵ *Id.*; Swanwick, *supra* note 6, at 132.

²⁶ Gzesh, *supra* note 13.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *American Baptist Churches v. Thornburgh (ABC) Settlement Agreement*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Oct. 28, 2008), <http://www.uscis.gov/laws/legal-settlement-notices/american-baptist-churches-v-thornburgh-abc-settlement-agreement>.

³² *Nicaraguan Adjustment and Central American Relief Act (NACARA) 203: Eligibility to Apply with USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Jan. 23, 2015), <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/nicaraguan-adjustment-and-central-american-relief-act-nacara-203-eligibility-apply-uscis>.

Alas, the Cold War hangover and Reagan resistance to modern-day humanitarian asylum had ended.³³ Through much of the 1980s, the Department of State issued advice letters for each asylum case, that had significant sway on the decisions made by local immigration offices.³⁴ By the late 1980s, however, this practice had ended, and local offices were left with much greater autonomy in reviewing individual asylum cases.³⁵

Almost immediately after the United States had put in place an asylum program able to apply the policy-neutral, humanitarian-oriented goals of international law and the 1980 Refugee Act, there was a pushback from asylum traditionalists. Those pushing for reform claimed that the humanitarian asylum system was prone to fraudulent claims and perceived as a loophole for gaining residence by immigrants and immigration lawyers.³⁶ Reform supporters contended that the perceived loophole led to an inundation of asylum applications beyond the resources of the Immigration and Naturalization Service (“INS”) in the early 1990s.³⁷

The pushback came to fruition in 1995 when a Republican-led Congress passed legislation requiring an “enlarged Asylum Corps, halting the automatic issuance of a work permits to new asylum applicants, and an accelerated processing of asylum applications.”³⁸ In 1996, the same legislative actions were supplemented to include “new expedited removal procedures, but the protection against removing someone who feared persecution if returned to his homeland was protected by requiring a screening of all asylum claims by a member of the Asylum Corps.”³⁹ Further action in 1996 “reduce[d] the ability of immigration lawyers to continue to seek sequential reviews of removal orders until they find a sympathetic judge and to use an asylum claim as a defense against removal if the alien has been living illegally in the United States for more than a year without initiating an asylum claim.”⁴⁰

³³ Gzesh, *supra* note 13, at 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *An Overview of Asylum Policy: Hearing Before the Subcommittee on Immigration of the Committee on the Judiciary*, 107th Cong. 112–13 (2001) [hereinafter *Hearing*] (statement of Dan Stein, Executive Director, Federation for American Immigration Reform).

³⁷ *Id.* at 113.

³⁸ *Id.*

³⁹ *Id.* at 114.

⁴⁰ *Id.*

Ironically, though there was an obvious ideological animus in the initiation of reform in the early 1990s, the resulting reforms primarily came to fruition in the form of procedural processing of asylum claims. These reforms have been incorporated and maintained as an integral part of the Immigration and Nationality Act to date and have arguably been a positive force in dealing with the inundation of asylum claims that began in the early 1990s.⁴¹ It is true that asylum claims and migration skyrocketed in the early 1990s.⁴² However, it does not necessarily follow that the humanitarian nature of the Refugee Act of 1980 led to frivolous or increased asylum claims. It more likely follows that human rights violations and fear are widespread and that the United States is an attractive place to flee to because of its economic reputation. The latter hypothesis would suggest a need for more international cooperation in an asylum system as a way to distribute the overall burden of human rights violations and refugee acceptance.⁴³

It is not to say that the early 1990s opposition to the effects of humanitarian asylum was an endorsement of foreign policy-based asylum. One of the largest reforms of the 1990s, which occurred in 1994, was as a compromise of a past “open door” policy for Cuban refugees.⁴⁴ In what was called the “wet foot, dry foot” policy, a compromise was adopted whereby Cuban refugees reaching United States territory were allowed to stay and apply for adjustment of status, but Cubans interdicted en route at sea would be returned to Cuba.⁴⁵ Although the “wet-foot dry-foot” policy was a monumental departure from traditional foreign policy-based asylum, the near-automatic admission of Cubans who entered illegally with no reference to an individual applicant’s persecution was demonstrative of the fact that the Refugee Act of 1980 and the Sanctuary Movement of the late 1980s had not dislodged all foreign policy bias from the current asylum regime. However, some of the most prominent activists from the mid-1990s reform era, such as the Federation for American Immigration Reform (“FAIR”), appear to op-

⁴¹ See 8 U.S.C. § 1151(b) (2009) (stating that an alien may not apply for asylum unless he or she can prove by clear and convincing evidence that the application has been filed within a year of arrival in the United States, subject to some exceptions).

⁴² JACK MARTIN, REFUGEE AND ASYLUM POLICY REFORM 5 (2010), available at http://fair.thinkrootshq.com/docs/RefugeeAsylum_final.pdf.

⁴³ Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT’L L. 1, 14 (1994), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djcl>.

⁴⁴ See George, *supra* note 12, at 73.

⁴⁵ *Id.* at 5.

pose the effects of both humanitarian asylum and the international refugee standard, as well as foreign policy-based asylum, including asylum status for Cubans who make it to United States territory illegally.⁴⁶

FAIR seems to promote a policy that is anti-immigration due to the progressing number of immigrant admissions in the United States more so than the adoption of any policy-specific bias in refugee law. FAIR, however, chooses to promote reforms that strangle the United States' refugee system rather than looking at angles for international cooperation in order to distribute the burden of refugees.⁴⁷ However, by restricting the flow of refugees to the United States, the government "merely direct[s] the flow of refugees elsewhere," and this should certainly not be the policy of a nation often accused of "policing the globe."⁴⁸ And as far as expanding the scope of asylum, one of FAIR's arguments in opposition to humanitarian-based asylum, as discussed hereinabove, there has simply been no expansion in United States asylum law beyond what is already well accepted in international law.

IV. THE WAR ON TERROR, THE DIFFERENCE, AND THE ANALYSIS

The attacks of September 11, 2001, created an arch-nemesis of the United States not encountered since the conclusion of World War II and the rise of the Red Soviet Union. When President George W. Bush began his "War on Terror" mantra, a modern-day witch-hunt not unlike McCarthyism and the "red scare" soon followed. Shortly after September 11th, "refugee admission was temporarily halted pending a review of the selection process and a review of security for those federal government personnel who travel the world considering candidates for the U.S. program."⁴⁹ Since then, "refugee admission has resumed with more in-depth background checks for refugees and a scaled back outreach program in areas of the world considered risky."⁵⁰ In a perfect storm, the discovery that the United States' new nemesis originated from the Middle East came at a time when the number of

⁴⁶ See *Hearing*, *supra* note 36, at 117 ("The third proposed reform is to put an end to the quasi-asylum status of Cubans who arrive illegally in this country.").

⁴⁷ *Id.* (noting that "[a]nother part of the problem is the process over the past few years of expanding the scope of eligibility of asylum," which "attracts additional claimants").

⁴⁸ See Boed, *supra* note 43, at 31.

⁴⁹ Don Barnett, *The Coming Conflict over Asylum: Does America Need a New Asylum Policy?*, CENTER FOR IMMIGR. STUD. 1 (Mar. 2002), <http://www.cis.org/sites/cis.org/files/articles/2002/back102.pdf>.

⁵⁰ *Id.*

United States' asylum seekers was shifting from former Communist countries to Africa and the Middle East.⁵¹

The War on Terror's potential to cause the United States to relapse to its Cold War-esque foreign policy-based asylum has been discussed before.⁵² However, the discussion perhaps came too soon.⁵³ Although the Cold War and the War on Terror have some similar characteristics in that they are not traditional wars of persistent armed conflict and the overall objectives are somewhat vague, they are starkly dissimilar with respect to America's perception of the enemy. While both are ideological wars, the ideology opposed in the Cold War era was directly related to a form of government.

The War on Terror, however, cannot be called a war against Islamic theocratic governments because theocracies existed without blatant United States opposition well before the War on Terror. Although terrorism is occasionally associated with corrupt governments, it is more often considered anti-government and is associated with "the unlawful use or threatened use of force or violence by a person or an organized group against people or property with the intention of intimidating or coercing societies or *governments*, often for ideological or political reasons."⁵⁴ Therefore, the Cold War foreign policy that influenced the asylum bias in favor of refugees from enemy nations as an admonishment of the failure of a particular form of government would not seem to make sense in the War on Terror. This is because the enemy in the War on Terror is not necessarily affiliated with any particular form of government. Thus, no one is admonished by a bias in favor of admitting the enemy. Therefore, one would not expect to see higher asylum grant rates for refugees from theocratic governments or even from governments of countries with a high density of terrorist cells.

Several of the September 11th attackers were in violation of their student visas, so it is no surprise that the post-September 11th policy pressures have influenced large-scale reform in domestic immigration

⁵¹ *Id.*

⁵² See e.g., IMMIGRATION POLICY AND SECURITY: U.S., EUROPEAN, AND COMMONWEALTH PERSPECTIVES (Terri Givens et al. eds., 2008).

⁵³ Daniel Swanwick compared foreign policy influences on asylum in the Cold War and War on Terror in an article written in 2006, well before the Boston Marathon Bombing. Both the article and the relevance of the Boston Bombing are discussed *infra*.

⁵⁴ *Terrorism*, Free Dictionary, <http://www.thefreedictionary.com/terrorism> (last visited Jan. 24, 2014) (emphasis added).

law,⁵⁵ the most transformative of which has been the dissolution of the INS and the restructuring of all facets of what was the INS as an extension of the Department of Homeland Security.⁵⁶ In addition, as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”), a digitalized system designed to track international students and visitors in the United States known as the Student and Exchange Visitor Information System (“SEVIS”) was created.⁵⁷ It is clear that post-September 11th national policies have affected immigration policy in the United States. However, what is not clear is whether these national policies that prevail post-September 11th should be expected to create any bias in asylum grants or denials in favor of or against any particular nations.

In *Foreign Policy and Humanitarianism in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror*, Daniel L. Swanwick engages in a study related to the questions posed here.⁵⁸ Swanwick attempts to identify a correlation between foreign policy objectives in the War on Terror and asylum grants and denials.⁵⁹ He describes the question as whether the bias towards granting asylum to refugees from Communist countries, based on the presumption that refugees from Communist countries would face persecution upon return, has developed into a third school of thought,⁶⁰ which assumes persecution upon return to the home country of refugees fleeing “countries that are uncooperative with the United States in the War on Terror.”⁶¹ Despite Swanwick’s admitted awareness of the challenge in defining governmental enemies in the War on Terror, he alleges that “it is possible to construct a table of allies and enemies of the United States in the War on Terror.”⁶² In constructing this table, Swanwick uses the State Department report on terrorism, which details the “extent to which the governments of foreign countries cooperated with the United States during that year to prosecute and prevent acts of international terror-

⁵⁵ THE 9/11 COMMISSION REPORT 187, 384 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

⁵⁶ See Swanwick, *supra* note 6, at 136–37.

⁵⁷ See 8 U.S.C. § 1372(a) (2009).

⁵⁸ See generally Swanwick, *supra* note 6.

⁵⁹ See generally *id.*

⁶⁰ The other schools of thought are Humanitarian asylum and Cold War foreign policy asylum. *Id.* at 129–30.

⁶¹ Swanwick, *supra* note 6, at 139.

⁶² *Id.* at 140.

ism in that country.”⁶³ This methodology creates more problems in an already difficult classification because it attempts to devise an objective dichotomy based on a verbal report.

What kind of language would serve as the differentiation between two distinct and meaningful categories like enemy and ally? Such a table would be more convincing even if it were based on arbitrary quantitative but objective criteria, such as classifying as allies those countries reported to engage in more than ten official forms of prosecuting terrorist activity and classifying as enemies those engaging in less than two official forms of prosecuting terrorist activity. However, the State Department report used was apparently very “concise,” or in other words, not very detailed or helpful in separating countries into ally-enemy categories.⁶⁴ In hypothesizing the outcome of the study, it is suggested that

if the Immigration Courts are operating under a Cold War style foreign policy bias, we would expect to discover that enemies garner higher grant rates than allies.⁶⁵ Conversely, if asylum adjudications are being conducted in a manner that is neutral to foreign policy concerns, we would expect grant rates not to be significantly correlated to ally or enemy status.⁶⁶

Finally, it is suggested that “[a] third option, which was neither expected nor seen, would have allies receiving higher grant rates than enemies.”⁶⁷ However, based on the hypothesis set forth here, this would be the precise result that one would expect to see, and arguably, if a current attempt at this study were conducted in a more accurate fashion, that precise result would likely be observed.

Swanwick concluded that “while there is no general relationship between a country’s ally or enemy status and its asylum grant rate, there is a correlation between enemy status and grant rate in the period surrounding a change in the country’s foreign relationship with the United States.”⁶⁸ Even assuming the accuracy of the ally/enemy dichotomy formulated in this study, this outcome seems to indicate the general nature of media attention and the perception of a country that occurs when some event causes a strained relationship with the United States. As stated above, the Department of State no longer issues ad-

⁶³ *Id.* at 140–41.

⁶⁴ *Id.* at 141.

⁶⁵ *Id.* at 143.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 144.

vice letters, and most asylum grants and denials are left to the discretion of asylum officers and immigration court judges.⁶⁹ During times when a nation switches from ally to enemy status, media attention is likely to create a biased perception in the minds of asylum officers that upheaval is occurring in the region.

The most critical issue Swanwick's study fails to recognize is the dynamic in which the War on Terror has played out and the values it has affected. The spread of Communism in the 1950s and the attempt to contain it over the course of the Cold War created a foreign policy based on prideful esteem in democracy and the individuality and freedom it represented to Americans. Communism was perceived as a threat to the American way of life, but the threat was nebulous and debatably even illusory. While terrorism is also perceived as a threat to the American way of life, it has manifested itself in a much more real sense. September 11th represented unprecedented violence on American soil. Furthermore, while there has always been a general ideological opposition by the United States to those who use religion for extremism and violence, the War on Terror stands for a much more practical shift in policies. The War on Terror did not initiate any major shift in foreign policy, as the United States has had tension with Iraq since the Gulf War and with other Middle Eastern countries since well before 2001, as well.

The attacks of September 11th more accurately represented a major shift in domestic policy influenced by national security concerns as seen by the first major legislation post-September 11, the USA PATRIOT Act.⁷⁰ If the War on Terror had primarily created a shift to a U.S. foreign policy that made enemies out of nations who had done a poor job prosecuting terrorist activity and allowing for its harbor, then the United States certainly would have been one of its own worst enemies. The discovery that the attackers used student visas in the process of planning September 11th caused shockwaves, leading to the aforementioned deconstruction of the INS and immigration laws being re-implemented as an arm of the Department of Homeland Security.⁷¹

⁶⁹ See Gzesh, *supra* note 13.

⁷⁰ Rosemary Jenks, *The USA Patriot Act of 2001: A Summary of the Anti-Terrorism Law's Immigration-Related Provisions*, CENTER FOR IMMIGR. STUD. (Dec. 2001), <http://www.cis.org/sites/cis.org/files/articles/2001/back1501.pdf> ("Undoubtedly, the USA PATRIOT Act contains a number of immigration provisions that will improve our ability to identify and either exclude or prosecute aliens with terrorist ties.")

⁷¹ See Swanwick, *supra* note 6, at 136.

Although the War on Terror created a major shift in domestic policy by the urgent emphasis on enhanced homeland security and increased monitoring of visa recipients, its potential effects on asylum law may not have been immediately noticeable. The Boston Marathon bombings of April 15, 2013, renewed the asylum policy debate in the wake of the War on Terror.⁷² This is because the two suspects in the Boston bombings reportedly used the asylum system to gain admission to the United States.⁷³ The suspects “were brought to the U.S. a decade ago by their parents, who had fled the deteriorating economy and burgeoning conflicts in the Central Asian region the family had called home.”⁷⁴

This event came amidst the immigration bill proposed by the “Gang of Eight” that would actually relax asylum requirements. Thus immediately after the bombing “critics of immigration reform [were] already invoking the marathon bombing suspects as a reason to slow the Senate’s . . . bill.”⁷⁵ Despite the fact that the Boston bombing suspects gained residency through the asylum system as children and no available information would have given rise to a reason for suspicion or alarm, changes to the bill were suggested, such as preventing asylum recipients from returning to their home country because one of the suspects returned to Russia in the year preceding the attack. The flawed logic of this suggested modification of the bill with respect to terrorists using asylum to remain in the country has been criticized for the numerous reasons an asylee may legitimately want to return to their home country.⁷⁶

Nevertheless, perhaps illuminating the potential or existence of the proposition set forth here, Senator Paul said “[o]ur refugee programs have proven to be a problem We may need more scrutiny

⁷² Stephen Dinan, *Rethinking Immigration Rules for Asylum After Boston*, WASH. TIMES, May 19, 2013, <http://www.washingtontimes.com/news/2013/may/19/rethinking-immigration-rules-for-asylum/?page=all>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Zeke J. Miller & Alex Altman, *Immigration Reform's First Big Test: The Boston Bombing*, TIME (Apr. 19, 2013), <http://swampland.time.com/2013/04/19/immigration-reforms-first-big-test-the-boston-bombing/>.

⁷⁶ Dinan, *supra* note 72 (“There are situations where someone wants to return home to see a dying relative or to try to play a role in constructive politics. And then there are the situations where someone was granted asylum years before, but their home country has since stabilized.”).

when accepting refugees from high-risk nations.”⁷⁷ Therefore, it would not be unreasonable to say that, in the wake of the War on Terror and especially after the fuel the Boston bombings added to the assault on asylum, one would expect to see lower asylum grant rates from “high-risk” nations, which one could also classify as an enemy nation. This would be a domestic policy bias against asylum applicants from “high-risk” nations as opposed to a foreign policy-based bias in favor of asylum applicants from enemy nations. As Swanwick aptly stated, “[t]his is not the Cold War.”⁷⁸

IV. THE “MATERIAL-SUPPORT” BAR AS BIAS AGAINST HIGH-RISK NATIONS

Other evidence that September 11th created an antipodal affect in asylum adjudication from that of the Cold War era is seen in the broadening of the material support bar since the attacks. Although Swanwick discusses the broadened material support bar after September 11, he failed to hypothesize the logical result of a diametric bias in asylum from that of the Cold War.⁷⁹ After September 11, 2001, the United Nations called on “states to ensure that asylum-seekers have not planned, facilitated, or participated in the commission of terrorist acts.”⁸⁰

The United States has always expressed concern with dangerous individuals entering its territory.⁸¹ With the Immigration Act of 1990, Congress formally made “terrorist activities” a bar to refugee status, and in 1996 Congress articulated the first version of the material support bar.⁸² But it was the September 11th attacks, followed by the Real ID Act of 2005,⁸³ which led to the extreme broadening of the material

⁷⁷ Benjy Sarlin, *Boston Bombing Could Impact Refugee Policy in Immigration Bill*, TALKING POINTS MEMO (Apr. 24, 2013, 4:11 PM), <http://talkingpointsmemo.com/dc/boston-bombing-could-impact-refugee-policy-in-immigration-bill>.

⁷⁸ See Swanwick, *supra* note 6, at 144.

⁷⁹ *Id.* at 137–38.

⁸⁰ Jordan Fischer, *The United States and the Material-Support Bar for Refugees: A Tenuous Balance Between National Security and Basic Human Rights*, 5 DREXEL L.R. 237, 242 (2012).

⁸¹ The Alien and Sedition Act allowed the President to order any alien he deemed dangerous to depart from the U.S. *Id.* at 245.

⁸² *Id.*

⁸³ The Real ID Act was another piece of post-September 11 “terrorism legislation” that has been said to specifically target asylum seekers. Marisa S. Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Premise*, 43 HARV. J. ON LEGIS. 101, 101 (2006) (“The Real ID Act, passed on May 11, 2005, is the first post-September 11 an-

support bar by which asylum law is now applied.⁸⁴ The Real ID Act broadened the material support bar definitions that, in turn, affected asylum seekers in three ways: first, it required no nexus between the immigrant's actions and terrorist activities; second, it allowed detainment on suspicions of past violent crimes or aiding of terrorism; and third, it added an expanded definition of terrorist organization resulting in the inclusion of organizations the immigrant may not even know aid in terrorist activities.⁸⁵ The Board of Immigration Appeals had previously defined the material support bar by three elements: "(1) the applicant knows or should have known (*mens rea*) that (2) material support the applicant provided (3) was to a terrorist organization."⁸⁶

Given the fact that the United States has, since its inception, had legislation that aimed to prohibit dangerous persons from entering its borders, perhaps most convincing evidence to support the theory that the War on Terror created a new bias through the application of the material support bar is that the broadened scope set forth by the Real ID Act removed the *mens rea* requirement from the material support bar.⁸⁷ This tends to show that the War on Terror led to more than resurgence in concern for national security and that it created a change in overall domestic policy that was in opposition to a network of associations. If the asylum applicant lacks the *mens rea* to provide material support to terrorism and, as further provided by the new evolution of the Real ID Act, lacks the knowledge that what is being supported is a "terrorist organization," he or she likely poses no greater threat to national security and are no more likely a terrorist than any other applicant.

The material support bar is further evidence of the proposition here because one would expect applicants who are more likely to be negatively affected by the material support bar to be from countries where terrorism is harbored or uncontrollable. This is because it is more likely that those applicants incidentally provide material support to terrorist organizations under the broadened statutory definition simply because the volume of terrorist cells is higher. Nations where

terrorism legislation specifically to target a group of vulnerable individuals to whom the United States has historically granted protection: asylum seekers.").

⁸⁴ Fischer, *supra* note 80, at 246.

⁸⁵ *Id.* at 246–47.

⁸⁶ *Id.* at 256.

⁸⁷ *Id.* ("The current application of the material support bar under the REAL ID Act suffers from both a lack of an intentional *mens rea* and a failure to apply the knowledge requirement to the third element—a terrorist organization.").

terrorists are more likely to be harbored or uncontrolled are more likely to be enemies of the United States or, at a minimum, considered “high-risk” by the United States because countries that are more likely to harbor terrorists would indicate the governments either refuse to prosecute terrorist activities, the governments are controlled by terrorist organizations, or the governments are unable to control terrorists’ activities. Thus, one would expect to see a bias against granting asylum to applicants from these countries.

Much like the fact that a refugee fleeing a Communist country was presumed to be a victim of persecution, a refugee who has incidentally aided the modern-day incarnation of evil, a terrorist organization, is presumed to be a danger or liability and not deserving of safe haven in the United States. The broadening of the material support bar clearly shows a shift in domestic policy in the wake of the War on Terror, which represents a type of hysteria not seen since the Cold War. However, because of the nature of the enemy and the manner of the “war,” one would expect to see a diametrical effect on asylum grants and denials from nations associated or infested with the enemy.

V. A SUGGESTION FOR SOCIAL POLICY AS AN INFLUENCE ON ASYLUM

In sum, policy may always influence asylum decisions, and the United States will never fully practice humanitarian asylum. It can be fairly concluded, however, that biases influenced by backwards policies and waves of hysteria in American culture like those that have been examined here in terms of the Cold War bias in favor of applicants from Communist nations and the potential War on Terror bias against applicants from “high-risk” nations are not good. Nevertheless, it does not follow that all biases in the asylum system are inherently bad or even avoidable.

A purely humanitarian asylum system would likely be biased, as well. There is no objective way to measure human suffering. The primary level of asylum review is a heavily discretionary system,⁸⁸ and it would be reasonable to assume that asylum officers have their own personal biases as to what kinds of persecution are more or less humane. The same could be said of immigration judges and circuit court judges at the appellate level. Groups such as FAIR have called for an end to the refugee category of “membership in a particular social group” be-

⁸⁸ The regulation that outlines the procedure for interview before an asylum officer uses the term “discretion” twice. *See* 8 C.F.R. § 1240.67 (2003).

cause they claim that it injects too much subjectivity into the asylum system.⁸⁹ However, the discretionary asylum program is inherently subjective, and removing the category would only place subjectivity in other categories. The statutory language “on account of” which requires an applicant’s persecution to be on account of a particular category creates subjectivity in all categories.⁹⁰ Whether a person has a well-founded fear of persecution “on account of” any category requires subjective judgments about governments or other persecutors because it requires value judgments regarding the motivations of governments and organizations portrayed in the media. Furthermore, categories such as religion are not as objective in today’s world as they may have been in the past. The informal practice and growth of unconventional religions has grown. The issue with the “membership in a particular social group” category is not that it is subjective but that it is more amorphous than the other categories. But this suggests that more case law and statutory guidance, not the removal of the category, are needed.

Accordingly, the subjectivity of the asylum system should be embraced, but instead of allowing asylum officers to let their own personal biases guide them, certain social policies should be pronounced to guide asylum officers in their decisions. The United States, as seen by the practice of the Cold War foreign policy bias, lets its self-righteousness become part of the asylum system. At the same time, the United States has attempted to come into compliance with international asylum standards.

With that in mind, the United States should let domestic trends in social policy guide asylum decisions. For example, with the recent Supreme Court ruling that the lack of federal recognition of same-sex marriages violates the Due Process Clause,⁹¹ why not encourage a bias in favor of granting asylum to applicants from nations who criminalize sexuality and allow violence against same-sex couples? The UNHCR has accepted the lesbian, gay, bisexual, and transgender (LGBT) community as entitled to all human rights, and stated that “[s]exual orientation is a fundamental part of the human identity.”⁹² It has also concluded that sexual orientation may be part of multiple refugee cat-

⁸⁹ *Hearing, supra* note 36, at 113, 117.

⁹⁰ See U.S.C. § 1101(a)(42)(A) (1996).

⁹¹ *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2696 (2013).

⁹² DIV. OF INT’L PROT. SERVS., PROT. POLICY & LEGAL ADVICE SECTION, UNITED NATIONS HIGH COMM’R FOR REFUGEES, UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO

egories, including “membership in a particular social group” and “political opinion.”⁹³ But most importantly, it has been concluded that “[i]nternational and national developments in sexual orientation case law clearly show that LGBT persons may be recognized as a ‘particular social group’ and, as such, are entitled to protection under the 1951 Convention.”⁹⁴ With the United States’ history of self-righteous policy biases in its asylum program and its attempts to be in compliance with international law, both could flourish in a healthy way by encouraging a bias in favor of granting asylum to applicants from nations that have laws criminalizing same-sex marriage, as an admonishment of those governments.

VI. CONCLUSION

The inception of the United States’ recognition of asylum represents a peculiar turning point in American history, as it represented an outlet of American pride and its own turn from forms of governmental persecution. Until 1980, the asylum system in the United States was heavily influenced by Cold War policy, and applicants were granted asylum on a case-by-case basis with a strong bias in favor of applicants from Communist nations.⁹⁵ In 1980, the United States became fully compliant with international asylum standards but, in practice, maintained the same Cold War bias until the late 1980s.⁹⁶ As soon as humanitarianism was recognized as the primary purpose of asylum in the United States, there was pushback due largely to an inundation of asylum applicants in the early 1990s.⁹⁷

After September 11, 2001, the United States had new national policies and a new national enemy unprecedented since the Cold War. Because of the nature of the new enemy and the violence perpetrated on American soil, one would expect the domestic policy in the wake of the War on Terror to create a bias in asylum decisions diametrical to that seen in the Cold War. After it was discovered that the suspects in the 2013 Boston Marathon bombing gained residency in the United States through the asylum system, there were calls for “more scrutiny

SEXUAL ORIENTATION AND GENDER IDENTITY 6 (2008), *available at* http://www.justice.gov/eoir/vil/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf.

⁹³ *Id.*

⁹⁴ *Id.* at 18.

⁹⁵ See Swanwick, *supra* note 6, at 131 n.4.

⁹⁶ *Id.*

⁹⁷ See generally, *Hearing, supra* note 36.

when accepting refugees from high-risk nations.”⁹⁸ There is the potential to see, in the wake of the War on Terror, a lower grant rate for asylum applicants from “high-risk nations.” The broadening of the material support bar set forth in the 2005 Real ID Act is further evidence of this possibility.

The asylum system is inherently subjective, and some form of bias will always be impressed upon asylum decisions. As such, the United States should embrace the nature of the system, and instead of impressing negative policies in the wake of mass hysteria, such as the bias seen in the Cold War and the potential bias in the War on Terror, the United States should encourage a bias representing current domestic social trends. An example would be encouraging, in the wake of *United States v. Windsor*, a bias in favor of applicants from nations that have laws criminalizing homosexuality or acquiesce in violence against homosexuals.

⁹⁸ Sarlin, *supra* note 77.